The IMPACT of State Prohibitions of Punitive Damages on Libel Litigation: An Empirical Analysis

- By Dennis Hale*

The impact of punitive damages on media libel litigation remains an issue very much alive at the beginning of the new millennium. A February 2002 headline in Editor & Publisher magazine, the major independent trade magazine devoted to the American newspaper industry, warned: “Punitive Damage Awards on the Rise in Media Libel Cases.” The headline introduced an article summarizing a 20-year study by the Libel Defense Resource Center (LDRC). The study revealed a 136 percent increase in the total damages awarded at trials despite a 32 percent drop in the total number of media libel trials from the 1980’s through the 1990’s. The study further revealed that punitive damages represented a higher proportion of all damages in the 1990’s. The article quoted Sandra S. Baron, executive director of the LDRC, who explained that juror attitudes about the media contribute to, and ultimately cause, this rise in punitive damages. As Ms. Baron explained to Editor & Publisher, “You hope no newspaper is inhibited from doing a story simply because of the possibility of high jury awards, but it would be unrealistic to think the media turns a totally blind eye.”

This Article explores the role of punitive damages in media libel cases by measuring the quantity and quality of libel appeals for a ten-year period in states with and without punitive damages. Specifically, the Article identifies appellate court decisions for media libel cases over a ten-year period from 1986 to 1995, comparing five states with punitive damages (Alabama, New Mexico, South Carolina, South Dakota and Tennessee) to five states without punitive damages (Louisiana, Massachusetts, Nebraska, Oregon and Washington). Each appeal of a federal or state media libel case was coded for the following characteristics: year, whether the media won or lost at both the trial and appeals stages, existence of a pretrial summary judgment, and the size of punitive and other damage awards at both the trial and appeals stages.

The remainder of this introduction differentiates between punitive damages and other classifications of civil damages and includes a discussion of three randomly selected media libel cases from one year to illustrate the magnitude of different types of libel damages. Section I, “Supreme Court Jurisprudence on Punitive Damages,” examines the analysis of punitive damages by the high court in media and nonmedia libel cases. Section II, “Proposals to Reform the Law of Libel,” examines the concept of prohibiting punitive damages as one of a range of reforms with the potential for reducing libel burden on mass media defendants. Section III, “Methodology and Its Precur tors,” explores the precedent in media law research for measuring the impact of a legal provision by systematically measuring a universe of appellate court decisions. Section IV, “Methodology,” describes the techniques used to measure media libel appeals for ten years in ten states while Section V, “Findings,” reports the results of the ten-year, ten state analysis of media libel appeals. Section VI, “Conclusions and Discussion,” wraps up this Article by examining the ramifications of the results produced by the ten-state study.
Black’s Law Dictionary defines punitive damages as "damages awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit." 9  

Punitive damages, also called exemplary damages, vindictive damages, smart money, and punes, "are intended to punish and thereby deter blameworthy conduct." 10 Actual or compensatory damages "compensate for a proven injury or loss" and "repay actual losses." 11 General damages, however, do not require specific claims or proof to be sustained because the law presumes that such damages follow from the type of wrong complained of. 12

The magnitude of each damage type varies considerably in libel cases. An award might contain only modest or even no actual damages, such as damages awarded for provable losses in an occupation or business. Awards ordinarily contain significant general damages to compensate for losses in such difficult-to-quantify areas as reputation and mental suffering. Furthermore, depending on the degree of the defendant’s egregiousness or maliciousness, punitive or exemplary damages may be awarded as a multiple of the general or actual damages awarded.

When a state prohibits or limits punitive damages, it diminishes the influence of the category of damages most threatening to media defendants.

The chilling effect of punitive damages, and damages in general, concerned the U.S. Supreme Court from the start of its involvement in libel jurisprudence. Hints of this concern permeated the Court’s initial substantive libel decision, New York Times v. Sullivan. 22 In his majority opinion, Justice Brennan noted that subjective standards influenced the $500,000 jury verdict that resulted. 23 The award included compensatory and punitive damages, but the jury verdict did not differentiate between the two. 24 Furthermore, the jury was allowed to award punitive damages despite plaintiff’s failure to show the amount of actual damages suffered. 25 Justice Brennan additionally observed that the $500,000 in civil damages was one thousand times
greater than the maximum fine allowed by the state of Alabama in criminal libel suits. Later in the opinion he remarked: "The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute."  

Justices Black and Douglas, concurring with the majority's opinion in New York Times, also discussed the threatening nature of civil libel damages. They explained, "The half-million-dollar verdict does give dramatic proof, however, that state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials." Black and Douglas believed the actual malice rule, by itself, and without additional limitations, provided the press with insufficient protection against libel suits brought by public officials.

Two years later, the Court again expressed reservations concerning the amount of protection enjoyed by the press from libel suits brought by public officials in Rosenblatt v. Baer, a decision that expanded the actual malice rule applied to elected officials in New York Times to include appointed government officials as potential libel plaintiffs. Justice Black, again with Justice Douglas, authored a concurring and dissenting opinion explaining: "Half-million-dollar judgments for libel damages like those awarded against the New York Times will not be stopped by requirements that 'malice' be found, however that term is defined. Such a requirement is little protection against high emotions and deep prejudices which frequently pervade local communities where libel suits are tried." In Rosenbloom v. Metromedia, decided five years after Rosenblatt, Justices Marshall and Stewart dissented from the majority to advocate the imposition of limits on damages as a method of blunting the threat of libel suits.

