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Values And Value: An Essay On Libel Reform

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VALUES AND VALUE: AN ESSAY ON LIBEL REFORM

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> There may . . . be still other paths besides those that lead off into despair or back to where we have already traveled. If law is not an autonomous, suprahistorical entity, neither is it simply a mass of conflicting prejudices or the clever trick of some amorphous ruling class. History, as always, provides no clear road maps out of the present; but the questioning of old faiths and certainties may be able to offer clearer avenues for thought and action.[1]

In 1989 the United States Supreme Court celebrated the twenty-fifth anniversary of *New York Times v. Sullivan*[2] with a whimper. Having declined to deal with an array of excruciatingly difficult and significant problems,[3] the Court chose to take one case of less than earth-shattering import[4] which it used only to engage in a scholastic exegesis of the doctrine of *de novo* appellate review. Indeed, each of the five opinions[5] took pains to adumbrate the limited nature of what the Court undertook to do, expressly avoiding important substantive issues.[6]

A quarter century in which the Court first enunciated a profound change in the law of defamation, and then elaborated an intricate, cumbersome balancing mechanism, seemingly has culminated in judicial ex-

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1. N. ROSENBERG, PROTECTING THE BEST MEN 268 (1986) (footnote omitted).

2. 376 U.S. 254 (1964).

3. Thus, it declined to resolve the issue of distinguishing constitutionally protected, albeit scurrilous, matters of "opinion" from actionable defamatory "fact" (Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985); Brown & Williamson Tobacco Corp. v. Jacobson, 827 F.2d 1119 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1302 (1988)); or to determine the permissible limits of the award of presumed and punitive damages (DiSalle v. P.G. Publishing Co., 375 Pa. Super. 510, 544 A.2d 1345 (1988), *app. denied*, 557 A.2d 724, *cert. denied*, 109 S. Ct. 3216 (1989); Brown & Williamson Tobacco Corp. v. Jacobson, *supra*); or to clarify the anomalous position of the "privilege" of neutral reportage (DiSalle v. P.G. Publishing Co., *supra*).

4. Harte-Hanks Communications, Inc. v. Connaughton, 109 S. Ct. 2678 (1989).

5. Justice Stevens (for himself and seven other justices), the separate concurrence of Justice Scalia and the additional concurring opinions of Justices White, Blackmun, and Kennedy. *Id.*

6. "There is some debate as to whether the element of falsity must be established by clear and convincing evidence or by a preponderance of the evidence. . . . We express no view on this issue." *Harte-Hanks*, 109 S. Ct. at 2682 n.2 (Stevens, J.). *See* Justice Blackmun's concurring opinion, *id.* at 2699-700 (noting the reluctance to deal with issues of neutral reportage and the relationship of form and content of the defamatory utterance to the question of malice).

haustion and ennui. Following the unanimous *Sullivan* decision that, for the first time, made it clear that first amendment values are implicated by the common law of defamation,[7] difficult and important constitutional doctrine emerged from closely divided and occasionally bitterly antagonistic Supreme Court opinions. The rather awesome matrix by which the law of defamation is constitutionally defined today owes much to the exigencies of the creation of rickety majorities. The fragmented opinions of the 1960s and 70s that created the groundwork—from *Curtis*[8] through *Rosenbloom*[9] to *Gertz*[10]—were echoed, more acerbically, in the divided opinions of the mid-

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7. *Sullivan*'s express holding, that a public official is prohibited "from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not" (376 U.S. 254, 279-80 (1964)), coupled with language making it clear that the burden was on the plaintiff to demonstrate falsity and that the findings of the trier of fact were subject to *de novo* appellate review, served as the basic text from which the later extensions and refinements grew.

Much has been written about *Sullivan* and its progeny, starting with Kalven, *The* New York Times *Case: A Note on 'The Central Meaning of the First Amendment,'* 1964 SUP. CT. REV. 191. Exemplary contemporaneous commentary is collected in Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, at 7, n.49 (1983). Of the more recent works, compare Lewis, New York Times v. Sullivan *Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 83 COLUM. L. REV. 603 (1983) and Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. 782 (1986). *See generally* Halpern, *Of Libel, Language and Law:* New York Times v. Sullivan *at Twenty-Five*, 68 N.C.L. REV. 273 (1990) *and* Smolla, *supra*.

Sullivan, of course, may be read on many levels, from its pivotal role in the civil rights movement of the 1960s to its constitutional reversal of theretofore accepted common-law doctrine.

> The Court's opinion . . . aimed at three general goals: (1) to eliminate yet another weapon in the arsenal of segregationists in the South; (2) to reformulate the law of libel and thereby to eliminate what Justice Brennan called "the chilling" effect of traditional defamation laws; (3) most ambitiously, to link the changes in libel law to a new constitutional approach to free-speech issues, one that supposedly broke away from old legal formulas.

N. ROSENBERG, *supra* note 1, at 243.

8. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) ("majority" holding, created when Justices Black and Douglas chose to disagree less with Justices Warren, Brennan, and White than with the other four Justices, that the *Sullivan* malice standard—knowledge of falsity or reckless disregard with respect thereto—applies to public figure plaintiffs as well as to public officials). This holding recently received clearer judicial imprimatur, by way of *dictum*, in *Harte-Hanks*, 109 S. Ct. at 2684-85. *See* Halpern, *supra* note 7, at 280-82.

9. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (a plurality opinion applying the *Sullivan* malice standard to any defamation action involving matters of public concern, subsequently overruled by a bare majority in *Gertz* three years later).

10. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (a five Justice majority holding that a private figure plaintiff is not constitutionally required to demonstrate fault beyond negligence to maintain a defamation action and that neither punitive nor presumed damages are available to a plaintiff who does not demonstrate fault amounting to knowledge of falsity or reckless disregard with respect thereto).

1980s:[11] *Bose*,[12] *Greenmoss*,[13] *Hepps*,[14] and *Liberty Lobby*.[15] The ringing reaffirmation of *Sullivan* and its progeny by the Chief Justice[16] in the 1988 *Falwell* opinion[17] not only may have seemed gratuitous;[18] the Court also may be signaling its weariness with the great defamation issues.[19]

The issues, however, will not go away. Nor can concentration on exegesis of the refinements continue to divert attention from those matters vital both to individual and societal freedom. Neither judicial nor academic fatigue can long serve to avoid coming to grips with the serious value questions underlying the chaos that is the modern American law of defamation.

BALANCE, CHAOS, AND THE CALL FOR CHANGE

In its generalized form,[20] *Sullivan* imposed upon the common-law tort a constitutional requirement that the plaintiff demonstrate, with convincing clarity, that the defendant was at fault in publishing a false[21] defamatory utterance. Justice Brennan apparently contemplated a delicate balancing of the interest in reputation and the demands of the first amendment by substantive considerations of fault and procedural hurdles relating to the

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11. *See generally* Halpern, *supra* note 7 *and* Smolla, Dun & Bradstreet, Hepps, *and* Liberty Lobby: *A New Analytic Primer on the Future Course of Defamation*, 75 GEO. L.J. 1519 (1987).

