

BOOK REVIEW

THE GOOD, THE BAD, AND THE PRESS

SUING THE PRESS. By Rodney A. Smolla.* Oxford University Press, New York, N.Y., 1986. Pp. vii, 277. \$18.95.

Reviewed by Paul A. LeBel†

You . . . you *media* have all gotten just a tad too big for yer britches!
—Opus¹

A satirical piece published in *The Nation* a few years ago classified book reviews written by academics into a number of standard categories, including the review that was merely a filler before the one-line dismissal of the book being reviewed. Having no desire to dismiss Professor Smolla's book, let me get out of the way at the outset of this review the one-line comment I would make about *Suing the Press*:² I wish I had written this book, but if I had done so, I would have painted a less alarming picture of the plight of the press.

That comment is not meant to be taken as a complaint that Professor Smolla should have written a different book. In fact, *Suing the Press* is a much needed addition to the growing corpus of work discussing in some detail the current law of defamation and invasion of privacy. Unlike other recent works, *Suing the Press* is aimed at an audience broader than either the working press³ or media lawyers.⁴ Having already written one of the more thoughtful and comprehensive studies of the contemporary law of defamation,⁵ as well as a practitioner's text on the subject,⁶ Professor Smolla here draws on his considerable talent to entertain and

* Associate Professor of Law, University of Arkansas, Fayetteville, School of Law.

† Professor of Law, College of William and Mary. A.B., 1971, George Washington University; J.D., 1977, University of Florida.

1. B. BREATHED, PENGUIN DREAMS AND STRANGER THINGS 88 (1985).

2. R. SMOLLA, *SUING THE PRESS* (1986) [hereinafter cited by page reference alone].

3. See, e.g., B. DILL, *THE JOURNALIST'S HANDBOOK ON LIBEL AND PRIVACY* (1986).

4. See, e.g., L. ELDREDGE, *THE LAW OF DEFAMATION* (1978); C. MORRIS, *MODERN DEFAMATION LAW* (1978); M. NIMMER, *NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT* (1984).

5. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1 (1983).

6. R. SMOLLA, *LAW OF DEFAMATION* (1986).

anuse⁷ in order to attract the attention of a wider public to the critical issues that underlie many of the leading defamation and privacy invasion cases of the last quarter century. His ambitious listing of the questions that are posed by the "current explosion of litigation against the media" (pp. 7-8) may be largely unanswered, but he performs a substantial service by focusing the attention of the reader on the significant public policy choices that must be made. For this attempt to involve the public in considering the competing press, public, and personal interests that come into play in contemporary defamation and invasion of privacy litigation, Professor Smolla is to be applauded.

I would, however, give *Suing the Press* a qualified rather than unhesitant endorsement.⁸ First, Professor Smolla too readily depicts the key cases as illustrations of an "anti-media" or "anti-First Amendment" bias by the plaintiffs, the courts, or both. Part I of this review will take issue with what I call "The Paranoia Factor."⁹ Second, Professor Smolla engages in an exercise in popular psychology/sociology to come to the conclusion that a proliferation of litigation in the defamation and invasion of privacy fields demonstrates a change for the worse in the American character. In Part II, I will question both the descriptive and evaluative elements of what I refer to as "The Wimp Factor."¹⁰ Finally, Professor Smolla concludes with a set of recommendations that might seem more necessary than they actually are if the current state of defamation and invasion of privacy law is really not as bleak as Professor Smolla makes it out to be. In Part III, I will identify and criticize what I call "The Chicken Little Factor," a factor that plays a substantial role in much of the thinking about tort law reform in general and reform of such

7. Professor Smolla is without a doubt one of the most entertaining speakers on the libel conference circuit. The presentation of many of his ideas in this book enables the reader to appreciate his humor and insight without the distraction of the excesses sometimes displayed in the author's public speaking style.

Much of Professor Smolla's most engaging humor blends the popular culture of the day with the legal concepts that he is trying to explain. Some of his humor is simply cute, in the vein of his reference to Jane Fonda having switched "from sit-ins to sit-ups" (p. 19), and may have less than universal appeal. At times, however, Professor Smolla captures the essence of a complicated legal doctrine in a brilliant image. For those who have ever tried to explain the fictional construct of the "ordinary reasonable prudent person" of the standard of care in negligence law, Professor Smolla's description of this person as "a sort of legal Ward Cleaver" (p. 38) should provide a welcome substitute for the virtually meaningless "man on the Clapham omnibus." See, e.g., W. PROSSER, J. WADE & V. SCHWARTZ, *TORTS: CASES AND MATERIALS* 160 (7th ed. 1982).

