THE DEFAMED REPUTATION: WILL DECLARATORY JUDGMENT BILL PROVIDE VINDICATION?

It must be confessed at the beginning that there is a great deal of the law of defamation which makes no sense.[1]

INTRODUCTION

Striking the appropriate balance between the first amendment's guarantee of free speech and the dignity of the individual continues to trouble the judiciary.[2] For years,[3] courts struggled with the inherently difficult task of accommodating these competing interests. In 1964, the United States Supreme Court directly addressed the issue by constitutionalizing the law of defamation[4] in *New York Times Co. v. Sullivan*.[5] Since that landmark decision, the Supreme Court has continued to restructure the law of defamation.[6] In addition, most states have enacted legislation attempting to make sense of libel and slander law.[7] Despite these measures, most commentators

1. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 771 (4th ed. 1971).
2. "The constitutional values involved in the law of defamation include not only first amendment freedoms, but also the right inherent in the essential dignity and worth of every human being, to protection of reputation." Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 658 (D.C. Cir. 1966) (citing Justice Stewart's concurring opinion in Rosenblatt v. Baer, 383 U.S. 75, 92-93 (1966)).
3. All defamation cases demonstrate these competing interests. In the seminal English case on defamation, Hulton and Co. v. Jones, 2 K.B. 44 (1909), the competing interests of free speech and dignity were at issue. The defendant, an author, depicted a morally precarious fictional character; the plaintiff had the same name as the character portrayed. The court found that the harm to the plaintiff's dignity outweighed the defendant's right to free speech and held the defendant liable for defamation.

   In the United States, state courts first began hearing defamation cases in 1920. *See* Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 63-64, 126 N.E. 260, 262 (1920). In 1925, the Supreme Court first intimated that the first amendment applied to the states through the fourteenth amendment, and could therefore apply to state remedies for defamation. Gitlow v. New York, 268 U.S. 652 (1925); *see also* Near v. Minnesota, 286 U.S. 697 (1931). For the following 30 years, however, the Supreme Court declined to impose limitations under the Constitution on private activities for either libel or slander.
4. "Defamation" is the "holding up of a person to ridicule, scorn or contempt in a respectable and considerable part of the community; may be criminal as well as civil. [It] includes both libel and slander." BLACK'S LAW DICTIONARY 375 (5th ed. 1979).
5. 376 U.S. 254 (1964). In *New York Times*, the Supreme Court redefined the role of trial and appellate judges in libel cases. For more on the development of the constitutional law of defamation after *New York Times v. Sullivan*, see generally R. SACK, LIBEL, SLANDER AND RELATED PROBLEMS (1980).
6. Since *New York Times*, the Supreme Court has rendered more than 90 decisions on the issues of defamation.
7. *See* ALA. CODE §§ 6-5-184, 185 (1975); ARIZ. REV. STAT. ANN. §§ 12-653.02, .03 (1976); CAL. CIV. CODE § 48(a) (West 1954); CONN. GEN. STAT. ANN. § 52-237 (West 1985); FLA. STAT. ANN. §§ 770.01, .02 (West 1979); GA. CODE ANN. § 105-720 (1984); IOWA CODE ANN. § 659.3 (West 1969); KAN. STAT. ANN. § 60-209(j) (1980); KY. REV. STAT. ANN. §§ 411.060, .061 (Baldwin 1981); MASS. ANN. LAWS ch. 231, § 93 (Michie/Law. Co-op. 1974); MICH. STAT. ANN. § 27A.2911 (Callaghan 1967); MINN. STAT. ANN. §§ 331.01, 548.06, 619.54 (West 1981); MISS. CODE ANN. §§ 95-1-5, 11-7-61 (1972); MONT. CODE ANN. §§ 27-1-818, 819 (1985); NEB. REV. STAT. § 25-840.01 (1983); NEV. REV. STAT. § 41.336 (1983); N.H. REV. STAT. ANN. § 515:6 (1983); N.J. STAT. ANN. § 2A:43-2 (West 1983); N.M. STAT. ANN. § 38-2-9 (1978); N.C. GEN.

and interested parties are dissatisfied with the current status of the law of defamation. Instead of one manageable system, defamation law contains a disparate mixture of common law principles, statutory additions and constitutional rules.[8]

Representative Charles E. Schumer[9] agrees that the system does not work. Schumer asserts that the current defamation law fails to serve any of the interested parties: the media, the public figures, or the general public. To encourage a legislative reexamination, he introduced a bill[10] creating a new cause of action for vindication, distinct from the present cause of action for damages. Instead of seeking monetary damages, the plaintiff may opt for a declaratory judgment that the statement is false and defamatory. The defendant may, likewise, within certain time constraints, transform a damage suit into an action for declaratory judgment.[11]

This note first comments on the historical development of the current defamation law. Second, it analyzes the present defamation system and its attempt to achieve the goals of defamation law. The note then analyzes whether national tort legislation is the proper means for reform given various state legislative attempts to clarify the law. Finally, the note examines Schumer's bill, considers its strengths and weaknesses, and offers some suggestions for reform.

THE HISTORY OF DEFAMATION LAW

At common law, strict liability characterized the law of defamation.[12]

STAT. § 99-2 (1985); N.D. CENT. CODE § 14-02-08 (1984); OHIO REV. CODE ANN. §§ 2739.13, .14 (Baldwin 1982); OKLA. STAT. ANN. tit. 12, § 1446 (West 1980); OR. REV. STAT. §§ 30.160, .165, .170 (1981); PA. STAT. ANN. tit. 12, §§ 1583, 1586 (Purdon 1952); S.D. COMP. LAWS ANN. §§ 20-11-7, 8 (1979); TENN. CODE ANN. § 29-24-103 (1980); TX. STAT. ANN. art. 5431 (Vernon 1958); UTAH CODE ANN. §§ 45-2-1, -1.5 (1981); VA. CODE §§ 8.01-48, 49 (1984); W. VA. CODE § 57-2-4 (1966).

8. "Defamation law today is a jumble of constitutional and common law rules with a few statutes thrown in for good measure . . . Many state courts continue to cling to the common law, even though *New York Times* and its progeny have rendered portions of it obsolete." Watkins and Schwartz, *Gertz and the Common Law of Defamation: Fault, Nonmedia Defendants, and Conditional Privileges*, 15 TEX. TECH L. REV. 823, 861-62 (1984). The authors state there is no need to retain the conditional common law privilege unless the quantum of fact required to defeat the privilege exceeds the *Gertz* minimum requirement for negligence. *Id.*

9. (D-N.Y.)

10. H.R. 2846, 99th Cong., 1st Sess. § 1 (1985).

SECTION 1. ACTION FOR DECLARATORY JUDGMENT THAT STATEMENT IS FALSE AND DEFAMATORY.

(a) CAUSE OF ACTION

(1) A public official or public figure who is the subject of a publication or broadcast which is published or broadcast in the print or electronic media may bring an action in any court of competent jurisdiction for a declaratory judgment that such publication or broadcast was false and defamatory.

11. *Id.* at § 1(d).

12. L. ELDRIDGE, THE LAW OF DEFAMATION 14 (1978). Until 1964, American law mirrored English law on defamation: strict liability. *See* RESTATEMENT OF TORTS §§ 558, 563, 564, 579-580 (1938). As Lord Mansfield stated, the rule was "whenever a man publishes, he publishes at his peril." *See* Rex v. Woodfall, 98 Eng. Rep. 914 (1774). Thus, a defendant who published a defamatory statement was held automatically liable, regardless of whether he made the statement in good faith and reasonably believed the statement was true. Likewise, a defendant could not present evidence that the defamatory statement did not refer to the plaintiff; such evidence was irrelevant as to liability once the defendant made the statement.

In 1964, the United States Supreme Court put a halt to "liability without fault" in the defamation context. *See infra* notes 17-21 and accompanying text.