In Rosenbloom, a plurality of the Court expanded the actual malice rule to cover any news involving matters of general or public interest or concern. The case involved an award of $25,000 in general damages and $725,000 in punitive damages to a distributor of nudist magazines in Philadelphia in a suit against a radio station. The plurality opinion, authored by Justice Brennan and joined by Chief Justice Burger and Justice Blackmun, reversed the jury verdict. Marshall's dissenting opinion advocated limiting damages as a more effective method for reducing the threat of libel than expanding the actual malice rule. According to Marshall, "the size of the potential judgment that may be rendered against the press must be the most significant factor in producing self-censorship." He believed the unlimited discretion afforded juries in awarding damages rendered the end result of libel trials "unpredictable." Marshall wished to restrict libel damages to "proved, actual injuries" and to "real injuries." Three years later in Gertz v. Welch Justices Marshall and Stewart convinced the Supreme Court to adopt the approach advocated in their Rosenbloom dissent. In a five to four decision, the Court reversed the Rosenbloom plurality, which had extended the actual malice rule to virtually any newsworthy issue. Instead, the Gertz majority voted to require a lesser fault standard in most libel suits and to restrict damage awards. Characterizing the libel plaintiff as neither a government official nor a public figure but rather a private personality not required to prove actual malice, the Court ruled that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." The Court also ruled that henceforth, a punitive damage award required proof of actual malice. Justice Blackmun welcomed this new doctrine in his concurring opinion, believing that removing the specters of presumed and punitive damages, in the absence of actual malice, eliminated a significant and powerful motive for self-censorship.

In dissent Justice White referred to the constitutional limits on punitive damages as "radical changes in the law and severe invasions of the prerogatives of the states," as well as "a classic example of judicial overkill." Aside from the opinion of Justice White, the above precedent demonstrates how the U.S. Supreme Court utilized the First Amendment to restrict, but not prohibit, punitive damage awards in media libel cases.

**THE U.S. Supreme Court utilized the First Amendment to restrict, but not prohibit, punitive damage awards in media libel cases.**
While the Court utilized the First Amendment to confront the threat of punitive damage awards in media cases, it also utilized the Due Process Clause of the Fourteenth Amendment to restrict punitive damage awards in non-media civil cases. In *BMW v. Gore*, the Court invalidated a jury award of $4,000 in compensatory damages and $2,000,000 in punitive damages levied against a car dealer who had repainted a new vehicle without informing the owner. In ruling that the Due Process Clause required that punitive damages be awarded according to the degree of reprehensibility, the Court vocalized its concern over how the $2,000,000 in punitive damages equaled 500 times the compensatory damages awarded. According to the Court, “When the ratio is a breathtaking 500 to 1 . . . the award must surely ‘raise a suspicious judicial eyebrow.’” Finding the ratio grossly excessive and arbitrary, the Court concluded the award violated the Fourteenth Amendment’s Due Process Clause.

A year prior to *BMW*, a non-media case concerning an overturned three-wheel all-terrain vehicle prompted a majority of the Supreme Court to discuss the great potential for jury mischief in awarding punitive damages after a jury awarded $735,512 in compensatory damages and a staggering $5 million in punitive damages. The Oregon Supreme Court had refused to review the punitive damage award because of a provision in the Oregon Constitution that barred such review except in instances where no substantial evidence supporting the damage award existed. The U.S. Supreme Court ruled that the limitation of judicial review violated the Due Process Clause of the Fourteenth Amendment. As observed by Justice Stevens, “Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant’s net worth creates the potential that juries will use their verdicts to express biases against big business, particularly those without strong local pres-

**II. Proposals to Reform the Law of Libel**

Limits on punitive damages may be viewed as one of many strategies for reforming and fine-tuning the law of libel. Government policy makers and media leaders constantly explore proposals to modify the balance between two competing legal interests, freedom of the press and the individual’s right to protect a reputation. Both legal interests are essential to a free society. Justice Stewart, concurring in *Rosenblatt*, wrote that the right to protect a reputation “reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.” Stewart argued that the protection of reputation, even though primarily defined by state law, deserves as much protection as rights articulated in the U.S. Constitution. Despite Stewart’s arguments about the primacy of the right to protect reputation, libel law reform generally involves an incremental expansion of freedoms enjoyed by the press with a simultaneous contraction in the law of defamation.

One way to reshape libel law is to increase barriers to libel suits by strengthening the basic elements which libel plaintiffs must prove. The Supreme Court followed this practice in *New York Times* and *Gertz* when it created a fifth, required element in libel suits—that of fault. In *New York Times*, the Court required a showing of fault in the form of actual malice as a means for limiting the recovery of public officials in libel cases. In *Gertz*, the Court required a private figure bringing a libel suit to prove some degree of fault. The *Gertz* Court further allowed the states to select the appropriate fault standard provided they did not impose strict liability or liability without fault. The Court further strengthened the pre-existing libel element of identification in *New York Times*, requiring that elected officials clearly establish that they were identified in the defamatory message and that the story or advertisement was “of and concerning” the

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plaintiff. 62 Similarly, in Philadelphia Newspapers v. Hepps, the Supreme Court tinkered with another traditional libel element, that of falsity. 63 According to Hepps, a successful libel claim required the plaintiff to prove the falsity of the statement made by the defendant; the plaintiff would not be afforded a presumption of falsity. 64 While enhancing the basic elements of a libel suit may offer greater protection to the media from libel suits, strengthening the defenses available to a defendant in a libel suit provides another avenue of protection.