8. The book contains some examples of poor editorial attention. Although it may well be possible that the terrible neologism "mediatized" (p. 8) was a term Professor Smolla was unwilling to give up, the references to *The People's Court's* "Judge Wampler" (p. 12) and to "Morely" Safer (p. 11) should have been caught and corrected.

9. See *infra* notes 12-33 and accompanying text.

10. See *infra* notes 34-40 and accompanying text.

specific kinds of tort liability as defamation and privacy invasion.¹¹

I. THE PARANOIA FACTOR

In his descriptions of contemporary defamation and invasion of privacy law, Professor Smolla routinely attaches an "anti-media" or "anti-First Amendment" label to the material he is discussing. In some instances, the "anti-media" characterization refers to the plaintiff's reason for instituting the litigation against a media defendant.¹² In other instances, an "anti-First Amendment" label is attached to the decision which a court, frequently the United States Supreme Court, reaches in a media defendant case.¹³ In one instance, Professor Smolla's eagerness to find an "anti-media" slant to the developing body of Supreme Court decisions in this area goes so far as to lead him to characterize as "anti-media" a decision in a case that did not even involve a media defendant.¹⁴ Before discussing the unwarranted nature of a few representative samples of the "anti-media" or "anti-First Amendment" characterizations referred to in *Suing the Press*, it would be well to stop and consider in the abstract the implications of this approach.

Suppose that Bert enters the hospital for a routine surgical procedure. Upon regaining consciousness in the recovery room, Bert learns that the operation has left him paralyzed. Less than fully pleased with that outcome, Bert sues the hospital and all the attending physicians and nurses, alleging that the negligence of one or more of the parties caused his paralysis. Leave aside the question of whether Bert has stated a claim upon which relief can be granted. The question for consideration is whether it makes sense to refer to Bert's claim as "anti-medicine."

11. See *infra* notes 41-48 and accompanying text.

12. Professor Smolla uses General William Westmoreland's decision to sue CBS as an example of "anti-media litigation," and then attempts to use that case as a basis for justifying "anti-media litigation" (p. 23). Another example of Professor Smolla's use of the "anti-media" characterization occurs in a reference to "much of the current anti-media litigation that fills the daily headlines" (p. 51). Without any references to any specific litigation, it is impossible to tell whether Professor Smolla considers all defamation and privacy litigation to be "anti-media" in nature, or whether he reserves the application of that term to some narrower but unspecified subcategory. His later reference to the "current anti-media movement" (p. 162) is similarly unsupported by specific examples that would enable the reader to understand what Professor Smolla encompasses within this term.

13. The Supreme Court's decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), is characterized by Professor Smolla as the beginning of the Court's "back[ing] away from its earlier friendliness to the press" (p. 57), and as the case that "began the media's downhill slide in First Amendment decisions from the Supreme Court" (p. 66). For an alternative characterization of the *Gertz* decision, see *infra* notes 17-21 and accompanying text.

14. Professor Smolla describes *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), in which there was no media defendant, as one of the "media defeats in the Supreme Court in the late 1970's and early 1980's" (p. 254).

If one answers that question in the negative, as I think one must, then the next question is why the analogous lawsuit in the defamation or privacy invasion context could not be just as susceptible to characterization as a claim for relief from the harm caused in the specific case, rather than as an exercise directed at the class to which the defendant belongs or at the profession or trade which the defendant practices. Without a plausible explanation of why the "anti-media" characterization is more compelling than the "anti-medicine" label, the routine and indiscriminating categorization of defamation and invasion of privacy actions and decisions as "anti-media" seems silly.

Disposing of the suggestion that either the institution of a lawsuit or the rendering of a judicial decision against a media defendant necessarily supports an "anti-media" characterization does not in itself demonstrate that individual instances are improperly characterized in that way. What remains to be seen, then, is whether some representative examples of Professor Smolla's use of the "anti-media" or "anti-First Amendment" characterization are better understood in that way or alternatively as plaintiffs' narrower attacks on substandard media performance that has caused some harm to the plaintiffs.

One of Professor Smolla's least convincing uses of the "anti-media" explanation of the motivation for libel litigation occurs in his comparison of George Patton and William Westmoreland, two generals whom we are supposed to view as equally "stung by media portrayals" (p. 23) but only the latter of whom sued over those portrayals.¹⁵ Having made the initial characterization of the Westmoreland suit as "anti-media," Professor Smolla then attempts to justify the "safety valve" role that such "anti-media" litigation can play in contemporary society.

