

## Federal Influences on the Treatment of Law and Fact in Tort Litigation

Robert E. Keeton

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### Recommended Citation

Robert E. Keeton, *Federal Influences on the Treatment of Law and Fact in Tort Litigation*, 55 Md. L. Rev. 1344 (1996)  
Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol55/iss4/10>

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# FEDERAL INFLUENCES ON THE TREATMENT OF LAW AND FACT IN TORT LITIGATION

ROBERT E. KEETON\*

## INTRODUCTION

Three themes appear in this Article, sometimes intermittently and sometimes interwoven.

The first theme is about relationships between law and fact in tort litigation. Economic, social, political, and interpersonal developments outside the legal system, as well as developments within, have a significant effect on the nature of legal and factual issues in litigation. As this evolution continues, its consequences for the entire community of legal professionals, and for the larger community as well, are increasing.

The second theme implicates the law of defamation. It concerns the clash between protecting freedom of expression and protecting reputations against the harm resulting from the publication of falsehoods. Unsettled issues of law relevant to this theme are arising more often now than before. What courts are doing in seeking an appropriate accommodation between interests in reputation and in freedom of expression illustrates dramatically the first theme—consequences of changing concepts about relationships between legal and factual issues are increasing in tort litigation generally, not merely in the law of defamation.

The third theme is about who decides different kinds of issues that may determine the outcome of litigation. It is about the allocation of responsibility between judges and juries. Are changes identified as illustrations of the first two themes also pointing to modifications of conventional ways of defining and describing the distinction between issues that are to be decided as factual findings (by a jury, or by the trial judge in a bench trial) and those to be decided as matters of law are decided?

In this issue of the *Maryland Law Review*, we are paying deserved tribute to Professor Oscar Gray. His scholarly works, as we shall see in part V, contain significant insights that bear upon each of the three themes of this Article.

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\* United States District Judge, District of Massachusetts. Langdell Professor Emeritus, Harvard Law School.

## I. BROADER IMPLICATIONS OF A CONSTITUTIONAL FOUNDATION FOR FREEDOM TO PUBLISH FALSEHOOD

The Supreme Court's decision in *New York Times Co. v. Sullivan*<sup>1</sup> formulated a constitutional foundation for theories of protection against liability; first, for publishing falsehood and, second, as has later become evident, occasionally for other conduct. These developments have added a new edge of intellectual challenge to predicting the future of tort law. It is now evident that *Sullivan*'s rippling effects on tort law generally, and not just the law of defamation, have exceeded most early predictions. Other developments, both federal and state, and both legislative and precedential, have contributed to an ongoing trend of federalizing significant segments of tort law.

A distinction between law and fact, if not inherent in any concept of justice according to law, at the least can be observed in even the earliest records of Anglo-American jurisprudence. From an early date, this distinction has dominated thinking about the respective roles of courts and juries in jury trials, and the respective roles of trial and appellate judges in all litigation. Even so, precise formulations of the distinction are rarely attempted. The explanation for lack of deeper probing may have been that the kind of general understanding gleaned from the ordinary connotations of "law" and "fact" usually is sufficient for the judge and jury to go about their respective tasks. A more precise understanding may become essential to reasoned decision-making, however, in a small but growing percentage of tort litigation. This observation applies not only to federal law issues but also to state law issues and to tort litigation more generally and wherever it occurs. To keep the subject matter of this Article within manageable bounds, however, I propose to discuss only federal law influences on the law-fact distinction and the implications for tort litigation.

As we shall see in part V, Professor Gray's comments on the implications of *New York Times Co. v. Sullivan* foreshadowed the Supreme Court's recurring expressions on the subject of "independent" judicial determinations on mixed legal-factual issues of constitutional significance.

## II. "INDEPENDENT" DETERMINATIONS OF A REVIEWING COURT

### A. "Closer Scrutiny" and "Independent" Determinations

One distinctive rule of law that *New York Times Co. v. Sullivan* introduced is the proposition that the Supreme Court will indepen-

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1. 376 U.S. 254 (1964).

dently review constitutionally significant factual inferences to be drawn from a trial record.<sup>2</sup> Key factual inferences so reviewed in that case concerned whether the constitutionally required "actual malice" had been proved<sup>3</sup> and whether the defamatory expressions were "of and concerning" Sullivan.<sup>4</sup>