12. Bose Corporation v. Consumers Union of United States, Inc., 466 U.S. 485 (1984) (attempting to define the scope of *de novo* appellate review, the Court divided six to three).

13. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (a five to four Court, holding that a private plaintiff need not prove constitutional malice to recover presumed or punitive damages if the utterance complained of does not involve a matter of public concern—reincarnation of *Rosenbloom* in a different context).

14. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) (holding, by a five to four vote, that a private figure must prove falsity, at least in an action against a "media" defendant).

15. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (holding, in a six to three split, that the "convincing clarity" standard of proof of malice is applicable to motions for summary judgment).

16. Justice Rehnquist, in the past, had been considerably less than enthusiastic about the Court's constitutionalization of the tort of defamation.

17. Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

18. Prompting the observation by Justice White that *Sullivan* "has little to do with this case." *Id.* at 57 (White, J., concurring).

19. As Professor Smolla has noted, "[c]ertain members of the Court, in fact, seem weary of the whole business of libel and the first amendment." Smolla, *supra* note 11, at 1565 (noting also Justice Rehnquist's "chill on both your houses" comment during oral argument of *Liberty Lobby*).

20. *I.e.*, extending beyond the Sedition Act concerns motivating Justice Brennan to leave the widest possible room for criticism of the official conduct of public officials. *See* Halpern, *supra* note 7, at 277-78.

21. Although *Sullivan* made it clear that the plaintiff must demonstrate falsity, changing the common-law *defense* of truth, and that the plaintiff must demonstrate the defendant's knowledge of falsity or reckless disregard with respect thereto by clear and convincing evidence, the Court has left open the question whether the convincing clarity standard applies to plaintiff's proof of falsity. *See* Harte-Hanks Communications, Inc. v. Connaughton, 109 S. Ct. 2678, 2682 n.2 (1989).

burden and quantum of proof. The Court left to succeeding cases the task of extending and configuring this balance more clearly and specifically. In the process, as the paradigm changed from a public official complaining of widely publicized criticism of official conduct to a variety of contexts, the delicacy of the balance gave way to a constitutionalized law of defamation embodied in a structure of curlicues and refinements.

Constitutional doctrine became a function of the plaintiff's status and the nature of the defamatory utterance; the constitutional standards for determining liability and permissible damages varied with the public or private nature of the plaintiff and the public or private "concern" of the libel. Instead of a constitutional paradigm, we have a matrix.[22] With standards of fault and recovery dependent upon elusive definitions of status and context, not much is predictable apart from the general assumption that a plaintiff in a defamation action will have a very difficult time. To one examining the cases the law today might well seem capricious.[23]

The fact of a chaotic legal structure provides the only real consensus of considered thought in this area. There is little doubt that the law of defamation is needlessly complex and that it fails essentially of its purpose.[24] As Dean Bezanson has observed:

> For those whose interest is in protecting reputation, today's libel tort fails in almost all respects to do so. It underprotects the community-based interest in reputation, and overprotects the reputationally-unrelated interests in truth, responsible journalism, and freedom from emotional harm. [F]or those who placed faith in the privileges created by *New York Times Co. v. Sullivan* and its progeny, today's libel tort must be discouraging, if not utterly devastating, for it falls substantially short of safeguarding press freedom and fails to safeguard individual reputation as well. [T]oday's libel tort is profoundly and fundamentally disquieting in a society that attempts to strike a balance between reputation and freedom

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22. For a more graphic presentation of the combinations and permutations of the defamation matrix, see HALPERN, THE LAW OF DEFAMATION, PRIVACY, PUBLICITY AND "MORAL RIGHTS": CASES AND MATERIALS ON PROTECTION OF PERSONALITY INTERESTS 382 (1988). I have elsewhere suggested that "the rococo law of defamation today is in many ways similar to the ancient world of Ptolemaic epicycles: it has so many complexities and legal curlicues that it too is intelligible, if at all, only to a learned few who, with more candor than their priestly predecessors, confess largely to inability to predict the future." Halpern, *supra* note 7, at 295. The epicyclic cosmology was a way of reconciling a geocentric, circular vision of the universe with inconsistent observed celestial phenomena; it involved a theoretical structure so complex as to be inaccessible and unintelligible to all but a handful of priests who, learned in the arcana, could pretend to an ability to predict events.

23. *See, e.g.*, Bezanson, *The Libel Tort Today*, 45 WASH. & LEE L. REV. 535, 543 (1988) ("recovery by any plaintiff is more likely to be the product of chance than of any systematic pattern reflecting reputational interests").

24. *See* Halpern, *supra* note 7, at 311-12.

of expression. Change in the libel system is therefore an imperative.[25]

Such change—as contemplated by most current reform proposals—appears to mean trading the complexity of fault for a radical reduction in the monetary value of a defamation suit, through either the elimination or the severe limitation of money damages. Such proposals assume that the prospect of paying large judgments provides the most serious "chill" on free expression and that fundamental protection of the individual's interest in reputation need not be based on the same kind of damages complex that protects other, more tangible interests.

Certainly, monetary inflation, both in terms of the carrot for the plaintiff and the stick for the defendant, is an undeniable fact of modern defamation life. The present constitutional matrix for liability and damages serves the doubly deleterious purpose of radically increasing the price of defamation actions for all parties while radically reducing the plaintiff's possibility of ultimate recovery. By a perverse application of concepts of risk and return, a consequence of the present pattern of constitutionalization has been an enormous escalation in the stakes. At least for the public figure plaintiff, the extraordinarily high constitutional malice requirement necessitates the dedication of litigation energies to uncovering shockingly reprehensible conduct, well beyond matters of professional dereliction. Consequently, every significant libel case inevitably carries with it a foundation for punitive damages. Concomitantly, what would otherwise be a limited pre-trial procedure becomes an egregiously expensive burrowing into the defendant's conduct and motives, opening up for examination the entire editorial process.[26] Correlatively, even for certain private plaintiffs, the present constitutional damages rules[27] put a premium on a demonstration

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25. Bezanson, *supra* note 23, at 556. Twelve years earlier, prior to the most recent complications, Professor Christie noted: "The law in the area of injury to reputation is on the verge of chaos. Attempts by the Court to eliminate confusion have almost invariably increased it." Christie, *Injury to Reputation and the Constitution*, 75 MICH. L. REV. 43, 63 (1976).

26. *See* Herbert v. Lando, 441 U.S. 153.

> A plaintiff, under the *Sullivan* standard, establishes requisite malice only by demonstrating, if not defendant's actual knowledge of the facts, then defendant's subjective awareness of probable falsity. The consequence of the need for such an inquiry is extraordinarily extensive and expensive discovery proceedings in which the plaintiff seeks to discover not what the defendant felt or wanted (the presence of a "malicious" state of mind), but what the defendant knew or thought, or, from all of the surrounding circumstances, should have known or thought. In short, virtually the entire process underlying the publication is placed in issue and must be examined. The result is that while we have a clear, carefully defined constitutional criterion (however unreal) called "malice," we concomitantly and necessarily have institutionalized an elaborate, expensive and *ad hoc* procedure that inhibits counsel's ability to predict little more than the expense of a defamation action.