Instead of seeing Westmoreland's decision to sue CBS as a "new" and "anti-media" "way of thinking" (p. 23), one might view the litigation as an example of an "old" "anti-wrongful conduct" attempt to establish the falsity of the charges that the network had made about one particular aspect of Westmoreland's performance as commander in Vietnam. The attempted analogy to Patton is unpersuasive. If Professor Smolla has in mind the notorious slapping incident between Patton and the battle-fatigued infantryman during World War II, he ought to recognize the difference between reporting and editorializing about an incident that took place in the public view, in Patton's case, and purporting to expose the kind of conspiracy Westmoreland allegedly engaged in to keep the true

15. Westmoreland's suit against CBS is the subject of a number of recent book-length accounts. See R. ADLER, *RECKLESS DISREGARD* (1986); D. KOWET, *A MATTER OF HONOR* (1984); M. ROTH, *THE JUROR AND THE GENERAL* (1986). Professor Smolla devotes a chapter of *Suing the Press* to a discussion of the Westmoreland lawsuit (pp. 198-237).

extent of the enemy strength in Vietnam from the President and the public. Professor Smolla ought to recognize as well the qualitative difference between Westmoreland's being "stung" by general criticism of his performance as field commander in an unsuccessful military action and the "sting" involved in a set of specific allegations of deception and misconduct responsible, at least in the opinion of some, for unnecessary deaths during the Tet offensive.¹⁶ To the extent that the latter accusation was considered by Westmoreland to be both false and contrary to the moral values with which he sought to conduct himself as a professional soldier, Westmoreland's decision to sue does not suffer by comparison with Patton's decision not to sue.

The Supreme Court decision that emerges from Professor Smolla's book as being the most "anti-First Amendment" is *Gertz v. Robert Welch, Inc.*¹⁷ However, the characterization of the Court's opinion as hostile to the first amendment values articulated in the cases beginning with *New York Times Co. v. Sullivan*¹⁸ and leading up to *Gertz* requires a reading of the first amendment that virtually precludes media liability for defamatory publications. Some balance in the picture Professor Smolla paints of the *Gertz* decision could be introduced by recognizing that there were two distinct prongs to the Court's opinion. First, the Court had to decide whether the constitutionally required proof of the level of fault-as-to-falsity demanded of public official and public figure plaintiffs would be extended to those plaintiffs who could be categorized as private, rather than public, persons. In rejecting an earlier plurality opinion that had tied the heightened fault-as-to-falsity requirement to the public interest nature of the published material,¹⁹ the Court might legitimately be seen as expressing hostility to the idea that the specific first amendment protections recognized in the *Sullivan* case were universally applicable. But to conclude that the *Gertz* decision is thus "anti-First Amendment" requires a closing of one's eyes to the significant developments that constituted the second prong of the case. Far more influential than the limitation on the scope of the *Sullivan* rules²⁰ were the constitutional

16. The contemporaneous interpretation of the thrust of the CBS broadcast is summarized in R. ADLER, *supra* note 15, at 6.

17. 418 U.S. 323 (1974).

18. 376 U.S. 254 (1964).

19. See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 (1971) (plurality opinion).

20. The constitutional rules adopted by the Supreme Court in *Sullivan* and subsequent cases are identified in LeBel, *Reforming the Tort of Defamation: An Accommodation of the Competing Interests Within the Current Constitutional Framework*, 66 NEB. L. REV. (1987) (forthcoming). The primary *Sullivan* rule requires the defamation plaintiff to prove that the defendant either knew that the published material was false or recklessly disregarded the truth or falsity of the publication, a level of fault the Court called "actual malice." *Sullivan*, 376 U.S. at 279-80. It is the scope of application of that rule that was determined in the first prong of the *Gertz* decision.

restrictions that were recognized for the first time in defamation actions to which the *Sullivan* rules did not apply. Among those restrictions were a prohibition of strict liability and a heightened fault requirement as a prerequisite to recovery of presumed damages or punitive damages. Rather than marking the beginning of a "downhill slide" for the press (p. 66), *Gertz* might just as plausibly be viewed as the beginning of an increased sensitivity to the publishers of defamatory communications about private persons to whose lawsuits the *Sullivan* restrictions do not apply.²¹

In analyzing Professor Smolla's characterization of some decisions and litigation as "anti-media," it might be well to look at the opposite characterization and try to make some tentative assessment of the decisions he hails as "pro-media" or as media "victories." Chief among these would undoubtedly be *Sullivan*. *Sullivan* imposed significant constitutional restrictions on state tort law, and Professor Smolla legitimately characterizes the case as "a thrilling historical moment, preserving the vitality of a vigorous and open culture" (p. 51). After accepting Professor Smolla's characterization, however, it is necessary to understand precisely the nature of the victory and to appreciate the logical consequences of the victory.