The only defenses were truth, consent, and certain absolute and conditional privileges.[13] The common law privilege of "fair comment" allowed an individual to make statements of opinion upon matters of public interest, provided it was both reasonable and based upon facts fairly stated or known to the recipient of the communication.[14] The common law tolerated such "fair comment," despite the possibility of an ill-advised opinion, criticism, or comment devastating the reputation of its object.[15] Notwithstanding a substantial minority of jurisdictions, the Supreme Court carefully limited the "fair comment" privilege to opinions, criticisms, and comments based upon reasonably acknowledged facts; the Court would not tolerate defamatory mistatements of fact. Indeed, the Court continually suggested that, like obscenity and "fighting words," the first amendment did not protect defamatory publications.[16]

In 1964, however, the Supreme Court radically altered its position. In *New York Times*, the Court expanded the "fair comment" privilege to pro-

13. *See* A. HANSON, LIBEL & RELATED TORTS 79 (1979). *See also* L. ELDRIDGE, *supra* note 12, at 233-35. The common law rule recognized truth as a complete affirmative defense. "One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true." RESTATEMENT (SECOND) OF TORTS § 581A (1977). Also, when a plaintiff consents to an invasion, that consent serves as a complete defense to an action for defamation. RESTATEMENT (SECOND) OF TORTS § 583. For public policy reasons, the courts developed certain "absolute privileges" for judges, (exempt for any statements made from the bench), members of Congress, (exempt under the "Speech or Debate" clause of the Constitution while acting in their official capacity), executive and administrative officers, (exempt when discussing state matters in the course of official duty), and spouses, (exempt when making a defamatory statement to one another about a third person and not anticipating actionable defamation). *See* L. ELDRIDGE, *supra* note 12, at 339. Courts created conditional privileges, for public policy reasons, so true information can be given to protect one's own interests, the interests of third persons, or certain interests of the public. Conditional privileges shield a speaker from liability to prevent inhibition of free and truthful speech. The defendant may lose the privilege if it abuses the privilege. Some examples include: the protection of a publisher's interest; the protection of a recipient's interest or a third person's interest; common interests, such as business dealings, fraternal organizations, labor unions, professional societies, religious and social organizations; family relationships; communications concerning a suspected crime to one in the public interest; and communication of a matter of public interest, including alleged misconduct of a public servant. *See* L. ELDRIDGE, *supra* note 12, at 447.

14. The common law sanctioned opinions regarding, for example, the conduct and qualifications of public officials and employees. "Fair comment" is available to all defendants, media or nonmedia. The "fair comment" defense does *not* protect defamatory statements of fact. The privilege is a conditional one and only applies to honest opinions or criticisms; one cannot knowingly make a false statement and guise it under opinion or criticism to avoid liability. *See* P. CARTER-RUCK, LIBEL AND SLANDER 117 (1973).

15. L. ELDRIDGE, *supra* note 12, at 118.

16. The majority of American jurisdictions required the reporter to accurately state the facts underlying the opinion, criticism or comment. A substantial minority, however, believed that the interest in free debate substantially outweighed the need for supporting facts. These courts, therefore, absolved a reporter who stated an opinion, even if based upon expressed or implied mistakes of fact. The Supreme Court in *New York Times* cited ten cases that at least partially protected false and defamatory statements of fact in political debate. 376 U.S. at 280 n.20. *See* Coleman v. MacLennan, 78 Kan. 711, 98 P.2d 281 (1908); Ponder v. Cobb, 257 N.C. 281, 126 S.E.2d 67 (1962); Lawrence v. Fox, 367 Mich. 134, 97 N.W.2d. 719, (1959); Stice v. Beacon Corp., 185 Kan. 61, 340 P.2d 396 (1959); Bailey v. Charleston Mail Ass'n, 126 W. Va. 292, 27 S.E.2d. 837 (1943); Salinger v. Cowles, 195 Iowa 873, 191 N.W. 167 (1922); Snively v. Record Publishing Co., 185 Cal. 565 (1921); McLean v. Merriman, 42 S.D. 394, 175 N.W. 878 (1920).

In the *Coleman* case, the Kansas Supreme Court stated:

> The importance to the state and to society of such discussions is so vast, and the advantages derived are so great, that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occassional injury to the reputations of the individuals must yield to the public welfare, although at times such injury must be great.

78 Kan. at 724, 98 P. 2d. at 286.

tect not only opinions, but also misstatements of fact.[17] The Court adopted the minority common law view.[18] The Court asserted that the first amendment guarantee of free speech prohibits a public official from recovering damages for defamatory falsehood in reference to his official capacity.[19] The Court provided an exception where the plaintiff proves that the defendant made the statement with "actual malice."[20] The Supreme Court's basis for *New York Times* stemmed from the view that the first amendment embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials."[21]

Three years later, the Supreme Court extended the holding of *New York Times* to public figures.[22] In *Rosenbloom v. Metromedia, Inc.*,[23] the

17. The *New York Times* case arose during the peak of the civil rights campaign in the South. The New York Times Publishing Company published an editorial advertisement, signed by many well-known and respected personalities. The article, entitled "Heed Their Rising Voices," described the deprivation of southern blacks and referred to integration incidents and demonstrations in Montgomery, Alabama. The article also described repressive counter-measures taken by local authorities, including expulsions from school, intimidation by "truckloads of police armed with shotguns and tear gas," and padlocking dining rooms to "starve (demonstrators) into submission." 376 U.S. at 257-58, 292 app.

    The New York Times did not check for inadequacies because the material appeared correct, contained no personal attacks and an approved advertiser submitted it. Information in the defendant's news files, however, revealed the falsity of some of the charges. *Id.* at 258.

    Sullivan was the Commissioner of Public Affairs for the City of Montgomery. His duties included the supervision of the Montgomery police. He alleged that certain inadequacies in the advertisement imputed improper conduct on his part in directing the Montgomery police force. Sullivan demanded $500,000 in damages. The jury awarded him that amount, finding the statement libelous per se; the jury invoked a presumption of falsity and malice. *Id.* at 262. The Alabama Supreme Court affirmed the jury finding. *Id.* at 263.

    The Supreme Court mandated that a plaintiff prove the defendant published the statement with knowledge that it was false or with reckless disregard of whether it was false or not. Then, in 1974, the Court held that the first and fourteenth amendments prohibit a state from imposing "liability without fault" upon a publisher or broadcaster of a defamatory falsehood, at least with respect to a news media defendant. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

18. The Court stated "the interest of the public here outweighs the interest of appellant or any other individual. Errors of fact . . . are inevitable . . . whatever is added to the field of libel is taken from the field of free debate." 376 U.S. at 272. *See* R. SACK, *supra* note 5 at 1-3.

19. In *New York Times*, the Court asserted that "the constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. 279-80.

20. *Id.* at 280. For an examination of how the "actual malice" standard places a stringent burden of proof on the plaintiff, *see infra* notes 41-52 and accompanying text.

21. *Id.* at 270.

    Justice Black, joined by Justice Douglas, concurred in the decision, but wrote that only absolute privilege for the press would assure free debate. *Id.* at 293-97 (Black, J., concurring).

    Justice Goldberg, also concurring, set forth his conviction that the people should have an absolute right to criticize public officials. "The theory of our Constitution is that every citizen may speak his mind and every newspaper express its view on matters of public concern and may not be barred from speaking or publishing because those in control of government think that what is said or written is unwise, unfair, false or malicious." *Id.* at 298-99 (Goldberg, J., concurring).

22. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). Both this case and its companion case, *Associated Press v. Walker*, involved well-known figures, but not public officials. In *Curtis Publishing Co.*, the Saturday Evening Post, accused Wally Butts, the athletic director for the University of Georgia, of conspiring to "fix" a football game played in 1962 between Georgia and the University of Alabama. *Id.* at 135. In *Associated Press*, General Edwin Walker, after resigning from a long and honorable career in the United States Army, became a political activist. The Associated Press distributed a news dispatch giving an eyewitness account of events on the campus of the University of Mississippi on the evening of September 30, 1962, when a massive riot erupted because of federal

Supreme Court stretched the *New York Times* actual malice standard to include "public interests."[24] *Rosenbloom* eliminated the distinction between public and private individuals.[25] At the same time, however, the Supreme Court gave no guidance to the lower federal courts in applying the "public interest" test. Many commentators interpreted *Rosenbloom* to provide absolute protection to the news media.[26]

The *Rosenbloom* "public interest" test was short lived, however. In *Gertz v. Robert Welch, Inc.*,[27] the Supreme Court rejected the "public interest" test, stating that it failed to achieve a fair balance between the first amendment guarantee of free speech and the protection of reputation.[28] The Court thus retreated to the *Butts* and *Walker* "public figure" test.[29] Additionally, the Court delineated three factors to consider when determining whether a plaintiff is a "public figure:" his role in the dispute, his access to the media, and the voluntariness of his participation in the controversy.[30]

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efforts to enforce a court decree ordering the enrollment of a black student. The dispatch stated that Walker was in command of a violent crowd and personally led a charge against federal marshals sent to enforce the court's decree. *Id.* at 140.

The Court determined that public figures are often major forces in the ordering of society and thus should be held to the same standard as public officials. *Id.* at 155. Moreover, the Court found that because public figures are not accountable to the political system, public scrutiny of their conduct may be society's only way to monitor their activities. *Id.*

The holding that the *New York Times* "actual malice" test applied to public figures was upheld in Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler, 398 U.S. 6 (1971); Monitor Patroit Co. v. Roy, 401 U.S. 265 (1971); and Gertz v. Robert Welch, Inc., 418 U.S. 323, 336 n.7 (1974).

