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## Libel Reform: An Appraisal

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## **LIBEL REFORM: AN APPRAISAL†**

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C. Thomas Dienes\*

Today, I am going to talk about the law of libel. A major part of my work at U.S. News is prepublication review of *U.S. News and World Report* and *The Atlantic*. I make difficult decisions such as assessing the risk that the Ayatollah Khomeini might sue the magazine for libel. I am not sure if you can libel the Ayatollah, but be careful if you do—he has very potent remedies.<sup>1</sup> I will not focus on the law of libel as it is practiced in Michigan or in other states today. Instead, I want to examine proposals for the total restructuring of defamation law. Perhaps in evaluating such proposed changes, we can better appreciate the strengths and weaknesses of existing libel law.

In particular, I want to evaluate the Annenberg Project's proposed Libel Reform Act. In the winter of 1987-88, Northwestern University's Annenberg Program<sup>2</sup> brought eleven persons to Washington, D.C. to discuss libel reform. They held very differ-

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† Originally delivered as the keynote address at a conference on "The Media and the Law: New Legislation, Judicial Trends and Controversial Proposals for Reform," held at Wayne State University, March 11, 1989. Co-sponsored by the Detroit Bar Association, the Detroit Bar Foundation, the State Bar of Michigan and the Gannett Foundation, the conference focused on media access to government processes and documents and on libel legislation. I want to express my appreciation to Richard E. Russell and Leonard M. Niehoff, associated with Butzel, Long, Gust, Klein & Van Zile, and other organizers of the conference for their invitation to address the group and for their hospitality.

I also wish to thank Sandra S. Baron, Managing General Attorney, National Broadcasting Company and a panel member of the Annenberg Project; Professor Jerome Barron of George Washington University, National Law Center; and Professor Marc A. Franklin, Stanford Law School, who commented on a draft of this speech.

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1. The Ayatollah died on June 3, 1989. The reference in the text to "potent remedies" is a reference to the order of Chemin that Moslems should assassinate Salman Rushdie, author of *The Satanic Verses*, and punish Viking Penguin, the publisher, and others involved in distributing the book. Chicago Tribune, June 4, 1989, at 1, col. 3.

2. The Annenberg Washington Program was established by Northwestern University in 1983. It seeks, through forums and research studies, to evaluate how communication technologies and public policies on communications affect American life. The Libel Reform Project, conceived by the Program director Newton N. Minow, former FCC director, reflects the belief "that the current libel system is not working well for anyone. It neither adequately protects First Amendment values nor provides plaintiffs with an effective way to vindicate their damaged reputations." The Report of the Libel Reform Project of the Annenberg Washington Program, Proposal for the Reform of Libel Law 7

ent attitudes toward the law of defamation. There were plaintiffs' attorneys and media lawyers, Tony Lewis of the *New York Times* and the arch-conservative Bruce Fein, an academic, a businessman, an insurance representative, and a judge. They were charged with the task of seeking a consensus on how the interests of freedom of the press could be reconciled with the interest in safeguarding reputation. The proposed Libel Reform Act is the result of their give-and-take sessions and the trade-offs they made.<sup>3</sup>

In fact, the provisions of the Act are not really that new. It is an amalgam of libel reform proposals that have been considered over the last few years. For example, Representative Charles Schumer of New York introduced proposed federal legislation that would have allowed a media defendant a new cause of action in the form of a declaratory judgment action.<sup>4</sup> In addition, other reform acts have been urged in California and Illinois.<sup>5</sup> All faced a hostile media response; none managed to secure any interested, supportive constituency and died without any really serious consideration. The Annenberg Libel Reform Act has been introduced in the Connecticut Legislature, and I expect that it will suffer the same fate as its predecessors.<sup>6</sup> Before I discuss the reasons for the failure of these reforms, I would like to talk

(1988) [hereinafter Annenberg Proposal] (on file at the University of Michigan Journal of Law Reform).

3. The Proposed Libel Reform Act is set forth in its entirety in the Appendix [hereinafter Act]. A section-by-section analysis of the Act is presented in Annenberg Proposal, *supra* note 2, at 19-25.

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

5. See, e.g., Cal. S.B. 1979 (introduced by Senator Bill Lockyear); Ill. H.B. 1391 (introduced by Rep. John Cullerton). Compare Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CALIF. L. REV. 809 (1986) (advocating a declaratory judgment alternative to a libel action for damages available at the plaintiff's option) with Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 CALIF. L. REV. 847 (1986) (advocating a declaratory judgment alternative available to plaintiffs or defendants in libel actions by public officials and public figures). See generally Barron, *The Search for Media Accountability*, 19 SUFFOLK U.L. REV. 789 (1985) (arguing for legislation giving plaintiff a "right of reply" as an alternative to a damages action); Cook, *Reconciling the First Amendment with the Individual's Reputation: The Declaratory Judgment as an Option for Libel Suits*, 93 DICK. L. REV. 265 (1989) (arguing for a declaratory judgment alternative available to the libel plaintiff); Leval, *The No-Money, No-Fault Libel Suit: Keeping Sullivan in its Proper Place*, 101 HARV. L. REV. 1287 (1988) (arguing for a declaratory judgment alternative available to the libel plaintiff).

6. Conn. H.B. 5932, introduced by Rep. Richard Tulisano, in 1988, died in the Judiciary Committee of the Connecticut General Assembly. A similar bill, Iowa S.B. 40, was introduced in the Iowa legislature but was not reported out of Committee. Ill. H.B. 1391, introduced by Rep. John Cullerton, and California S.B. 1393, introduced by Sen. Barry Keene, also using a declaratory judgment alternative to an action for damages, are under consideration. News Notes, 16 Media L. Rep. (BNA) (No. 14) May 9, 1989.

about the special provisions of the Annenberg Project's Libel Reform Act.

The heart of the proposal is a two-stage, no-damages, no-fault alternative to the present libel action for damages.<sup>7</sup> Stage One commences with a written demand by the plaintiff for a retraction or reply. The demand must be made within thirty days of the defamatory publication, or the plaintiff's claim is barred. If the defendant prints a legally satisfactory retraction or reply within thirty days of the request, that ends the dispute.<sup>8</sup>

From the media's viewpoint, this Stage One retraction proceeding would have significant advantages over present law. Not all states have retraction laws, and those that do vary considerably. However, a retraction or reply does not stop a plaintiff from litigating for actual damages.<sup>9</sup> The printing of a retraction, as in Michigan, only limits the damages that the plaintiff can recover.<sup>10</sup> For example, the law might limit recoverable damages to

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7. Act, § 1, abolishes the common-law action for false-light privacy. Although both defamation and privacy are concerned with injury to human dignity rather than physical injury, privacy seeks to redress the plaintiff's personal interest in emotional tranquility rather than his relational interest in reputation, which is the focus of the defamation tort. The Act would not preempt other related causes of action, such as intentional infliction of emotional distress. In *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), the Court extended the constitutional requirement of actual malice (*See infra* note 22) to defeat the Rev. Jerry Falwell's mental distress claim against *Hustler* based on a parody in the magazine.

8. Under Act, § 3, a "timely and conspicuous retraction" will bar the action. Even if the plaintiff requests a right of reply, a retraction will suffice. In short, a media defendant may, but need not, grant space for reply to avoid litigation.

Thirty days seems to me to be a very short "*de facto* statute of limitations." However, most demands for corrections and retractions do arise shortly after publication, and there is value in a prompt resolution of disputes. *See* Murasky, *Avoidable Consequences in Defamation: The Common-Law Duty to Request a Retraction*, 40 RUTGERS L. REV. 167, 168-69 (1988) (arguing that plaintiff's failure to seek a retraction should bar any avoidable damages incurred after the time when the plaintiff could reasonably have reported the error).

9. The "issue status" section of VI Libel Defense Resource Center, 50-State Survey 1988: Current Developments in Media Libel and Invasion of Privacy Law 934-37 (1988), indicates that thirty-one states have retraction statutes and eleven other jurisdictions recognize the limitation by other means, *e.g.*, common law, jury instructions. Only one of the retraction laws appeared to bar the plaintiff's action. *See* R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 589-619 app. (1980) (setting forth state retraction statutes).