Before *Sullivan*, a state could impose liability on a publisher of defamatory material upon proof that the publication tended to injure the reputation of the plaintiff.²² The defendant could then attempt to prove

21. The Supreme Court's recent decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985), might appear at first glance to undercut the assertion in the text. In a decision that addressed only the "actual malice" prerequisite to recovery of presumed or punitive damages, the plurality opinion of Justice Powell distinguished two categories of defamatory communications about private persons. Although the *Gertz* protections would continue to apply to those communications that involve matters of public concern, the Court held that those protections were not constitutionally required in a defamation case that did not involve a matter of public concern. *Id.* at 2946.

Dun & Bradstreet can only be understood in the context of the last twenty years of defamation law, a subject that is beyond the scope of this book review but which is covered in my forthcoming article cited *supra* note 20. Instead of seeing that recent history as an all-or-nothing recognition of a single constitutional immunity from liability for defamation, one can view the Supreme Court decisions as recognizing a set of distinct protections and then working out the precise scope of application of each of those protections. From that perspective, *Dun & Bradstreet* can be understood as restricting the application of the private-plaintiff presumed-and-punitive-damages rules to the same category of defamatory publications to which all the other constitutional rules had previously been applied, i.e., to those involving matters of public concern.

An observer of the Supreme Court's corpus of defamation law needs to distinguish between decisions that refuse to extend prior decisions to the lengths sought by defamation defendants and decisions that cut back on previously recognized protections. *Dun & Bradstreet* clearly falls into the former category.

22. The definition of "defamation" is set out in W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 773-78 (5th ed. 1984) [hereinafter PROSSER & KEETON].

that the publication was true, or at least materially true.²³ Fault on the part of the publisher was not an essential element of a defamation claim,²⁴ and the principal way that fault was interjected into the litigation was through a plaintiff's attempt to defeat a conditional or qualified privilege that the defendant had asserted.²⁵

In *Sullivan*, the Supreme Court refused to permit defamation liability to turn on the ability of the publisher to prove the truth of what was communicated about the plaintiff.²⁶ In order to eliminate the disincentive to publish statements the truth of which cannot be guaranteed, the Court introduced as a constitutional element of the plaintiff's claim for relief a requirement that the plaintiff establish an aggravated level of fault with regard to the truth or falsity of the defamatory statements.²⁷ Subsequent Supreme Court decisions specified that the "reckless disregard" of the *Sullivan* rule required a subjective appreciation of the high risk of falsity of the published material.²⁸ Furthermore, even in those cases in which this aggravated level of fault is not a prerequisite to recovery of actual damages, it is often a prerequisite to recovery of presumed or punitive damages.²⁹

These "pro-media" decisions are not unequivocally favorable to press defendants. First, the logical consequence of requiring proof of a subjective fault-as-to-falsity is that the plaintiff must be free to inquire into the state of mind of those who were involved in the reporting and editing process.³⁰ Any other conclusion would have turned the qualified constitutional privilege recognized in *Sullivan* into a de facto absolute privilege, due to the inability of a plaintiff ever to prove the constitutionally required subjective fault. Second, beyond the intrusion into the editorial decisionmaking process, the interjection of an issue of the defendant's fault into the core of the plaintiff's case may carry with it a

23. See generally L. ELDREDGE, *supra* note 4, at 323-38.

24. See *id.* at 14-25.

25. See PROSSER & KEETON, *supra* note 22, § 15, at 832-35.

26. The Court stated that "[a] rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . 'self-censorship.'" *Sullivan*, 376 U.S. at 279.

27. *Id.* at 279-80. See also *supra* note 20.

28. See, e.g., *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) ("There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.") (emphasis added).

29. See *Gertz*, 418 U.S. at 348-50. But cf. *supra* note 21 (discussing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985)).