Halpern, *supra* note 7, at 279-80 (footnotes omitted).

27. *See supra* notes 10 and 13.

of the reprehensible nature of the defendant's conduct.[28] The strong impetus to portray the defendant not only as unprofessionally in error but as venal, reckless and an unworthy member of society, exacerbated by the fact that most substantial plaintiffs' verdicts are reversed or substantially reduced on appeal, produces inflated demands and verdicts.[29]

By assuming the centrality of these dollar issues rather than the structure that has produced them, reform proposals, such as those contemplated by the Model Communicative Torts Act (the project which gave rise to this symposium) and the Annenberg Libel Reform Proposal,[30] would effectively take away both the carrot and the stick, substituting for the present model a declaratory judgment proceeding, a no-fault/no-damages inquiry into truth.[31] Notwithstanding their obvious appeal, these proposals, appearing both to give and to take evenhandedly, are unworkable, unrealistic, and unresponsive to the needs of the reputational interest.

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> [B]ecause the recovery of presumed [and punitive] damages is so closely linked to proof of *New York Times* actual malice, defamation plaintiffs have an apparent incentive to introduce the "actual malice" issue into cases in which a finding for the plaintiff on that issue would not otherwise be a prerequisite to liability.

LeBel, *Reforming the Tort of Defamation: An Accommodation of the Competing Interests Within the Current Constitutional Framework*, 66 NEB. L. REV. 249, 304-05 (1987) (footnote omitted).

29. *Id.* at 305 ("evidence introduced regarding the aggravated wrongdoing of the defendant . . . may lead a fact finder to be more inclined to raise the level of damages awarded to a plaintiff"). A recent egregious example is a Florida jury's verdict of $100 million on a defamation claim asserted by GTE Corporation against Home Shopping Network. "GTE Wins $100 Million Libel Case," *N.Y. Times*, August 3, 1989, § D, p.1, col. 6. Home Shopping Network had charged in a press release that poor equipment installation by GTE had hurt Home Shopping's business and it instituted an action against GTE for $500 million in lost profits and $1 billion in punitive damages. The libel award for GTE was on its counterclaim based on the press release. Of course, "[m]ost libel awards, especially those of large amounts, are reduced on appeal." *Id.*

30. REPORT OF THE LIBEL REFORM PROJECT OF THE ANNENBERG WASHINGTON PROGRAM: PROPOSAL FOR THE REFORM OF LIBEL LAW 9 (1988) (hereinafter THE ANNENBERG REPORT).

31. THE ANNENBERG REPORT, by allowing *either* party to turn a defamation action into a no-fault/no-damages declaratory judgment action (as well as by using retraction or reply to preempt any action) effectively eliminates all money damages other than counsel fees. THE MODEL COMMUNICATIVE TORTS ACT similarly provides for an expedited declaratory judgment action limited to the issue of truth (§§ 3-101, 9-107). Although it does not give the defendant an option to convert an action for damages into such a declaratory judgment proceeding, a plaintiff who seeks the alternative of damages has a heavy burden of proving reputational injury, while the damages are limited to "reasonable compensation based on proof of lost earnings, diminished earning capacity, lost profits, loss of commercial value, or any other *pecuniary* loss that proximately results from the injury." §§ 3-101, 9-101 (emphasis added). The declaratory judgment approach to libel reform owes much to the work of Professor Marc Franklin, although he contemplated parallel, alternative schemes whereby the plaintiff could choose either a no-fault declaration of falsity or an action for damages subject essentially to the present complex rules. *See* Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CALIF. L. REV. 809 (1986) (hereinafter *Alternative*), building on the earlier Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. REV. 1 (1983) (hereinafter *Proposal*).

On Viewing with Alarm: The Power of Arrogance

The peculiar genius of *Sullivan* was in the promulgation of a constitutional doctrine of fault and falsity to harmonize the law of defamation with first amendment values. The doctrinal concern was not whether the press, as such, behaved well or badly or whether a particular plaintiff deserved a certain amount of damages. In a sense, despite the major change it created in the common law, the *Sullivan* doctrine was conservative. The doctrine assumed no underlying value judgments favoring either the plaintiff or the defendant; the concern was to circumscribe the defamation action to the extent necessary to ensure the vigor of the first amendment. Justice Brennan did not minimize or disparage the importance of protecting reputation, nor do his opinions indicate anything but a concern with the need to give speech breathing room through a controlled margin for error.[32] *Sullivan* and its progeny, in significantly altering the common law by the erection of constitutional hurdles in the way of recovery, also rejected the absolutist position (urged by Justices Black and Douglas) that simply would bar actions for defamation.[33] Whatever one's opinion of the multi-standard, status-based constitutional structure, the *Sullivan* doctrine, as amplified, was created to limit and to modify the common-law remedy, not to eliminate it.

For a variety of reasons—perhaps inertia, the inexorable continuation of a process of constitutionalization once begun, perhaps deep-seated conviction coupled with the inevitable sense of righteousness that follows from arguing "for" the first amendment, and perhaps the power of concentrated ownership of print and television—the nature of the inquiry seems to have shifted, and the underlying premises of *Sullivan* have become diffused in a flood of media and academic "viewing with alarm."[34] The issue for many

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32. Indeed, it is ironic that, in *Paul v. Davis*, 424 U.S. 693 (1979), Justice Brennan, dissenting from a decision refusing to recognize a due process claim arising out of officially sanctioned defamation, took great pains to underscore his belief that "the enjoyment of one's good name and reputation has been recognized repeatedly in our cases as being among the most cherished of rights enjoyed by a free people, and therefore as falling within the concept of personal 'liberty' [contemplated by the due process clause]." *Id.* at 722-23 (Brennan, J., dissenting).

33. It is this fundamental value balancing that prompted the strong and continuing objections of Justices Black and Douglas to any but an absolute application of the first amendment to bar actions for defamation. Albeit from a different perspective, their Cassandra-like predictions of disaster following from any attempt to balance the first amendment strictures with competing interests in reputation seem to have been accurate; *see, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 293-97 (1964); Curtis Publishing Co. v. Butts, 388 U.S. 130, 171 (1967) ("It strikes me that the Court is getting itself in the same quagmire in the field of libel in which it is now helplessly struggling in the field of obscenity. No one, including this Court, can know what is and what is not constitutionally . . . libelous under this Court's rulings.").

34. *See* Halpern, *supra* note 7, at 288.