Strengthening defenses to libel actions such as fair comment or opinion, qualified privilege, libelproof, the statute of limitations, and correction and retraction statutes provide additional avenues for the protection of defendants and for libel reform. The rare defense of libelproof applies when a court concludes the reputation of a libel plaintiff is damaged to such a degree that it cannot be harmed by a new defamation. 65 The common law defense of fair comment protects the right of journalists, commentators and reviewers to criticize those who share their creations with the public—everyone from actors and professional athletes to restaurant chefs and architects. 66 Qualified privilege, a defense existing in different forms in every state and often referred to as “the most important common-law defense in the post-Times v. Sullivan era,” protects journalists who report defamatory comments made in official proceedings from libel liability provided their stories are fair and accurate. 67 The statute of limitations represents the limited time period during which a libel suit may be initiated following an incident of alleged libel. 68 A short statute of limitations typically benefits media defendants while a long statute benefits libel plaintiffs. 69 Libel retraction laws also vary considerably from state to state. Thirty states limit libel recovery by statute when the media retract defamatory falsehoods. 70 The protection offered by libel retraction statutes varies from prohibitions on punitive damages to restricting damages to out-of-pocket losses. 71 The Uniform Correction Act, officially titled the Uniform Correction or Clarification of Defamation Act, was drafted and approved in 1993 by the National Conference of Commissioners on Uniform State Laws and later endorsed by the House of Delegates of the American Bar Association and by the American Association of Newspaper Editors. 72 The Uniform Correction Act would strengthen the protection for the news media in many states by requiring that recoverable damages be restricted to provable, actual damages in instances where the media publishes a proper correction to an incident of defamation. 73

Strengthening out-of-court forums for libel disputes provides a method for modifying the impact of libel litigation without changing the actual law. Robert Chandler, a former publisher of a daily newspaper in Eastern Oregon, advocated a simplified arbitration procedure to resolve conflicts between potential libel plaintiffs and newspapers. 74 Other observers of the news media have advocated the creation of news councils to resolve disputes concerning the accuracy and balance of news stories. 75 Supporters of such councils attest to their ability to reduce the incidence of libel suits. 76 A study of the quantity of libel litigation in Minnesota before and after the creation of the Minnesota News Council found that libel suits increased less in the Gopher state than in the border states of Wisconsin, Iowa, North Dakota and South Dakota, states without news councils. 77

In conclusion, a great variety of proposals exist for modifying the substance and impact of libel law. They include legislative and judicial proposals, state and federal proposals, and legal and non-legal (or out-of-court) proposals. Of those proposals, the Supreme Court and other legal policy makers pay considerable attention to the concept of limiting or prohibiting punitive damages.

III. Methodology and Its Precursors

This Article relies on a methodology for the legal research of mass communication that evaluates the impact of a legal provision by measuring the number and quality of relevant appellate court decisions. The Minnesota News Council study, cited earlier, provides one illustration of this methodology. 78 That study identified and coded all federal and state appellate decisions concerning media libel over a 39-year period for five states. 79 One finding noted that following the creation of the Minnesota News Council, libel appeals increased 149 percent in the states surrounding Minnesota compared to an increase of only 55 percent in Minnesota. 80 This approach of relying on a proscribed universe of appellate court decisions as a mirror of trial court activity works best for a subject such as libel. Both types of losing parties, plaintiffs and defendants, are strongly motivated and thus more likely to appeal an adverse trial judgment. Losing at trial motivates a libel plaintiff to appeal an adverse judgment to the next higher court just as much as it does a losing media defendant.
Donald Gillmor and Melanie Grant used this methodology in their empirical analysis of 614 media libel appeals—all libel appeals reported by Media Law Reporter for the seven years between 1982 and 1988. Among its findings, the Gillmor-Grant analysis revealed that the number of libel appeals remained constant from year to year. The media won over 80 percent of the cases following appeals. In support of their analysis, Gillmor and Grant provided a state-by-state chart reporting the number of libel cases per million residents in each state. According to the authors, “states, such as Massachusetts, Washington and Oregon, that prohibit the awarding of punitive damages gain no particular advantages for media defendants, nor does Michigan, a state that has generally been unsympathetic to punitive damages.” According to the Gillmor and Grant analysis of seven years of libel appeals in the fifty states, the presence or absence of punitive damages did not make much of a difference.

The analysis conducted by Gillmor and Grant provided data and comments relevant to the research questions explored in this Article on punitive damages. The application of state-level data from the Gillmor-Grant study allowed for the comparison between the punitive and non-punitive states analyzed in this Article. However, contrary to the expected findings of this Article, the Gillmor-Grant study revealed that non-punitive states averaged 1.87 media libel appeals per capita, compared to 1.23 libel appeals for the five punitive damage states. This finding, based on data for ten of the 50 states in the Gillmor-Grant study, contradicted the anticipated results for the ten-state study in this Article.

David Anderson, a professor at the University of Texas Law School, utilized a methodology similar to that used by Gillmor and Grant in his statistical analysis of the 199 media cases decided by the U.S. Supreme Court in the 195 years from 1791 to 1986. One striking finding of Anderson’s study was that with the exception of the Warren Court years of 1954-1969, media litigants generally lost more often than other classifications of litigants appearing before the Supreme Court. Paul Kostyu, the Columbus bureau chief for the Canton, Ohio, Repository and formerly a journalism faculty member at Ohio Wesleyan University, also performed research by analyzing a universe of cases. Kostyu examined a decade of decisions by the U.S. Court of Appeals for District of Columbia concerning freedom of expression issues. Kostyu’s major finding was that judges appointed by Democratic Presidents Lyndon Johnson and Jimmy Carter supported free expression litigants about 19 percent more often than judges appointed by Republican President Ronald Reagan. Kostyu demonstrated the usefulness of analyzing a category of cases from one court to measure the influence of a characteristic of the justices such as political party.