Precedent for some sort of independent review by the Supreme Court of constitutionally significant inferences from historical facts, though first made an explicit part of the law of defamation in *Sullivan*, had developed earlier in litigation over asserted rights other than First Amendment protections of expression. One example involved the application of a standard of proof requiring, in a denaturalization proceeding, evidence that is "clear, unequivocal, and convincing."<sup>5</sup> Both the concept of independent review and the terminology associated with it evolved as applications in varied contexts accumulated during the twentieth century.<sup>6</sup> Earlier opinions of the Court more often spoke of "closer scrutiny" than of "independent" review.<sup>7</sup> With the addition of frequent and varied illustrations not only within the law of defamation, but also for example, in habeas corpus proceedings, the evolution of precedents regarding the scope and limits of this more rigorous review accelerated in the two decades after the 1964 decision in *Sullivan*. Then, in 1984, the Court returned to this theme in deciding *Bose Corp. v. Consumers Union of United States, Inc.*<sup>8</sup> By this time the Court was ready to say that in certain areas the Court "exercise[s] its own independent judgment"<sup>9</sup> about inferences to be drawn from a record. One year later, in *Miller v. Fenton*,<sup>10</sup> quoted below, the Court referred to a federal court's function in considering voluntariness of a confession as one of "independent federal determination."<sup>11</sup>

This rule of independent determination, although first invoked in defamation law in *Sullivan*,<sup>12</sup> had earlier beginnings,<sup>13</sup> and contin-

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2. *Id.* at 285.

3. *Id.* at 286-87.

4. *Id.* at 288.

5. *Baumgartner v. United States*, 322 U.S. 665, 670-72 (1944); *see also* *Schneiderman v. United States*, 320 U.S. 118, 125, 158 (1943).

6. *See, e.g.*, the treatment of independent review in Justice O'Connor's opinion in *Miller v. Fenton*, 474 U.S. 104, 105-18 (1985), discussed *infra* text accompanying notes 15-17.

7. *E.g.*, *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 418 (1962) (Frankfurter, J., dissenting) (stating that FED. R. Civ. P. 52(a) "permits closer scrutiny" of trial judge's factual findings).

8. 466 U.S. 485 (1984).

9. *Id.* at 501 n.17, 514 (emphasis added).

10. *Miller*, 474 U.S. at 112; *see infra* text accompanying note 17.

11. *Miller*, 474 U.S. at 112.

12. 376 U.S. 254, 285-92 (1964).

ues to produce a growing body of illustrations in quite varied contexts. One example, barely postdating *Bose*,<sup>14</sup> is *Miller*,<sup>15</sup> a case in which a state prisoner presented constitutional challenges in a federal habeas corpus proceeding seeking release under 28 U.S.C. § 2254.<sup>16</sup> The prisoner challenged the admissibility of a confession in a state criminal trial. Justice O'Connor, delivering the opinion of the Court, explained why the ultimate question of the admissibility of a confession is a legal inquiry requiring plenary federal review.

The Court of Appeals recognized that treating the voluntariness of a confession as an issue of fact was difficult to square with "fifty years of caselaw" in this Court. It believed, however, that this substantial body of contrary precedent was not controlling in light of our more recent decisions addressing the scope of the § 2254(d) presumption of correctness. We acknowledge that the Court has not charted an entirely clear course in this area. We reject, however, the Court of Appeals' conclusion that these case-specific holdings tacitly overturned the longstanding rule that the voluntariness of a confession is a matter for independent federal determination.

In the § 2254(d) context, as elsewhere, the appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive. A few principles, however, are by now well established. For example, that an issue involves an inquiry into state of mind is not at all inconsistent with treating it as a question of fact. Equally clearly, an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question. But beyond these elemental propositions, negative in form, the Court has yet to arrive at "a rule or principle that will unerringly distinguish a factual finding from a legal conclusion."

Perhaps much of the difficulty in this area stems from the practical truth that the decision to label an issue a "question of law," a "question of fact," or a "mixed question of law and fact" is sometimes as much a matter of allocation as it is

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13. See *supra* note 5 and accompanying text.

14. 466 U.S. 485 (1984).

15. 474 U.S. at 104.

16. Section 2254 provides that "[i]n any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . shall be presumed to be correct . . ." 28 U.S.C. § 2254(d) (1994).

of analysis. At least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.

....

After defending at length its conclusion that the voluntariness of a confession was entitled to the § 2254(d) presumption, and after carefully analyzing the petitioner's confession under that standard, the Court of Appeals suggested in a brief footnote that it "would reach the same result" even were it to give the issue plenary consideration. Inasmuch as it is not clear from this language that the court did in fact independently evaluate the admissibility of the confession, and because, in any event, we think that the case warrants fuller analysis under the appropriate standard, we reverse the decision below and remand for further proceedings consistent with this opinion.<sup>17</sup>

Barely more than a decade later, in 1995, this formulation of the concept was reasserted forcefully in an especially interesting context. The case before the Court was *U.S. Term Limits, Inc. v. Thornton*.<sup>18</sup> The petitioners challenged an amendment to the Arkansas Constitution that precluded persons who had served a specified number of terms in the United States Congress from having their names placed on the ballot for election to Congress. Justice Stevens delivered the opinion of the Court, holding that (1) states are constitutionally forbidden to impose qualifications for representatives or senators,<sup>19</sup> (2) the power to set additional qualifications was not reserved to the states by the Tenth Amendment,<sup>20</sup> and (3) a state constitutional provision is subject to federal constitutional challenge when it has the likely effect of handicapping a class of candidates and has the sole purpose of indirectly creating additional qualifications.<sup>21</sup>

The term limits controversy was a matter of great public interest. So, too, was the Court's role in resolving the few aspects of the larger controversy that were before the Court. Explaining his dissent from the Court's resolution of one of those aspects of the larger term limits

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17. *Miller*, 474 U.S. at 112-14, 118 (citations omitted).