10. MICH. COMP. LAWS ANN. § 600.2911(2)(b) (West Supp. 1989) provides:

Exemplary and punitive damages shall not be recovered in actions for libel unless the plaintiff, before instituting his or her action, gives notice to the defendant to publish a retraction and allows a reasonable time to do so, and proof of the publication or correction shall be admissible in evidence under a denial on the question of the good faith of the defendant, and in mitigation and reduction of exemplary or punitive damages. For libel based on a radio or television broadcast, the retraction shall be made in the same manner and at the same time of the day as the original libel; for libel based on a publication, the retraction shall be published in the same size type, in the same editions and as far as practica-

special damages or it might preclude punitive damages. Under the proposed Libel Reform Act, a legally satisfactory retraction or reply ends the plaintiff's claim.<sup>11</sup>

The retraction provision of the Libel Reform Act offers the promise of a speedy end to litigation and is likely to be welcomed by the media. But is it really desirable to bar all plaintiffs from damage actions simply because the defendant prints a retraction? Suppose the plaintiff has suffered serious, provable economic loss. Even granting the questionable assumption that a retraction restores reputation, it cannot make up for economic loss. Although I strongly believe in the value of retraction statutes for avoiding needless litigation, I question the desirability of foreclosing any damages action by a plaintiff. I would urge instead that the printing of a legally satisfactory retraction, or a reply where that remedy would be acceptable to the plaintiff, should operate to limit the plaintiff to special damages (i.e., out-of-pocket loss) or, alternatively, actual damages, defined solely in terms of reputational harm.<sup>12</sup> Mental distress is simply too

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ble, in substantially the same position as the original libel; and for other libel, the retraction shall be published or communicated in substantially the same manner as the original libel.

11. Act, § 3(f), provides that "[a] conspicuous retraction is a retraction published in substantially the same place and manner, as the defamatory statements being retracted. The placement and timing of the retraction must be reasonably calculated to reach the same audience as the prior defamatory statements being retracted." In its section-by-section analysis, the Annenberg Proposal states that "[t]o be sufficient, a retraction must withdraw and repudiate the prior defamatory statements and publish the corrected facts." Annenberg Proposal, *supra* note 2, at 21. Recognizing the special problem posed by implied defamation rather than defamation by an actual statement made in the publication, the Annenberg Proposal provides that a retraction is sufficient if the defendant indicates he "did not intend either to state or to imply the meaning ascribed by the plaintiff." *Id.* See Act, §§ 3(9)-3(h) for other provisions seeking to clarify the nature of a legally satisfactory retraction or reply. Section 10(a) of the Act provides for an award of attorney's fees to the prevailing party if the sufficiency of a retraction or reply is litigated.

12. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), compensatory or actual damage was defined to include "impairment of reputation and standing in the community, personal humiliation and mental anguish and suffering." *Id.* at 350. Although damages for mental suffering might well be included as parasitic damages, I would argue that they should not be included as compensatory damages. The defamation tort is concerned with harm to reputation and to the plaintiff's relations with others—not primarily with emotional distress. The interest in emotional tranquility is protected by torts such as privacy and intentional infliction of mental distress. Harm to reputation should be a prerequisite to maintaining a defamation action. See Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747 (1984) (criticism of allowing recovery without proof of actual harm to reputation).

open-ended; it is too often simply punitive damages by another name.<sup>13</sup>

Under the proposed Libel Reform Act, if no satisfactory retraction or reply is published, we move to Stage Two. This is where the real controversy is centered. At Stage Two, *either* party may finally convert the claim into a no-fault, declaratory judgment action on the issue of truth or falsity. If either party elects the declaratory judgment route, that is conclusive—there can be no damages action.<sup>14</sup> The prevailing party on the issue of truth or falsity gets attorney's fees from the loser.<sup>15</sup>

In the Stage Two declaratory judgment proceeding, the plaintiff has the burden of proving falsity by clear and convincing evidence. Although it is not completely clear under the Act, I believe that a more exact statement is that the plaintiff must prove the absence of substantial truth.<sup>16</sup> Clearly, under *Philadelphia Newspapers v. Hepps*, a libel plaintiff seeking damages must prove the falsity of the publication, at least in public interest speech cases.<sup>17</sup> But modern libel law is unclear as to whether substantial truth is a privilege that the defendant must allege and prove or whether it is part of the plaintiff's prima facie case, i.e., the plaintiff must prove the absence of substantial truth to prove falsity.<sup>18</sup>

Let me provide an example. Noah Robinson, Jesse Jackson's half-brother, sued *U.S. News and World Report* for libel. I hasten to add that the publication occurred before I became General Counsel. Our magazine had printed a short item noting

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13. See *infra* notes 23-28 and accompanying text on punitive damages in defamation actions.

14. Act, § 4(e).

15. Act, § 10(b).

16. Act, § 6(a) and (b), provides that the plaintiff has the burden of proving falsity and that this burden cannot be met if the defamatory statements are substantially true. Although I interpret this to mean that the plaintiff has the burden in the absence of substantial truth, the section could be read merely to recognize the defense of substantial truth.

17. 475 U.S. 767 (1986). Arguably the burden of proof on the falsity issue was placed on public officials as early as *New York Times v. Sullivan*, 376 U.S. 254 (1964). See *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (a "public official [is] allowed the civil [defamation] remedy only if he establishes that the utterance [is] false."). My caveat in the text limiting the principle to public interest cases is necessitated by *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985), where the Court allowed the recovery of presumed and punitive damages by a private figure plaintiff when the defamatory publication did not involve a matter of public concern. *Dun & Bradstreet* may presage a more general limitation of constitutional protections in private speech cases.

18. At common law, substantial truth was an affirmative defense. While *Hepps* makes falsity part of plaintiff's prima facie case, courts frequently continue to refer to the "defense" of truth.

Robinson's arrest for conspiracy in the stabbing of a federal grand jury witness in South Carolina, the fact that Robinson was a target in a federal drug trafficking investigation, and that his apartment and office in Chicago had been searched by federal agents pursuant to a warrant.<sup>19</sup> Everything was true, except that Robinson had been arrested and charged by local police, rather than by FBI agents as we had published.<sup>20</sup> Robinson sued *U.S. News* for \$2 million—one million in compensatory damages and one million in punitives. Our publication was inaccurate, some would say "false." But we would argue that the article was "substantially true." Its "gist" and "sting" concerning the arrest were accurate; the error in detail did not add significantly to the reputational harm that would result from the true facts. Did Robinson have the burden of proving that the publication was not "substantially true," or did *U.S. News* have the burden of showing that, although the publication was inaccurate as to a detail of the arrest, it was substantially true? The distinction had procedural significance. Could we move to dismiss the complaint for failure of the plaintiff to state a claim under FED. R. CIV. P. 12(b)(6) or did we have to answer, plead substantial truth as a defense, and then move for judgment on the pleadings or, in the alternative, summary judgment? We decided not to take chances and answered, arguing that the plaintiff could not prove the absence of substantial truth. Our motion is still pending in the federal court.<sup>21</sup>

Although I believe it is likely that either the plaintiff or the defendant will choose the declaratory judgment option, if neither party elects this route, then the matter is handled as an ordinary damages action under familiar libel law rules, including the requirement that the plaintiff prove fault.<sup>22</sup>

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19. U.S. NEWS & WORLD REPORT, June 20, 1988, p. 14.

20. In fact, Robinson was charged and indicted on four different counts. He was subsequently charged *inter alia* with murder. Although the jury was unable to reach a verdict on most of the charges, Robinson was convicted as an accessory after the fact of assault and battery and sentenced to ten years. *N.Y. Times*, Jan. 31, 1989, at A17, col. 1.

21. Defendant's motion for summary judgment was granted on grounds that the article was substantially true. *Robinson v. U.S. News & World Report, Inc.*, 16 Media L. Rep. (BNA) (No. 19) 1695 (N.D. Ill. 1989).