23. 403 U.S. 29 (1971).

24. *Id.* at 42. "It is clear that there has emerged from our cases decided since *New York Times* the concept that the First Amendment's impact upon state libel laws derived not so much from whether the plaintiff is a 'public official,' 'public figure,' or 'private individual,' as it derives from the question whether the alleged defamatory publication concerns a matter of public or general interest." *Id.* at 44. Regarding what constitutes a "public or general interest" the Supreme Court left the "delineation of the reach of that term to future cases." *Id.* at 45.

In *Rosenbloom*, the police charged the plaintiff, a private individual, with selling obscene literature. A local radio station owned by the defendant subsequently broadcasted stories about the plaintiff's arrest. *Id.* at 33. The Court held that this was a legitimate public concern, and therefore held that the *New York Times* "actual malice" test applied to a private individual in this situation. *Id.* at 52.

25. Calore, *Public Figures and the Passage of Time*, 39 WASH. & LEE L. REV. 1327 (1982).

26. *Id. See also* Ashdown, *Gertz & Firestone: A Study in Constitutional Policy Making*, 61 MINN. L. REV. 645, 667 (1977); Kalver, *The Reasonable Man & The First Amendment: Hill, Butts & Walker*, SUP. CT. REV. 267, 283-84 (1967); Note, *The Supreme Court 1970 Term*, 85 HARV. L. REV. 38, 222 (1971).

27. 418 U.S. 323 (1974).

28. *Id.* at 343. In *Gertz*, a Chicago policeman was convicted for the rape of a 17-year-old girl. The girl's family hired the plaintiff, a lawyer, to commence a private action against the policeman. *The American Opinion*, a magazine owned by the defendant, characterized the policeman's conviction as a communist plot to undermine law enforcement activities. The article called the plaintiff, who was not part of the original prosecution, a "Leninist and a communist fronter." *Id.* at 326. The Court held the plaintiff was not a public figure and could recover damages without showing actual malice. *Id.* at 352.

29. *See supra* note 22.

30. In the recent case of Lerman v. Flynt Distributing Co., Inc., 745 F.2d 123 (2d Cir. 1984), the Second Circuit summarized the "public figure" criteria:

(1) successfully *invited public attention* to his views in an effort to influence others prior to the incident that is the subject of litigation;

(2) *voluntarily injected himself into public controversy* related to the subject of the litigation;

(3) assumed a *position of prominence* in the public controversy; and

(4) maintained regular and continuing *access to the media.*

Id. at 136 (emphasis added).

DEFAMATION LAW TODAY

The defamation system remains infested with problems. The law unjustly favors media defendants at the expense of plaintiffs with valid defamation claims. Current defamation law denies many injured plaintiffs access to the court system. In addition, the system imposes incredible expenses on the plaintiff, the defendant, and the court system. The bulk of the problem eminates from the extremely complex and confusing *New York Times* standard which imposes an unreasonably stringent burden of proof on the plaintiff.

The Media Advantage

Dean Prosser asserted that *New York Times* and its progeny was "unquestionably the greatest victory won by the defendants in the modern history of the law of torts."[31] The question now becomes whether the system unfairly favors the media defendants. It appears that the Supreme Court, in an effort to protect free expression and debate along with the desire to eliminate frivolous lawsuits, produced a system which cannot adequately compensate genuinely injured plaintiffs.

Responding to the reality of frivolous defamation lawsuits,[32] the Supreme Court placed a stringent burden of proof on defamation plaintiffs. After *New York Times* and its progeny, public figures and public officials must prove "actual malice" to recover damages. In addition, the Supreme Court restricted the types of damages recoverable by private defamation plaintiffs. In *Gertz*, the Supreme Court held that absent actual malice, the private defamation plaintiff may not recover presumed or punitive damages against publishers or broadcasters.[33] By limiting the amount of damages recoverable, *Gertz* forces private individuals to think twice before initiating frivolous defamation suits with little or no actual injury.[34] As a result, media defendants succeed almost seventy-five percent of the time in their ef-

31. W. PROSSER, *supra* note 1, at 819.

32. An estimated one-half of all filed defamation suits are "nuisance" cases with no hope of ultimate success. Franklin, *The Marshall P. Madison Lecture: Good Names and Bad Law: A Critique of Libel Law and A Proposal*, 18 U.S.F.L. REV. 1, 6 n.27 (1983).

33. In *Gertz*, the Court stated:

> Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but . . . punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensated for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence. In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.

418 U.S. at 350.

Note that this restriction applies only to news media defendants—publishers and broadcasters. Nonmedia defendants remain strictly liable; unsheltered by the *Gertz* fault requirement, nonmedia defendants are liable for compensatory, as well as punitive damages. This has created a great deal of controversy. *Id.* at 349-50. *See generally* Watkins and Schwartz, *supra* note 8.

34. The Supreme Court, in the recent case of Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S.Ct. 2939 (1985), made an exception to the *Gertz* fault rule. *Dun & Bradstreet* established that private plaintiffs may recover punitive damages for defamatory statements unrelated to matters of public concern, without a showing of actual malice. *Id.* at 2946. Thus, the stringent, subjective "actual malice" requirement applies to private plaintiffs, regarding matters of public concern, as well as to public figures with respect to damages recoverable.

forts for pre-trial dismissal.[35]

The Supreme Court's restrictive measures appear overreaching. While only fifty percent of such cases fit into the "nuisance" category, seventy-five percent of all defamation cases never reach trial. Thus, the system may deprive some plaintiffs with valid defamation claims from having their cases heard. Consequently, media defendants may receive an unwarranted advantage. Moreover, a recent Supreme Court decision provides additional protection to media defendants. Under this decision, a plaintiff must now prove not only actual malice, but also that the defendant's statement was false.[36]

Expensive and Unworkable

Another objection to the current defamation system is its expense and complexity. Those plaintiffs who successfully avoid summary judgment engage in a rollercoaster ride before their case ends. Along the ride, the plaintiff, the defendant, and the public incur incredible legal costs.

The ride begins at the trial stage, where eighty-five percent of the plaintiffs receive large money verdicts against media defendants. Yet, despite a higher success rate than any other tort plaintiffs,[37] appellate courts reverse more than two-thirds of jury verdicts.[38] Most often appellate courts reverse because the plaintiff failed to sustain the burden of proof by a "clear and convincing" standard.[39] In the end, only about seven to ten percent of all defamation plaintiffs ultimately keep a judgment against a media

35. Trial statistics from 1981 revealed that defendants succeeded in dismissing 74% of all libel cases before trial. *See* Franklin, *Winners & Losers & Why: A Study of Defamation Litigation*, 1981 AM. B. FOUND. RESEARCH J. 802-03. Appellate courts affirmed 33 out of 50 motions to dismiss and 73 of 94 summary judgments. *Id.*

36. The case, rendered on April 21, 1986, arose out of several articles by *The Philadelphia Inquirer* about the plaintiff, Maurice Hepps. *The Philadelphia Inquirer* made statements that Hepps, the owner of several convenience stores, had connections with organized crime. In a 5-4 decision, the Supreme Court held that the issue of the statements' truthfulness is no longer an affirmative defense placed on the defendant. Now, the falsity of the statement is an element of the plaintiff's prima facie case. Philadelphia Newspapers, Inc. v. Hepps, No. 84-1491 (U.S. Sup. Ct. Apr. 21, 1986) (available on LEXIS and WESTLAW).

37. Franklin, *supra* note 32, at 7-10. Commentators have several explanations for this anomalously high rate of plaintiff success at trial. Since courts dismiss most weak cases before trial, juries receive only the strongest cases. Another explanation is that jurors act out of sympathy for the defamed individuals, many of whom are noteworthy persons. They view the media as a "deep pocket" that takes advantage of defenseless individuals to sell a story. Jurors thus enter a trial intent on punishing the defendant. This is especially true regarding newspaper chains with monopolistic tendencies. Jurors find it easy and justifiable to render big money verdicts against corporate giants. Because of their predisposition, many jurors disregard the "actual malice" standard and the requisite burden of proof. Aside from their predispositions, jurors may disregard the courts' instructions merely because they do not understand the "actual malice" standard and the burden of proof that the plaintiff must overcome. Foster, *No Independant Liability For Refusal To Retract*, 19 ARK LAW. 84, 87 (1985).