Lastly, two national studies conducted by the Libel Defense Resource Center (LDRC) provided methodological support for this approach of analyzing court cases within a defined universe. The two studies, one analyzing trial verdicts and the other focusing on appellate-level decisions, documented the significance of punitive damages in media libel cases. The LDRC trial study examined the characteristics of libel trial verdicts over a 19-year period (1980 through 1998) in all 50 states. The LDRC, represented by media attorneys and media organizations in every state, has created comprehensive databases on media libel litigation at both the trial and appellate levels. The LDRC trial study found that, on the average, the media won 37 percent of the 22 libel trials held each year. Of those trials, 78 percent took place in state courts while the remaining 22 percent took place in federal courts. The trial study discovered an average of $2.86 million in damages awarded in the decade of the 1990s, twice the $1.44 million averaged during the 1980s. The trial study further discovered that punitive damages contributed significantly to the amount of trial damages awarded. Fifty-four percent of the cases awarding damages included punitive damages as part of the award, with punitive damages representing 61 percent of the total damages awarded. The LDRC study demonstrated that despite infrequent damage awards, punitive damages dominate such awards when they arise.

THE LDRC study of libel appeals documented how punitive damages significantly contribute to total damages and how appellate courts often react by reducing such awards.
The 19-year LDRC trial study also provided some support for the research questions posed in this Article. The trial study consisted of a variety of statistical analyses and devoted several tables to state-by-state comparisons. When this state-level, LDRC trial data was used to contrast the five states in this Article with punitive damages (Alabama, New Mexico, South Carolina, South Dakota, Tennessee) with the five states without punitive damages (Louisiana, Massachusetts, Nebraska, Oregon, Washington), some patterns emerged. States without punitive damages averaged 1.08 libel trials per million population, versus 1.58 trials per million for states with punitive damages. States without punitive damages awarded a $193,000 median in total damages awarded compared to $1,005,000 median in states with punitive damages. At the appellate level, non-punitive states awarded an average of $70,000 in damages versus $249,000 in punitive states. These findings were consistent with the research expectations of this Article.

The second LDRC study, an appeals court study, focused exclusively on the appeals of media libel cases over a fourteen year period from 1984 to 1998. The appeals study found that 74 percent of the media libel cases occurred in state courts, with the remaining 26 percent occurring in federal courts. At the trial level, media defendants won 28 percent of the cases with plaintiffs winning the remaining 72 percent. Seventy percent of the overall damages awarded included punitive damages. Appellate courts, however, often modified punitive damage awards to the media's benefit. Appellate courts either reversed or remanded some 54 percent of adverse decisions against the media. They reversed or remanded an even higher percentage—77 percent—of punitive damage awards that were imposed upon the media. The LDRC study of libel appeals documented how punitive damages significantly contribute to total damages and how appellate courts often react by reducing such awards.

In conclusion, a variety of researchers have used the systematic analysis of a universe of media cases and appeals to measure the impact of media law provisions on punitive damage awards in libel suits. At least one study, by Gillmor and Grant, contradicted the research expectations explored in this Article. The 19-year LDRC trial study provided some support for the research questions posed in this Article and suggested that state prohibitions on libel damages may actually depress libel litigation.

### IV. Methodology

The analysis set forth in this Article sought to compare the quantity and quality of media libel appeals in states with and without punitive damages. The analysis explored two major research concerns. First, it suspected a lower incidence of media libel appeals in states without punitive damages because an attorney's and potential libel plaintiff's knowledge of punitive damage limitations would discourage some parties from bringing libel suits. Second, it suspected a lower average in total damages awarded in states without punitive damages, in instances where a media libel plaintiff prevailed at trial or on appeal. The analysis ultimately suspected that a prohibition on punitive damages would make a significant difference in the total amount of damages awarded.

To keep this analysis at a manageable size, it focused on ten years of cases in five punitive and five non-punitive states. Alabama, New Mexico, South Carolina, South Dakota and Tennessee represented the punitive states while Louisiana, Massachusetts, Nebraska, Oregon and Washington represented the non-punitive states. The study classified states using the LDRC 50-State Survey. The goal of this classification was to identify two groups of five states that remained stable for a decade concerning punitive damage awards. Detailed tables in the LDRC 50-State Survey indicated a state's overall status on punitive damages as well as whether the state recognized limits on punitive damages created by the Supreme Court in its Gertz decision, from retraction laws limiting punitive damages, and from common law restrictions on punitive damages. While each state included in the study recognizes the Gertz restrictions, the study excluded states recognizing common law restrictions. The study ignores the issue of retraction law provisions on punitive damages because it was felt that retractions would affect only a small fraction of all media libel cases.

The initial intent of the research method was that separating states according to whether or not they awarded punitive damages would create two large groups allowing for the selection of matched pairs. For example, a Southern state with a medium population and punitive damages could be matched with a Southern state with a medium population and a prohibition on punitive damages. However, the small number of states that fell cleanly into the categories of puni-
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tive damages and non-punitive damages prevented the desired matching scheme.