22. *New York Times v. Sullivan*, 376 U.S. 254 (1964), held that actual malice, i.e., subjective knowledge of falsity or reckless disregard of truth or falsity, is required for defamation actions brought by public officials. Justice Warren extended the actual malice standard to public figures in his concurring opinion in *Curtis Publishing v. Butts*, 388 U.S. 130 (1967). In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974), the Court held 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 defam-

There is, however, one vital, valuable change—neither punitive nor presumed damages are recoverable.<sup>23</sup> This is sweet music to the media. Punitive damages constitute one of the great uncertainties in modern libel law—they are an essentially uncontrolled element bearing no relationship to compensatory damages, threatening defendants generally and the media in particular.<sup>24</sup> “Less reputable” publishers, such as *Hustler*, *Penthouse*, or *The National Enquirer*, are especially susceptible to the threat of huge punitive damage awards bearing no relation to a plaintiff’s actual losses.<sup>25</sup>

But even “reputable” media face the threat of huge punitive damages awards. In *Brown & Williamson Tobacco Corp. v. Jacobson*,<sup>26</sup> the defendants were sued for making false state-

atory falsehood injurious to a private individual.” *But see supra* note 17 on the possible implications of *Dun & Bradstreet*.

Most states have opted for a negligence standard in private figure cases; however, a few have retained a more demanding fault standard. Although it appeared that Michigan would require actual malice in cases involving speech in the “public interest,” in *Rouch v. Enquirer News of Battle Creek*, 427 Mich. 157, 398 N.W.2d 245 (1986), the court rejected the public interest standard and adopted negligence. *See Niehoff, Constitutional Law*, 34 WAYNE L. REV. 565 (1988). Efforts to legislate a “public interest and concern” privilege failed. But the legislature in a last-minute revision, required that, in a suit brought by a private figure plaintiff based on negligence, “[r]ecovery . . . shall be limited to economic damages including attorney fees.” MICH. COMP. LAWS ANN. § 600.2911(7) (West Supp. 1989). The effect of this damages limitation was a subject of debate at the Wayne State Media Law Conference.

23. Act, § 9(b) & (d). In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court rejected awards of presumed and punitive damages, absent proof of actual malice, stating: “[P]unitive damages are wholly irrelevant to the State interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries . . . .” *Id.* at 350. *But cf.* *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985) (allowing states to award presumed and punitive damages in defamation actions brought by private figure plaintiffs where the publication does not involve matters of public concern). *See generally*, Libel Defense Resource Center, “Punitive Damages in Libel Actions,” LDRC Bulletin No. 24 (Dec. 1988), at 1-43.

24. The study by the Libel Defense Resource Center [hereinafter LDRC] indicates that punitive damages are awarded in 60% of all libel cases in which plaintiffs win damages against the media. The average punitive damage award between 1980 and 1986 was approximately \$2,000,000. Libel Defense Resource Center, “Punitive Damages in Libel Actions,” LDRC Bulletin No. 24 (Dec. 1988), at 8. *See* LDRC Bulletin No. 21 (Oct. 1987), at 19.

25. In *Gertz*, 418 U.S. at 349, Justice Powell stated that punitive damages allow juries “uncontrolled discretion . . . to punish unpopular opinions . . . .” *See generally* LDRC Bulletin No. 18 (Dec. 1986), at 61-62 (citing *Guccione v. Hustler Magazine*, 7 Media L. Rep. (BNA) 2077 (Ohio Ct. App. 1981) (\$37,000,000 in punitive damages); *Lerman v. Flynt Distrib. Co.*, 745 F.2d. 123 (2d Cir. 1984) (\$33,000,000 in punitive damages), *cert. denied*, 471 U.S. 1054 (1985); *Pring v. Penthouse Int’l.*, 695 F.2d. 438 (10th Cir. 1982) (\$25,000,000 in punitive damages).

26. 644 F. Supp. 1240 (N.D. Ill. 1986), *aff’d*, 827 F.2d 1119 (7th Cir. 1987), *cert. denied*, 108 U.S. 1302 (1988). A jury recently awarded Richard DeSalle, a former Pennsylvania Circuit Court judge, nearly \$2,800,000—\$210,000 in compensatory damages and



ments claiming the tobacco companies' ads appealed to youth, using pot, sex, and alcohol as come-on themes. For the first time, the \$1,000,000 damages figure was surpassed when the tobacco company recovered \$3,000,000, \$2,000,000 of which was in the form of punitive damages. I believe that the defendants' conduct was reprehensible. Nevertheless, awarding \$1,000,000 (originally \$3,000,000) to the tobacco company for injury to its reputation and subjecting a broadcaster to \$2,000,000 in punitive damages for publishing material commenting on tobacco advertising to youth seems to me to be an excessively dangerous threat to press freedom.

A few jurisdictions have legislatively limited punitive damage awards for certain torts.<sup>27</sup> Disproportionate punitive damages have been constitutionally challenged before the Supreme Court in a non-media case, on grounds that the punitive damages, 100 times higher than the compensatories, constituted excessive fines in violation of the eighth amendment and a denial of due process.<sup>28</sup> I personally believe that the elimination of this punitive device, either through judicial action or reform legislation, would provide a worthwhile change in libel law.

In the litigation stages under the proposed Libel Reform Act, media defendants can claim various privileges.<sup>29</sup> One of the most

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\$2,000,000 punitive damages—against the *Pittsburgh Post-Gazette*. The case was affirmed on appeal and the Supreme Court denied certiorari. DeSalle had sued for libel based on newspaper charges that, as an attorney, he had been part of a conspiracy to falsify a will. See Radolf, *The Chilling Effect*, EDITOR & PUBLISHER, July 22, 1989, at 11-12.

27. It has been claimed that some 35 states have enacted legislation limiting punitive damages or their availability which could apply to libel. Kaufman, Johnston, & Sackler, *Tort Reform and Libel*, 10 COMM. & LAW 15, 31 (1988). Though many of these reforms are limited to defining procedures or evidentiary standards for awards of punitive damages, other laws "cap" punitive damage awards or require that such awards bear some defined proportional relationship to the compensatory damage award. The recent scholarly commentary on punitive damages in libel cases has been extensive. See, e.g., Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1986); Van Alstyne, *First Amendment Limitations on Recovery from the Press*, 25 WM. & MARY L. REV. 793 (1984); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269 (1983); Note, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 MICH. L. REV. 1699 (1987); Note, *Punitive Damages in Libel Law*, 98 HARV. L. REV. 847 (1985).

28. In *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989), the Court held 7-2 that the excessive fines clause does not apply to punitive damage awards in civil cases between private parties. The due process issue was held not to have been properly raised in the lower court or on appeal.

29. Act, § 8, provides for absolute privilege, in both declaratory judgment and damage actions, for participants in judicial proceedings and legislative proceedings, and participants in quasi-judicial or quasi-legislative executive or administrative proceedings. Section 8 also recognizes a variety of common law conditional privileges in damage actions. Because a conditional privilege would put the defendant's fault in issue, these

important is a neutral reportage privilege, which also includes the common law privilege to report matters of the public record.<sup>30</sup> But this is not simply the neutral reportage privilege recognized by a number of jurisdictions.<sup>31</sup> Under the traditional neutral reportage doctrine, the truth or falsity of the statement reported is irrelevant; all that is required for invoking the privilege is that a responsible person made the statement, that the statement is accurately reported, and that it is newsworthy. But the proposed Libel Reform Act goes even further. The Act provides for a sweeping, absolute privilege for accurate reporting of the statements of *any* person or organization, so long as the matter involves the public interest and the source is identified.<sup>32</sup>

When I engage in prepublication review, one of the subjects of major concern for me is the credibility of the source. I will re-

privileges would not be available in declaratory judgment actions under the Act. See Annenberg Proposal, *supra* note 23. On absolute and conditional privileges in defamation action, see generally W. KEETON, PROSSER AND KEETON ON TORTS 815-38 (5th ed. 1984); R. SACK, LIBEL, SLANDER AND RELATED PROBLEMS ch. 6 (P.L.I. 1980); B. SANFORD, LIBEL AND PRIVACY ch. 10 (1985) (looseleaf service); R. SMOLLA, LAW OF DEFAMATION ch. 8 (1989) (looseleaf service); Winfield & Cavanaugh, *Privileges Redux: Rediscovering the Common Law*, in LIBEL LITIGATION 1988 31-49 (P.L.I. 1988).