38. Geographically removed from the trial venue and not susceptible to the emotions of the case that often taint the jury, appellate judges approach the case on an abstract level and focus on the law. Franklin, *supra* note 32, at 13.

39. *See, e.g.*, Postill v. Booth Newspapers, 118 Mich. App. 608, 325 N.W.2d 511 (1982) (appellate court reversed the jury award finding the evidence insufficient to demonstrate actual malice); Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762 (1983) (appellate court reversed a jury verdict for the libel plaintiff on the ground that the plaintiff failed to show the defendant acted with reckless disregard for the truth).

defendant.[40]

The "Actual Malice" Standard

The Supreme Court's choice of words in describing the "actual malice" standard has created confusion. Ordinarily, "malice" means ill-will, spite, hatred, or evil intent.[41] Indeed, the ordinary understanding of malice is clearly distinct from the *New York Times* definition.[42] The Court's use of the words "actual malice" has caused a great deal of confusion within the system.

The "actual malice" inquiry turns on the media defendant's subjective state of mind when it published or broadcast the defamatory statement.[43] In contrast, most tort cases revolve around the objective "reasonable man" standard.[44] Under *New York Times*, "errors of fact" caused by negligence are not compensable.[45]

The Supreme Court intentionally made negligent reporting unactionable. To do otherwise, would drastically infringe upon first amendment freedoms. If the media fears liability for mere mistakes of information, the danger of self-censorship threatens the entire system of free speech. The media might steer clear of new stories rather than risk lawsuit. The media would never print[46] a story in advance, but would wait until it had verified and double-checked every story before relaying vital news to the public. Furthermore, the media may not publish or broadcast some stories at all for fear that one negligent statement might lead to enormous monetary loss. Free speech would thus respond to profit motives rather than to the Bill of

40. After conducting a survey of the lawyers and parties of approximately 800 libel cases, spanning from 1974 to mid-1984, three University of Iowa professors reported that one libel plaintiff in ten prevails in court, while another 15% settle out of court, often without any cash payment. *See The Iowa Libel Research Project, printed in* Wehrwein, *Libel Suits: 10 Percent Are Winners*, Nat'l L. J., June 17, 1985, at 5.

41. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1367 (1966).

42. Bartimo v. Horsemen's Benev. and Protective Ass'n, 771 F.2d 894 (5th Cir. 1985) (citing Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82 (1967)).

43. In Herbert v. Lando, 441 U.S. 153 (1978), the Court stated: "*New York Times* and its progeny made it essential to proving liability that the plaintiff focus on the conduct and state of mind of the defendant. To be liable, the alleged defamer of public officials or of public figures must know or have reason to suspect that his publication is false. In other cases, proof of some kind of fault, negligence perhaps, is essential to recovery." *Id.* at 160.

44. "Reckless disregard is not the general tort concept but involves a substantial state of mind inquiry." Tavoulareas v. Piro, 401 U.S. 279, 292 (1971).

"The test which we laid down in *New York Times* is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth." Garrison v. Louisiana, 379 U.S. 64, 79 (1964).

The objective standard compares the conduct of a reasonable, prudent man to the conduct of the defendant. If the defendant's conduct fails to meet the standard, he is deemed negligent and thus liable. *See* W. PROSSER, *supra* note 1, at 149-66.

45. In Time, Inc. v. Pape, 401 U.S. 279, 292 (1970), the Court reasoned: "*Time*'s conduct reflected at most an error of judgment. We have held that if 'the freedoms of expression are to have the breathing space they need . . . to survive,' misstatements of this kind must have the protection of the first and fourteenth amendments." *Id.*

46. Defamation cases stem from printed stories six times more frequently than from broadcasts. In 1981, 241 defamation cases arose from printed statements: 179 involved statements in newspapers, 40 resulted from magazine stories and 22 involved books. In contrast, only 44 defamation cases arose from broadcasts in 1981, 36 from television and 8 from radio. This is probably due to the fact that stories in print contain much more information, including names and results of investigations. *See* Franklin, *supra* note 32, at 795, 810.

Rights.[47]

The Burden of Proof for "Actual Malice"

While the *New York Times* "actual malice" standard may be good law and provide the appropriate balance, the fact remains that jurors do not view the standard as judges do. Indeed, in most cases appellate courts reverse jury determinations because they find that the plaintiff failed to satisfy the requisite burden of proof for "actual malice."[48]

The Supreme Court recently articulated the burden of proof standard for "actual malice" in *Bose Corp. v. Consumers Union of United States, Inc.*[49] The Court in *Bose* required that the plaintiff demonstrate, by clear and convincing evidence, that the defendant either realized the falsity of his statement or that he subjectively entertained serious doubt as to the the truth of the statement.[50] The Supreme Court recognized "a significant difference between proof of 'actual malice' and mere proof of falisity."[51] The problem remains, however, that in many defamation cases juries fail to understand the law and therefore merely look to the falsity of the statement when imposing liability.[52] The result, of course, is reversal by the appellate court.

The Result Under Current Defamation Law

The winner under the *New York Times* system is undoubtedly media defendants. They too, however, are dissatisfied with the system. While the media defendants may avoid large judgments at the appellate level, they amass monstrous legal bills defending defamation suits.[53]

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47. Foster, *supra* note 37, at 80. Journalism awards and prizes may counteract the reporters' tendency to "play it safe." Franklin, *supra* note 32, at 16.

48. *See supra* notes 38-40 and accompanying text.

49. 104 S.Ct. 949 (1984). In *Bose*, the defendant published a magazine article evaluating the quality of numerous brands of loudspeakers, including one marketed by the plaintiff, the Bose Corporation. Bose sued when the defendant failed to retract statements in its article about Bose's system, including one that the sound of individual musical instruments tended to wander "about the room." *Id.* at 1953. The Supreme Court held that to recover, the plaintiff needed to prove by *clear and convincing evidence* that the defendant made the false disparaging statement with *actual malice*. *Id.* at 1965.

The First Circuit Court of Appeals reversed the trial court and the Supreme Court affirmed. The Court held that Bose failed to prove actual malice by a clear and convincing standard. *Id.*

50. "The burden of proving 'actual malice' requires the plaintiff to demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of the statement." *Id.* at 1965 n.30.

51. *Id.* at 1965.

52. The "clear and convincing" standard is an intermediate test between the normal "preponderance of the evidence" civil standard and the "beyond a reasonable doubt" criminal standard. Yiamouyiannis v. Consumers Union of U.S., Inc., 619 F.2d 932, 940 (2d. Cir. 1980). Most juries fail to understand the various levels of culpability, which also leads to reversible error. The result is misapplication of the law.

53. Franklin, *supra* note 32, at 13. While *New York Times* and its progeny make libel suits much harder for plaintiffs to win, they also make libel suits far more expensive for defendants to defeat. Recent headlines illustrate the problem with the present libel law: long trials, huge legal bills to both parties, and ultimate victory to neither.

The Israeli politician Ariel Sharon's suit against *Time* magazine (Sharon v. Time, Inc., 609 F. Supp. 1291 (S.D.N.Y. 1984)) ended in a compromise after 8 1/2 weeks of trial. The jury found *Time's* ambiguously worded account of Sharon's activities, relating to the massacres of Palestinians at refuge camps in Lebanon, false and defamatory, but not reckless. Both sides accumulated legal bills in the millions. On April 9, 1985, the court of appeals reversed the judgment notwithstanding

The plaintiff, however, is the real loser under today's defamation law. The plaintiff receives and keeps a judgment in only five to ten percent of all libel cases and usually only small amounts.[54] The plaintiff does not receive remuneration for the impairment of his reputation and standing in the community, the mental anguish and personal humiliation, or the actual out-of-pocket loss resulting from the statement. Additionally, the plaintiff fails to "clear his name" in the eyes of his family, friends and community members.[55]

The present system discourages plaintiffs with valid legal claims from bringing defamation suits for damages.[56] Defamation litigation is lengthy and expensive. Attorneys are generally predisposed against defamation cases and therefore rarely take contingent fee arrangements.[57] Plaintiffs must pay attorneys a lump sum while often only receiving token damages; plaintiffs thus are left with nothing but enormous legal bills.[58] The present defamation system also fails to serve the public because lengthy lawsuits impose correspondingly large administrative and judicial costs.

Vindication Remedies: Alternatives to Common-Law Defamation Remedies

Many commentators believe "vindication remedies" provide a constitutionally permissible recourse to deserving plaintiffs, while eliminating or

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the verdict and remanded that case to district court. 759 F.2d 90 (D.C. Cir. 1985). On June 11, 1985, the court of appeals denied petitons for a rehearing, and held that "the record demonstrates that a properly instructed jury found liability, that clear and convincing evidence supports its verdict so far as liability is concerned, and that it was improper for the trial court to reweigh the jury's findings on credibility and arrive at a judgment n.o.v." *Id.* at 103. The case is now up on appeal and legal expenses already surpass $5 million.