The analysis required the preparation of a coding sheet for analyzing all state and federal media libel appeals. Besides the name and citation of each appeal, the sheet addressed twelve specific items: (1) the ten numbered states; (2) whether or not the state awarded punitive damages (yes or no); (3) the mass medium at issue (newspaper, television, radio, magazine, book, or other); (4) whether litigated in state or federal court; (5) the year (1986 through 1995); (6) whether the press emerged victorious at trial phase (yes or no); (7) whether the matter was decided via pretrial summary judgment (yes or no); (8) the amount of general (non-punitive) damages awarded after trial (in $1,000s); (9) the amount of punitive damages awarded after trial (in $1,000s); (10) whether the press emerged victorious on appeal; (11) the amount of general (non-punitive) damages awarded after appeal (in $1,000s); and (12) amount of punitive damages awarded after appeal (in $1,000s). The entry of these twelve case-specific items into a computer database allowed for an analysis of the quantity and quality of media libel appeals in punitive and non-punitive states.

The study identified and analyzed media libel appeals in two stages using the Internet legal database, Lexis. The study first identified potential media libel cases by conducting a search with the delimiters of "libel" or "defamation" for appellate court decisions for each of the ten states over the specified ten-year period. A similar search was conducted of appellate court decisions for the same ten states from the U.S. Court of Appeals.

The next step was to examine each "libel" and "defamation" appellate court decision to determine if it involved mass media libel, which for purposes of this study was defined as the content of a mass medium libeling an individual or entity outside of that mass medium.

After identifying the media libel appeals, a coding sheet was completed for each case. Descriptive statistics were then computed using a standard, computer statistical program. The study did not use tests of significance on a selective sample but instead analyzed an entire universe of libel cases.

The following

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<th>State</th>
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<th>Media Cases</th>
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findings summarize the descriptive statistics and discuss the major research concerns.

V. Findings

The initial Lexis search identified a total of 1,282 potential appeals, 981 (77 percent) potential state appeals and 301 (23 percent) potential federal appeals. An examination of each appeal determined that only 121 qualified as a media libel appeal.\(^\text{115}\)

Of the 121 media libel appeals identified, 84 percent came from state courts and 16 percent from federal courts, a proportion similar to those identified by other libel case studies.\(^\text{117}\) The study further revealed a fairly even dispersal of media appeals over the years, with 58 percent filed in the first five years and 42 percent filed in the second five years. Some 4 to 17 percent of appeals were filed in each year. Similar to previous studies, some 60 percent of the cases concerned newspapers. Newspapers, with their in-depth and investigative reporting, find themselves involved in potential libel situations more often than other media. Cases involving the other media revealed the following percentages: 29 percent for television; 8 percent for magazines; 2 percent for radio; 2 percent for books; and 0 percent for other media.

The media fared quite well. Of the 121 cases, the media emerged victorious 81 percent of the time at the appellate level and 74 percent of the time at the trial level. Courts decided approximately 87 percent of these cases at the pre-trial, summary judgment phases.\(^\text{118}\) Media defendants view the availability of pre-trial judgments in media libel cases favorably because it can reduce the length, preparation and expense of litigation.

Research for this study harbored concerns that states prohibiting punitive damages would produce a smaller incidence of media libel cases. It was hypothesized that the unavailability of punitive damages in states would discourage some potential libel plaintiffs from initiating lawsuits. Similarly, the availability of punitive damages in states would provide an additional incentive that would motivate some libel plaintiffs to follow through and sue for defamation. However, as the Table indicates, this was not the case.\(^\text{119}\) After factoring in the populations of each state, calculations revealed an average of 3.7 cases per million in states without punitive damages compared to 3.3 cases for states with punitive damages.\(^\text{120}\) An alternate means of calculation revealed an even greater disparity between punitive and non-punitive states. Dividing the populations of the two groups of states by the total number of media libel cases, the non-punitive damage states averaged 4.15 cases to 2.74 for the punitive states.\(^\text{121}\) Regardless of how the value was calculated, states with punitive damages had a lower incidence of libel appeals than cases without punitive damages, a result contrary to the expectations of this study.

Comparing percentages of media victories for non-punitive and punitive states produced minimal differences. The media won 79 percent of the time at the trial stage in non-punitive states, versus 85 percent in punitive states. Courts granted pretrial summary judgments 89 percent of the time in non-punitive states, versus 83 percent in punitive states. The media won at the appellate level 75 percent in non-punitive states, versus 73 percent in punitive states. Furthermore, 86 percent of trials in non-punitive states occurred in state courts versus 80 percent in punitive states. These differences in the quality of media libel appeals between punitive and non-punitive states were inconsequential and modest at best.

Lastly, the study compared non-punitive and punitive damage cases for instances in which the media lost and the plaintiff was awarded damages at the trial level. Only nine of the 121 cases fell into this category, five in non-punitive states and four in punitive states.\(^\text{122}\) By dividing those two numbers, four and five, by the total populations in the two categories of states, we arrive at .26 cases with damages in non-punitive states and .27 cases in punitive states.\(^\text{123}\) Once again, the difference is inconsequential.

Only an examination of the magnitude of damages reveals a difference that favors non-punitive states. In the non-punitive states, total damages awarded at the trial level averaged $68,000, only 10 percent of the $686,000 average for damages in the punitive states.\(^\text{124}\) In punitive states, punitive damages accounted for 53 percent of the trial damages awarded, with other damages accounting for the remaining 47 percent.\(^\text{125}\)

Decisions of the appellate courts tend to diminish the above mentioned differences between non-punitive and punitive states. Of the five damage awards in non-punitive states, only three survived appeals as compared to only two of the four cases surviving appeal in the punitive states.\(^\text{126}\) After factoring population, the study revealed .154 damage awards in non-punitive states versus .137 in punitive states. Additionally, $92,000 in total damages per case sur-
vived appeal in non-punitive states versus $98,000 per case in punitive states. Thus, decisions of the appellate courts tended to nullify the significant advantage enjoyed by non-punitive damages states by reducing great disparity in damages between non-punitive and punitive states at the trial level.