30. Act, § 5. See also Annenberg Proposal, *supra* note 2, at 23, (noting that the fair report privilege is "automatically encompassed by the absolute neutral reportage privilege established in Section 5."). The fair report privilege is recognized by RESTATEMENT (SECOND) OF TORTS, sec. 611 (1977):

The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgment of the occurrence reported.

See generally D. ELDER, THE FAIR REPORT PRIVILEGE (1988).

31. The neutral reportage privilege permits republication of a defamatory statement even where the publisher doubts the truth of the statement. It was introduced in *Edwards v. National Audubon Soc.*, 423 F. Supp. 516 (S.D.N.Y. 1976), *rev'd*, 556 F.2d 113 (2d Cir. 1977), *cert. denied sub nom. Edwards v. New York Times*, 434 U.S. 1002 (1977). For a survey of the judicial reaction to the doctrine, now recognized in about a half-dozen jurisdictions, see Bowles, *Neutral Reportage as a Defense Against Republishing Libel*, 11 COMM. & LAW 3 (1989). See generally J. BARRON & C.T. DIENES, HANDBOOK OF FREE SPEECH AND FREE PRESS § 6.26 (1979).

32. The nature of the "official proceedings" covered by statutory privilege became a major source of dispute in Michigan as a result of the decision of the Michigan Supreme Court in *Rouch v. Enquirer & News of Battle Creek*, 427 Mich. 157, 398 N.W.2d 245 (1986). *Rouch* held that arrest information provided by police to a newspaper was not covered by the statutory fair report privilege. The court reasoned that the statute "evoked notions of adjudicatory action, rather than of government action generally." 427 Mich. at 172, 398 N.W.2d at 252. The statute was revised to provide:

Damages shall not be awarded in a libel action for the publication or broadcast of a fair and true report of matters of public record, a public and official proceeding, or if a governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body, or for a reading of the report which is a fair and true headnote of the report.

MICH. COMP. LAWS ANN. § 600.2911(3) (West Supp. 1989).

view with the reporter who the source is, why he is in a position to know, if there is any reason to expect a bias, the possibility of corroboration through other sources, and whether we have checked with the target of the statement for his side of the story. None of these questions would really be necessary to ask under the proposed neutral reportage privilege.

But I am increasingly coming to the conclusion that these questions should not control what gets published in the media—that the only proper question should be: was the statement, in fact, made by the source cited? Is it really the function of a reporter and lawyer to judge the credibility of a source and then to decide whether or not to publish? It is not as if the judgment concerning credibility were a clear, objective determination. Just ask John Tower and the Senate. Judging credibility is a highly subjective process, often involving great uncertainty. Yet, because of the uncertainty over credibility, the media may suppress newsworthy reports. Perhaps, if the matter is newsworthy, it should be accurately communicated to the public with disclosure of the source. The public would then be allowed to hear the statement and make its own assessment of the merits of the statement. After all, the media is *truthfully* reporting what was said—its value is a question for the public.

This, then, is the essence of the proposed Libel Reform Act. The ability to end libel actions with a retraction, abolition of presumed and punitive damages, a sweeping, absolute neutral reportage privilege—all are changes that would be individually welcomed by the media. And yet, it is likely that the media would strongly oppose the proposed Act or any similar no-fault, declaratory judgment reform. Why? The answer lies in the costs and risks of any no-fault, declaratory judgment proposal.

A clear cost of any no-fault, declaratory judgment reform is loss of the *New York Times* privilege.<sup>33</sup> Currently, the require-

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33. See *supra* note 22. *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964), held that a public official cannot recover in defamation absent clear and convincing evidence of actual malice. Public officials include those government employees with policy-making authority and access to the media. See *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Rosenblatt v. Baer*, 383 U.S. 75 (1966). One study estimated that 87% percent of all media libel cases are resolved on the basis of *New York Times* privilege. R. BEZANSON, G. CRANBERG & J. SOLOSKI, *LIBEL LAW AND THE PRESS: MYTH AND REALITY* 185 (1987).

My speech was not intended to address the question of whether a statute eliminating the constitutional privilege would be constitutional. Counsel for the *New York Times*, Floyd Abrams, for example, observed: "It may well be that the First Amendment does not permit defendants to be stripped of all the protection afforded by *New York Times Co. v. Sullivan* simply because a declaratory judgment is sought." A.B.A. J. 34 (Jan. 1989). As will be noted below, a declaratory judgment still provides a potential "chilling effect" on press freedom—the threat of media self-censorship—emphasized by Justice

ment that a libel plaintiff prove fault is the greatest protection for the media. The public figure plaintiff must prove knowledge of falsity or subjective awareness of a high probability of falsity.<sup>34</sup> The private figure plaintiff must prove at least negligence.<sup>35</sup> *Hustler Magazine v. Falwell* recently reaffirmed the vitality of this *New York Times* first amendment protection.<sup>36</sup>

Because of the fault requirement, most public figure libel actions can be disposed of prior to trial, at the motions stage. Under the standards set forth in *Anderson v. Liberty Lobby*,<sup>37</sup>

Brennan in *New York Times*. It is arguable that the threat of attorney's fees, an increased number of libel claims and costly litigation over the question of truth or falsity, produce an excessive chill on press freedom. See *infra* notes 52-57 and accompanying text. Finally, it is arguable that the constitutional privilege fashioned in *New York Times* is as much a matter of principle—of protecting the special role of the media in our democratic system—as a matter of the impact of libel damages on the media. See Kirtley, *Proposal to Reform Libel Law Has Troubling Aspects*, EDITOR & PUBLISHER, Nov. 5, 1988, at 52.

34. The constitutional privilege was extended to public figure plaintiffs through Chief Justice Warren's concurring opinion in *Curtis Publishing v. Butts*, 388 U.S. 130 (1967). In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974), the Court defined public figures to include pervasive, all-purpose public figures and limited purpose public figures:

For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

In subsequent cases, involving the limited purpose public figure, the Court has narrowly defined the category, focusing on the two requirements of voluntary participation and public controversy. Plaintiff's access to the press is an important consideration. See *Time, Inc. v. Firestone* 424 U.S. 448 (1976) (wealthy socialite in bizarre divorce proceeding held to be a private figure); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) (research scientist receiving federal grants held to be a private figure); *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979) (person guilty of contempt for failure to appear before a grand jury investigating Soviet espionage held to be a private figure).

35. *Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1974). In addition to precluding strict liability, *Gertz* bars presumed and punitive damages, at least absent proof of actual malice. In *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985), the Court restricted the *Gertz* damage limitations to speech involving matters of public concern. See *supra* note 17.

36. 485 U.S. 46 (1988). See *supra* note 7.

37. 477 U.S. 242, 255-56 (1986). In *Anderson*, the Court stated:

[W]here the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.

*Id.* The same demanding clear and convincing evidence burden of actual malice that the libel plaintiff must satisfy at trial applies in determining whether the case should go to trial. Even with the broad discovery into defendant's state of mind during the editorial process permitted by *Herbert v. Lando*, 441 U.S. 153 (1979), plaintiffs have difficulty meeting this standard.

construing all the evidence in the light most favorable to the plaintiff, it is clear that the public figure plaintiff will not be able to prove constitutional malice by clear and convincing evidence. In that case, summary judgment will be granted.<sup>38</sup>

If a libel plaintiff does get to the jury, the media will probably lose—the media lose about two-thirds of all jury verdicts,<sup>39</sup> which often provide for huge damage awards.<sup>40</sup> One could get the impression that juries do not like the media. Nevertheless, about seventy-five percent of these adverse jury verdicts are reversed or modified on appeal.<sup>41</sup> Under *Bose Corp. v. Consumers Union*,<sup>42</sup> in cases where a jury has found that the defendant acted with constitutional malice, the appellate courts engage in an independent, *de novo* review of the evidence.<sup>43</sup> The proper scope of this appellate review has proven controversial; the subject was again before the Supreme Court recently in *Harte-Hanks Communications v. Connaughton*.<sup>44</sup> But, at least presently, the appellate courts actively reverse adverse jury verdicts.