18. 115 S. Ct. 1842 (1995).

19. *Id.* at 1845.

20. *Id.* at 1854.

21. *Id.* at 1871.

controversy, Justice Thomas invoked precedents from the law of defamation. Joined by Chief Justice Rehnquist, Justice O'Connor, and Justice Scalia,<sup>22</sup> he stated: "In certain areas, indeed, this Court apparently gives quite little deference to the initial factfinder, but rather 'exercise[s] its own independent judgment' about the factual conclusions that should be drawn from the record."<sup>23</sup> One may reasonably assert that the term limits case was more about federalism than about Supreme Court review of the "factual conclusions" of the Arkansas Supreme Court. Nevertheless, what the opinions in *Thornton* say about the law-fact distinction is especially interesting. Justice Thomas noted that, on this subject, a connection with Justice Stevens's majority opinion in *Bose* appears in other contexts as well as that of the term limits controversy.<sup>24</sup>

One reason the dissenting opinion from Justice Thomas is especially interesting is that one may think of the Supreme Court's independent consideration of factual assertions as quite activist compared to the Court's generally cautious approach to reviewing factual findings. Indeed, it is often stated, somewhat provocatively but nevertheless seriously, that the Supreme Court's role is not to assure that justice is done in a particular case. Performing that function typically requires consideration of fact-dependent issues. The Supreme Court's primary role is to decide issues of law of more general significance. After all, before a case ever reaches the Supreme Court it has been through all of the processes of the lower courts aimed at assuring an appropriate decision on the facts (as well as the law, of course) after fair process. Yet, it was Justice Thomas, one of the strongest critics of judicial activism, who in 1995 wrote the dissent in *Thornton*, extolling the Supreme Court's role of "independent judgment" about "factual conclusions" of potential constitutional significance.<sup>25</sup>

The dissenting opinion of Justice Thomas brings a new focus on footnote 17 in *Bose*, which may be destined to take a place in the catalog of oft-cited Supreme Court footnotes.<sup>26</sup> Among the interesting features of the footnote is that it is entirely textual, with no citations.

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22. *Id.* at 1875 (Thomas, J., dissenting).

23. *Id.* at 1910 n.40 (citing *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 n.17 (1984)).

24. *Id.* (citing *Hernandez v. New York*, 500 U.S. 352 (1991) (plurality opinion) (considering whether a state court's finding on the question of discriminatory intent regarding peremptory strikes of jurors is subject to "independent appellate review")).

25. *Id.*

26. *Bose*, 466 U.S. at 501 n.17.

A finding of fact in some cases is inseparable from the principles through which it was deduced. At some point, the reasoning by which a fact is "found" crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment.<sup>27</sup>

The paragraph of text to which footnote 17 is appended discusses Federal Rule of Civil Procedure 52(a)<sup>28</sup> and makes the point that the rule's prescription of a deferential standard (not "clearly erroneous") for appellate review of a federal trial court's findings of fact

including those described as "ultimate facts" because they may determine the outcome of litigation . . . does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.<sup>29</sup>

The cases cited in the text to which note 17 was appended are *Pullman-Standard v. Swint*,<sup>30</sup> and *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*<sup>31</sup> Among cases cited two pages earlier is *NAACP v. Claiborne Hardware Co.*,<sup>32</sup> in which members of a civil rights group defended against claims of tort liability for an alleged conspiracy to boycott, and the Court invoked the *Sullivan* independent review standard.<sup>33</sup>

The opinion of the Court in *Bose*, delivered by Justice Stevens, concludes:

We hold that the clearly-erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by *New York Times Co. v. Sullivan*. Appellate judges in such a case must exercise in-

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27. *Id.*

28. Rule 52(a) provides in pertinent part, "Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." FED. R. CIV. P. 52(a).

29. *Bose*, 466 U.S. at 501.

30. 456 U.S. 273, 287-88 (1982) ("Rule 52(a) does not furnish particular guidance with respect to distinguishing law from fact").

31. 456 U.S. 844, 858 (1982) (reversing an appellate court's rejection of a "finding" supported by evidence).

32. 458 U.S. 886, 934 (1982) (reversing state court's imposition of liability because state court's factual findings were "constitutionally insufficient to support the judgment").

33. *Id.* at 915-16 n.50 (stating that the Court must make an "independent examination of the whole record") (citation omitted).