**VI. Conclusions and Discussion**

This study explored whether state prohibitions on punitive damages influence the quantity and quality of media libel litigation. Answering that question involved a systematic analysis of all state and federal media libel appeals in ten states over a ten-year period.

For the most part, the status of punitive damages in a state did not affect libel litigation. First, the quantity of libel appeals was about the same in both non-punitive and punitive states. Second, trial courts awarded damages in a comparable number of instances. Third, following review by an appellate court, the number of instances in which damages were awarded was about the same. Fourth, following review by an appellate court, the average total damages awarded was about the same in both types of states.

The legal climate only proved more protective for the media in states without punitive damages in relation to damages awarded by trial courts. Trial courts awarded average damages in an amount ten times greater in punitive damage states than in non-punitive damages states. These differences disappeared following an appeal of the case.

Consequently, it cannot be argued that a state prohibition in punitive damages provides the media with significant protection against libel suits. One of the appealing provisions of the Uniform Correction Act, which was introduced a decade ago, is its limitation of damages to concrete, provable losses.127 Both the Associated Press Managing Editors and the American Society of Newspaper Editors endorse the Act but, to date, only one state legislature—that of North Dakota—has adopted the model statute as law.128 Large-scale media—metropolitan dailies and big city TV news operations—appear unenthusiastic about the Uniform Correction Act and apparently have not encouraged their state newspaper organizations and broadcast associations to lobby for it in their legislatures. A state legislature is not going to change the law in an obscure field such as defamation unless major organizations with a stake in the issue vigorously lobby for the desired change. These big media managers may not desire such reforms because they have concluded that the status quo and existing libel laws best benefit their operation. According to the findings of this study, efforts made to lobby state legislatures to change punitive damages or correction laws for libel may be unnecessary.

A possibility that prohibitions on punitive damages do, in fact, depress libel litigation, remains a valid consideration. However, the limited scope of this study precluded the detection of that influence. Other variations in libel laws between the states may have masked the impact of the differences in punitive damages. A study of one decade and ten states may have been too limited to detect any influence.

**ENDNOTES**

1 Dennis Hale is a professor in the Department of Journalism at Bowling Green State University having earned his Ph. D. in journalism from Southern Illinois University at Carbondale. He formerly served as the head of the Law Division of the Association for Education in Journalism and Mass Communication.


3 Id.

4 Id.

5 Id.

6 Id.

7 Id.

8 BLACK’S LAW DICTIONARY 396 (7th ed. 1999).

9 Id. Punitive damages are also referred to as “punitive damages,” “presumptive damages,” “added dam-
ages,” “aggravated damages,” “speculative damages,” and “imaginary damages.” *Id.*

10 *Id.* at 394.

11 *Id.* at 394-95.


13 Henrichs v. Pivarnik, 588 N.E.2d 537 (1992). *Henrichs* involved a suit over a defendant’s failure to answer plaintiff’s corrections of the defamatory falsehoods in an editorial printed in the *Lake-Porter Leader*. *Id.* at 538. The trial judge granted summary judgment in favor of plaintiff and held a jury trial concerning damages. *Id.* at 541. Punitive, but no compensatory, damages were awarded. *Id.* The appellate court upheld the summary judgment and the punitive damage award, ruling that punitive damages were permissible because the matter involved libel *per se*, which presumes some damages. *Id.* at 545.

14 *Id.* at 545.


17 *Peoples Bank & Trust Co*, 978 F.2d at 1071 (characterizing the $650,000 compensatory damage award as shocking and exaggerated and unsupported by the evidence, which failed to show neither harm to plaintiff’s health nor diminished earning capacity; Plaintiff Nellie Mitchell walked away with $1 million in total damages, the compensatory damage award being reduced to $150,000). See *Obituary, Nellie Mitchell, 103; Won Tabloid Suit, N.Y. TIMES*, Jan. 2, 1999, at C-6.


19 *Id.*

20 *Id.* The majority, in a 3-2 decision, concluded the editorials were false, defamatory, and published with actual malice. *Id.* at 577. The two dissenters disagreed and, arguing that the editorials were substantially true, proclaimed they had “never seen a major case so badly botched.” *Id.* at 585.

21 New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (relying upon the First Amendment for the first time in order to place a limit on libel liability created by the states, the Court ruled that a public official bringing suit as a libel plaintiff must prove that defamatory falsehoods were published with actual malice, defined as a knowing or reckless falsity).

22 *Id.* at 260.

23 *Id.* at 262.

24 *Id.* at 260 (according to Justice Brennan, the plaintiff, L.B. Sullivan, the elected commissioner of public affairs in Montgomery, Alabama, “made no effort to prove that he suffered actual pecuniary loss as a result of the alleged libel”).

25 *Id.* at 277.

26 *Id.*

27 *New York Times*, 376 U.S. at 293 (Black, J., concurring).

28 *Id.* at 294.

29 *Id.* at 297 (arguing the First Amendment created an “unconditional right to say what one pleases about public affairs); *Id.* at 280 (defining “actual malice”).

30 Rosenblatt v. Baer, 383 U.S. 75 (1966). In a suit arising out of a newspaper column asking what happened to the revenue of the recreational area when managed by the libel plaintiff, an appointed supervisor of a county recreation and ski area in New Hampshire, the Court characterized the libel plaintiff as a public official required to prove actual malice because he was a part of “the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.” *Id.* at 85.

