1987

Taking Libel Reform Seriously

Rodney A. Smolla
University of Arkansas Law School

Taking Libel Reform Seriously

by Rodney A. Smolla*

I. Introduction

If anything good has come from the proliferation of highly publicized and expensive litigation aimed against the media in recent years,[1] it is the encouragement of thoughtful contributions from plaintiffs, journalists, attorneys, law professors, and others, in symposia such as this one, to the task of reform.[2] Case by case, common law and constitutional law development has simply failed to produce a coherent, equitable system for redressing injury to reputation that nonetheless maintains sufficient breathing space for freedom of speech.[3] By almost all accounts, the law of

---

* Professor of Law, University of Arkansas, Fayetteville. Yale University (B.A., 1975); Duke University Law School (J.D., 1978).

1. Whether or not there has been an explosion of litigation against the media in *absolute terms*, measured purely by the number of filings, for example, is a question virtually impossible to answer with any existing hard data. Empirical research about defamation litigation is a relatively new science. We are gaining an increasingly accurate statistical portrait about libel litigation as it stands now, a portrait that stretches back about a decade in its coverage, but there is simply no elaborate data base for defamation litigation thirty, fifty, or seventy years ago. For empirical data on defamation litigation, *see generally*, Bezanson, Cranberg & Soloski, *Libel Law and the Press: Setting the Record Straight*, 71 Iowa L. Rev. 215 (1985); Franklin, *Suing the Media for Libel: A Litigation Study*, 1981 Am. B. Found. Res. J. 795 [hereinafter *Suing the Media*]; Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 Am. B. Found. Res. J. 455 [hereinafter *Winners and Losers*].

2. There is no room for doubt that whatever the quantitative increase in libel litigation may be, its qualitative impact on society in recent years has been dramatic. Today this impact is one of the dominant concerns of the press and of the press's critics. Libel litigation has been thrust from the obscure backwaters of the law of torts into a prominent topic of national conversation. *See generally*, R. Smolla, Suing the Press: Libel, The Media, and Power (1986). For a thoughtful essay on the evolution of modern libel litigation from one of the leading practitioners in the field, *see* B. Sanford, Libel and Privacy: The Prevention and Defense of Litigation 1-13 (1985).

3. *See, e.g.*, Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 83 Colum. L. Rev. 603 (1983); Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. Pa. L. Rev. 1 (1983).

defamation is in a doctrinal shambles and a practical morass—it doesn't make sense on paper or in practice; it satisfies neither plaintiffs nor defendants.[4]

All concerned should take suggestions for reforming the law of defamation seriously. There are several reasons why the time for change is ripe. First, we are beginning to learn a great deal more about how the system actually operates. Empirical work that people such as Professor Marc Franklin of Stanford[5] and Henry Kaufman of the Libel Defense Resource Center in New York[6] began several years ago has recently been supplemented by an enormously impressive empirical study from Professors Bezanson, Cranberg, and Soloski at the University of Iowa.[7] Second, the United States Supreme Court appears to be in the midst of a rethinking process about constitutional rules governing defamation, a process with mixed prospects from the media's perspective. The Court recently treated the press to a pair of victories. In *Philadelphia Newspapers, Inc. v. Hepps*,[8] the Court placed the burden of proof on the issue of truth on plaintiffs in private-figure cases, including issues of public concern.[9] In *Anderson v. Liberty Lobby, Inc.*,[10] the Court held that 'clear and convincing evidence' is the appropriate standard to determine whether there is a genuine triable issue on the existence of actual malice in a summary judgment motion.[11] Despite these two uptilts for the press, in what has otherwise been a largely downhill decade,[12] the most educated guess is that the Supreme Court will continue to narrow the first amendment protections that exist in the defamation area, returning more and more of the field to the common law.[13] From the media's perspective, there simply may be

---

4. For two recent compilations of views on the problems with libel litigation, *see* GANNETT CENTER FOR MEDIA STUDIES, THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS, Conference Report (1986) [hereinafter THE COST OF LIBEL]; 7 THE AM. LAW. (July/Aug. 1985) (Special pullout supplement including viewpoints by Steven Brill, Floyd Abrams, Harold Evans, Marc Franklin, John Kuhns, Jonathan Lubell, William Rusher, Thomas Sheilds, William Tavoulareas, William Thomas, Mike Wallace, and Bob Woodward).

5. *See Suing the Media* and *Winners and Losers*, *supra* note 1.

6. The Libel Defense Resource Center is a clearinghouse for information on libel litigation, issuing periodic reports and surveys; Henry Kaufman is the LDRC's Director.

7. *See* Bezanson, *et al.*, *supra* note 1. The final results of this study will be published in a book by Bezanson, Cranberg & Soloski, forthcoming in the spring of 1987.