38. Approximately 75% of defendants' motions for summary judgment are granted. LDRC Bulletin No. 12 (Dec. 1984), at 1-32; Kaufman *Trends in Damage Awards, Insurance Premiums, and the Cost of Media Libel Litigation*, in *THE COST OF LIBEL* 1, 7 (E. Dennis and E. Noam eds. 1989).

39. Henry Kaufman, general counsel at LDRC, sets the loss figure at sixty to seventy percent. See Stille, *Libel Law Takes on a New Look*, NAT'L L.J., Oct. 24, 1988, at 32, col. 3. The LDRC estimates 75% losses in jury trial cases. LDRC Bulletin No. 21 (Oct. 1987), at 11.

40. The LDRC reports 32 of 126 libel damage awards studied at or in excess of \$1,000,000 between 1980-1986. LDRC Bulletin No. 21 (Oct. 1987), at 19. In a 1982 study of 47 damage awards, the average of 30 of the awards exceeded \$2,000,000. LDRC Bulletin No. 11 (Nov. 1984), at 14-15.

41. See Kaufman, *supra* note 38, at 7 n.33 (citing LDRC Damages Study No. 1 at 7; LDRC Damages Study No. 2, at 19-21).

42. 466 U.S. 485 (1984).

43. In *Bose* the Court stated:

We hold that the clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by *New York Times v. Sullivan*. Appellate judges in such a case must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity.

*Id.* at 514 (footnote omitted).

44. 109 S. Ct. 2678 (1989). A candidate for municipal judge in Ohio sued the Journal News for reporting that a grand jury witness had alleged that he offered bribes for their help in securing information concerning the incumbent judge who had been endorsed by the paper. *Id.* at 2682. The jury, finding actual malice, awarded the candidate \$5,000 in compensatory damages and \$195,000 in punitive damages. *Id.* The Court of Appeals and the Supreme Court affirmed.

Although Justice Stevens' opinion for the Court is highly fact-specific, the case does reaffirm *Bose* by requiring the appellate court to reexamine the factual record. *Id.* at 2694-95. Even though jury credibility determinations are subject to a clearly erroneous

The bottom line is that today libel plaintiffs almost always lose. Only about ten percent of libel plaintiff actions ultimately survive the litigation process.<sup>45</sup> Awards for survivors have been, on the average, between \$100,000 and \$150,000.<sup>46</sup> Given this kind of potential payoff, or lack thereof, it is not surprising that libel actions are declining—down over twenty percent during the past couple of years.<sup>47</sup> Unless the action is simply punitive, to harm the media, it is increasingly not economically viable for plaintiffs to pursue litigation.

Of course, victory may be costly for the media. About eighty percent of libel insurance costs are incurred in defending libel actions, rather than in compensating injured plaintiffs.<sup>48</sup> In the *Westmoreland* case, for example, CBS expended over \$6,000,000 in its successful defense.<sup>49</sup> But honestly, these mega-costs for libel defense are rare. Most libel defense costs are far less expensive. The average defense cost is about \$100,000.<sup>50</sup> Nevertheless, this is a significant amount, particularly for small uninsured publishers,<sup>51</sup> and the possibility of a costly defense is ever present.

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standard on appeal, the appellate court must review the entire record to determine if it supports the jury findings of actual malice. *Id.* at 2696.

45. Franklin, *Suing the Media for Libel: A Litigation Study*, 1981 AM. B. FOUND. RES. J. 795, 811. Note that the 10% figure does not reflect settlements. Time, Inc., for example, recently settled a libel claim for a reported \$500,000. Stille, *supra* note 39, at 1. I am not aware of any statistics regarding libel settlements.

46. Kaufman, *supra* note 38, at 7 (citing LDRC Damages Study No. 2, at 23) set the average award at under \$100,000. More recently, the estimate has been \$150,000. See Kaufman, Johnston, & Sackler, *Tort Reform and Libel*, 10 COMM. & LAW 15, 20 (1988); Stille, *supra* note 39, at 32, col.4.

47. Johnson & Kaufman, *Annenberg, Sullivan at Twenty-Five, and the Question of Libel Reform*, 7 COMM. LAWYER 3, 6 (1989). Stille, *supra* note 39, at 32, col.1, reports a decline of 25% to 40% from 1985 estimates. Even Rodney Smolla, director of the Annenberg Project, while arguing that the case for libel reform is compelling, acknowledges that "[f]rom the defense view, certainly, a case may be made for the status quo. The siege on the citadel has abated . . . . The crisis . . . has run its course. Most media defendants have recently experienced an easing in the number of libel suits they are facing. Insurance markets have adjusted." Smolla, *A Defense of the Annenberg Libel Reform Proposal*, 7 COMM. LAWYER 3 (1989).

48. Lankenau, *Living With the Risk of Libel*, FOLIO MAG., Nov. 1985, at 171.

49. *Westmoreland v. CBS, Inc.*, 596 F. Supp. 1170 (S.D.N.Y. 1984). The defense cost estimate is from Lankenau, *supra* note 48, at 171. See also J.C. Goodale, *Survey of Recent Media Verdicts, Their Disposition on Appeal, and Media Costs* in MEDIA INSURANCE AND RISK MANAGEMENT 69 (J. Lankenau ed. 1985).

50. Kaufman, Johnston & Sackler, *supra* note 46, at 27 n.41. Other estimates run as high as over \$200,000. See Cook, *supra* note 5, at 278.

51. Many small publishers are unable to afford libel insurance. See Massing, *Libel Insurance: Scrambling for Coverage*, COLUM. JOURNALISM REV., Feb. 1986, at 35. The Alton Telegraph was forced into bankruptcy by libel loss. See *Green v. Alton Tel. Printing Co.*, 107 Ill. App. 3d 755, 438 N.E.2d 203 (1982). For an account of the litigation, see T. LITTLEWOOD, *COALS OF FIRE: THE ALTON TELEGRAPH LIBEL CASE* (1988). The need for

The real question for the media is: Is the potential savings in litigation costs from a declaratory judgment alternative worth the loss of the constitutional privilege, with its concomitant high probability of a media win? For most media defendants, I doubt it. The proponents of these reform proposals picture the declaratory judgment action as a simple, relatively low-cost determination of truth or falsity. But is that accurate? It seems to me that, for many cases, the reform advocates grossly underestimate the difficulty of determining truth or falsity. As I indicated earlier, inaccuracies in a publication do not necessarily render a publication false—the “gist” or “sting” of a story may still be substantially true.<sup>52</sup> Truth and falsity are not simple axioms to be demonstrated, but are often highly controversial findings over which lawyers will spill blood.

Further, the plaintiff must prove a false statement of *fact*. Opinion is fully protected both under the proposed Libel Reform Act and as a matter of constitutional law.<sup>53</sup> Those of you who regularly read libel cases know the controversy and uncertainty of the fact/opinion distinction. It has become one of the

special consideration of the problems posed for small publishers by libel litigation has been noted. See Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F.L. REV. 1, 14-22 (1983); Nagel, *How to Stop Libel Suits and Still Protect Individual Reputations*, WASH. MONTHLY, Nov. 1985, at 12.