*dependent judgment* and determine whether the record establishes actual malice with convincing clarity.<sup>34</sup>

The two dissenting opinions in *Bose* by Justice White<sup>35</sup> and [now Chief] Justice Rehnquist, with whom Justice O'Connor joined,<sup>36</sup> agreed that the actual knowledge component of "actual malice" is one of historical fact—a finding that is to be reviewed under the Rule 52(a) standard rather than by an "independent judgment" or "de novo" standard. The dissenters pointed out, however, that previous decisions of the Court in other contexts had approved independent appellate review of facts underlying constitutional claims when a conclusion of law as to a federal right and a finding of fact are "so intermingled" as to make independent review essential to a correct determination of the constitutional issue.<sup>37</sup> In a footnote to his dissent,<sup>38</sup> Justice Rehnquist noted that issues distinguished from the "actual malice" issue in defamation include obscenity and child pornography cases,<sup>39</sup> and cases of words inciting to anger or violence.<sup>40</sup> These cases, in the view of Justices Rehnquist and O'Connor, "more clearly involve the kind of mixed questions of fact and law which call for *de novo* appellate review than do the *New York Times* 'actual malice' cases, which simply involve questions of pure historical fact."<sup>41</sup>

Another significant opinion bearing on the meaning and applicability of "independent" review was released on November 25, 1995, in *Thompson v. Keohane*.<sup>42</sup> Here, too, a petitioner serving a sentence under a state conviction was seeking habeas relief under 28 U.S.C. § 2254(d). During a two-hour, tape-recorded session at the Alaska state trooper headquarters, he had confessed to killing his former wife. He contended that the troopers obtained his confession without giving *Miranda* warnings.<sup>43</sup> The federal district court denied the petition,<sup>44</sup> and the Court of Appeals for the Ninth Circuit affirmed.<sup>45</sup>

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34. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 514 (1984) (footnote omitted) (emphasis added).

35. *Id.* at 515 (White, J., dissenting).

36. *Id.* (Rehnquist, J., dissenting).

37. *Id.* at 517.

38. *Id.* at 517-18 n.1.

39. *Id.* (citing *New York v. Ferber*, 458 U.S. 747, 774 n.28 (1982); *Miller v. California*, 413 U.S. 15 (1983); *Roth v. United States*, 354 U.S. 476 (1957)).

40. *Id.* (citing *Hess v. Indiana*, 414 U.S. 105 (1973) (per curiam); *Street v. New York*, 394 U.S. 576 (1969); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)).

41. *Id.*

42. 116 S. Ct. 457 (1995).

43. *Id.* at 460.

44. *Thompson v. Keohane*, No. CV-91-00171-JWS (D. Ark. Dec. 8, 1993).

Both federal courts held that the state court's ruling that he was not "in custody" for *Miranda* purposes was a "fact" determination as to which section 2254(d) establishes a presumption of correctness.<sup>46</sup>

Justice Ginsburg, delivering the opinion of the Court, held that state court "in custody" rulings, made to determine whether *Miranda* warnings are due, do not qualify for a presumption of correctness under section 2254(d).<sup>47</sup> Citing *Miller v. Fenton*,<sup>48</sup> the opinion acknowledges "that the Court has not charted an entirely clear course" in distinguishing between law and fact in the area of "mixed determinations"<sup>49</sup> and, after declaring that "[t]wo lines of decisions compose the Court's § 2254(d) law/fact jurisprudence,"<sup>50</sup> continues:

In several cases, the Court has classified as "factual issues" within section 2254(d)'s compass questions extending beyond the determination of "what happened." This category notably includes: competency to stand trial; and juror impartiality. While these issues encompass more than "basic, primary, or historical facts," their resolution depends heavily on the trial court's appraisal of witness credibility and demeanor. (Although the trial court is "applying some kind of legal standard to what [it] sees and hears," its "predominate function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record."). This Court has reasoned that a trial court is better positioned to make decisions of this genre, and has therefore accorded the judgment of the jurist-observer "presumptive weight."

On the other hand, the Court has ranked as issues of law for section 2254(d) purposes: the voluntariness of a confession; the effectiveness of counsel's assistance; and the potential conflict of interest arising out of an attorney's representation of multiple defendants. "What happened" issues in these cases warranted a presumption of correctness, but the Court declared "the ultimate question" outside section 2254(d)'s domain because of its "uniquely legal dimension."<sup>51</sup>

In a summarizing paragraph, Justice Ginsburg declared:

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45. *Thompson v. Keohane*, No. 94-35052, 1994 WL 424289, at \*1 (9th Cir. Aug. 11, 1994).

46. *Thompson*, 116 S. Ct. at 462.

47. *Id.* at 460.

48. 474 U.S. 104 (1985).

49. *Thompson*, 116 S. Ct. at 464 (quoting *Miller*, 474 U.S. at 113).

50. *Id.*

51. *Id.* at 464-65 (internal citations omitted) (alteration in original).