31 *Id.* at 95 (Black, J., concurring in part and dissenting in part).

32 See Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 86

33 Id. at 43-44.

34 Id. at 40.

35 Id. at 52 (explaining that because the libel plaintiff had been arrested on obscenity charges, a matter of public or general concern, he was required to prove actual malice). Five justices in all voted to reverse the jury verdict favoring the plaintiff. Id. at 30. While the three-justice plurality opinion advocated expanding the actual malice rule to include stories about private individuals involved in matters of general or public interest, a concurring opinion by Justice Black urged a more protective rule for the press that would bar any libel suit concerning a matter of public interest. Id. at 57. A concurrence by Justice White advocated the adoption of a doctrine narrower than that advanced by the plurality opinion, requiring application of the actual malice rule for stories about the official actions of public servants. Id. at 59. Justices Harlan, Marshall, and Stewart disagreed with the conclusion of the plurality. Id. at 62-87. Justice Douglas did not participate in the case. Id. at 29.

36 Id. at 78, 86.

37 Id. at 82.

38 Rosenbloom, 403 U.S. at 83 (noting that large punitive damage awards could be fatal to small entities).

39 Id. at 84. Justice Marshall wished to prohibit all punitive damages in private party libel suits, thus limiting all damages to actual losses. He commented that damages “can be awarded for more than direct pecuniary loss but they must be related to some proven harm.” Id. at 87.


41 Id. at 333 (noting how the Rosenbloom decision produced five opinions, none of which commanded more than three votes, Justice Powell described the Rosenbloom opinions as reflecting three “divergent traditions of thought [extension of the actual malice rule to more situations, granting the press absolute immunity to libel actions, and connecting the actual malice protection to the status of the plaintiff] about the general problem of reconciling the law of defamation with the First Amendment”).

42 Id. at 347, 350.

43 Id.

44 Id. at 350.

45 Id. at 354 (Blackmun, J., concurring).

46 Gertz, 418 U.S. at 376, 397-98 (White, J., dissenting).


48 Id. at 579-80 (finding “no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive . . . [or] no egregiously improper conduct,” the Court determined the punitive damages awarded to be unjustified).

49 Id. at 583.

50 Id. at 585.


52 Id. at 418. Oregon was the only state in the nation providing for such a limited review of punitive damages. Id. at 427-28.

53 Id. at 418.

54 Id. at 432.

55 Rosenblatt, 383 U.S. at 92.

56 Id.

57 See New York Times, 376 U.S. at 279-80; Gertz, 418 U.S. at 347.


59 Gertz, 418 U.S. at 347.

60 Id. at 347-48.

61 New York Times, 376 U.S. at 288-89 (noting the advertisement that instigated the lawsuit did not name the
libel plaintiff nor did it contain “even an oblique reference to respondent as an individual”).

62 See Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986). In Hepps, a newspaper had reported the libel plaintiff, an owner of a convenience store chain, had ties to organized crime which the plaintiff used to obtain favors from the state liquor control board. Id. at 769. The Pennsylvania courts, consistent with state common law, allowed the plaintiff to enjoy a presumption of falsity. Id. at 771. The Supreme Court reversed, holding that under the First Amendment, private figures involved in matters of public concern must prove falsity. Id. at 776.

63 Id. at 776.

64 See, e.g., Kevorkian v. Am. Med. Ass’n, 602 N.W.2d 233 (Mich. Ct. App. 1999) (ruling that Jack Kevorkian, the champion of physician assisted suicide, had a reputation so soiled that it could not be damaged).

65 See, e.g., Cherry v. The Des Moines Leader, 86 N.W. 323 (Iowa 1901) (concluding that sarcasm, and even ridicule, could be used by media critics if based on facts and if absent malice or wicked purpose, the Iowa Supreme Court protected a newspaper’s vicious criticism of three stage performers, the Cherry Sisters).


67 See id. at 135.


69 See Middleton, supra note 66, at 157.

70 See id.


72 Kelvin Childs, ASNE Launches Push to Limit Libel Suits, EDITOR & PUBLISHER, Apr. 18, 1998, at 42; see also Winfield & Wall, supra note 71, at 46.


75 See id. at 6-7.

76 Id. at 13. Created in 1971, the Minnesota News Council continues to function to this day. It consists of twelve media members and twelve laypersons and has been described as an independent, nongovernmental, voluntary organization serving as a forum for complaints about inaccurate or unfair news reporting. Id. at 1.

77 Id.

78 Id. at 9.

79 Id. at 13.

80 See Donald M. Gillmor and Melanie C. Grant, Sedition Redux: The Abuse of Libel Law in U.S. Courts (New York: Freedom Forum Media Studies Center, 1991) available at http://www.cios.org/www/freef.htm (last viewed Nov. 18, 2002). The study was conducted while Gillmor, a journalism professor at the University of Minnesota, was a senior fellow at the Freedom Forum Media Studies Center at Columbia University. Grant, a legal research assistant, was a student at the Columbia School of Law. The researchers analyzed a range of characteristics for each of the 614 cases, including the presence of negligence or actual malice, whether the plaintiff was a public official or public figure, the size of any money judgments, and the media type (newspaper, magazine, radio, television, wire service, pamphlet, or book). Id. at 7.

81 See id. at 8.

82 See id.

83 See id. at 17.

84 See id. at 16.
See id. at 17.

86 See David A. Anderson, Media Success in the Supreme Court (New York: Gannett Center for Media Studies, 1987).

87 See id. at 5.


89 See id. at 37-53 (suggesting that democratic appointees supported free expression litigants more so than Republican appointees).