52. See *supra* notes 16-21 and accompanying text. Johnson & Kaufman, *supra* note 47, at 4, observe that “[t]he declaratory judgment proposal, among other conceptual deficiencies fails to recognize that the most seriously litigated libel disputes do not focus on readily ascertainable matters of truth or falsity, but rather on the quite debatable implications of competing interpretation of controverted facts . . . .” They add that “[l]itigating truth/falsity . . . is usually if not always more costly than litigating fault . . . .” *Id.* at 6. Cameron DeVore, a noted media defense attorney, similarly notes: “Evidence of ‘truth’ is almost always the most costly component of libel defense.” The Annenberg Libel Proposal, unpublished paper, Dec. 12, 1988, at 4 (on file at the University of Michigan Journal of Law Reform). Criticizing the Annenberg proposal, he warns that “[w]hen a subject complains about a big story that the media *believes* to be true but (like most big stories) might have difficulty proving to be true in a court of law, the media would be faced with a Hobson’s choice. It would either have to throw in the towel and retract, or likely be remitted to a trial where ‘truth’ would be determined by a judge, winner take all.” *Id.* See also Radoff, *Defining the Sullivan Decision*, ERROR & PUBLISHER, April 15, 1989, at 9-10, (citing similar reactions of a number of media attorneys to the Annenberg proposal).

But see R. BEZANSON, G. CRANBERG, & J. SOLOSKI, *LIBEL LAW AND THE PRESS: MYTH AND REALITY* 106-07 (1987), who argue that it is the element of fault that provides the most significant element of litigation costs. But, at the present time, it is plaintiff’s inability to prove fault that permits early dismissal of most libel litigation. If fault is removed as the dispositive issue, it is probable that truth or falsity would be litigated in far more cases than it is presently.

53. See Act, § 2. In *Gertz*, 418 U.S. at 339-340, the Court stated: “Under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”

most controversial issues in libel litigation.<sup>54</sup> And the fact/opinion distinction will continue to be a virulent source of controversy in a declaratory judgment action.

I believe that removal of the fault issue, in most cases, will simply redefine the litigation—truth or falsity will become the focus of the battle. I have great faith in lawyers to fill any vacuum created by the loss of a legal issue. If fault is no longer an issue, lawyers will see to it that truth or falsity rises in its place. Moreover, if the press loses on the truth or falsity issue, the media will pay the plaintiff's attorney fees and other costs.<sup>55</sup> The reality is that the media is likely to lose much more often on truth and falsity, deprived of the fault buffer provided by the *New York Times* privilege.

In addition to the clear costs resulting from all of these no-fault, declaratory judgment reform proposals, the reforms also pose additional *risks* for the media. One is sort of a generic risk posed by any legislative reform. The media becomes very uptight whenever its interests become the focus of legislative, and especially state legislative, action. Even if the proposed Libel Reform Act were acceptable to the media as written—which it is not—media advocates are not certain that the proposal would stay “as written” when it reaches the legislative arena. Upsetting the delicate tradeoffs underlying a reform act might well create a law with significant chilling effects on press freedom. Put sim-

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54. For example, consider whether epithets such as “scam,” “scab,” “sleazebag,” “insane,” “Mafia kingpin,” constitute statements of fact or opinion. Perhaps the most widely used test for distinguishing fact from opinion looks to the “totality of the circumstances” to determine whether “the average reader” would view the statement as fact or opinion. In deciding such an issue, a court should consider the common usage or meaning of the specific language, its verifiability, the full context of the statement and the setting in which it appears. *Ollman v. Evans*, 750 F.2d 970, 979 (D.C. Cir. 1984) (en banc), cert. denied, 471 U.S. 1127 (1985). See *Janklow v. Newsweek*, 788 F.2d 1300 (8th Cir.) (en banc), cert. denied, 479 U.S. 883 (1986), adopting *Ollman's* four part test and adding, from Judge Bork's concurrence in *Ollman*, consideration of the function of the statement, i.e., does it contribute to maintaining a vigorous political arena.

55. Act, § 10. The award of attorney's fees against the defendant, absent any proof of fault, again raises the question of the constitutionality of the proposed Libel Reform Act. See *supra* note 33. The threat of heavy litigation costs when the issue of truth or falsity is especially unclear could produce the “chilling effect,” stressed in *New York Times v. Sullivan*. Professor Smolla, director of the Annenberg project, argues: “If the net “chilling effect” of all of the provisions of the comprehensive new reform structure would be less than that of the old system (including *New York Times* and *Gertz*) then the fee-shifting device should be constitutional.” Smolla, *supra* note 47, at 11. He draws support for the proposal's constitutionality from the judicial treatment of the Civil Rights Attorneys' Fees Awards Act of 1976, allowing attorneys' fees even against a defendant who enjoys immunity from damages. However, it is questionable that the common law immunity enjoyed by officials is comparable to the first amendment privilege fashioned in *New York Times* and its progeny.



ply, the media does not trust legislators. They believe, rightly or wrongly, that a number of legislators are waiting out there with their axes honed ready to do violence to the press. Courts seem a far friendlier preserve in which to do battle for first amendment freedoms.<sup>56</sup>

Another risk for the media is increased libel complaints by plaintiffs. Plaintiffs under the reform acts would have an opportunity to win by establishing falsity and, if they win, of shifting their costs to the defendant. An Iowa Libel Research Project claims that most libel plaintiffs do not really want money, but instead seek vindication of their reputation, or vengeance.<sup>57</sup> If that is true, a system that affords plaintiffs a meaningful chance to secure vindication by a retraction, or a declaration of falsity, could stimulate increased libel complaints. I doubt many editors, especially those at the smaller newspapers, will look kindly on such a risk.

Furthermore, how will the publishers, editors, and journalists respond to the proposed Libel Reform Act if it were enacted? I would like to believe that media such as the *New York Times*, CBS and NBC, *U.S. News*, or that other magazine—I forget the name, but it has something to do with clocks—would be just as careful in prepublication review. But “the media” is not homogeneous—there are a variety of different entities that make up “the media.” How will some of the “less reputable” publishers respond? Under the proposed Libel Reform Act, such publishers could eliminate any chance of damages through a retraction or a simple default at the beginning of the declaratory judgment stage—a cheap, effective way of eliminating complaints. Indeed, even libel insurance would probably be unnecessary with such a low-cost option available.

I have been looking at these reform proposals from the media's perspective. But lawyers who represent libel plaintiffs have not been especially enthusiastic for these proposals. The Iowa Project's claims notwithstanding, many libel plaintiffs *do* want

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56. See Johnson & Kaufman, *supra* note 47, at 6. An extreme statement of this feeling is the reaction of Don Reuben, a leading media lawyer, to the Annenberg project: “I don't want anything that a legislature gives me . . . [t]hey could screw up a three-car funeral. I'd rather leave it up to the courts. The courts gave you *New York Times* (protections).” De Vincenzo, *Libel Law Under Scrutiny*, Newport News, Va. Press, February 13, 1989, at B3.

57. Bezanson, Cranberg & Soloski, *supra* note 52, at 93. See Bezanson, *The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get*, 74 CALIF. L. REV. 789 (1986); Soloski, *The Study and the Libel Plaintiff: Who Sues for Libel?*, 71 IOWA L. REV. 217 (1985).

money.<sup>58</sup> Indeed, for a number of libel plaintiffs who suffer actual damage to reputation, particularly provable economic loss, from a libelous publication, money provides vital compensation.<sup>59</sup> And yet, under the Annenberg proposal, no matter how much injury to reputation and economic damage the plaintiff suffers, no matter how wrongful the conduct of the defendant, the plaintiff can be barred from a damages action. Intentional libel resulting in provable economic harm could be redressed only by a declaration of falsity.

Consider the case of a young attorney, Kid Lawyer, recently out of law school, who leaves the big city and goes to a small community. She soon begins a successful practice. But the other lawyer in town, who has enjoyed a monopoly on the legal business for forty years, is not happy. He has a friend who owns the local newspaper. He gets him to run an article, loaded with defamatory, harmful statements about Kid Lawyer. Kid Lawyer's shingle is soon hanging low. What can she do? Under the Act, very little. She is limited to seeking a retraction or reply or a declaration of falsity. This is little solace for her economic loss.