Classifying "in custody" as a determination qualifying for independent review should serve legitimate law enforcement interests as effectively as it serves to insure protection of the right against self-incrimination. As our decisions bear out, the law declaration aspect of independent review potentially may guide police, unify precedent, and stabilize the law.<sup>52</sup>

The only other opinion handed down in *Thompson v. Keohane* was that of Justice Thomas, joined by the Chief Justice, dissenting.<sup>53</sup> The dissent, however, differs only about what result should be reached by independent determination and does not challenge the independent determination principle.

Indeed, the dissent states: "Because the *Miranda* custody issue 'falls somewhere between a pristine legal standard and a simple historical fact,' we must decide, 'as a matter of the sound administration of justice, [which] judicial actor is better positioned . . . to decide the issue in question.'"<sup>54</sup>

In summary, the Court's evolving practice of exercising "its own independent judgment" or "review" or "determination" is connected with pervasive principles, first, of federalism, second, of allocation of functions between judge and jury, and, third, of allocation of functions between trial and appellate courts. With respect to allocation of functions between judge and jury, we also must account for remnants of the influence of the distinction between law and equity.<sup>55</sup> The implications of the Court's practice of independent determination are matters of great potential significance in the legal system generally and in tort litigation particularly.

*B. What, Exactly, Is the Meaning of an "Independent Judgment," "Review," or "Determination"?*

In *Bose*, as noted above, all nine Justices then serving on the Court approved independent appellate review of facts underlying constitutional claims in certain types of cases—those in which conclusions of law as to a federal right and one or more findings of fact are so intermingled as to make independent review essential to a correct determination of the constitutional issue.<sup>56</sup> Is it significant that at least some

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52. *Id.* at 467 (citations omitted).

53. *Id.* (Thomas, J., dissenting).

54. *Id.* at 468 (quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985) (alterations in original)).

55. See also *Markman v. Westview Instruments, Inc.*, 116 S. Ct. 1384 (1996) (invoking historical equity jurisprudence as a relevant consideration in determining whether patent "claim" interpretation is to be left to the jury).

56. See *supra* text accompanying notes 34-41.

of the dissenting Justices did not sign on to the terminology of "independent judgment"?

As the Court works out other implications of this evolving concept, the phrases "independent review" and "closer scrutiny," as applied to findings of fact of a jury or judge in a trial court, may be less supportive than the phrase "independent judgment" for taking an issue away from the jury or trial judge and treating it at all levels of litigation as an issue to be decided as matters of law are decided. Reaching an independent judgment may connote substituting the Court's judgment for that of the finder of facts and ending the litigation on that basis, rather than just determining that the finding must be set aside and a new trial granted, unless the Court also concludes that, "as a matter of law," the record simply will not support the finding that was made.

More recently, federal circuit courts as well as the Supreme Court have extended the practice of independent determination by higher federal courts about "factual conclusions" reached in a federal trial court, or elsewhere in the earlier history of a controversy destined for decision in a federal trial court, and on appeal in a higher court. Some illustrations involve constitutional challenges to the validity of actions by officials of legislative or executive branches of the national government or a state government. An example is *Wilson v. Arkansas*,<sup>57</sup> adopting the "knock-and-announce" principle of common law as "an element of the reasonableness inquiry under the Fourth Amendment."<sup>58</sup>

Another example is *New Hampshire Motor Transport Ass'n v. Town of Plaistow*.<sup>59</sup> That case concerned a dormant Commerce Clause challenge to a town's curfew on noisy, foul-smelling trucking of hazardous waste over residential streets between 9:00 p.m. and 6:00 a.m. The Court of Appeals for the First Circuit affirmed the district court's rejection of the challenge, explaining: "[A]bsent discrimination, courts may reasonably insist on a fairly clear showing of undue burden before holding unconstitutional a traditional example of local regulation."<sup>60</sup> The Court of Appeals also stated: "Even if we reviewed this [district court's] fact-specific legal determination *de novo*, our conclusion would be the same."<sup>61</sup> The court cites to note 17 in *Bose*,<sup>62</sup> sug-

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57. 115 U.S. 1914 (1995).

58. *Id.* at 1918.

59. 67 F.3d 326 (1st Cir. 1995), *cert. denied*, 64 U.S.L.W. 3519 (U.S. Apr. 1, 1996).

60. *Id.* at 333.

61. *Id.* at 332-33 (citing *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 n.17 (1984)).

gesting the possibility of invoking the "independent judgment" principle of review in this dormant Commerce Clause context. Another context was added to the growing list of illustrations in *Ornelas v. United States*.<sup>63</sup>

Will future decisions continue to refine the distinction between (1) the Court's holding that the Court itself (and, of course, lower courts as well) must exercise "independent judgment" over an issue rather than reviewing deferentially a purported factual finding by a jury because the factual issue is too tightly interwoven with a legal issue material to a constitutional challenge to be left to a jury, and (2) the Court's exercising independent review only to ensure that juries (and trial judges as finders of fact) have not erred in applying the law? Absent further refinement of the distinction, trial judges and trial advocates may face even greater difficulty in crafting instructions to a jury with sufficient clarity that the formal presumption that jurors have faithfully followed the court's instructions on the law in reaching their verdict is consistent with realistic expectations.