> There is . . . a strong and experienced defamation "defendant's lobby," vigilant and articulate. At the same time, the call for an expansive reading of the first amendment is—and ought to be—an appealing one. To the extent that a matter implicates the

is not whether a given policy is consistent with first amendment freedom. Rather, the focus has become whether a particular decision and the concomitant doctrinal ramifications are "good" or "bad" for the press. Each new restriction on the common-law action is hailed as a further support in the structure of freedom necessary to a democratic society. Each move to allow a plaintiff some room to recover for injury to reputation is seen as a threat to fundamental liberty. The real "chilling effect" may be felt by those to whom every defamation action is not simply an unprincipled attack on the constitution by a thin-skinned plaintiff nor every meaningful judgment against outrageous communicative conduct a harbinger of the end of a free society:

> [T]here is an orthodoxy in libel law practice and scholarship today. Its proponents zealously protect media interests and are quick to denounce departures from the true faith as "anti-first amendment." They seem never to have encountered an absolute privilege they didn't like, nor a qualified privilege that shouldn't be extended. The harm inflicted by speech is seldom regarded by the orthodox view as significant enough to warrant compensation. Indeed, any prospect of tort liability is seen as an intolerable threat to first amendment values.[35]

With the inquiry framed in terms of abstract allegiance to first amendment values, meaningful debate is not easily diverted from journalistic parochialism. Journalists, of course, are in an anomalous position. As the most visible force giving meaning to the first amendment, journalists must have room to function without the accountability inherent in other professions.[36] At the same time, the concentrated power of the press and television—the corporatization and consolidation of a polyglot mixture of competing publications—and the uniform intrusiveness and celebrity of television "news," producing at its worst self-referential, self-laudatory and self-conscious journalism, leaves these guardians of liberty unrespected and unloved.[37] As Fred W. Friendly[38] observed, with respect to television journalism:

> first amendment it implicates matters at the heart of American democracy. The call to arms, particularly for the academic scholar, is irresistible and leaves only to the most sensitive hearer the cry of the individual injured by the defamatory falsehood. The question then, *why* impair the long established right of the injured individual, can be heard only faintly and those who raise it risk much.

Id.

35. LeBel, *Emotional Distress, the First Amendment, and "This Kind of Speech": A Heretical Perspective on* Hustler Magazine v. Falwell, 60 U. COL. L. REV. 315, 318 (1989).

36. "While not 'professionals' by any standard definition, journalists still belong to a special occupation. They have been granted privileges by the Constitution." T. GOLDSTEIN, THE NEWS AT ANY COST: HOW JOURNALISTS COMPROMISE THEIR ETHICS TO SHAPE THE NEWS 18 (1985).

37. *Id.*

38. Edward R. Murrow Professor Emeritus, Columbia Graduate School of Journalism.

> In the final analysis, responsibility rests with top management. The current chief executive officers of the major networks have emerged from the ranks of money managers and manufacturers who are not steeped in the tradition and standards of broadcast journalism. . . . The tradition today has become the constant crush for hot pictures in pursuit of ratings and revenues, not journalistic integrity.[39]

The problem is compounded by the arrogance that seems to accompany power and celebrity, an institutional unwillingness to concede error or meaningfully to atone for the injury inflicted by that error.[40]

Consider the case of *DiSalle v. P.G. Publishing Co.*,[41] in which a Pennsylvania appellate court upheld a jury verdict of $210,000 in compensatory damages and $2,000,000 in punitive damages predicated upon findings that the defendant newspaper had published false and defamatory material concerning the plaintiff both with reckless disregard as to its truth or falsity (the constitutional "malice" requisite to a determination of liability) and with ill will amounting to an intention to harm the plaintiff (the common-law malice requisite to the recovery of punitive damages). After the United States Supreme Court denied *certiorari* the judgment was paid (together with $561,000 in interest).[42] The defendant continued to insist that none of the reporters or editors involved in the article "believe they have done anything wrong [and that] such a large award [will] probably chill news coverage at other papers."[43] In reporting this story, *The New York Times* only briefly dealt with the conduct giving rise to the damages. Instead, it devoted most of its coverage to spokespeople who viewed with alarm the action of the jury and the courts and to commentators who raised the prospect of a "chill" on aggressive news coverage.[44] From the lack of any comment on the defendant's conduct,[45] one would be hard put to realize

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39. Friendly, *On Television: News, Lies and Videotape, N.Y. Times*, Aug. 6, 1989, § 2, p. 1, 27, col. 5 (Nat'l Ed.).

40. *See* T. GOLDSTEIN, *supra* note 36, at 236-37:

> Although most papers now run corrections boxes, many papers are still reluctant to admit they are wrong. "We'd sooner drown our children," Michael Gartner, then of the Des Moines Register and Tribune Company, told a group of Florida lawyers and journalists in the winter of 1984. "What do many papers and editors—and their lawyers, I should add—do when a paper errs? We equivocate. We bluster. We alibi. We hide behind technicalities, We hide behind secretaries. We hide behind lawyers."

41. 375 Pa. Super. 510, 544 A.2d 1345 (1988), *app. denied*, 557 A.2d 724 (Pa. 1989), *cert. denied*, P.G. Publishing Co. v. DiSalle, 109 S. Ct. 3216 (1989).

42. *Pittsburgh Paper Pays $2.8 Million Libel Award*, N.Y. Times, July 12, 1989, p.13, col. 7 (Nat'l Ed.).

43. *Id.*

44. *Id.*

45. It has been suggested that "[*The New York*] *Times* has viewed just about every decision that has gone against the press as a fresh menace to freedom, no matter how inconsequential." T. GOLDSTEIN, *supra* note 36, at 192.

> The First Amendment is a motherhood and apple pie issue to the media; and

that both trial and appellate judges had concurred in a jury finding of gratuitous and malicious conduct on the part of the defendant.[46]

The consequence of such continuing refusal to acknowledge, let alone ameliorate,[47] conduct that in others would be considered outrageous, is inevitably greater distrust and, ultimately, an undesirable weakening of those first amendment protections that are truly necessary.[48] The rigid use of

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> *The New York Times*, as the country's premier paper, has taken the lead in its defense. . . .
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> The attitude of the paper was summed up by A. M. Rosenthal in a speech to a group of lawyers [the Fordham Law Alumni Association, on January 30, 1976]: "The latest and perhaps most dangerous threat to the existence of the free press comes from . . . court rulings. . . ."

Id.

46. The jury had been specifically charged with respect both to constitutional malice, in the sense of reckless disregard for the truth, as a condition to liability, and common-law malice, in the sense of an intention to harm, as a condition to the award of punitive damages. *DiSalle*, 375 Pa. Super. at 521, 547, 544 A.2d at 1350, 1364. The Pennsylvania Superior Court noted the trial judge's finding that

> the Defendant's actions evidenced a particular disregard for its responsibilities as a major news gathering and conveying source. Far from attempting to report dispassionately on a dispute which had ripened into a protracted legal proceeding, the purpose of the *Post-Gazette* was to sensationalize this bitter family controversy by lurid suggestions of fraud and sexual impropriety by a man whose reputation was above reproach. It is not simply that the article . . . was replete with inaccuracies; it was more that the editors in charge . . . found it necessary to insert an unfounded and sensational element to fill a "hole" in the story [and] highlighted it in such a way as to leave the natural impression on the part of the reader that a serious question of Mr. DiSalle's competence and integrity had been entertained in a court of law.