8. 106 S. Ct. 1558 (1986).

9. *Id.* at 1563.

10. 106 S. Ct. 2505 (1986).

11. *Id.* at 2512.

12. *See, e.g.*, Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979); Hutchinson v. Proxmire, 443 U.S. 111 (1979); Herbert v. Lando, 441 U.S. 153 (1979); Time, Inc. v. Firestone, 424 U.S. 448 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

13. The process of "deconstitutionalizing" the law of defamation has already begun. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939 (1985) (holding that, in

little choice but to take the battle for protection to other forums. Finally, the general national debate over the mission and function of the tort system, conducted under the auspices of the catch phrase 'tort reform,'[14] has created a climate of ferment in which the very sorts of problems that, from the media's perspective, plague defamation litigation—for example, massive jury verdicts for intangible injury—are being addressed in the broader context of all tort litigation.[15]

Many reforms have been suggested: putting greater emphasis on retraction or equal time remedies, eliminating the actual malice standard, placing caps on all non-pecuniary damages, eliminating punitive damages, absolutely barring suits by high policymaking officials, making the losers pay the winners' attorney's fees, substituting some form of declaratory judgment remedy for money damages,[16] and others. Some of these proposals are reforms, some are regressions,—depending upon whom you ask and whose ox is gored.

Unfortunately, among many media interests there seems to be a degree of rigidity about all of this talk, a reflexive suspicion that the first amendment is going to be stealthily written away in the fine print, a tenacious clinging to *New York Times Co. v. Sullivan*, and a prayer for the longevity of the liberal members of the Supreme Court. While many of us hope that the *New York Times* decision is never overruled and that the vital extension of the *New York Times* actual malice standard to public-figure cases is never annulled,[17] we must also not shy away from the open-minded exploration of creative alternatives to the law of libel. We should begin to take the prospect of reform seriously and to make the most of it.

Two critical components to the more comprehensive reform packages have begun to surface during the debate. The first component suggests the substitution of some form of declaratory remedy for the traditional suit for money damages. The second proposes a requirement that, in some or all circumstances, the loser pays the winner's attorney's fees.

---

a private figure case not involving matters of public concern against a 'nonmedia' defendant, no first amendment restrictions on punitive or presumed damages apply). *See also* 12 MED. L. REP. (BNA) 1256, News Notes, Nov. 19, 1985 (comments of libel attorney John McCrory).

14. *See, e.g., Critical Issues in Tort Law Reform: A Search for Principles*, 14 J. LEG. STUD. 459-818 (1985) (Symposium of viewpoints on tort reform from a conference Yale Law School conducted).

15. On the 'liability crisis' that has generated this debate, *see* Brill, *The Not-So-Simple Crisis*, 8 THE AM. LAW. 1 (May 1986).

16. *See, e.g.*, Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747 (1984); LeBel, *Defamation and the First Amendment: The End of the Affair*, 25 WM. & MARY L. REV. 779 (1984); *see also* R. SMOLLA, *supra* note 2, at 238-57, and the sources cited *supra* note 4.

17. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Associated Press v. Walker, 388 U.S. 130 (1967).

This Article examines some of the issues these two ideas pose.

II. The Declaratory Judgment

If libel plaintiffs ultimately seek not money, but vindication of their reputation through a plain, speedy, and efficient remedy, and if defendants seek a system that is substantially less costly in legal fees and consumption of time and energy, then perhaps an entirely new remedial approach ought to be considered, one fashioned in some manner around the notion of a declaratory judgment. The idea is not completely new. My distinguished colleague, Professor Robert A. Leflar, has told me that, in the remote and picturesque Ozark Mountains of northwest Arkansas a century ago, there existed a form of declaratory judgment remedy for libel, which went by the quaint but certainly apt title, the 'lie-bill.' A defamed plaintiff would file the 'lie-bill' in court and attempt to establish that lies about him had been spoken. If he prevailed, the court drafted a judgment declaring the truth and forced the defendant to sign it.

The general approach of trading-in fault rules for a declaratory action centered on truth or falsity has begun to gather support from a number of quarters, including *New York Times* correspondent Anthony Lewis, Professor Marc Franklin of Stanford, United States Congressman Charles Schumer (D., N.Y.), Professors Bezanson, Cranberg, and Soloski of Iowa, and others.[18]

If any such reform is the product of legislation, and thus necessarily the result of compromise, each side will have to surrender some substantial advantage that it enjoys under the current system. The most obvious exchange is damages for fault. For plaintiffs, the barter would consist of their giving up any hope of money damages. For defendants, the quid pro quo would be the elimination of any fault standard (actual malice or negligence) as a buffer against liability. Little or no pretrial discovery (the most costly consumer of legal fees) would be permitted, and the truth or falsity of the defamatory accusations would be the focal point of the litigation. Several interesting proposals are currently at large, fleshing out the details of this sort of bargain.