### III. IS THERE AN ORGANIZING PRINCIPLE?

#### A. *Why Search for an Organizing Principle?*

Generalizations about law that spring from observations of similar developments in varied types of litigation may be quite valuable aids to decision-makers. This is especially true if they are successfully used in deciding particular controversies—that is, they serve as aids to making informed choices on candidly explained grounds.

If the effort to identify an organizing principle succeeds, we will be better prepared to decide the hard cases that fall so close to the line of distinction implicit in any statement of principle that choice is difficult.

Is there an underlying principle (that goes beyond even the severest form of independent review) by which a reviewing court determines when it will, or should, invoke the independent judgment

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62. *Id.*

63. *Ornelas v. United States*, No. 95-5257, 1996 WL 276414, at \*1-2 (U.S. May 28, 1996) (holding that the Court of Appeals must review de novo trial court's determinations of ultimate questions of reasonable suspicion to stop and probable cause to make warrantless search of automobile); see also *Whren v. United States*, 116 S. Ct. 1769, 1775-76 (1996) (finding that temporary detention of motorist upon probable cause to believe that a traffic violation had occurred did not violate Fourth Amendment prohibition against unreasonable seizure, even if a finder of facts might decide that a reasonable officer would not have made the stop absent other law enforcement objectives).

practice? Or are the illustrations from varied contexts no more than disconnected examples of ad hoc decisions?

### B. *A Provisional Principle*

One possible way of framing a provisional organizing principle is the following:

Law sometimes assigns to a finder of facts (jury or judge in a non-jury trial) and at other times assigns to courts (to be decided as matters of law are decided) the function of drawing from historical facts (either historical facts that are undisputed or historical facts as found by a finder of facts on disputed evidence) an evaluative inference that what happened satisfied a legal test upon which the outcome depends. This function is assigned to a court, not to a jury (or a trial judge as finder of fact), when the court determines that (1) the court is significantly better positioned than a finder of fact to decide the combined legal-factual issue, (2) risks of misapplication of the controlling law by a finder of fact are substantial, and (3) the legal protection for the interest at risk is constitutional.

Another possibility to be considered is whether the practice may extend beyond issues of constitutional dimension, to other compelling interests that are highly valued in the legal system. That is, should element (3) of the foregoing statement of the principle be expanded beyond *constitutional* protection for some interests that are highly valued in the legal system?

## IV. NEW COMPLEXITIES IN THE LAW OF DEFAMATION

### A. *The Seamless Web and Other Metaphors*

A defamation case may present a host of questions, unanswered by precedent, about how the trial court and the reviewing court are to deal with thoroughly intermingled legal-factual elements of an issue. One point has been settled by the Supreme Court in *New York Times Co. v. Sullivan*<sup>64</sup> and its progeny, including *Bose*.<sup>65</sup> A reviewing court (including the Supreme Court), before allowing a defamation claim to survive a motion for summary judgment or for judgment as a matter of law, *may*—and perhaps at the Court of Appeals level, where the only assured review of the trial court's judgment occurs, *must*—independently examine the record with special care. The purpose of the special rule is to assure that either before or after the case is submitted

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64. 376 U.S. 254 (1964).

65. 466 U.S. 485 (1984).

to a finder of facts, but in any event before a judgment becomes final, a court determines whether the finding can be or has been properly made on evidence sufficient to support the finding. In performing that function the trial court (and, if there is an appeal, the reviewing court) must, (1) correctly understand all of the relevant substantive law that identifies which facts must be found to support a claim or defense, (2) correctly understand the special rules about burdens of production and persuasion (including who has each burden and, as to a burden of persuasion, whether it is "by a preponderance of the evidence" or instead invokes some more demanding standard, such as "by clear and convincing evidence"), (3) correctly apply (when examining the record to determine whether it presents some genuine dispute of material fact) both the substantive law rules and the rules regarding burdens, and (4) determine, as nearly as possible, whether the finder of facts correctly understood and applied both the substantive law and the special rules about burdens referred to in the first three requirements.

In some defamation cases, additional problems make the task of the trial judge and the task of the appellate court, on review, even more difficult. The two problems stated immediately below are illustrations.