Of course, if you do not believe in any law of libel, this scenario might not be troubling. For you, absolute privilege may be the price we pay for a free press. But if you believe, as I do, that reputation is a valuable personal interest deserving of legal protection, and/or that the press can abuse its constitutional position, then you may well conclude that there is a need for some law of libel. Admittedly, such libel law must provide adequate protection to the press against excessive chill. *New York Times* and its progeny have provided such a balance. It is not a perfect

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58. Bezanson, Cranberg & Soloski, *supra* note 52, at 93. At a conference held on the Annenberg proposal on February 13, 1989 in Washington, D.C., media lawyers and other media representatives present, including this author, seriously questioned the Iowa Study's finding on plaintiffs' motivations. Consider the following observation of Gilbert Cranberg, a founder of the Iowa project:

Establishing motive in libel is especially complex given the frequently intangible character of the harm; the role played by anger and the desire to punish; the way objectives shift over time; the satisfaction people get merely by suing; and the influence of lawyers, whose interests may not be congruent with those of their clients.

*In Libel, Money Isn't Everything*, Wall St. J., July 13, 1989, p. A14.

59. Both Franklin, *A Declaratory Judgment Alternative to Libel Law*, 74 CALIF. L. REV. 809, 836-842 (1986) and Cook, *Reconciling the First Amendment With the Individual's Reputation: The Declaratory Judgment as an Option for Libel Suits*, 93 DICK. L. REV. 265, 295-303 (1989), while advocating a declaratory judgment alternative to libel damages, reject giving the defendant an option to convert the damages claim. On the other hand, the Schumer bill, *supra* note 4, the Barrett article, *supra* note 5, and the Annenberg Proposal, *supra* note 2 (citing the need for effective press freedom), would afford defendants a conversion option.

balance, and many of the separate proposals of the Annenberg Project are most attractive. For example, elimination of punitive damages, retraction laws limiting plaintiffs to special or reputation-based actual damages, and some form of neutral reportage privilege would be desirable changes in libel law. But the Libel Reform Act's declaratory judgment proposal is unacceptable.

I would suggest that a better approach, at least as an initial step, is to make the declaratory judgment truly optional. Only if both parties agree to forgo the fault-based damages action, in favor of a no-fault, declaratory judgment action to determine truth or falsity, would that track be used. In other words, either party could veto the use of the declaratory judgment option.<sup>60</sup>

If it is true, as reform proponents claim, that many plaintiffs out there are only seeking vindication of their reputation, one could expect that they would opt for the declaratory judgment route. If, as reform proponents also claim, the declaratory judgment route would benefit many media defendants, especially smaller media threatened by heavy litigation costs and damages, one could expect them to follow their self-interest and elect the declaratory judgment option. These interests may or may not coalesce. However, the no-fault, no damages, declaratory judgment option would never be imposed on the parties. Such an approach would have the advantage of providing a trial of reform, without excessively distorting the present structure of libel law.<sup>61</sup> If the option is mutually elected and works in some cases, it can be expected that it would be more frequently used.

I admit that this proposal is not as exciting as a total restructuring of the law. It may, in fact, produce only minimal change. But I believe it is preferable to proposals that simply force a predetermined structure on the variety of plaintiffs and defendants involved in libel litigation. It is preferable to proposals that abandon the *New York Times* balance in favor of a questionable legislative experiment that restructures libel law.

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60. My proposal is analogous to the National Libel Dispute Resolution Program at the University of Iowa. While the Iowa program involves a no fault, no damages private proceeding, agreed to by both parties, I would employ the adjudicative structure already in place. It should be noted that the Iowa project had not gotten any cases during its first year of operation. Stein, *Libel Resolution Program Off to a Slow Start*, EDITOR & PUBLISHER, Dec. 10, 1988, at 18.

61. The question of whether libel reform should occur through federal or state law is troubling. The Annenberg Proposal leaves the issue undecided by providing alternative formulations. Act § 14. A federal law would avoid the forum shopping dangers of a state-by-state approach. But a federal law would also preempt the libel law of the states, thus losing the values found through state experimentation. Compare Franklin, *supra* note 5, at 818-19 (opting for state reform) with Cook, *supra* note 5, at 292 (arguing that "[t]he declaratory judgment should be created through federal rather than state legislation").

## APPENDIX

## THE LIBEL REFORM ACT

## PREAMBLE

The purpose of this Act is to provide an efficient and speedy remedy for defamation, emphasizing the compelling public interest in the dissemination of truth in the marketplace. The provisions of this Act are intended to encourage the prompt resolution of defamation disputes through remedies other than money damages and should be liberally construed to accomplish that purpose.

## SECTION 1: SCOPE OF COVERAGE

*(a) One Cause of Action*

One cause of action, for defamation, shall exist for all claims based on publication of false defamatory statements. The cause of action for false-light invasion of privacy is abolished.

*(b) Publication Defined*

Publication is the communication of defamatory matter, intentionally or by negligent act, to one other than the person defamed.

*(c) No Distinction Between Media and Nonmedia*

The provisions of this Act shall apply without regard to the media or nonmedia status of the publisher.

## SECTION 2: FALSE DEFAMATORY STATEMENTS OF FACT REQUIRED

*(a) False Statements of Fact Required*

All actions for defamation must be based upon publication of false defamatory statements of fact of and concerning the plaintiff. No action may be based upon statements that are expressions of opinion.

*(b) Defamatory Defined*

A statement is defamatory if, as reasonably construed, it tends to injure the plaintiff's reputation.

*(c) Question for Court*

Whether the statements giving rise to the action are capable of being reasonably understood as defamatory statements of fact is initially a question of law to be decided by the court. If the court determines that the statements are capable of being reasonably understood as defamatory statements of fact, it shall be for the

trier-of-fact to determine whether the statements were actually so understood by recipients of the statements.

(d) *Factors to be Considered*

In determining whether the statements giving rise to the litigation are defamatory statements of fact or statements of opinion, the court and trier-of-fact shall consider:

(1) The extent to which the statements are objectively verifiable or provable;

(2) The extent to which the statements were made in a context in which they were likely to be reasonably understood as opinion or rhetorical hyperbole and not as statements of fact;

(3) The language used, including its common meaning, and the extent to which qualifying or cautionary language, or a disclaimer, was employed.

### SECTION 3: RETRACTION OR REPLY

(a) *Request as Prerequisite to Suit*

No action for defamation may be brought against any defendant, unless the plaintiff shall allege either:

(1) That the plaintiff made a timely and sufficient request for a retraction and the defendant failed to make a timely and conspicuous retraction; or

(2) That the plaintiff made a timely and sufficient request for an opportunity to reply, and the defendant failed to provide the plaintiff with a timely and conspicuous opportunity to reply or to make a timely and conspicuous retraction;

(3) That the plaintiff made a timely and sufficient request in the alternative for either a retraction or an opportunity to reply, and the defendant failed to make either a conspicuous retraction or provide the plaintiff with a conspicuous and timely opportunity to reply.

(b) *Retraction Defined*

A retraction is a good faith publication of the facts, withdrawing and repudiating the prior defamatory statements.

(c) *Reply Defined*

A reply is the publication of the plaintiff's statement of the facts.

(d) *Timely Request*

A timely request for retraction or reply is a request made within 30 days of the publication of the defamatory statements.

(e) *Requirements for Request*

A request for a retraction or reply must be made in writing and signed by the plaintiff or his authorized attorney or agent. It

must specify the statements claimed to be false and defamatory and must set forth the plaintiff's version of the facts.

(f) *Conspicuous Retraction*

A conspicuous retraction is a retraction published in substantially the same place and manner as the defamatory statements being retracted. The placement and timing of the retraction must be reasonably calculated to reach the same audience as the prior defamatory statements being retracted.

(g) *Conspicuous Reply*

A conspicuous reply is a reply written by the plaintiff and published in substantially the same place and manner as the defamatory statements to which the reply is directed. In the case of a broadcast, the defendant may read the reply or permit the plaintiff or his designate to read it. The defendant may require that the reply not exceed the length of the material in which the defamatory statements of and concerning the plaintiff were published, and that its form reasonably accommodate the nature of the medium in which it is to be published. The reply must be concise and limited to rebuttal of the defamatory statements.