A proposal by Professor Marc Franklin, who has long been one of the preeminent scholarly voices on the law of defamation, creates incentives for the litigants to lay their cards on the table and avoid litigation altogether through a negotiated settlement. Plaintiffs, as a condition to obtaining attorneys' fees if they prevail, must—in advance of filing the case—present all of their evidence to the defendants. Plaintiffs who do not prevail must pay the defense's legal fees. A retraction published or

---

18. *See* Bezanson, *et al.*, *supra* note 1, and the sources cited *supra* note 4.

broadcast prior to the suit (presumably after the defendant has been presented with the plaintiff's evidence) would absolutely bar the litigation. A retraction published after the litigation commenced would also terminate the case, but the defendant would pay the plaintiff's legal fees. Franklin would retain current statutory and common law privileges.[19]

Congressman Charles Schumer has proposed legislation to permit the plaintiff to sue for a declaratory judgment and further permit defendants an absolute right to convert any suit for money damages into a suit for a declaratory judgment.[20] Prevailing plaintiffs would be entitled to attorney's fees, unless defendants published a retraction within ten days of the entry of judgment. Schumer would also bar punitive damages in suits for damages, and in declaratory judgment actions he would deny plaintiffs attorney's fees if defendants demonstrated that they made reasonable attempts to ascertain the truth.[21] A proposal by California State Senator Lockyer contains a similar element barring plaintiffs recovery of attorney's fees in declaratory judgment suits when the defendant acted reasonably in first checking out the story.[22]

Analogous to the new use of instant replay in professional football games, the declaratory judgment idea offers much promise, but has quite a few bugs to be worked out. Professor David Anderson of Texas, for example, has raised a sticky question: Why wouldn't the prudent media defense attorney advise his or her client simply to default in any declaratory judgment suit brought against it?[23] The plaintiff would then receive a judgment that could be publicly waved about as proof that the media lied, but the judgment, in the absence of any contest, would be of ambivalent persuasive force (some might view it as a tacit concession of 'guilt' by the media defendant, while others might view it as a meaningless exercise of legal process), and of doubtful catharsis for the injured plaintiff.[24] Presumably, some incentive to litigate might be provided by the possibility of having to pay the plaintiff's legal fees. That sanction, however, ought to be relatively inconsequential, since attorney's fees for merely filing the suit and taking a default from the defendant normally would be minimal.

A second potential difficulty in the declaratory judgment approach centers around the inclusion of fault issues to determine whether a plaintiff's legal fees are recoverable. To bring fault issues back into the litigation on

---

19. *See* THE COST OF LIBEL, *supra* note 4, at 19.

20. *Id.*

21. *Id.*

22. *Id.*

23. Remarks of Professor David Anderson delivered at conference on libel litigation at the Marshall-Wythe School of Law, College of William & Mary, Institute of Bill of Rights Law, in June 1986.

24. *Id.*

the attorney's fees question would seem to undermine one of the principal attractions of the declaratory judgment reform—the streamlining of the litigation by eliminating fault issues. The existence or nonexistence of fault has proven to be an enormously complex and costly litigation issue in libel trials, and precisely the sort of issue that the declaratory judgment action is best engineered to avoid.

A third potential problem with the declaratory judgment concept is that its promise of providing a civilized vehicle for vindicating reputation in a forum of streamlined efficiency is only likely to be fulfilled when the litigants do not hotly contest the question of truth. It would work marvelously well in a suit such as that Carol Burnett brought, for example, where the *National Enquirer* had manufactured its sensationalized story essentially out of whole cloth and was caught red-handed in a lie.[25] The declaratory judgment would accomplish far less, however, in cases in which the litigants have diametrically opposed notions as to what the truth is and cling to their respective versions with emotional tenacity. In both *Westmoreland v. CBS, Inc.*[26] and *Sharon v. Time, Inc.*,[27] the real 'truth' was highly elusive. Throughout the litigation in both cases, the media defendants vigorously maintained that they had gotten their stories correct, while plaintiffs protested vehemently that they had been the victims of callous lies.[28] To the extent that, contrary to General Westmoreland's express wishes, *Westmoreland* evolved into a suit over the symbols and lessons of Vietnam, the case obviously transcended the functional capability of the judicial process, to a point that no declaratory judgment action alone could remedy. Similarly, to the extent that *Sharon* degenerated into the life and times of Ariel Sharon, including a plebiscite on whether *Time* was anti-Israel or Sharon a terrorist masquerading as a statesman, it too lost touch with any version of 'truth determination' likely to be triable in a perfunctory declaratory judgment hearing.