Id. at 569, 544 A.2d at 1376. The findings were not questioned on appeal. *Id.* at 530, 560, 544 A.2d at 1355, 1371.

Similarly disturbing is the response of *Time* magazine to the carefully deliberated jury verdict in the highly publicized action brought by Ariel Sharon for material published about him in the magazine. The jury had expressly found the article false and defamatory and strongly criticized *Time*'s lack of professionalism, but also found that the defendant had not acted with constitutional "malice"—knowledge of falsity or reckless disregard for the truth—and accordingly found the defendant not liable. Each side was then quick to proclaim victory, moral or otherwise.

> [Notwithstanding the jury's finding that] certain *Time* employees . . . acted negligently and carelessly in reporting and verifying the information . . . *Time* issued a statement saying that the case should never have reached an American courtroom, that it was now over and that "*Time* has won it. . . . We continue to have the utmost confidence . . . in our editorial staff and our editorial procedures". . . . *Time*'s managing editor, . . . saying he disagreed with the jury's comment about negligence, declared, "We are totally confident that the story is substantially true."

Time Cleared of Libeling Sharon but Jurors Criticize its Reporting, N.Y. Times, Jan. 25, 1985, p.1, col. 2. For a detailed discussion of this litigation and the behavior of the parties, see R. SMOLLA, SUING THE PRESS 80-100 (1986).

47. Consider the brief and uneventful life of the National News Council, a voluntary journalistic attempt at self-examination and oversight that expired for lack of meaningful media support. *See* T. GOLDSTEIN, *supra* note 36, at 238-39.

48. *See, e.g., id.* at 192:

apparent constitutional principle to avoid responsibility for unprofessional conduct serves to undermine what otherwise might be appealing proposals for libel reform. The assumption that widely circulated publications or broadcasts, be they *Time* magazine or *The National Enquirer* or *Sixty Minutes*, would be significantly impressed by a non-monetary judgment declaring the defamatory falsity of a purported news item confuses professional pride with powerful arrogance. In short, recent experience indicates that, from the defendant's point of view, a declaration of falsity would not mean very much.[49]

However, the task of the law of defamation is the protection of the individual's interest in reputation, not the promotion of responsible speech. My unkind remarks about the behavior of the press in the face of clearly demonstrated irresponsibility are not a plea for using the law of defamation to make the press behave better.[50] It is not at all clear that we really want or should have a well-behaved press.[51] Before there was any talk of "chill," there was a long pre-*Sullivan* history (and the English have a continuing history) of the coexistence of a vigorous, if not disorderly, press with a money damages-based libel law. Today, notwithstanding prophecies to the contrary, there is little hard evidence, although much speculative assumption, of significant press self-censorship.

The law of libel does provide a price for crossing a line; a price that, when the irresponsibility is coupled with an intention to harm, can turn into a penalty. That, however, is a consequence and is not the primary purpose of the law. The absence of motivation for more professional and responsible, if not decent, behavior is not *per se* an argument against a

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> In its earnest desire to protect the First Amendment, the *Times* often has overreacted and overplayed stories involving press-law issues. That, I think, has unintentionally been harmful in the long run to the First Amendment. What the *Times* has done smacks of special pleading. It and other major papers are in danger of crying wolf too often. . . . In a speech [on March 22,] 1984 at the University of Michigan, [Floyd] Abrams said that "so long as the press focuses intently on only one word out of one Amendment of the Constitution—even the First Amendment—it focuses too narrowly. And unpersuasively. And ultimately self-defeatingly."

49. *See* Franklin, *Alternative*, *supra* note 31, at 839.

> If those who publish defamatory communications were freed from [the] threat [of money damages], the only checks on abuse would be internal restraints, professional standards (in the case of the press), and the deterrent effect produced by whatever nonmonetary relief scheme was put into place. Given the almost total failure of the first two of those alternatives to produce a satisfactory level of claims and litigation, one should be extremely skeptical about the ability of the third option to serve as an effective means of keeping the harm caused by the publication of falsehood to a socially acceptable level.

LeBel, *supra* note 28, at 307.

50. As Floyd Abrams has observed: "A libel case is not a journalism seminar. It is important not to confuse what the law requires of a journalist with what the deans of journalism schools might think is the best way to go about being a reporter." *Appeals Court Turns Down Suit Citing Libel in Use of Quotation*, N.Y. Times, Aug. 6, 1989, p. 19, col. 2 (Nat'l Ed.).

51. *See* Reston, *Reputation and the Modern Journalistic Imperative*, 74 CALIF. L. REV. 753 (1986).

proposal that would remove the threat of substantial damages as a "chill" on free speech if it adequately recognized the reputational interest injured by defamation. This consideration, however, must color the trade-off relieving the plaintiff from the almost impossible burden of proving constitutional malice and eliminating meaningful damages. While it does provide context, the question remains: does a formal declaration of falsity remove the sting and its poison so that the interest in reputation is realistically protected? I think not.

QUESTIONS OF VALUE

The position of the reputation interest in the scheme of values in our communication-dominated society is a matter of some debate.[52] So too, no clear consensus exists as to the dimensions of that "mysterious thing [that] inheres in the social apprehension that we have of each other."[53] Nevertheless, whether considered as "a mélange of several distinct concepts"[54] or a single, undifferentiated interest, reputation is one manifestation of the human personality. Defamation is an assault on that personality. Smirking at the defamation plaintiff is too easy;[55] it is too facile a step from the belief that "everyone will be world famous for fifteen minutes,"[56] to the proposition that community perception, that "web of connections"[57] defining one's reputation, is too evanescent to be taken seriously.[58] Societal

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52. *See, e.g.*, Bellah, *The Meaning of Reputation in American Society*, 74 CALIF. L. REV. 743 (1986); Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691 (1986); Reston, *supra* note 51.

53. Post, *supra* note 52, at 692.

> Although there has been considerable scholarly attention directed to the definition and articulation of "the First Amendment interest" in protecting expression, there has been relatively little discussion of the nature and importance of "the State's interest" in protecting reputation. The latter inquiry, of course, requires an exploration into the obscure purposes and functions of common law defamation, which is not a journey that many modern commentators have been willing to undertake, especially given the attractive and well-traveled alternative routes of constitutional analysis. Yet it is all too easy to assume that everyone knows the value of reputation, and to let the matter drop with the obligatory reference to Shakespeare's characterization of a "good name" as the "immediate jewel" of the soul.

Id.

54. *Id.* at 740.

55. "He jests at scars, that never felt a wound." W. SHAKESPEARE, THE TRAGEDY OF ROMEO AND JULIET, Act II, Scene ii.