(h) *Publication of Retraction or Reply in Customarily Designated Places*

When the defendant customarily publishes retractions, corrections or opportunities to reply in a designated place, publication of a retraction or reply in that place shall be deemed conspicuous if notice of the retraction or reply is published in substantially the same place and manner as the statements to which the reply or retraction is directed.

(i) *Options of Defendant*

Upon receipt of a request for a retraction, the defendant may satisfy the requirements of this Section only by publishing a retraction. Upon receipt of a request for an opportunity to reply, or upon receipt of a request in the alternative for either a retraction or opportunity to reply, the defendant may satisfy the requirements of this Section by electing either to publish a retraction or to provide the plaintiff with an opportunity to reply.

(j) *Timely Retraction or Reply*

To be timely, the publication of a retraction or reply must be made within 30 days of the request. In the case of a false and defamatory statement about a candidate for public office, however, the retraction or reply shall not be deemed timely unless it is published within a reasonable time under the circumstances prior to the election.

## SECTION 4: DECLARATORY JUDGMENT

### (a) *Declaratory Judgment Action Brought by Plaintiff*

Subject to the requirements of Section 3, a person who is the subject of any defamation may bring an action in any court of competent jurisdiction for a declaratory judgment that such publication was false and defamatory.

### (b) *No Damages Permitted*

No damages shall be awarded in such an action, and the filing of such an action for declaratory judgment shall forever bar the plaintiff from asserting or recovering for any other claim or cause of action arising out of the publication which is the subject of the action.

### (c) *Proof of Fault or State of Mind Not Required*

Neither the fault nor state of mind of the defendant shall be an element of such an action.

### (d) *Burden of Proof*

In any action for a declaratory judgment, the plaintiff shall bear the burden of proving by clear and convincing evidence that the publication was false and defamatory.

### (e) *Election of Defendant to Convert Action for Damages to an Action for Declaratory Judgment*

A defendant in an action for defamation shall have the right, at the time of filing its answer or within 20 days from the commencement of the action, whichever comes first, to designate the action as an action for a declaratory judgment. Any action designated by the defendant as an action for a declaratory judgment pursuant to this provision shall be treated for all purposes as if it had been filed originally as an action for a declaratory judgment by the plaintiff, and the plaintiff shall be forever barred from asserting or recovering for any other claim or cause of action arising out of the publication which is the subject of such action.

### (f) *Docket Priority*

Actions for declaratory judgments in defamation cases shall be granted priority over other civil actions in setting trial dates, and in all cases must be tried within 120 days of the filing of the complaint, unless the court makes an explicit finding on the record that such an expedited trial date is impracticable under the circumstances. The court may issue such orders as to discovery as are consistent with the expedited trial required by this Section.

## SECTION 5: NEUTRAL REPORTAGE

No cause of action for either a declaratory judgment or damages may be maintained for the reporting of false and defamatory statements involving matters of public interest or concern made by persons or entities other than the defendant if the persons or entities who made the statements are identified and the statements are accurately reported.

## SECTION 6: TRUTH OR FALSITY

### (a) *Burden of Proof*

In any action for defamation, whether for declaratory judgment or damages, the plaintiff shall bear the burden of proving by clear and convincing evidence that the defamatory statements of and concerning the plaintiff are false.

### (b) *Substantial Truth*

The plaintiff shall not be deemed to have met the burden of proof required by this Section if the defamatory statements are substantially true.

## SECTION 7: MINIMUM FAULT REQUIREMENTS

In all defamation actions for damages, at minimum the plaintiff shall bear the burden of proving, through clear and convincing evidence, that the defendant failed to act as a reasonable person under the circumstances.

## SECTION 8: PRIVILEGES

### (a) *Absolute Privileges*

Any cause of action for defamation maintained pursuant to this Act, whether for a declaratory judgment or for damages, shall be absolutely barred if the statements were made by:

(1) Judges, attorneys, witnesses, jurors, or other participants in any judicial proceeding;

(2) Legislators, attorneys, aides, witnesses, or other participants in any legislative proceeding; or

(3) Executive and administrative officials, attorneys, witnesses, or other participants in any quasi-judicial or quasi-legislative executive or administrative proceeding.

### (b) *Conditional Privileges Abolished in Declaratory Judgment Actions*

All conditional privileges are abolished in actions for declaratory judgment maintained pursuant to Section 4.

### (c) *Conditional Privileges in Damages Actions*

In actions maintained for damages, the defendant shall be given a conditional privilege for statements made:



(1) In the self-defense of the defendant's own legitimate interests;

(2) In furtherance of the legitimate interests of others;

(3) To protect a common interest between the defendant and the recipient of the communication; or

(4) To persons officially charged with the duty of acting in the public interest.

(d) *Abuse of Conditional Privilege*

No cause of action based upon statements encompassed by a conditional privilege may be maintained unless the plaintiff proves that the defendant abused the privilege. The privilege shall be deemed abused and forfeited if the defendant deliberately communicated the defamatory matter to persons other than those to whom communication was necessary to serve the interests giving rise to the privilege. If the communication was not made to persons other than those necessary to serve the interest giving rise to the privilege, then the privilege shall be deemed abused and forfeited only if the defendant published the defamatory statements with the knowledge of falsity or reckless disregard for truth or falsity.

## SECTION 9: DAMAGES

(a) *Libel and Slander Distinctions Abolished*

All distinctions among libel, slander, libel per se, libel per quod, slander per se and slander per quod are abolished.

(b) *Recovery Limited to Actual Injury*

In any action for damages, recovery shall be limited to reasonable compensation based on proof of actual injury. Presumed damages are abolished. Proof of special damages (specific, pecuniary, out-of-pocket damages) shall not, however, be required. Proof of damage to reputation is a prerequisite to any recovery of damages. If proof of reputational injury is established, the plaintiff may additionally recover damages for personal humiliation, anguish or emotional distress.

(c) *All Factors Considered*

In awarding compensatory damages for actual injury the trier-of-fact may take into account all factors relevant to the impact of the defamatory statement, including whether it was in written or oral form.

(d) *No Punitive Damages*

No punitive damages shall be permitted in any action for defamation.

**SECTION 10: ATTORNEYS' FEES**

(a) *In Litigating the Sufficiency of a Retraction or a Reply*  
The defendant may move to dismiss any action for defamation on the grounds that the plaintiff failed to comply with the requirements for a request for a retraction or reply set forth in Section 3, or on the grounds that the defendant either published a retraction or provided an opportunity to reply, in compliance with the requirements of Section 3. If the action is so dismissed, the defendant shall be awarded reasonable attorneys' fees. If the action is not so dismissed, attorneys' fees shall be awarded as otherwise provided in this Section.

(b) *In Declaratory Judgment Actions*  
In any action brought as a declaratory judgment or converted to an action for a declaratory judgment, the court shall award the prevailing party reasonable attorneys' fees. The court shall have discretion to deny or reduce the award of attorneys' fees to any prevailing party who litigated vexatious or frivolous claims or defenses.

(c) *In Damages Actions*  
In any action for damages, each side shall bear its own attorneys' fees, subject to the applicable general rules of the jurisdiction for civil litigation.

**SECTION 11: LIMITATIONS PERIOD OF ONE YEAR**

Any action for defamation must be commenced no later than one year after the first date of publication.

**SECTION 12: SINGLE PUBLICATION RULE**

An action brought pursuant to this Act shall be the exclusive remedy for all injury in all jurisdictions arising from the defamatory statement upon which the action is based.

**SECTION 13: SEVERABILITY**

The provisions of this Act are severable, and any judicial decision declaring any provision of this Act invalid shall not be deemed to invalidate other provisions of the Act.

**SECTION 14: PREEMPTION AND JURISDICTION***Alternative A—Federal Statute*

The provisions of this Act shall be preemptive of all applicable state laws governing defamation or false-light invasion of privacy. A cause of action pursuant to this Act may be brought in any state or federal court of competent jurisdiction.

*Alternative B—State Statute*

Except as otherwise provided herein, the provisions of this Act are preemptive of applicable prior law governing defamation or false-light invasion of privacy. A cause of action pursuant to this Act may be brought in any state or federal court of competent jurisdiction.