General William C. Westmoreland, after 20 weeks of trial against CBS over its account of his role in Vietnam, dropped the suit. He claimed victory after receiving a statement of respect from CBS and legal bills in the millions. CBS also claimed victory, but while it avoided a judgment against it for damages, it too must pay its lawyers approximately three to five million dollars. Westmoreland v. CBS, Inc., 596 F. Supp. 1166 (S.D.N.Y.), *aff'd*, 752 F.2d 16 (2d Cir. 1984).

Mobil Oil President William P. Tavoulareas received a jury verdict of $2.05 million against the Washington Post. The jury determined that the Post's article, which stated that Tavoulareas misused his position and corporate assets to "set up" his son Peter in the shipping business and diverted some of Mobil Oil's shipping business to him, was "false. . . defamatory and made with 'actual malice'." The trial judge disagreed; he ruled on a motion that the evidence was insufficient to support the verdict and entered a judgment notwithstanding the verdict. (Touvalareas v. Wash. Post Co., 567 F. Supp. 651 (D.D.C. 1983)).

Finally, after seven years, a federal jury in Hawaii recently returned a verdict for the defendant, Guam's Pacific Daily News, owned by Gannett Co., Inc. and against the plaintiff, Nauru's President Hammer DeRoburt. The jury decided that the defendant's article stating that President DeRoburt had authorized and delivered a $600,000 "secret" loan to a campaign in the Marshall Islands seeking separation from U.S.-administered Micronesia, was false and defamatory, but not reckless. The litigation cost approximately $5 million. (DeRobert v. Gannett Co., Inc., 733 F.2d 701 (9th Cir. 1984)). *See supra* note 40.

Due to the rampant threat of liability, about 75% percent of all newspapers and broadcasters carry libel liability insurance. Franklin, *supra* note 32, at 18-19 (citing a study conducted by Anderson & Murdock, *Law Decisions on Daily Newspaper Editors*, 58 JOURN. Q.525n.87 (1981)). *See also* Note, *Of Things to Come—The Actual Impact of* Herbert v. Lando *and a Proposed National Correction Statute*, 22 HARV. J. ON LEGIS. 440, 468 (1985). The high cost of liability insurance may have a chilling effect on a free speech.

54. *See supra* note 35. *See also* Franklin, *supra* note 32, at 5 nn.23, 29.
55. *See* Franklin, *supra* note 32, at 29.
56. *See* Wehrwein, *supra* note 40.
57. *See* Franklin, *supra* note 32, at 29-30.
58. *Id.* at 12.

modifying many problems currently burdening defamation parties.[59] First, all persons—public figures as well as private citizens—may use vindication remedies. Second, the degree of the defendant's culpability is immaterial in an action for vindication. Because the plaintiff need not prove the defendant's subjective state of mind, the litigation is expedited and costs greatly reduced. Third, the vindication remedy does not distinguish between media and nonmedia defendants. [60] Fourth, the traditional common law privileges do not apply in a vindication action, thereby preventing the defendants from escaping liability.[61] Fifth, most vindication remedies do not induce media self-censorship.[62]

The Vindication Remedies

An array of vindication remedies exist, including injunctions, retractions, rights of reply and declaratory judgments.

Injunctions

Dean Roscoe Pound[63] argued that the legal remedy of damages inadequately redresses a damaged reputation. He asserted that the courts should abandon the purely historical remedy because of the impossibility of measuring injury to reputation. Pound preferred the equitable remedy of injunction.[64] This remedy, however, will not succeed against the fervent first amendment concerns present today.[65]

Right of Reply

"Right of reply" statutes allow a defamed individual the opportunity to publish his version of the story in as conspicuous a manner as the original

59. *See* Hulme, *Vindicating Reputation: An Alternative to Damages as a Remedy for Defamation*, 30 AM.U.L.REV. 375, 386-90 (1981). *See also* Note, *Vindication of the Reputation of a Public Official*, 80 HARV. L. REV. 173 (1967).

60. The distinction between media and nonmedia defendants is not as significant after *New York Times*. The Supreme Court set forth that the first amendment does not extend greater protection to the media than to the non-media defendants. Far more than half of all reported litigation is against nonmedia defendants. In 1980, of 534 reported cases, 69% were against nonmedia defendants. *See* Franklin, *supra* note 35, at 855-56.

61. The defense of privilege focuses on the status of the publisher, not on the content of the words published. The courts, at common law, established privileges for the protection of certain societal interests, considered more compelling than the plaintiff's right to judicial redress. Many commentators believe the adoption of a vindication remedy could provide an effective compromise between these societal interests and the goal of compensating defamed plaintiffs. Hulme, *supra* note 59, at 398.

62. Franklin, *supra* note 32, at 33. Critics of current libel law argue that the threat of a lawsuit leads newspapers and other media forums to "steer clear" of investigative reporting. The ultimate result is that society loses when self-censorship takes hold among editors and publishers. Many commentators assert that if the only penalty to the media for false reporting was the requirement to correct the statement, the public might receive better reporting. *Id.* at 14-15.

63. Dean Roscoe Pound was the main advocate of the use of injunctive relief in defamation cases. *See* Pound, *Equitable Relief Against Defamation & Injuries to Personality*, 29 HARV.L.REV. 640 (1916).

64. *Id.*

65. In 1931, the Supreme Court held a state statute unconstitutional that permitted the issuance of injunctions against newspapers that regularly contained "malicious, scandalous and defamatory matter. Near v. Minnesota, 283 U.S. 97 (1931). For more court decisions exhibiting the reluctance to enjoin defamatory statements, see Hulme, *supra* note 59, at 386 n.65.

publication.[66] Right of reply statutes attempt to place the plaintiff and defendant on equal footing. The public may discern the truth from observing both sides of the controversy. Some states attempted to impose right of reply statutes.[67] The Supreme Court, however, dealt a death blow to comprehensive right of reply statutes in 1974. In *Miami Herald Publishing Company v. Tornillo,*[68] the Court held that the government may not compel a newspaper editor to publish a reply against his will and under the threat of criminal punishment.[69] The Court found such forced publications an impermissible infringement upon editorial decision-making and thus the first amendment.

Retraction

Over half the states have retraction statutes, making retraction the most common form of defamation legislation.[70] These statutes suggest that voluntary retraction compensates the defamation victim better than an award of money damages.[71] Retraction statutes seek to prevent plaintiffs from reaping rewards disproportionate to the injury sustained.[72]

At common law, retraction only mitigated damages, because defamation was deemed to inflict irreversible harm.[73] State retraction statutes,

66. The term "publication" for purposes of this note encompasses all forms of media coverages, including both print and broadcasts.

67. Nevada had a right of reply statute, but repealed it in 1961 (formerly codified at NEV. REV. STAT. § 200.570). Mississippi presently has a limited right of reply for political candidates. MISS. CODE ANN. § 95-1-5 (1972).

68. 418 U.S. 241 (1976). The plaintiff, Patrick Tornillo, Executive Director of the Classroom Teachers Association, was a candidate for the Florida House of Representatives in the fall of 1972. On September 20th and September 29th of 1972, the defendant, printed verbatim his replies, in accordance with FLA. STAT. § 104.38 (1973), "a right of reply" statute. The statute provides that if a candidate for nomination or election is assailed regarding his personal character by any newspaper, the candidate has a right to demand that the newspaper print, vebatim his replies. The *Miami Herald* sought a declaration that the Florida statute was unconstitutional. The circuit court found the right of reply statute an unconstitutional infringement on the freedom of the press under the first and fourteenth amendments. *Id.* at 245. The Florida Supreme Court reversed the lower decision. *Id.* The United States Supreme Court reversed the Florida Supreme Court and held the statute unconstitutional stating: "Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors." *Id.* at 258.

69. *Id.*

70. *See infra* notes 75-78.

71. CAL. CIV. CODE, § 48(a) (West 1954); FLA. STAT. ANN. § 770.01 (West 1979). In Werner v. Southern California Associated Newspapers, 35 Cal. 2d. 121, 216 P.2d 825 (1950), the California Supreme Court set forth: "Now, as far as vindiction of character of reputation is concerned, it stands to reason that a full and frank retraction of the false charge, especially if pubished as widely and substantially to the same readers as was the libel, is usually in fact a more complete redress than a judgment for damages." *Id.* at 833, citing Allen v. Pioneer Press Co., 40 Minn. 117, 124, 41 N.W. 936, 938.