The libel suit is a high-visibility tort because it is often initiated by high-visibility plaintiffs. Given the distressing reality that the controversies that trigger major libel suits often concern dramatically different versions of events, and the tendency of both plaintiffs and defendants to get caught up in the emotions of the moment and become even more psychologically convinced that *their* truth is *the* truth, we should not expect the

---

25. *See* Burnett v. National Enquirer, Inc., 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983); R. SMOLLA, *supra* note 2, at 100-17.

26. 596 F. Supp. 1170 (S.D.N.Y. 1984) (decision denying summary judgment), *aff'd*, 752 F.2d 16 (2d Cir. 1984).

27. 599 F. Supp. 538 (S.D.N.Y. 1984).

28. *See* R. ADLER, RECKLESS DISREGARD (1986); R. SMOLLA, *supra* note 2, at 80-99, 198-237; Adler, *"Annals of Law (Two Trials—Part I)"* THE NEW YORKER, June 16, 1986, at 42; Adler, *"Annals of Law (Libel Trials—Part II)"* THE NEW YORKER, June 23, 1986, at 34.

declaratory judgment solution, by itself, to solve everything. Indeed, since determining the truth or falsity of the defamatory charges in a sharply contested case may often concern exceptionally complex evidentiary disputes—in *Westmoreland* there were hundreds of thousands of documents through which to sift—it is somewhat difficult to imagine how the truth issue can be litigated with any semblance of orderly due process without permitting at least some meaningful discovery.

Finally, any new reform mechanism fashioned along the declaratory judgment model would be faced with at least a modicum of uncertainty as to its constitutional validity. The reform proposals are all grounded in the assumption that the Supreme Court would treat the declaratory judgment remedy as so radically different from the conventional tort suit for damages that it deserves exemption from the fault rules emanating from *Dun & Bradstreet*,[29] *New York Times*, and *Gertz*.[30] In fact, suits tried under the actual-malice standard already at times take on the functional equivalence of a declaratory judgment. When William Shockley sued the *Atlanta Constitution* for a story concerning his controversial and unpopular views on race and genetics, Shockley won the case but received a jury award of only one dollar—the jury's 'declaration' was apparently that the *Constitution* had indeed told a falsehood in equating Shockley's theories with Nazi Germany.[31] As to *what else* the one dollar award signified, either about the jury's perception of Shockley or the law of libel, each of us may freely speculate.

A media defendant who was bent on challenging the constitutionality of the proposed declaratory judgment mechanism would by no means have a frivolous case. If the defendant were forced to pay substantial attorney's fees, for example, the argument might well be pressed that the fee award is indistinguishable from an award of damages. To use a recent example, the jury award of punitive damages in Mobil Oil President William Tavoulareas' celebrated suit against the *Washington Post*[32] was set at the figure Tavoulareas had given to the jury on his attorney's fees.[33] A media defendant who was forced to pay two million dollars in attorney's fees to the plaintiff in a public figure case in which a protracted litigation battle over the truth took place could quite plausibly claim a constitu-

---

29. 105 S. Ct. 2939 (1985).

30. One of the refreshing components of the Mercer Law Review Lead Articles II Symposium on Libel is that the editor explicitly invited the authors not to submit traditional, heavily footnoted law review pieces, but instead invited them to express their viewpoints more succinctly. The usually obligatory history of the law of defamation from *New York Times* until today that would typically be inserted here is, thus, mercifully omitted.

31. Shockley v. Cox Enters., 10 Media L. Rep. (BNA) 1222 (N.D. Ga. 1983).

32. Tavoulareas v. Washington Post Co., 759 F.2d 90 (D.C. Cir.), *reh'g en banc granted*, 763 F.2d 1472 (D.C. Cir. 1985).

33. 759 F.2d at 137.

tional right to the protection of the actual malice standard.

Perhaps those proposals that excuse the defendant from liability for attorney's fees if the defendant publishes or broadcasts a prompt retraction would cure this constitutional objection. Plaintiffs might maintain, however, that the problem with the retraction/no attorney's fees solution is that it may leave the plaintiff with a remedy more expensive than it was worth. The prospect of spending hundreds of thousands or millions of dollars on an attorney to receive merely a retraction may make the libel suit the exclusive province of those lucky enough to be seen on *Lifestyles of the Rich and Famous*. If the alternative route of making the defendant pay attorneys' fees only if actual malice or negligence is established (depending on the public or private status of the plaintiff and the speech) cures the potential constitutional defect, there remains the problem previously alluded to, that most of the time and cost savings of the declaratory judgment action will have been lost.