56. Andy Warhol, *quoted in* J. BARTLETT, FAMILIAR QUOTATIONS 908 (15th ed. 1980).

57. Bellah, *supra* note 52, at 743.

> [R]eputation by its very nature is indelibly social. . . . Reputation is the extension and elaboration of that *recognition* which lies at the basis of our social existence. Thus, although we think of a person as "having" a reputation, reputation is not a property or possession of individuals—it is a relation between persons.

Id.

58. *See, e.g.*, Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747, 777 (1984) ("Many of our ideas about reputation are products of a simpler era. . . . In today's pluralistic society, much is tolerated and little is universally condemned.").

saturation with celebrity, media-created transitory fame[59] and the craving for exposure at any cost can too easily obscure the reality of the deep harm that can result from the publication of a defamatory utterance. It is tempting to dismiss the excesses of some damage awards as jury vindictiveness toward a powerful press rather than, perhaps, overzealous sympathy for an injured victim. The publicity afforded the sensational libel suit brought by well-known and well-off individuals helps foster the image of manipulative plaintiffs doing violence to the first amendment; an image that diverts attention from the reality of the tort.[60] Indeed, if we do value that intangible personality interest in external perception called "reputation," we must not trivialize the tort directed to reputation in the process of accommodating protection of that interest to the exigencies of the first amendment.

Presuming that there is something of value in reputation and that a tort directed to that interest requires redress, rather than that a claim founded on that interest is inherently suspect, the burden must be on those who would significantly vary the remedial scheme from that applicable to other interest-invasive acts. Before the well-established remedy for breaches of societally imposed duties—money damages—may be eliminated, a compelling case must be made that money damages are neither necessary nor appropriate. Notwithstanding the important work that has been done to address this concern, such a case has not been made.

Certainly, the roots of the law of defamation lay in the communal-spiritual realm rather than in the individual-pecuniary world. The ancient remedy for "bearing false witness" involved spiritual atonement and cleansing for the defamer rather than compensation for the defamed.[61] However,

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59. *See* Bellah, *supra* note 52, at 747. Consider the role of the media in making, and unmaking, political figures:

> [I]n the personalized politics of recent years the "charisma" of the leader may be almost entirely a product of media exposure and, by the same token, can disappear in the same way. Few people, for example, knew anything about what Jimmy Carter had done as governor of Georgia, and those who did were not encouraged. Carter was created by his media exposure in the primary campaign and, one would have to say, in considerable measure destroyed by media exposure as President.

Id. (footnote omitted).

60. *See* Bezanson, *The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get*, 74 CALIF. L. REV. 789 (1986).

> The view of libel plaintiffs as persons with no confidence in their claim who manipulate the legal process for personal ends seems greatly overbroad. . . . Rather than suing for improper or manipulative reasons, most plaintiffs seem to resort to litigation as a means of self-help and legitimation of their claim. . . . Nor does the fact that some plaintiffs use the legal system to pursue a meritless claim discredit the motives of all plaintiffs. Rather . . . most plaintiffs sue for the simple reason that they have no effective alternative for redressing reputational harm.

Id. at 807.

61. *See* L. ELDREDGE, THE LAW OF DEFAMATION 5 (1978). The canonical roots of defamation go back at least to the time of William the Conqueror, who established separate church courts to administer the canon law remedy of defamation, predicated upon the "sin"

the civil, pecuniary nature of the tort remedy has been established for almost three hundred years.[62] Finding a firm traditional or historical justification for confining the law of defamation to a narrower remedial scheme than is available for other torts would be difficult. On the contrary, historically, the remedial envelope for defamation at common law, with its strict liability antecedents and presumptions of falsity and harm, was far more expansive even than that provided for intentional torts. Historically and intuitively, no predicate exists for the argument that for this tort—and this tort alone—money damages are superfluous to an effective remedial scheme.

Libel reform centered on the elimination or the severe limitation of damages is bottomed on the assumption that damage awards in defamation actions—entailing exposure to the vicissitudes of capricious juries—are not required to provide an injured plaintiff "vindication," and that such vindication is all that is needed to protect the interest in reputation. Certainly, vindication is a compelling motivation for the plaintiff injured by a defamatory utterance.[63] In a sense, defamation is unique among the torts in that the injury from defamation is to the way others perceive the victim. Unlike directly inflicted injuries, "repair" does not involve action by or upon the plaintiff; rather, it requires alteration of the perception of the plaintiff by the community, restoration of the prior perception. Theoretically, the truth may reverse the negative impact on reputation arising from a false defamatory utterance and a public declaration of the falsity of the utterance should restore the plaintiff's reputation. Consequently, if this kind of restoration achieves vindication, then attainment of that restoration should amount to complete relief and obviate the need for money damages. This deceptively simple syllogism is flawed in at least two significant respects. First is the assumption that a declaration of falsity or a recanting of the defamatory utterance in fact would provide restorative vindication; second is the assumption that restorative vindication, even if effective, is a sufficient

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of bearing false witness.

> A person found guilty of the sin . . . was required to do public penance. The sinner, wrapped in a white shroud, holding a lighted candle, and kneeling, acknowledged his "false witness" in the presence of the priest and parish wardens and begged the pardon of the injured party. This public penance gave the complainant public vindication, but nothing more.

Id.

62. As the court noted in Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70, 76 (W. Va. 1983):

> Throughout the Middle Ages, the ecclesiastical courts exercised general jurisdiction over defamation, punishing it with penance. . . . It was not until the reign of Henry VIII, that the common law courts began to exercise some jurisdiction over actions for defamation. By the end of the sixteenth century, however, common law courts exercised practically absolute jurisdiction over these actions.

See S. HALPERN, *supra* note 22, at 2-4.

63. *See* Bezanson, *supra* note 60, at 808. Dean Bezanson has concluded that "effective response to alleged falsity, emotional relief, and vindication of reputation chiefly appear to motivate most plaintiffs." *Id.*

remedy when it has not at all been considered sufficient, or even paramount, in our general remedial scheme for tortious conduct.

Of course, an immediate and prominent retraction, designed to be given the same attentive circulation as the offending material, can be reasonably effective. Such a retraction certainly would ameliorate the injury and thereby preclude any substantial damages. However, to expect either such immediacy or such prominence is chimerical. A delayed retraction or a judicial declaration following even an expedited court proceeding, after the damage has been done, can never really undo that damage. Rumor is pernicious and the truth can seldom outrun the lie. In an age of news digests, "sound bites" and competition for a short public attention span, expecting that a declaration of falsity, judicial or otherwise, would effectively repair the damage or deter the offender from "standing by the story" is simply unrealistic.[64] The easy assumption of the restorative power of a declaration of falsity reminds one of Shaw's observation on the self-deception by which "people persuade themselves that what is done can be undone by repentance; that what is spoken can be unspoken by withdrawing it; that what is true can be annihilated by a general agreement to give it the lie."[65] A judicial declaration or an impersonal retraction is hardly the modern analogue of the public penance and public vindication of the ancient ecclesiastical treatment of defamation.[66] Such a declaration may ease some of the pain and may provide some balm for the defamed individual—it may provide some measure of vindication—but it is naive to expect that the declaration would undo the damage or otherwise be restorative.