Commenting on the Florida statute, a Florida court asserted that the retraction statute protected "the public interest in the 'free dissemination of news,' and the reasonable likelihood of occassional error as a result of the tremendous pressure to deliver the information quickly." Davies v. Bossert, 449 So. 2d 418, 426 (Fla. 1984).

72. "The first remedy of a victim is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its impact on reputation." *Gertz*, 418 U.S. at 344.

73. *See* Taylor v. Hearst, 107 Cal. 262, 40 P. 392 (1895). In *Taylor,* a newspaper inadvertently charged the plaintiff with fraud due to a printing error. The defendant newspaper printed a correction four days later. The court declared that the retraction would only mitigate damages. 107 Cal. at 270, 40 P. at 394. *See also* W. PROSSER, *supra* note 1, at 799 n.23.

however, modify the common law and impose limits, varying in degree from state to state, on the amount recoverable when retractions are made.[74] Two types of state statutes limit recovery to "actual damages." The first will do so if the plaintiff demands a retraction and the defendant complies.[75] The second requires the defendant to both publish a retraction and prove that it made the original publication in good faith.[76] A third type restricts recovery altogether unless the plaintiff first demands a retraction and the defendant refuses to comply.[77] The final form provides that if the defendant publishes a retraction, the court will consider it as a mitigating factor.[78]

Retraction statutes have experienced a great deal of success, and courts have held them constitutional.[79] Several disadvantages, however, exist in the use of retraction statutes. Primarily, the statute's effectiveness depends on the defendant's cooperation.[80] The plaintiff can never legally compel the defendant to issue a retraction.[81] Additionallly, it is difficult to determine the "sufficiency" of a retraction needed to activate the statute.[82]

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74. Hulme, *supra* note 59, at 387 n.69.

75. *See* ALA. CODE §§ 6-5-184, 185 (1975); ARIZ. REV. STAT. §§12-653.02, .03 (1976); CAL. CIV. CODE § 48(a) (West 1954); FLA. STAT. ANN. §§ 770.01, .02 (West 1979); GA. CODE ANN. § 105-720 (1984); MICH. STAT. ANN. § 27A.2911 (Callaghan 1967); MINN. STAT. ANN. §§331.01,548.06, 619.54 (West 1981); NEB. REV. STAT. § 41.336 (1983); NEV. REV. STAT. § 41.336 (1983); S.D. COMP. LAWS ANN. §§ 20-11-7, 8 (1979).

76. *See* CONN. GEN. STAT. ANN. § 52-237 (West 1985); KY REV. STAT. ANN. § 411.060, .061 (Baldwin 1981); MASS. GEN. LAWS ch. 231, § 93 (Michie/Law Co-op (1974)); MISS. CODE ANN. §§ 95-1-5, 11-7-61 (1972); MONT. CODE ANN. §§ 27-1-818, 819 (1985); N.C. GEN. STAT. § 99-2 (Michie 1985); N.D. CENT. CODE § 14-02-08 (1984); TENN. CODE ANN. § 29-24-103 (1980); UTAH CODE ANN. § 45-2-1, 1.5 (1981).

77. *See* FLA. STAT. ANN. § 770.01 (West 1979); IOWA CODE ANN. § 659.3 (West 1969); KAN. STAT. ANN. § 60-209(j) (1980); N.H. REV. STAT. ANN. § 515:6 (1983); N.M. STAT. ANN. § 38-2-9 (1978); OH. REV. CODE ANN. §§ 2739; 13, .14 (Baldwin 1982); OR. REV. STAT. §§ 30.160, .165, .170 (1981); PA. STAT. ANN. tit. 12 §§ 1583, 1586 (Purdon 1952); S.D. COMP. LAWS ANN. §§ 20-11-8 (1979); TEX. STAT. ANN. CIV. STAT. § 5431 (Vernon 1958); VA. CODE §§ 8.01-48, 49 (1984); W.VA. CODE §57-2-4 (1966).

78. *See* N.D. CENT. CODE § 14-02-08 (1984) and OR. REV. STAT. §§160,.165, .170 (1981). The Oregon statute restricts recovery entirely, unless either the plaintiff first requests a retraction and the defendant refuses or the plaintiff proves actual malice.

79. Hulme, *supra* note 59, at 388 n.72.

80. *Id.* at 388 n.73.

81. *Id.*

82. Some state statutes detail the exact requirements for a sufficient retraction. For instance, KY. REV. STAT. ANN., § 411.061, entitled "Actions against a radio or television broadcasting station for damages for publication of a defamatory statement; definitions" sets forth:

> (2) A "sufficient demand for correction" is a demand . . . in writing; . . . signed by the plaintiff . . . ; which specifies the statement . . . claimed to be false and defamatory. . . . and sets forth the true facts; and which is delivered to the defendant prior to the commencement of the action.
>
> (3) A "correction" is either (a) the publication of an acknowledgment that the . . . statements . . . are erroneous, or (b) the publication of the plaintiff's statement of the true facts.
>
> (4) A "conspicuous publication" in a visual or sound radio broadcast . . . broadcast at substantially the same time of day, and with the same sending power, as the statement . . . specified as false and defamatory. . . . A publication . . . which is agreeable to the plaintiff shall in any event be deemed "conspicuous."
>
> (5) A "timely publication" in a visual or sound radio broadcast is . . . within one business day after the . . . demand for correction is received by the defendant. A "business day" is any day other than a Sunday or legal holiday. A publication . . . agreeable to the plaintiff shall in any event be deemed "timely."

OR. REV. STAT. § 30.165, entitled "Publication of correction . . . retraction upon demand" sets forth:

> (1) The demand for correction or retraction shall be in writing, signed by the defamed person or his attorney and be delivered to the publisher of the defamatory statement, either

Some commentators believe the plaintiff should have a separate cause of action if the defendant fails to make a demanded retraction. This would prevent *New York Times* from insulating the media from all liability when it publishes or broadcasts an erroneous report in good faith and yet refuses to make a public retraction.[83] Such a cause of action would recognize that any wrong, even made in good faith, should have a concomitant remedy. Moreover, a plaintiff may more easily prove the defendant's failure to retract a false statement than to prove that the defendant made the statement with "actual malice." In effect, legislation of this nature would amount to a separate tort of outrageous conduct or intentional infliction of emotional distress.[84]

The creation of a separate cause of action for failure to retract, however, faces several barriers. The media, naturally would lobby vehemently against such legislation.[85] Moreover, it is very unlikely that such legislation creating a separate tort for the failure to retract would pass constitutional muster.[86]

Declaratory Judgments

Declaratory judgments involve a judicial determination that the statement was false and defamatory.[87] The purpose of filing suit for a declaratory judgment is purely vindicatory; the plaintiff receives no damages, except possibly costs, attorneys fees, or both.[88] Unlike the traditional defa-

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personally or by registered mail at the publisher's place of business or residence within 20 days after the defamed person receives actual knowledge of the defamatory statement. The demand shall specify which statements are false and defamatory and a request that they be corrected or retracted. The demand may also refer to the sources from which the true facts may be ascertained with accuracy.

(2) The publisher of the defamatory statement shall have not more than two weeks after receipt of the demand for correction . . . to investigate the demand; and . . . he shall publish the correction . . . in: (a) The first issue thereafter published . . . (b) The first broadcast or telecast thereafter made . . . (c) The first public exhibition thereafter made . . . .

(3) The correction . . . shall consist of a statement by the publisher . . . that the defamatory statements . . . are not factually supported and that the publisher regrets the original publication thereof.

Other statutes, however, fail to provide any guidance on what is a "sufficient retraction."

83. Without a duty to correct, the media could brazenly refuse to correct a statement, even an erroneous statement made in good faith. The plaintiff cannot prove actual malice in cases of good faith error and thus *New York Times* insulates the defendant from liability. Therefore, a separate duty to retract erroneous statements would create the necessary balance. Many believe that this independent cause of action should be a corollary to the *New York Times* rule.

84. Bristow, *Retraction and Tort Liability in Media Defense Cases,* 19 ARK. LAW. 81, 83 (1985).

85. The additional tort cause of action would substantially expand the defendants' potential liability. The media contends that this cause of action is unnecessary as they rarely refuse to retract good faith errors. They assert that making a retraction in most states would substantially reduce their potential damages and in others may eliminate damages altogether. It is also a matter of basic journalistic ethics to correct errors upon discovery, they claim. *Id.*

86. Requiring anyone to make a statement against their will infringes on free speech. The Soviet legal system accesses fines and "other measures" for a refusal to retract. Foster, *supra* note 37, at 84.