30. This consequence was recognized in *Herbert v. Lando*, 441 U.S. 153, 160 (1979). In *Lando*, the Supreme Court refused to create a privilege based on the first amendment that would have barred a plaintiff suing for libel to inquire into the editorial processes of those responsible for publication. *Id.* at 169-70. Professor Smolla characterizes *Lando* as the Supreme Court decision "that more than any other seemed to seal the media's declining fortunes" (p. 66).

significantly higher risk that the factfinder will view the defendant in a highly negative light. Although defendants who are sued by public plaintiffs may benefit from their ability to obtain summary judgments on the basis of the heightened standard of proof that those plaintiffs must meet,³¹ plaintiffs who need only to prove a defendant's negligence by a preponderance of the evidence could easily use the evidence about the defendant's aggravated fault to paint a picture of a party for whom the factfinder would likely have little sympathy. In short, the great constitutional victory won by the press in *Sullivan* and the subsequent cases may carry with it substantial practical and strategic liabilities for the press.

In criticizing Professor Smolla's use of the "anti-media" and "anti-First Amendment" labels, I do not mean to deny that there is a role for what one of my colleagues calls "a healthy paranoia." Undoubtedly, some litigation against the press is motivated by a desire to inhibit vigorous media coverage of the plaintiff's activities.³² Nevertheless, the quality of the public understanding and debate about what is at stake in the law of defamation and invasion of privacy is not well served by a knee-jerk circle-the-media-wagons attitude on the part of the press and the scholars who study the problem. That understanding and debate would be helped by a more discriminating examination of the merits of plaintiffs' claims, the various kinds and degrees of first amendment protection, and the legitimacy of the conduct of the press both before and after publication of material alleged to be defamatory.³³

II. THE WIMP FACTOR

In a continuation of a theme first put forth in a 1983 law review article,³⁴ Professor Smolla uses recent examples of defamation and invasion of privacy litigation to explore some hypotheses about the national character. Chief among these hypotheses is the suggestion that the prevalence of litigation of the sort discussed in *Suing the Press* reveals a decline in a mental toughness that in the past allowed the victims of offending publications to shrug off the allegations and go on about their

31. When the knowledge or reckless disregard level of fault-as-to-falsity is a prerequisite to liability, a plaintiff must establish that fault with "convincing clarity." *Sullivan*, 376 U.S. at 285-86. In its latest decision regarding defamation, the Supreme Court held that a court ruling on a motion for summary judgment must apply the clear and convincing evidence standard to test the sufficiency of the plaintiff's evidence. See *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2514 (1986).

32. The defamation actions by the LaRouche associates may be the best examples of this phenomenon.

33. For a thoughtful critique of the conduct of both Time and CBS after challenges by Generals Sharon and Westmoreland, see Yoder, "When Journalists Stonewall," Wash. Post, Nov. 14, 1986, at A27, col. 3. See also R. ADLER, *supra* note 15.

34. See Smolla, *supra* note 5.

lives.³⁵ Implicit in many of Professor Smolla's comments on this issue is the normative judgment that this change in American character is a change for the worse.

To be sure, Professor Smolla states that we should be cautious about concluding "that we are a society of wimps" (p. 23). Nevertheless, the tenor of the discussion lends itself to such a conclusion. This disparagement of defamation and privacy invasion victims who go to court instead of ignoring or responding in nonlitigious ways to the offending publications is in some respects the equivalent of the "she asked for it" defense in rape cases, and should be no more acceptable than that method of attacking the victim.³⁶

The temptation not only to blame the victim but to snicker at the victim's resort to the legal system for redress³⁷ might be resisted more easily if one considers the changes in the media that have accompanied the "thinning of the American skin" (p. 16) that Professor Smolla perceives. Two such changes worth noting involve the image that members of the press currently cultivate and the impact that modern media communications can have.

Professor Smolla sees a contrast between the kind of attention given to political figures in the past and that given to public figures of today. The behavior of the press today, we are told, is much less vicious than was the case at the time of Jefferson, for example.³⁸ Conceding for the moment that there is such a qualitative difference, one might draw from that difference a conclusion that is precisely opposite to Professor Smolla's. Instead of deciding that there is something lacking in the fiber

35. Professor Smolla quotes legal scholarship from as recently as forty years ago to support the contention that "[a] toughening of the mental hide was thought of as a better protection against the frictions and clashings incident to a robust and open society than the law could ever be" (p. 17). "Americans," Professor Smolla tells us, "have quite obviously changed." (*Id.*) Professor Smolla ties this "general increase in the sensitivity of the media's victims" into an explanation of "anti-media litigation" as a "recent plight of the media in the courts" (p. 15).