Moreover, even if the truth could overtake the lie and, in fact, restore the injured reputation, it does not follow that we thereby have provided a reasonably complete remedy, or one appropriate to our general remedial scheme for tortious conduct. When a tort entails physical injury, nonmonetary and complete restoration normally is not feasible. Damages are an approximation of the cost of restoration or the monetary equivalent of replacement. Even then, such restoration is but one element of the remedial scheme,[67] which includes pecuniary quantification of the proximately caused parasitic harms—pain and suffering and emotional distress—however imprecise the process.[68] Tort law also generally countenances punitive damages

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64. *See, e.g., supra* note 46.

65. G.B. SHAW, MAN AND SUPERMAN, Act III, in SEVEN PLAYS BY BERNARD SHAW 517, 616 (1951).

66. *See supra* note 61.

67. *See generally* Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CALIF. L. REV. 772 (1985). "[C]ompensation alone does not justify our tort system. . . . In effect, tort law does not compensate victims; it merely shifts the loss and thus changes the victim's identity." *Id.* at 786.

68. *See id.* at 778. As Professor Ingber has observed:

> It is difficult to justify monetary damages for intangible injuries exclusively on the basis of victim compensation. Significantly, such injuries cannot be readily quantified. Translating pain and suffering or emotional distress into monetary terms

if the conduct of the defendant is sufficiently reprehensible. In short, the remedial inquiry is not bounded by the dimensions of simple "restoration." Indeed, something more than either compensation or restoration is involved. The process implicates human values transcending economic exchange:

> From the victim's perspective, compensation is not just reimbursement, it is making amends for the injury done by bestowing a "consolation, a solatium." Refusal to grant damages effectively bestows upon the injurer a form of legal "entitlement" to cause the injury. Although money damages may not be an equivalent to the injury experienced, they can serve as an important symbolic means of preserving the entitlement of personal security and autonomy against infringement.[69]

In the case of defamation, the human values of dignity and decency[70] are particularly evident. Of course, money damages cannot restore the damaged reputation, any more than they can restore the broken limb. However, the inadequacy of damages as a complete restorative hardly justifies their elimination. Indeed, perhaps even more in the case of defamation, with its affront to dignity and decency, than in other types of tortious behavior, the entitlement consequences of the damages remedy are singularly appropriate. To suggest that defamation plaintiffs want "vindication" is not to demonstrate that they are neither interested in nor significantly compensated by the societal legitimization of their reputational interest afforded by a formal award of damages.[71] Indeed, effective vindi-

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> poses tremendous problems of proof because . . . no market exists to provide a standard for compensating a victim of such a loss. Such injuries have no measurable dimensions, mathematical or financial.
>
> Courts have recognized that there is no exchange value for pain and suffering or emotional distress and, therefore, have relied upon the collective judgment of juries to quantify such injuries. . . . Juries are left with nothing but their consciences to guide them.

Id. (footnotes omitted).

69. *Id.* at 781-82 (footnotes omitted).

> Because money is highly valued in our society, we use it to measure and recognize the worth of both tangible and intangible items. If society is to signify its commitment to the support of psychic well-being, damages for intangible injuries must be permitted. Compensation may restore the plaintiff's sense of self-value, and ease his sense of outrage.

Id. at 781 (footnotes omitted). Professor Ingber argues, however, that compensation for such psychic harms "should focus on ramifications that are quantifiable and transferable—special/pecuniary rather than general damages. These damages . . . are likely to be limited and provable, and thus less subject to jury discretion." *Id.* at 785.

70. *See generally* Ingber, *Defamation: A Conflict Between Reason and Decency*, 65 VA. L. REV. 785 (1979).

71. The empirical work of the Iowa Libel Research Project has demonstrated the importance of defamation plaintiffs' intangible concerns but the data hardly compel the conclusion that damages may be obviated in an effective remedial scheme. The Iowa project, described in detail in R. BEZANSON, G. CRANBERG & J. SOLOSKI, LIBEL LAW AND THE PRESS: MYTH AND REALITY (1987), was designed to "explore the feasibility of non-litigation processes through which libel disputes might be resolved." *Id.* at ix.

cation—and not simply its etymological cousin, revenge[72]—requires just this kind of legitimization by societal acknowledgement. Society acknowledges through the means that society has come to accept, money damages, that the defamed individual has been hurt and that the defamer has acted wrongfully.[73] To subordinate the defamation remedy is to subordinate the injury and to devalue the reputational interest. So long as we profess to value that interest, only the conclusion that no other method can accommodate the interest in reputation to the strictures of the first amendment can justify a remedial scheme least consistent with that value.

By the complementary removal of the plaintiff's fault burden, libel reform predicated upon the elimination or severe restriction of damages also facilitates exposure of the falsity. The focus on damages, however, is less the product of belief in the remedial sufficiency of the declaration of falsity[74] than of concern over what are viewed as capricious and vindictive jury awards. Distrust of the jury forms a substantial part of the libel debate.[75] The attitude is not groundless. Even allowing for the animus of the press to any recovery of proper damages for the defendant's improper conduct, the well-publicized and apparently arbitrary jury excesses[76] certainly lend substance to the distrust.

The apparently open-ended and unstructured awards of presumed damages are at the center of the antipathy toward the jury. Presumed damages,

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72. *See* E. PARTRIDGE, ORIGINS: A SHORT ETYMOLOGICAL DICTIONARY OF MODERN ENGLISH 155 (1966).

73. *See, e.g.*, LeBel, *supra* note 28, at 306-07:

> [L]iability for monetary damages for defamation both legitimately compensates for real harm and reasonably deters the kind of conduct that produces such harm. Whether one is pleased with the reality or not, it seems inherently undeniable that the threat of monetary liability is what keeps the defamation action operating as a constraint on the unjustified production of harm.

74. The constitutional underpinning for the no-fault approach to the issue of falsity probably involves the elimination of damages. THE MODEL COMMUNICATIVE TORTS ACT assumes that its severe restriction of damages would similarly pass constitutional muster (Comment to § 3-101). The fault/damages exchange has some constitutional logic, albeit institutional unsoundness.

75. The concurring opinion of Judge Bork in Ollman v. Evans, 750 F.2d 970, 997 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985) articulates this distrust: "The only solution to the problem libel actions pose would appear to be close judicial scrutiny to ensure that cases about types of speech and writing essential to a vigorous first amendment do not reach the jury." *See* Matheson, *Procedure in Public Person Defamation Cases: The Impact of the First Amendment*, 66 TEX. L. REV. 215, 281 (1987) ("First amendment considerations . . . should confine the jury's role."); Van Alstyne, *First Amendment Limitations on Recovery from the Press—an Extended Comment on "The Anderson Solution,"* 25 WM. & MARY L. REV. 793, 794-95 (1984).