87. A declaratory judgment is a "statutory remedy for the determination of a justiciable controversy where the plaintiff is in doubt as to his legal rights. A binding adjudication of the rights and status of litigants even though no consequential relief is awarded." BLACK'S LAW DICTIONARY 368 (5th ed. 1979).

88. This action parallels a defamation action for nominal damages. Justice White, dissenting in *Gertz*, noted that the practical effect of a nominal damage award is a "judicial declaration that the publication was indeed false." 418 U.S. at 376 (White, J., dissenting).

mation suit for damages, declaratory judgments only determine the falsity and defamatory nature of the statement. The parties avoid the length and expense of litigation for damages.[89]

A PROPOSED FEDERAL SOLUTION

The national character of today's mass media favors the establishment of a unified system of recourse against publishers. Currently, the majority of states have some form of legislation addressing defamation remedies.[90] While these laws may supplement existing case law, divergent state systems unduly burden multistate publishers by making it next to impossible to satisfy the requirements of each state in which they publish.[91] A codified national defamation system would simplify the process.[92]

Responding to the problems inherent in current defamation law, Representative Charles E. Schumer has drafted a bill proposing a federal response to the issue.[93]

THE SCHUMER BILL

H.R. 2846, the bill proposed by Representative Schumer, provides public officials and figures who are the subject of a publication with a cause of action.[94] The bill limits causes of action to claims based upon publication in print or broadcast in the electronic media.[95] The plaintiffs must prove by "clear and convincing" evidence that: (1) they are a public official or public figure; (2) the statement was published; (3) the publication concerned the plaintiff; and (4) the statement was false and defamatory.[96]

Under the bill, the plaintiff need not prove the defendant's state of mind.[97] The bill makes state of mind irrelevant and thus the plaintiff avoids the burdensome task of showing "actual malice." Under the Schumer bill, the plaintiff is not entitled to damages. Instead, the plaintiff may receive a declaratory judgment that the publication or broadcast is false and defamatory.[98] Exercising the declaratory judgment option precludes the plaintiff from bringing another action for damages arising out of the same publication.[99]

An interesting provision in the bill gives the defendant the right to con-

89. *See* Hulme, *supra* note 59, at 390.
90. *See supra* note 7.
91. *Id.*
92. Congress' authority to enact such national legislation raises a problem. Congress may try to enact the legislation under the commerce clause, U.S. CONST. art. I, § 7, cl. 3, but it may be too narrow to permit Congress to regulate all publications. Congress may, however, use sections of the fourteenth amendment as the source of congressional authority, U.S. Const. amend. XIV, § 5. So long as the legislation protects the first and fourteenth amendment rights established by *New York Times*, the fourteenth amendment avoids the limitations of the commerce clause. *See id.* at 1755-56. *See also* Katzenback v. Morgan, 384 U.S. 745 (1966).
93. *See supra* note 10.
94. H.R. 2846 at § 1(a)(1).
95. *Id.*
96. *Id.* at § 1(b).
97. *Id.* at § 1(a)(2).
98. *Id.* at § 1(a)(3).
99. *Id.* at § 1(c).

vert an action brought against it for damages into an action for a declaratory judgment.[100] The defendant may do so if the plaintiff is a public figure or official and if the original action for damages arose out of an allegedly false and defamatory publication.[101] Once the defendant converts the cause of action, the court treats the case as if originally filed by the plaintiff.[102] This bars the plaintiff from bringing another action based on the same publication or broadcast.[103]

Representative Schumer offers H.R. 2846 as a panacea to the ailings of today's defamation law. The proposal would indeed revolutionize libel law and solve a few of its problems. However, H.R. 2846, as proposed, fails to adequately protect the plaintiff's interests. Moreover, it produces the potential for serious and harmful press misconduct. As the Schumer bill stands, it would further impair defamation law. The proposal, however, contains some desirable components and with revision, could provide the desired solution to the current problems.

Advantages of H.R. 2846

Less Expensive

The bill provides a less expensive and more workable alternative to the present cause of action for damages. A primary objection to current law is the enormous legal bills that both defamation plaintiffs and defendants incur. Indeed, the high expenses of defamation litigation make it a farce—lawyers' fees regularly exceed any amount that the plaintiff could reasonably expect to recover.

Declaratory judgment actions circumvent the costs. The parties merely appear before a judge with the only issue being whether the publication was false and defamatory. The parties need not prove or disprove the state of mind of the defendant. The parties avoid the extensive discovery into their opponent's reputation that taints the action for damages.[104] Instead, the

100. *Id.* at § 1(d)(1).
101. *Id.* at § 1(d)(2).
102. *Id.*
103. *Id.* The Schumer bill also contains provisions applicable to all defamation actions, whether for damages or for a declaratory judgment. First, the bill establishes a one year statute of limitations dating from the time of the publication. *Id.* at § 2. Second, the bill prohibits all punitive damages in defamation actions. *Id.* at § 3. Third, attorneys' fees are awarded to the prevailing party, with two exceptions; the court may reduce or disallow the award of attorneys' fees if it determines that there is an overriding reason to do so and the court shall not award attorneys' fees against a defendant which proves that it exercised reasonable effort to ascertain that the publication or broadcast was not false and defamatory or that it published or broadcast a retraction not later that 10 days after the action was filed. *Id.* at § 4.
104. *Id.* at § 1(a)(2).

In an action for damages, where state of mind is at issue, the defense searches for evidence of the plaintiff's bad reputation. To do so, the defendant's counsel investigates every facet of the plaintiff's life—past behavior, education, work experiences, family, friends, political affiliations and ambitions. This process often takes several years. Meanwhile, the plaintiff's attorneys seek to prove that the defendant acted with "actual malice." This involves a total investigation into the lives of the involved reporters and editors, as well as into the internal procedures of the newsroom and the contents of unpublished notes and outtakes.

In Herbert v. Lando, 441 U.S. 153 (1979), the Supreme Court gave a liberal interpretation of the discovery rules. The plaintiff, Lt. Col. Anthony B. Herbert, a retired army officer with wartime service in Vietnam, received widespread media attention in 1969 and 1970, when he accused his superior officers of covering up reports of war crimes and atrocities. *Id.* at 156. In 1973, CBS

declaratory judgment route limits discovery to the truth of the statement. Once the judge renders a declaratory judgment, the litigation ends.[105] Furthermore, due to the simplicity of the declaratory judgment process, a party may not even need an attorney.

Plaintiff's Option

Allowing a plaintiff to opt for a declaratory judgment and thus avoid the expense, time, and energy of a trial for damages is extremely attractive, especially with the uncertainty of recovery. In addition, plaintiffs may clear their names with a declaratory judgment. A declaratory judgment that the defendant's statement was false may be all some plaintiffs want and the wise choice for a plaintiff lacking resources to cover the costs of litigation.

Attorneys' Fees

The bill provides that the court shall award the prevailing party reasonable attorneys' fees, in any action.[106] Extension of the provision to all defamation suits will serve to decrease groundless actions. A plaintiff with a "nuisance" claim may think twice before initiating the suit if faced with the imminent threat of paying both his and his opponent's fees, if he loses.[107] For the declaratory judgment to work properly, it needs the attorneys' fees provision. Even a victorious plaintiff does not receive any damages with which to pay an attorney. If the bill failed to include such a provision, a plaintiff may shy away from declaratory judgments.

These provisions have merit, but only if Congressman Schumer drastically revises the bill as a whole. As it stands, H.R. 2846 has numerous difficulties.

Pitfalls of H.R. 2846

The Defendant's Option

The major downfall of the Schumer bill is the provision allowing the defendant to opt for a declaratory judgment action.[108] Congress should refuse to adopt this provision for several reasons. First, the provision raises serious constitutional questions. Allowing a defendant to convert a plain-

broadcast a report on Herbert and his accusations. Barry Lando produced and edited the program, "60 Minutes," and Mike Wallace narrated the show. Herbert sued because he believed the program portrayed him as a liar and an opportunist who used the alleged conduct of his superior officers as an excuse for his own relief from command. *Id.*

The Court held that Lando must answer questions concerning his thought processes as he put the broadcast together. *Id.* at 157, 169. The Court did so despite realizing that "if plaintiffs in consequence now resort to more discovery, it would not be suprising and it would follow that the costs and other burdens of this kind of litigation would escalate and become much more troublesome for both plaintiffs and defendants." *Id.* at 176.

At present, Herbert v. Lando is in its eleventh year of discovery and the parties do not anticipate a trial before 1987, if then. Once a case finally leaves the discovery stage, the trial itself may last for several months. And once the jury renders a verdict, the litigation is rarely over.