From the other side of the coin, plaintiffs may have some constitutional objections of their own. The single most popular Supreme Court quotation in the area of libel litigation these days is the stirring language of Justice Stewart,[34] which treats protection of reputation as one of the essential attributes of any decent system of ordered liberty:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.[35]

Might plaintiffs, tracking this language, convincingly maintain that elimination of traditional defamation tort suits for money damages deprives them of their only meaningful remedy for vindicating their essential dignity and worth, violating the due process clause? The due process clause violation argument might conceivably work to strike down some reforms at the state level. The courts have occasionally interpreted due process principles or similar provisions derived from state constitutional law in this manner.[36] The argument should fail, however, under a federal consti-

---

34. Rosenblatt v. Baer, 383 U.S. 75 (1966) (Stewart, J., concurring).

35. *Id.* at 92.

36. The Montana Supreme Court recently struck down a legislatively enacted cap on damages as violating the Montana Constitution. Pfost v. Montana, 713 P.2d 495 (Mont. 1985). *See generally, Cap on Tort Damages Violates Montana State Constitution*, 29 ATLA L. REP. 52 (1986).

tutional analysis. The United State Constitution should not be read to freeze the evolution of common law doctrine. The federal due process clause cannot be read as a guarantee of perpetual state recognition of traditional common law rights and remedies. Justice Thurgood Marshall once explained the issue quite well:

> Appellants' claim in this case amounts to no less than a suggestion that the common law of trespass is not subject to revision by the State . . . . If accepted, that claim would represent a return to the era of *Lochner v. New York*, . . . when common-law rights were also found immune from revision by State or Federal Government. Such an approach would freeze the common law as it has been constructed by the courts, perhaps at its 19th-century state of development. It would allow no room for change in response to changes in circumstances. The Due Process Clause does not require such a result.
>
> On the other hand, I do not understand the Court to suggest that rights of property are to be defined solely by state law, or that there is no federal constitutional barrier to the abrogation of common-law rights by Congress or a state government. The constitutional terms "life, liberty, and property" do not derive their meaning solely from the provisions of positive law. They have a normative dimension as well, establishing a sphere of private autonomy which government is bound to respect. Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way. Indeed, our cases demonstrate that there are limits on governmental authority to abolish "core" common-law rights, including rights against trespass, at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.[37]

Although the complete abolition of all legal avenues of reputational redress for all plaintiffs might conceivably raise due process objections (though even that claim is problematic), certainly the retention of some form of remedy through the declaratory judgment mechanism ought to save the declaratory judgment reform from constitutional infirmity.[38] Finally, the plaintiffs would be faced with the embarrassing fact that the Supreme Court has already held, in *Paul v. Davis*,[39] a due process case

---

37. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 93-94 (1980) (Marshall, J., concurring).

38. To the extent that Justice Marshall's formulation from *Pruneyard* may be distilled into a constitutional test, the abolition of 'core' common law rights, such as the suit for defamation, would only violate due process if 'no reasonable alternative remedy' were established or 'no compelling necessity' existed. The declaratory judgment remedy is certainly a reasonable alternative remedy, which is all that due process requires.

39. 424 U.S. 693 (1976). The *Paul* ruling ran contrary to a number of prior decisions that did seem to make reputation a liberty interest sufficient to trigger due process protections. *See* Wisconsin v. Constantineau, 400 U.S. 433 (1971); Jenkins v. McKeithen, 395 U.S. 411

written by Justice Rehnquist, that reputation alone is not a 'liberty interest' encompassed within the protections of the due process clause.[40] Given the holding in *Paul*, a state's decision to make alterations in the manner in which it chooses to protect reputation certainly would not violate due process.[41]

A plaintiff might formulate an attack of a more scaled-down nature aimed at the lack of adequate discovery. The argument would assert that the state, having once recognized an interest in reputation by creating at least a declaratory judgment remedy, should be forced to provide sufficient time and procedural resources, through normal discovery devices, to allow the plaintiff to prepare the case adequately. The need for discovery would be particularly acute when the defendant possesses information vital to ferreting out the truth. Ultimately, however, this argument is not promising. Liberal discovery rules are a relatively modern procedural invention and, though certainly enlightened, generally have not been thought compelled by the due process clause. In fact, in the criminal justice system, discovery procedures remain substantially less expansive than in civil trials, despite the heightened due process concerns that exist in the criminal context.