First, the meaning of "genuine dispute" varies with context. As this phrase is used in relation to motions for summary judgment or for judgment as a matter of law during trial, its precise meaning depends on whether the burden of persuasion is "by a preponderance of the evidence" or instead "by clear and convincing evidence." Indeed, the problem of variable meaning of "genuine dispute," in the sense of something that goes to the jury, is further complicated by the fact that one might reasonably view the clear and convincing evidence standard as, at least in the first instance, a directive to the court about examining its own state of mind when deciding whether to let an issue go to the jury, rather than a directive to the court about instructions it should give to the jury about the degree to which the jury is satisfied about the truth of some disputed factual assertion.<sup>66</sup>

Second, the substantive constitutional law standard varies with context. The Supreme Court has determined the substantive law rules for a few, but only a few, of the many possible sets of relevant factual variables in defamation cases. It has laid out a fairly detailed

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66. Compare Justice Breyer's explanation of the "harmless error" standard in *O'Neal v. McAninch*, 115 S. Ct. 992, 994 (1995) (concluding that when a reviewing judge in a habeas corpus case is in "grave doubt" about whether a trial error affected the verdict, it should not be treated as "harmless error").

and specific set of rules for an alleged defamatory statement (a) by a media-type declarant, (b) about a public official, or (c) on a subject matter of public concern.<sup>67</sup> It has yet to hold, or even say for a clear majority of the Court, much about an alleged defamatory statement (a) by a private speaker, (b) about a private person (that is, one who is neither a public official nor a public figure), or (c) on a subject matter that is private (that is, not a matter of public concern, not a matter bearing upon legally recognized interests of some identifiable group, and not even a matter within the scope of a legally recognized "interest").<sup>68</sup>

Rather than resorting to the traditional metaphor of law as a two-dimensional, or even three-dimensional, seamless web, think of the law of defamation as a cube of cubes composed of the twenty-seven separate cubic boxes labeled to represent the twenty-seven possible combinations of the three variables (regarding the type of defendant-declarant, the type of plaintiff, and the type of subject matter). In each small cubic box stacked together to form the larger cube is a set of legal rules to be applied to a fact situation having the set of variables for that position in the larger cube. Around the diagonal between two opposite corners of the cube of cubes, most favorable respectively to liability and nonliability, are twenty-five more cubic boxes, most of which are empty or nearly so, because the precise set of variables each box represents has not yet been before the Court, and the inferences we draw about the rules that will apply are merely that—inferences, informed by analogy, rather than firm precedents.

Think, for example, about the box concerned with a defamatory statement by a private person, about a person drawn into public view by a tragic coincidence, as in *Brown v. Hearst Corp.*<sup>69</sup> The plaintiff in that case was a husband and father whose wife, an airline flight attendant, disappeared under circumstances that remain to some extent a mystery.<sup>70</sup> By coincidence, another woman in the same small community, also an airline flight attendant, had disappeared less than a year earlier, and her husband had been convicted of murder in connection with the disappearance, and had, of course, been the subject of extensive media reports.<sup>71</sup> After the second disappearance, a custody dis-

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67. See *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

68. One may wonder whether an "interest" still might be legally recognized even if it is no more than curiosity, as benign as curiosity can ever be in knowing salacious facts about one's neighbors.

69. 54 F.3d 21 (1st Cir. 1995), *aff'g* 862 F. Supp. 622 (D. Mass. 1994).

70. *Id.* at 23.

71. *Id.*



pute arose over a child and led to bitter court proceedings that were the subject of media reports.<sup>72</sup> Police investigation of the second disappearance occurred, but no criminal proceedings were initiated.<sup>73</sup> Months after media reports regarding the second disappearance and the custody dispute had ceased, a television program aired by the defendant corporation's station brought together in one program these separate incidents, drew some comparisons, and raised questions about the still-undetermined circumstances of the second disappearance.<sup>74</sup> The plaintiff sued for defamation, alleging that the television program carried the defamatory innuendo, among others, that he was a murderer.<sup>75</sup>

In such a case, who decides, and how does one decide, which of the twenty-seven boxes is the right box for this case (for example, is this or is this not a statement about a "public figure" on a matter of "public concern"?), and what are the rules of decision in that box?

### B. "Opinion" and Associated Complexities

As defamation cases sometimes dramatically illustrate, the relevant variables extend beyond and become more complex than just the three sets identified above in the metaphor of a seamless web and the three-dimensional metaphor of a cube of cubes. A proposed distinction between statements of fact and statements of opinion adds complexity not addressed by either of the metaphors just discussed.

Is it significant, for determining the scope of the constitutional limitations upon liability for allegedly defamatory declarations, whether an objectively reasonable interpreter of the declaration would not understand the defamatory sting to be asserted as fact, but at most as an opinion? Is it significant whether a reasonable interpreter of the communication would understand it as *not only* stating an opinion *but also* disclosing the basis for that opinion?

One may read Chief District Judge Tauro's opinion in *Brown v. Hearst Corp.*,<sup>76</sup> as having been influenced considerably by the distinction between making an implicit assertion of fact ("he is a murderer") and reporting undisputed facts, including those about an extensive investigation in which the plaintiff figured but was never charged, and then expressing or implying an opinion about the likelihood that

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72. *Id.*

73. *Id.*

74. *Id.* at 23-24.