91 See id.

92 See LDRC, 1999 Report on Trials and Damages. The LDRC trial study provided a detailed statistical analysis of types of damages, wins, and losses in media libel cases.

93 See LDRC, supra note 92, at 12-14.

94 See id. at 15.

95 See id. at 20.

96 See id. at 30.


98 See LDRC, supra note 92 at 56-61.

99 See id. at 59-61.

100 Id.

101 Id.

102 Id.


104 Id. at 20.

105 Id. at 17, 26.

106 See LDRC, supra note 92, at 30.

107 See LDRC, supra note 103, at 24.

108 Id.

109 Id. at 25. The LDRC appeals study did not provide a state-by-state breakdown of data. Thus it was not possible to examine state-level findings for the ten states analyzed in this Article as was done with the LDRC trial study.

110 See LDRC 50-State Survey 1987 (Henry Kaufman ed., 1987) (publishing about every other year; each volume of the LDRC 50-State Survey exceeds 1,000 pages and consists of detailed summaries and tables of the libel provisions and defenses for each of the fifty states and U.S. Circuit Courts of Appeals). After first publishing in 1982, the LDRC 50-State Survey was used to confirm the punitive damage status for the states analyzed in this Article in its 1987 edition, which covered developments in the law through the end of the 1986 calendar year. Id. The 1994-95 edition includes information current through October 1995. See LDRC 50-State Survey 1994-95 (Henry Kaufman ed., 1994).

111 This search was necessarily broad and identified all of the media libel cases as well as some nonmedia and slander cases which fell outside the scope of this project.

112 The definition of “mass media libel” was created by the author and researcher to focus the study on traditional libel cases involving the mass media. The study excluded slander cases involving private parties as defamation defendants. It also excluded cases involving mass media employees suing to recover their jobs and who included defamation among their various claims. The study excluded a few appellate decisions that
involved the mass media defaming by something other than media content, such as an employer reference letter.

113 A “test of significance” indicates the probability that a difference that is measured in a sample reflects a difference in the universe from which the sample was selected. When an entire universe is examined, as was done in this analysis for ten states over a ten year period, measures of significance are unnecessary. Measurements of the universe reflect the reality of the real world.

114 See LDRC, 1998 Report on Appellate Results, supra note 103.

115 This table reports the major findings for the ten-state, ten-year analysis with punitive and non-punitive states grouped together. The “All Cases” column refers to the total of all libel and defamation appeals initially identified for each state, including a large number of extraneous slander cases. The “Media Cases” column refers to the traditional media libel cases that were the focus of this analysis. The media cases range from a mere two in the rural state of Nebraska and four in New Mexico to twenty in Massachusetts and 35 in Louisiana. The “Population” column refers to the population of each state in millions. The “Cases/Population” column refers to the state’s media cases over the ten year period divided by the population. The “Means” report the total values for a group of states divided by five. For example, each of the non-punitive states averaged sixteen libel cases for the ten year period, versus eight media cases for the punitive states.

116 See Hale & Scott, supra notes 74-79; LDRC (trial-study), supra notes 92-102; LDRC (appeals study), supra notes 103-109. The media libel appeals in the Minnesota study consisted of 10 percent federal cases, compared to 22 percent federal cases in the LDRC libel trials study and 26 percent in the LDRC libel appeals study. Id.

117 This generally meant that the trial judge made an initial determination at the pre-trial state that the case should be terminated prior to holding an actual trial before a jury.

118 See LDRC, 1998 Report on Appellate Results, supra note 114, and accompanying Table.

119 The figure for non-punitive states was calculated by adding the values for cases per population for the non-punitive states, and dividing by five. The figure for punitive states was derived by repeating the same process.

120 For example, the alternative method of calculating the number of libel cases per population for non-punitive states was to add the five values for media cases in the Table (35, 20, 2, 6, 18) and add the five state populations (4.2, 6.0, 1.6, 2.8, 4.9), resulting in totals of 81 libel cases for 19.5 million people. Dividing cases by the number of people involved results in a value of 4.15 cases per million people.

121 These values were obtained from the report of the frequencies of the four variables on damages: punitive damages awarded at the trial stage, other damages awarded at the trial stage, punitive damages approved at the appeals stage, and other damages approved at the appeals stage.

122 For example, adding the five state populations of non-punitive states indicated on the Table produces a 19.5 million total. Dividing the five cases with triad damages by 19.5 million results in .26 cases per million.

123 Adding the two categories of damages, punitive and other, at the trial for the nine cases with damages for the two categories of states produced these results.

124 Totaling all damages in the four trials with damages in the punitive states, and dividing by the total in punitive damages provided these results.

125 Comparing the damage amounts at the trial and appellate levels for the nine cases in which any damages were awarded produced these results.

126 See Whitefield & Wall, supra notes 71-72 and accompanying text. The Uniform Correction Act reduces the legal liability for media libel defendants who publish corrections to defamatory falsehoods in a timely and prominent manner.

127 Over a decade ago, the Uniform Correction Act was announced with significant fanfare. It took con-
considerable skill to devise a proposal for a uniform law acceptable to delegates of the American Bar Association and to major journalism organizations. However, only one rural state has bothered to adopt this uniform law. Media organizations constantly lobby a variety of issues in the state legislatures such as taxation, regulation of advertising, privacy, state open records laws and state open meetings laws. But the media organizations, and the attorneys advising them, are apparently satisfied with the balance between reporting rights and defamation protection that currently exists in most states.