An absolutely stark prohibition on all discovery, even if constitutional, might well be overkill. Without some opportunity for discovery, attorneys will be tempted to launch fishing expeditions at trial. If the lawyer for either the plaintiff or defendant is convinced that the other side has a smoking gun that has not been revealed, he or she will make vigorous efforts to bring that out at trial. Time saved in pretrial discovery may be lost in the more cumbersome processes of the courtroom. Furthermore, it seems somewhat odd that in the very type of litigation in which an alleged lie sits at the heart of the controversy, we would turn back the clock of civil procedure to the days when pretrial discovery did not exist, and courtroom gamesmanship, bravado, and the element of surprise were the principle engines of truth.

III. Legal Fees

From the media's perspective, the 'big chill' in libel litigation comes more from legal fees than from jury verdicts that actually survive appel-

---

(1969); Cafeteria Workers v. McElroy, 367 U.S. 886 (1961); Wieman v. Updegraff, 344 U.S. 183 (1952); Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123 (1951).

40. 424 U.S. at 711-12. *See* Smolla, *The Displacement of Federal Due Process Claims by State Tort Remedies*: Parratt v. Taylor *and* Logan v. Zimmerman Brush Company, 1982 U. Ill. L. Rev. 831, 836-47.

41. 424 U.S. at 711-12.

late review.[42] As Henry Kaufman of the Libel Defense Resource Center has stated, "The shouting in libel today is about the cost of litigating even the ninety percent or more of libel claims that the media win. And that cost is onerous and getting worse."[43] As the meters tick away in the lush offices of prestigious law firms in New York, Chicago, Los Angeles, Washington, San Francisco, or Atlanta, to the pricy tune of two or three hundred dollars an hour, the legal fees for defending libel suits run to the hundreds of thousands, or even millions, of dollars.[44] The American Society of Newspaper Editors estimates the average cost of defending a libel case as $95,000; some insurance carriers place the average at above $150,000 per case.[45] The libel insurance market, in fact, has been increasingly unstable because plaintiffs are managing to extract their pound of flesh through staggering legal expenses.[46] The McClatchy Newspaper chain has estimated its legal fees as over one million dollars per year;[47] estimates for CBS's legal fees in *Westmoreland* are reportedly between five and ten million dollars, and in *Herbert v. Lando*[48] between three and four million dollars; in both cases CBS 'won.'[49] Legal fees comprise eighty percent of the aggregate costs of defending suits against the press with the remaining twenty percent representing actual payments for jury awards and settlements.[50] The costs of defending suits have risen exponentially since the 'bad old days' before *New York Times Co. v. Sullivan*.[51]

One of the intriguing aspects of virtually all reform programs is that they provide for some sort of mechanism whereby the loser pays the winner's legal fees, at least in some circumstances. Such a change should be a component in any systematic libel reform effort.

Unlike the English system, of course, the traditional American rule is that each side in civil litigation pays its own legal fees—win, lose, or draw. Because media defendants in libel litigation ultimately win ninety percent of all cases after appeal, while often spending crippling sums to get those victories, the message is quite clear: if punishment is the motive, plaintiffs do not have to win to win, and whatever the parties' motives, defendants do not have to lose to lose.

---

42. R. SMOLLA, *supra* note 2, at 74.
43. THE COST OF LIBEL, *supra* note 4, at 2.
44. *See* R. SMOLLA, *supra* note 2, at 74-76.
45. THE COST OF LIBEL, *supra* note 4, at 3.
46. *See generally*, PRACTICING LAW INSTITUTE, MEDIA INSURANCE AND RISK MANAGEMENT (J. Lankenau, Chairman) (1985).
47. R. SMOLLA, *supra* note 2, at 75.
48. 441 U.S. 153 (1979).
49. 596 F. Supp. at 1178; 441 U.S. at 177.
50. R. SMOLLA, *supra* note 2, at 74-76.
51. *See* THE COST OF LIBEL, *supra* note 4, at 3 (citing *New York Times Co.*).

The traditional American system is classically defended as insuring equality of access to courts because each side pays its own legal fees. The contingency fee system, through which plaintiffs' attorneys take cases for a percentage of the recovery, augments this access. If the quality of justice should not depend on how much money a person has, an impecunious plaintiff with a legitimate claim should not be deterred from pursuing vindication for lack of ability to hire a lawyer or because of the intimidating prospect of having to pay the defendant's lawyer if the plaintiff should lose. The tort reform movement, on the other hand, has fueled increasing criticism of the American legal fee system, particularly the contingency fee, on the theory that lawyers flame the fires of litigation to generate more fees. The traditional system has deep roots, however, and the powerful appeal of egalitarian access to judicial relief.

Nevertheless, we have frequently made the societal choice to alter the rule in defined classes of cases when special policy considerations merit some adjustment in the usual balance of litigation incentives. The statutory authorization for recovery of attorney's fees in federal civil rights cases,[52] for example, reflects the judgment that the interest in vindicating such values as racial and sexual equality are best served by the additional incentive to avoid discrimination posed by the threat of paying a plaintiff's attorney's fee if such charges are established.