75. *Id.* at 24.

76. 862 F. Supp. 622, 632 (D. Mass. 1994) (holding broadcast report not actionable), *aff'd*, 54 F.3d 21 (1st Cir. 1995).

plaintiff in fact did the act.<sup>77</sup> As long as the opinion is based on the reported facts—and the communication does not suggest in any way that the declarant knows anything more that is material to one's forming one's own opinion—is it protected expression?

Justice Powell's opinion for the Court in *Gertz v. Robert Welch, Inc.*,<sup>78</sup> made the sweeping assertion that "[u]nder the First Amendment there is no such thing as a false idea."<sup>79</sup> The Court has pulled back from that broad assertion, but the precedents have not foreclosed the argument that something is left of the constitutional protection for a speaker's expressions of opinion as distinguished from the speaker's assertions of fact.<sup>80</sup>

Also, as another aspect of *Brown v. Hearst Corp.* illustrates, precedents have not foreclosed some limited protection for reporting a court proceeding—in *Brown*, a child custody proceeding.<sup>81</sup> Does the circumstance that a television program included statements about a custody proceeding of some time past invoke principles and policy questions like those underlying the common-law privilege of a fair report, even if not satisfying, as a matter of law, the precise elements of a fair report? Would it be significant that a departure, if any, from a fair report, or from the theme of a fair report, was only, or at least principally, in that a defamatory sting (for example, an innuendo that plaintiff committed a specific crime) might be suggested to the mind of the reasonable interpreter of the program as a whole, but not as the meaning the creators of the program intended? Questions such as these illustrate that the law of defamation is now even more complex than is captured in the metaphor of many unfilled boxes in a cube of cubes.

## V. PROFESSOR GRAY'S INSIGHTS

The 1986 edition of Harper and James,<sup>82</sup> revised by Professor Oscar Gray, presents a remarkably crisp and informative statement of a final point to which I now turn. "The tort of defamation has undergone revolutionary changes in the United States since 1964, as a result of developments in constitutional law. Those changes, and the resulting state of defamation law, can best be understood against the back-

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77. *Id.* at 628-29.

78. 418 U.S. 323 (1974).

79. *Id.* at 339.

80. See, e.g., *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19-21 (1990) (declining to create a separate constitutional protection for "opinion").

81. *Brown*, 862 F. Supp. at 626.

82. FOWLER V. HARPER ET AL., *THE LAW OF TORTS* (2d ed. 1986 & Supp. I 1995).

ground of the earlier common law doctrine."<sup>83</sup> Professor Gray then continues with a brief overview that brings together circumstances supporting some central observations about the history of what we know today as the law of defamation.

At common law the defamation actions, libel and slander, *were strict liability torts. . . . Absent truth or privilege, the actor was subject to liability without regard to his fault or lack of fault.* Plaintiff might prove damages, but need not do so. The trier of fact was permitted to find "presumed" damages. Punitive damages could also be awarded, on criteria that varied among the states. Typically something in the way of "malice" was required, but this might mean any number of things, e.g., spite, ill will, or wrongful purpose. Liability was on the whole predicated on false statements of fact. There could also be liability, however, for defamatory statements of opinion that fell outside a zone of privilege permitted by the doctrine of "fair comment." Within that zone of privilege a considerable degree of vilification was permitted for certain objectives deemed worthy of protection, e.g., literary and dramatic criticism, and political discussion.

*This scheme of legal relationships between defamers and the defamed worked reasonably satisfactorily, on the whole, until the 1960s, despite a few strange theoretical anomalies, and occasional apparent injustices . . . .*

*In the 1960s, however, a constitutional crisis developed in connection with the reporting of events related to the civil rights movement . . . .*<sup>84</sup>

Before *New York Times Co. v. Sullivan*,<sup>85</sup> there was no general newsworthiness privilege. If the media-type declarant failed to satisfy the elements of "fair comment" as developed in the applicable state law, liability was strict. No proof of fault of any kind was required (beyond, of course, such fault as one might perceive in the declarant's not satisfying the elements of the privilege of fair comment).

The outcomes of defamation cases in both state and federal courts have been materially different since 1964 because of *Sullivan*. Of potentially greater long-term significance, however, is the fact that tort law more generally has been deeply influenced by developments in the law during the thirty years since the *Sullivan* decision. We ordinarily think of these developments as part of the law of defamation,

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83. *Id.* § 5.0 at 2.

84. *Id.* at 3-5 (footnotes omitted) (emphasis added).

85. 376 U.S. 254 (1964).

but in fact they extend to application of the First Amendment in contexts other than defamation and to practices with respect to "independent" court determination of legal-factual issues of potentially more pervasive influence in tort law more generally.

These influences will continue, and so will the benefit of Professor Gray's lucid exposition of their historical foundations in the law of defamation.