36. In a curious comment about Carol Burnett's litigation against the *National Enquirer*, Professor Smolla suggests that "the *National Enquirer* article about Carol Burnett probably enhanced her reputation more than hurt it, for her crusade made her a heroine among her peers" (pp. 24-25). One might wonder whether Professor Smolla would seriously contend that it would be a benefit for him to be lied about in a review of his work. Furthermore, the reputation enhancement Professor Smolla speculates about would occur only as a result of the plaintiff's pursuit of the litigation option that he otherwise disparages.

37. Professor Smolla refers to defamation and privacy litigation as "one of America's newest growth industries" (p. 5), and characterizes "[t]he million dollar libel suit" as "the newest American status symbol. It seems at times that everybody who's anybody has a libel suit going on the side" (p. 6).

38. Smolla notes that the *New York Commercial Advertiser* referred to Jefferson as "a spend-thrift, a libertine . . . and an Atheist," while the *New England Palladium* accused him of being "a coward, a calumniator, a plagiarist [and] a tame, spiritless animal" (p. 16).

of contemporary victims of comparatively milder publications, it is possible to view the difference between the roles set by the press for itself today and in the past as a fairly compelling justification for using the judicial forum to vindicate the interests invaded by press conduct. The press today, for the most part, attempts to present itself as neutral, objective, and responsible. The contrast with the partisan press of the past highlights the different effects that defamatory falsehoods published by those different types of press can have. In the past, if a public figure was subjected to the full blast of what was widely perceived to be an opposition press outlet, the reader's reaction was probably affected by a consideration of the source. The potential for serious harm was reduced to the extent that the biases and the objectives of the publisher were part of the community's knowledge.³⁹ In contrast, if one of today's television networks publishes defamatory falsehoods, the viewer, influenced by the network's carefully cultivated image, will be more prone to believe that the report is truthful. One of the major differences between the press of today and the press of the past is that we expect what we read and see today to be true.⁴⁰ News operations today tend to be perceived as producing not attacks on targets but rather information about newsworthy subjects. As a result, those people about whom false information is disseminated today are harmed in a different way than were the subjects of attacks from predictable quarters in the past.

The change in the size and scope of media enterprises is the second factor that makes litigation a reasonable response to the publication of defamatory falsehoods. It is often the case today that the impact of the defamatory publication will far outstrip both the temporal and geographic range in which personal acquaintance with or knowledge about the victim will counteract the impression created by the communication. Contemporary media might turn us into "global villagers," but the ability to screen the media information through independent or personal sources is not at all comparable to the situation that prevailed in the past, when a local newspaper might publish something about a member of the community who was otherwise known to the readers. As a result of the technological advances and conglomerate expansion of recent decades, the "checks and balances" of the past no longer operate as an effective counter to the negative impression conveyed by what the press publishes

39. A related phenomenon today might be referred to as "the *National Enquirer* defense." When sued for defamation, a media enterprise of that ilk might respond, "Sure, it's false. So what? *Everything* we publish is false, and everyone *knows* that it's not to be taken seriously." I think it is reasonable to assume that an entity such as CBS News would be less than eager to take advantage of this sort of argument.

40. See R. ADLER, note 15, at 16-18.

about a person. Accordingly, the victim of a defamatory falsehood communicated to an audience having nothing but the media to rely on for information about that person could legitimately view litigation as the only effective way to air his objection to the publication.

Professor Smolla is almost certainly correct when he observes that Americans today are more sensitive than they were in the past. It is also true that defamation and invasion of privacy litigation is part of a broader recognition of the importance of emotional well-being in contemporary society. The major criticism I would make of Professor Smolla's generally perceptive comments about the relationship between the law of defamation and the national character is that he gives inadequate attention to the way in which changes in the nature of the press have made litigation not a crutch for the emotional cripple but a necessary response to harm inflicted by an extremely powerful institution.

III. THE "CHICKEN LITTLE" FACTOR

In a manner that calls to mind the story of Chicken Little, too many commentators on the press and the first amendment are prone to react to each successive judicial decision with the claim that the sky is falling. This overreaction to the developing law of defamation and invasion of privacy is not simply a matter of a lack of academic or professional perspective. One's characterization of the legal framework within which these claims will be decided translates directly into one's view about a program for reform. After all, it makes sense to think that one's actions will be different if the sky actually *is* falling than if it is not.