In the case of libel litigation, two substantial arguments favor a rule in which the loser pays the winner's attorney's fees. The first is the destruction of first amendment values inherent in a system in which media defendants routinely pay severely punishing attorney's fees to defend themselves in cases they almost always win. The very chilling effect on free expression that *New York Times* was designed to avoid has come back with redoubled force through attorney's fees incurred in the process of litigating the *New York Times* standard.[53] A second reason for requiring the losing side to pay the winner's legal fees is more subtle; it deals with the unique psychology of defamation suits. Both plaintiffs and defendants, at times, begin to lose touch with reality in libel litigation. For some plaintiffs, a reputational wound may cut so jaggedly into the psyche that the plaintiff flails back wildly and desperately, even when the knifing edge of the story is substantially true. This phenomenon is nothing new; there appears to be an element of therapeutic catharsis, even when the fight is futile. Oscar Wilde's famous defamation suit against the Marquis of Queensbury is one of history's more poignant examples. Wilde, while still married, was the gay lover of Lord Alfred Douglas, the son of the Marquis of Queensbury. Wilde sued the Marquis for libel after the Mar-

52. 42 U.S.C. § 1988 (1982).
53. R. SMOLLA, *supra* note 2, at 239-41.

quis disclosed the affair. Wilde even lied to his own attorneys in denying the charges. The real truth came out in the litigation (as it had to, for Wilde and Douglas apparently had not been particularly discreet), and Wilde lost the case and then spent two years in prison because of the activity. He never really recovered from the tragedy; the legacy of the trial was a shortened life and squandered talent.[54]

One need not be as tragically lost as Oscar Wilde to miscalculate one's chances in a defamation suit. When the truth is ambiguous and the reputational damage severe, it is only human nature to shore up one's defenses as best one can and to begin to convince oneself of a purer, sanitized, more self-serving version of reality.[55] Experience also tells us that media defendants are at times irrationally defensive about their stories.[56] Insecure reporters may retreat into defensive shells worthy of comparison with Watergate's best stonewalling. Editors may be arrogant, or reflexively loyal to reporters, or simply too frenetically hassled to give the complaining victim of the story anything but the run-around. As one editor puts it: "Newspapers are reluctant to acknowledge complaints. We're defensive about it. Nobody likes to be criticized . . . . There's anger that somebody would question us. My immediate reaction is to be defensive about it.[57] While much of a story may be true, there may be nuances in tone or errors of small details that prove offensive to the plaintiff, and the media defendant may lack the sensitivity necessary to appreciate the plaintiff's outrage. Once lawyers are brought in, and first amendment principles are righteously asserted, there may be a hopeless polarization. Each side will 'get its back up,' and a dispute that might have been avoided by earnest negotiation—through a correction, or an opportunity for the plaintiff to present an opposing view, or simply through a dialogue in which the would-be plaintiff feels he or she has been listened to sincerely—results in protracted litigation. We know from the research conducted in the Iowa study that many plaintiffs at least state, when questioned, that they would not have sued the media defendant had they been treated with more courtesy, diplomacy, and understanding when they first brought their complaint to the defendant's attention.[58]

From the media's perspective, of course, there are limits to how courte-

---

54. *See generally* H. HYDE, THE TRIALS OF OSCAR WILDE (1948).

55. R. SMOLLA, *supra* note 2, at 239-41.

56. Remarks of Professor Gilbert Cranberg delivered at conference on libel litigation at Marshall-Wythe School of Law, College of William & Mary, Institute of Bill of Rights Law (June 1986).

57. Dan Foley, Managing Editor of the Quad City Times, Davenport, Iowa (quoted in Bezanson, *et al.*, *supra* note 1, at 223 (section written by Prof. Cranberg)).

58. *See generally* Bezanson, *et al.*, *supra* note 1, at 224-25 (section written by Prof. Cranberg).

ous and accommodating one can be. It is easy enough to be compassionate to the private individual swept into the newspapers for the first time in his or her life. A thoughtful dialogue with such a person after a complaint does not extract a great toll from the newspaper (certainly less than litigation) and may often be effective.

When the would-be plaintiff is a powerful public official or public figure with whom the media has an essentially adversarial relationship, however, the problem is more difficult. The conscientious newspaper must publish, in the words of the *Washington Post's* Bob Woodward, "the best obtainable version of the truth."[59] Everyone adversely affected by a hard-hitting story will probably have alternative versions of events or would have written the story with a different slant, tone, or headline. As Robert Sack puts it: "People who see something derogatory written about themselves always say it's false. Whoever says about an unflattering statement, 'You're right—thanks, I needed that?' "[60] The newspaper would be hopelessly buffetted and paralyzed into indecision if it catered to every demand for corrections, retractions, equal space, or alternative versions. Resistance to those pressures is, in fact, the essential courageous mission of an independent press.