105. H.R. 2846 at § 1(c)

106. *Id.* at § 4.

107. Some states have statutory provisions that allow for payment of attorneys fees by the loser of the lawsuit. *See* CA. CODE CIV. PROC.§ 1021.7 (West Supp. 1981) and N.D. CENT. CODE § 29-26-01 (1974).

108. *Id.* at § 1(d).

tiff's cause of action from one for damages into a declaratory judgment, forever barring that plaintiff from an actual trial by jury, violates the seventh amendment.[109] The Supreme Court has oftentimes recognized that the seventh amendment entitles parties to a jury trial in actions for damages for libel and slander.[110] In addition, federal policy has historically and continually favored jury trials.[111] That the defendant opts for a declaratory judgment cannot and should not prevent a plaintiff from presenting a case to a jury of his peers.[112]

Second, the defendant's option only serves to exacerbate the media advantage problem. The threat of a declaratory judgment is not likely to induce media self-censorship. The Shumer bill favors an aggressive press and will not inhibit zealous media activity. The danger of media self-censorship is not what impairs the current system, however. On the contrary, *New York Times* and its progeny overcompensated for this danger. Media defendants already enjoy vast protection. H.R. 2846, if enacted, will only further insulate the media from valid claims.[113] Schumer's proposal removes any protection against serious and harmful press misconduct still preserved in the current system. If the media need only worry that a judge will issue a declaratory judgment, the deterrent effect is destroyed. The press would have unprecedented freedom to print anything, regardless of its truthfulness or defamatory nature.[114] The potential for increased profits greatly outweighs the penalty of a judge's declaration. Providing a defendant with this option severely threatens an individual's right to privacy and right to maintain a secure reputation.

RECOMMENDATIONS

Publication of the Declaratory Judgment

The key flaw with the declaratory judgment remedy is that judicial proceedings and decisions rarely receive news coverage. A defendant may not want to publish a declaratory judgment stating that it earlier published a

109. "[I]n suits at common law where the value in controversy shall exceed twenty dollars, *the right to trial by jury shall be preserved*, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST., amend. VIII. (emphasis added).

110. Ross v. Bernhard, 396 U.S. 531, 533 (1970) (emphasis added). *See also* Curriden v. Middleton, 232 U.S. 633 (1914); Whitehead v. Shattuck, 138 U.S. 146 (1891); 5 J. MOORE, FEDERAL PRACTICE 38.11(5) (2d ed. 1969).

111. Simler v. Conner, 372 U.S. 221, 223 (1962) citing Scott v. Neely, 140 U.S. 106 (1891); Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525, 537-39 (1958); Beacon Theater, Inc. v. Westover, 359 U.S. 500 (1950); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962).

112. 372 U.S. at 223.

113. The provision in H.R. 2846 granting the media defendant the declaratory judgment option illustrates Representative Schumer's attempt to represent his constituents—the media bar centered in New York. Fifty-six percent of all state court opinions originate in New York courts. Franklin, *Suing Media For Libel: A Litigation Study,* 1981 AM. B. FOUND. RES. J. 795, 799 n.11. New York's attitude toward defamation litigation exhibits its media bias with its unparalleled state laws. The New York court system allows media defendants to appeal denials of motions to dismiss and motions for summary judgment. Furthermore, New York imposes a liability test on the plaintiff even more stringent than *Gertz. Id.* at 800 n.11.

114. Many newpapers, magazines and broadcasting stations may refrain from such activity, out of a desire to maintain creditability. These forums, however, are not the main offenders of defamation law.

false and defamatory statement. Likewise, competitors may not attack a fellow reporter out of professional courtesy or fear of retaliation. Even if the press covers the judicial proceedings, they are not likely to receive much public attention due to the fact that declaratory judgments are lengthy and less clearly written than most matters the media covers.[115]

One solution to this problem would require circulation of the judgment as extensively as the original statement. Unfortunately, this over-simplifies the answer. The threat of a first amendment violation once again clouds the analysis. A judicial order compelling the publication of a judgment must not intrude upon the editorial process protected by the first amendment. Most courts have found right of reply statutes unconstitutional.[116]

The publication of a declaratory judgment, however, differs from right of reply statutes and is more effective.[117] Right of reply statutes demand that the media publish the opinion or view of its opponent. Declaratory judgments represent the decision of an impartial third party. In *Mills*, the Court stated: "there is practically universal agreement that a major purpose of [the first] amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates . . . ."[118] The declaratory judgment option allows an impartial judge to disseminate the truth about a public official or figure.

Publication of the declaratory judgment presents the necessary compromise. The plaintiff forfeits the opportunity to pursue monetary reward in an effort to reduce the costs inherent in defamation litigation. The defendant also avoids the enormous costs associated with defending multi-issue defamation suits.

Thus, for H.R. 2846 to function properly, it should contain a provision for the public propagation of the declaratory judgment. Not only should the bill contain the publication requirement, but it should also detail what constitutes sufficient public announcement. The drafters of the provision could model the declaratory judgment statement after some of the more detailed state retraction statutes.[119]

Request for Retraction Prerequisite

The Schumer bill should also include a provision requiring the plaintiff

115. The Court in Werner v. Southern Cal. Assoc. Newspapers, 35 Cal. 2d 121, 129, 216 P.2d 825, 833 (1950), stated:

> [E]xculpation in the eyes of the world is not accomplished by quiet entry of a judgment on the musty rolls of a court. The judgment must be publicized, if those who have read the libel are to know of its adjudged falsity. Unless the community is both small and interested, so that news of the judgment is spread throughout it verbally, the plaintiff's vindication depends upon the mercy of the press. The vanquished defendant may not mention the judgment. Even his competitors — if he has any — may keep silent, out of fear of advertising a weapon which may be used against them when next they boggle.

116. In Mills v. Alabama, 384 U.S. 214 (1966), the Court stated that "government enforced right of access inescapably dampens the vigor and limits the variety of public debate." *Id.* at 218.

117. Publication of declaratory judgments provide a plaintiff with much more vindication. Right of replies fail to furnish the plaintiff with either an admission of error by the defendant or a judicial declaration of error.

118. 384 U.S. at 218.

119. These statutes would provide guidance as to the position of the statement, the time of the statement and so forth. *See supra* note 82.

to request a retraction before initiating either a declaratory judgment action or an action for damages. A retraction would not bar a declaratory judgment action, but may obviate the need for a declaratory judgment action. In addition, such a provision would allow the plaintiff to negotiate with the defendant before making an election between the declaratory judgment and the damages action.

CONCLUSION

With the above revisions to H.R. 2846, the new cause of action has a strong likelihood of widespread usage. Whether or not a defamed individual will elect the declaratory judgment option depends on the goals of the plaintiff. Many plaintiffs may not want to spend several years of their lives, along with a substantial portion of their pocketbooks, in an attempt to recover for a false and defamatory statement. Indeed, most plaintiffs seek a retraction from the media defendant before attempting to bring a lawsuit for damages, thus illustrating that monetary rewards are not always a plaintiff's foremost concern.[120] Furthermore, plaintiffs rarely receive more in damages than they spend in legal fees. Thus, monetarily, the plaintiff does not lose by the declaratory judgment in most cases. Moreover, the plaintiff may better vindicate his reputation in the eyes of his family, friends, and business associates by a declaratory judgment that the publication was false and defamatory. The Schumer bill, as amended, would strike the appropriate balance between protection of the media's right to free speech and the dignity of the individual.

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120. Carol Burnett asked the *National Enquirer* to retract its story before she brought the lawsuit. (Burnett v. National Enquirer, Inc., 193 Cal. Rptr. 206, 144 Cal. App. 3d 991 (1983).

On March 2, 1976, the National Enquirer printed a story about Burnett entitled "Carol Burnett and Henry K. in Row." The four-sentence item printed was:

> In a Washington restaurant, a boisterous Carol Burnett had a loud argument with another diner, Henry Kissinger. Then she traipsed around the place offering everyone a bite of her dessert. But Carol really raised eyebrows when she accidentally knocked a glass of wine over one diner and started giggling instead of apologizing. The guy wasn't amused and "accidentally" spilled a glass of water over Carol's dress. Maintaining the item was entirely false and defamatory, an attorney for Burnett telegrammed the National Enquirer the same day of publication, demanding a correction or retraction. Burnett was dissatisfied with the retraction and brought suit. The jury awarded her $300,000 compensatory damages and $1,300,000 punitive damages. The trial court by remittitur rendered its judgment for $50,000 compensatory and $750,000 punitive damages. The appellate court held for Burnett, but lowered the punitive damages to $150,000. *Id.* at 206.

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