The proposals for reform collected by Professor Smolla in the concluding chapter of *Suing the Press*⁴¹ respond to a wide range of perceived flaws in the current judicial treatment of claims against media defendants. Although the credibility of these proposals would have benefited from a much more thorough development of the precise nature of the specific problems and of how each reform proposal would meet those

41. Professor Smolla makes the following "non-exhaustive" (p. 239) recommendations for reform:

1. Require the losing side to pay the opponent's legal fees (*id.*).
2. Put a greater emphasis on retraction and equal time remedies, using restorative speech to cure damaging speech (p. 241).
3. Eliminate punitive damages, and impose absolute caps on all non-pecuniary losses (*id.*).
4. Eliminate entirely libel suits by high-ranking policy-making public officials for matters arising from their public duties (p. 243).
5. Adopt an approach to the fact/opinion distinction that discourages the use of libel suits as ideological forums (*id.*).
6. Pay greater attention to the context in which the defamatory speech is disseminated (p. 249).
7. Make general streamlining and simplification a dominant feature of any comprehensive effort at reform (p. 250).

problems, the fact that the book is targeted at the nonspecialist could account for the rather cursory treatment given the proposals. One can, however, draw from these and other recent reform proposals at least two premises that are of dubious merit. The first premise is that liability of the press for defamation and privacy invasion is currently too extensive, and the second premise is that the best solution to the problem of overexposure to liability for defamation and invasion of privacy lies in a continued expansion by the Supreme Court of the first amendment protection available to the press in such claims.

We should view with some skepticism the contention that the liability of the press is too extensive. Such statements are often thinly disguised assertions that the press should be beyond any judicial accountability for the harm it causes. It is in addressing the merits of the competing claims on this point that Professor Smolla's method of highlighting the major cases of the last twenty years is most likely to distort the picture of the litigation landscape. Although it is true that the landscape is littered with media horror stories,⁴² one might just as easily find examples of cases in which legitimate claims for relief were cast aside as a result of misguided applications of first amendment principles.⁴³

42. A couple of the most obvious examples could have been presented in a more illuminating fashion. The litigation following the release of the film *Missing* (Universal 1982) would be easier for the reader to evaluate (pp. 148-58) had Professor Smolla pointed out more clearly that this is precisely the kind of lawsuit that *Sullivan* is designed to control. Rather than being an example of the need for reform, the *Missing* litigation could be used to illustrate how the Constitution safeguards the media against liability for criticism of the performance of government officials without eliminating the ability of government officials to challenge false and defamatory factual assertions by proving that the publisher knew or thought the assertions were probably false.

The *Alton Telegraph* case (pp. 74, 113-14) is another horror story that should be evaluated carefully. In *Alton Telegraph* a small daily paper was faced with a \$9.2 million judgment because two of its reporters sent an unpublished memorandum they had written to a federal investigator. The paper filed for bankruptcy to avoid having to sell its assets. See *Green v. Alton Tel. Printing Co.*, 107 Ill. App. 3d 755, 438 N.E.2d 203 (1982). The peculiar facts of the case, however, make it something less than a representative sample of how the current law of defamation fails to protect significant press interests. If one is going to take issue with holding the newspaper liable in that situation, as I think one legitimately could, the objection should be to a legal rule that permits employer liability for defamation that does not appear in the employer's publication or broadcast.

43. Among the least justified applications of the constitutional protections developed in the defamation and invasion of privacy fields are those cases in which the plaintiff is injured as a result of a publication in the form of fiction. See LeBel, *The Infliction of Harm Through the Publication of Fiction: Fashioning a Theory of Liability*, 51 BROOKLYN L. REV. 281, 284 nn.7-8 (1985) (failure to recognize that constitutional issues developed in context of defamation cases do not necessarily fit when applied to suits based on fiction leads to "simplistic" resolution of cases). Professor Smolla devotes some attention to this topic (pp. 138-48), though he tends to display the strained analysis typically engaged in by courts wrestling with such cases. The subject of fictional publications as the basis of defamation and other tort claims is treated at great length in *Symposium: Defamation in Fiction*, 51 BROOKLYN L. REV. 223 (1985).