And yet, some play in the joints must exist—more play, perhaps, than we now have. There is simply no escaping the judgment that the press is not avoiding all of the libel litigation that it could, while still steering short of sacrificing journalistic integrity. Again, however, one must not overstate the point. In *Westmoreland*,[61] *Sharon*,[62] and *Tavoulareas*,[63] the litigation was often brutally bitter, and there probably was little that the defendants in these cases could have done to derail the litigation train once they published or broadcast the stories.[64]

Given the intensity of frustration that General Westmoreland, Ariel Sharon, and William Tavoulareas all exhibited, it may well be that nothing that CBS, *Time*, or the *Washington Post* could have done, within the confines of their own perceptions of the requirements of journalistic integrity, would have prevented the plaintiffs from filing the suits. William Tavoulareas has maintained that greater candor and openness about the journalistic mistakes that the *Post* allegedly made in his case would have

---

59. R. SMOLLA, *supra* note 2, at 193 (quoting Woodward's testimony in the *Tavoulareas* suit).

60. THE COST OF LIBEL, *supra* note 4, at 7. Robert Sack has long been one of the top libel attorneys in the country, and his book on libel litigation is one of the 'bibles' of the media defense bar. *See* R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS (1980).

61. 596 F. Supp. 1170 (S.D.N.Y. 1984) (decision denying summary judgment), *aff'd*, 752 F.2d 16 (2d Cir. 1984).

62. 599 F. Supp. 538 (S.D.N.Y. 1984).

63. 759 F.2d 90 (D.C. Cir.), *reh'g en banc granted*, 763 F.2d 1472 (D.C. Cir. 1985).

64. As of this writing, the *Tavoulareas* case remains in litigation.

created a sufficiently less acrimonious atmosphere to permit the parties to have worked something out.[65] The *Post*, however, denies that it acted arrogantly and maintains that Tavoulareas has rewritten history in so characterizing the *Post*. The paper maintains, in fact, that Tavoulareas himself noted that the *Post* had been open-minded in the negotiations that preceded the lawsuit.[66] There is substantial evidence that CBS, *Time*, and the *Post* were all guilty, to varying degrees, of less than outstanding journalism regarding some aspects of their respective stories.[67] The three defendants differed significantly in their relative inclinations to engage in meaningful negotiations prior to the commencement of the suits. Yet neither Westmoreland, Sharon, nor Tavoulareas were themselves innocent in the process of polarization. Getting into sniping contests at this late stage, however, is not particularly productive and misses the overriding point: libel litigation today is often commenced in the midst of a highly charged atmosphere in which both sides fail to examine their own positions and requirements rationally.

The legal system thus needs to employ whatever devices it has at its behest to encourage heads to cool and to induce the sober second thought. If both sides know in advance that they will bear the other side's legal costs should they lose, there is a substantially greater incentive for each side to engage in self-critical, level-headed calculation of pluses and minuses before embarking on destructive, energy sapping, embittering, socially wasteful, and costly litigation.[68]

IV. Conclusion

Despite many of the kinks that clearly need to be worked through, it seems as if exploring new reform packages centered around the declaratory judgment model and adjustments in attorney's fees rules would further the long range interests of both the press and plaintiffs. The Iowa research project on defamation[69] is in the process of entering a new phase, in which it will invite actual litigants to participate in an alternative dispute resolution process to resolve their disputes. The experience learned from that research, as well as from more comprehensive tort reform packages enacted in various states, will certainly contribute to our ability to make intelligent judgments. Perhaps all sides should, in the end, heed the wisdom of Mick Jagger, Keith Richards, and the Rolling Stones:

---

65. Letter from Kevin T. Baine, of Williams & Connolly, Washington, D.C., attorneys for the Washington Post (on file with author).

66. *Id.*

67. *See* R. Smolla, *supra* note 2, at 80-99, 182-237; R. Adler, *supra* note 28.

68. R. Smolla, *supra* note 2, at 241.

69. *See* Bezanson, *et al.*, *supra* note 2.

You Can't Always Get What You *Want*
You Can't Always Get What You *Want*
You Can't Always Get What You *Want*
But if you try sometime,
. . . you just might find you get what you *need*.[70]

70. M. Jagger & K. Richard, "You Can't Always Get What You Want" (© copyright 1969, Abkco. Music, Inc.). Others have previously seen legal significance in these lines. *See* Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 470 (1977); S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 659 (1979) (quoting Van Alstyne).