By the same token, undue emphasis of the litigation costs in the largest and most hard-fought cases (p. 75) can portray too bleak a view of the current state of the law of defamation and invasion of privacy. If one were trying to convey a sense of the costs of automobiles, for example, an exclusive focus on Ferraris and Rolls Royces would be misleading. Instead of exchanging shots over the outcomes of the "big" cases, those who are interested in the need for reform might be better advised to examine a wider spectrum of cases and investigate how defamation and invasion of privacy law works in the routine situation. Those involved in the study of defamation will benefit immensely from the work currently being performed by the researchers from the schools of law and journalism at the University of Iowa.⁴⁴ Before concluding that media liability is too extensive, it might be better to reflect upon the significant advantage the press seems to enjoy as indicated by data showing that a high proportion of media losses in the trial courts is offset by an equally high proportion of postverdict and appellate media victories.⁴⁵ One way to interpret this data is to conclude that the first amendment, on which most of these wins are based, is doing a remarkably effective job of countering a public perception, as expressed in jury verdicts, that the press is acting irresponsibly in causing harm to those victims who actually sue.

One might conclude, therefore, that rather than marking a constitutional failure, the current state of the law of defamation and privacy invasion is something of a constitutional success story. Such a "counter-Chicken Little" optimistic view of the contemporary constitutional law is unlikely to be accepted, of course, by those who consider the function of the first amendment to be the establishment of an immunity for the press from any judicial accountability to its victims. Proponents of this view of the first amendment almost naturally adopt the second of the premises reflected in the current reform proposals, that is, that the solution lies with an expansion of the constitutional restrictions on liability. Reliance on the Supreme Court as the source of expanded protection of the press from liability for defamation is a strategy that has pretty much played itself out.⁴⁶ Although there has been a steady stream of Supreme Court defamation decisions in recent terms, the thrust of those decisions has

44. The preliminary statement of the results of the first part of this study appears in Bezanson, Cranberg & Soloski, *Libel Law and the Press: Setting the Record Straight*, 71 IOWA L. REV. 215 (1985).

45. See Franklin, *Suing the Media for Libel: A Litigation Study*, 1981 AM. B. FOUND. RES. J. 795; see also *Defamation Trials and Damage Awards: Updating the Franklin Studies*, 4 LDRC BULL. pt. 1, at 2, 3-4 (1982); *Defamation Trials, Damage Awards and Appeals: Two-Year Update*, 11 LDRC BULL. 1 (1984).

46. See LeBel, *Defamation and the First Amendment: The End of the Affair*, 25 WM. & MARY L. REV. 779 (1984).

been to smooth out wrinkles rather than plow new ground.⁴⁷

What is needed, and what Professor Smolla provides in the form of what is at least an introductory survey, is a renewed focus on the tort law of defamation and invasion of privacy. Some of the constitutional rules currently in place undoubtedly could be improved upon, and others could be offered in addition to or in place of those now in force. Nevertheless, even if one assumes that the constitutional attention to the law of defamation and privacy invasion has reached or passed its peak, one can find in the doctrines and techniques of tort analysis ample room for reexamining what society might want defamation and privacy invasion law to accomplish, and at what cost to important public and press interests those goals might be achieved. My own belief, which I have set out elsewhere,⁴⁸ is that this tort-based consideration of press liability is a more promising vehicle for responsible accommodation of the interests at stake.

IV. CONCLUSION

Professor Smolla has written a book that is often provocative, frequently perceptive, and unflinching entertaining. To the extent that the book is subject to criticism, I would suggest that the primary shortcoming of *Suing the Press* consists of the attitudes I have tried to capture by the "Paranoia," "Wimp," and "Chicken Little" labels in the preceding discussion. Like *Opus*,⁴⁹ the reader of Professor Smolla's book might conclude that special pleading on behalf of the media is less than fully convincing. The conduct of the press can be fit into realistic and reasonable categories of good and bad behavior, and should not necessarily be accorded a separate realm of evaluation outside those categories.

The American press functions as an indispensable cog in our governing and private decisionmaking processes. Without a press free to publish without fear of political retribution, this society would be substantially less able to assemble and assimilate the information it needs to function. Nevertheless, the press as an institution is composed of individuals who are capable of inflicting serious harm upon others. It would be both unwise and potentially dangerous to conclude without careful consideration that any attempt to impose on the press some measure of

47. See, e.g., *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986) (clarifying applicability of clear and convincing evidence standard of proof on *Sullivan* actual malice issue at summary judgment motion stage); *Philadelphia Newspapers, Inc. v. Hepps*, 106 S. Ct. 1558 (1986) (holding that the plaintiff bears burden of proving falsity of allegedly defamatory publication). *But cf. supra* note 21 (discussing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985)).

48. See *LeBel*, *supra* note 20.

49. See *supra* note 1.

legal responsibility for the harm it causes is an inherent evil. The process of increasing public awareness of the contours and effects of the law of defamation and invasion of privacy is a healthy one, and Professor Sinolla has made a significant contribution to it.