76. *See, e.g.*, Brown & Williamson Tobacco Corp. v. Jacobson, 827 F.2d 1119 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1302 (1988) (a jury award of $3,000,000 in presumed damages, notwithstanding the absence of any proof of injury, reduced to $1.00 by the trial judge, was reinstated to the extent of $1,000,000 on appeal; a $2,000,000 punitive damages award was upheld); *see supra* note 29; Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 CALIF. L. REV. 847, 856-57 (1986).

"damages intended to compensate for harm that the plaintiff had not proved was actually incurred,"[77] are a troublesome, albeit traditional, component of the defamation cause of action. The common law, with more respect for logic than for policy, "allows recovery of purportedly compensatory damages without evidence of actual loss. [T]he existence of injury is presumed from the fact of publication."[78] Concern over "[t]he largely uncontrolled discretion of juries to award damages where there is no loss"[79] led to the *Gertz* "actual injury" rule[80] that constitutionally barred presumed damages in the absence of a showing of defendant's knowledge of falsity or reckless disregard with respect thereto.[81]

Gertz did not absolutely bar presumed damages, despite clear evidence that "the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact."[82] However, the relation of presumed damages to compensation for injury is too tenuous to support their inclusion in a reasoned and effective scheme for protecting the interest in reputation. Notwithstanding the Supreme Court's parsing of the presumed damages issue into compartments determined by the status of the parties or the nature of the speech, such damages are inherently too speculative to be considered proper compensation in any defamation action. At best, the determination of presumed damages "is a very inexact and somewhat arbitrary process."[83] The pernicious nature of substantial "compensatory" damages in the absence of demonstrated harm is not ameliorated by the magnitude of the defendant's fault. Even absent constitutional concerns, the existence of a purportedly compensatory scheme that operates independently of proof of harm would be disturbing. The first amendment implications flowing from such an unbounded assessment process make it intolerable.

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77. LeBel, *supra* note 28, at 268.

78. Gertz v. Robert Welsh, Inc., 418 U.S. 323, 349 (Powell, J.). The doctrine of presumed damages follows from the definition of a defamatory utterance as one that tends to harm the reputation of the person defamed. A finding that the defendant published defamatory matter *ipso facto* entails a finding that the plaintiff has been damaged.

79. *Id.*

80. "[T]he private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury." *Id.* at 350.

81. The rule, precluding the award of presumed damages to a private plaintiff who satisfies only the minimal constitutional fault requirement rather than *Sullivan* malice, was refined in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985), to apply only to a private plaintiff complaining of an utterance involving a matter of public concern. *See* Halpern, *supra* note 7, at 295-99; Smolla, *supra* note 11, at 1535-46.

82. *Gertz*, 418 U.S. at 349.

83. Brown & Williamson Tobacco Corp. v. Jacobson, 827 F.2d 1119, 1142 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1302 (1988); *see supra* note 76. *See also* Anderson, *supra* note 58, at 749-50 ("the process of fixing an amount of presumed damages is inherently irrational"); Halpern, *supra* note 7, at 318 ("There simply is no rational framework within which the court can assess the propriety of a jury's presumed damages award and thereby carry out its constitutional review function.").

To suggest eliminating presumed damages in all cases—the position of virtually all current reform proposals—is not to suggest eliminating compensation for intangible harm. Although assessment of presumed damages is an idiosyncracy of defamation, the process of quantifying intangible harm when some injury has been demonstrated is a familiar component of the traditional tort system.[84] As with compensation for other torts, the fact of harm proximately caused by a defamatory utterance provides the basis upon which damages may be quantified. Both direct—demonstrable reputational harm—and indirect, parasitic injury, tangible and intangible, are properly compensable.[85] The judicial system's long experience with emotional harm and similar psychic damage proximately caused by tortious conduct provides a reasoned, principled, and controllable approach to the assessment of these damages. There is no need either radically to circumscribe recovery for the serious, albeit intangible, injuries sustained by the defamation victim or to eliminate real but parasitic harm and limit recovery to pecuniary injury to reputation.[86] Removing presumed damages removes the possibility of a substantial recovery in the absence of some demonstrable injury proximately caused by the defendant's conduct. Once the injury is demonstrated, the system, however inexactly, can cope with compensation as it does whenever tortious conduct causes harm.[87]

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84. *See supra* notes 67 and 68.

85. As amplified in Time, Inc. v. Firestone, 424 U.S. 448 (1977), *Gertz* requires that there be "actual injury" caused by the defendant's act, but not that it necessarily be injury to reputation.

86. *See* Lebel, *supra* note 26, at 269, 270. As Professor LeBel has observed:

> [T]he Court has recognized that defamatory communications have as much potential for inflicting such personal injuries as emotional distress as they do for injuring the reputation of the plaintiff, and therefore, that plaintiffs deserve to be compensated for these non-reputational harms. . . .
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> The plaintiff who is unable to establish actual injury to reputation but who can establish other harm still has a claim for relief that sounds in defamation because of the *capacity* or the *potential* that the communication possesses for causing reputational injury. It is this *capacity for reputational harm* that is at the core of the defamation action and constitutes the gravamen of the wrongful conduct of the defendant in publishing material that has this capacity. The fact that on the occasion of a particular publication the reputational injury was not suffered or, as is more likely, simply cannot be proved, does not relieve the defendant of the obligation to compensate the plaintiff for the other foreseeable types of harm that the publication actually did cause on that occasion.

Id. (footnotes omitted). Limitation of damages, where recoverable at all, to direct pecuniary harm flowing from injury to reputation, precluding recovery for emotional harm and otherwise requiring proof that the plaintiff has suffered reputational injury, is a basic tenet of much current reform thinking. *See* THE MODEL COMMUNICATIVE TORTS ACT (§§ 3-101, 9-101); Anderson, *supra* note 58, at 763 (proposing that recovery be conditioned on "proof of some harm to reputation in every case"); Ingber, *supra* note 67, at 785 (urging that recovery for harms be limited to those quantifiable as special, pecuniary rather than general damages); Lewis, *supra* note 7, at 615-16 ("allowing recovery for 'mental anguish' or other unmeasureable harm would allow juries to speculate at large and in effect bring back presumed damages. . . . The Supreme Court should . . . require proof of special damages in all libel cases.").

87. The paradigmatic defamation case is not the aberrational Brown & Williamson

Punitive damages, the other *bête noir* of libel reform, are not so easy a target. Although often treated together with presumed damages, punitive damages are not unique to defamation nor do they have any compensatory function; they serve to punish.[88] Perhaps punitive damages—essentially a private fine—have no place at all in a reasoned damages system; perhaps they are inherently constitutionally suspect.[89] Nevertheless, unless we are prepared to eliminate punitive damages in all actions, there is no sound basis for eliminating them in defamation actions, where such damages are subject to intense scrutiny and meaningful standards. Irrespective of the extent of apparent constitutional permissibility,[90] the common law has generally conditioned the award of punitive damages on a clear demonstration of the defendant's ill will and intention to inflict harm on the plaintiff.

> The issue with punitive damages . . . is intentional harm, not intentional conduct which causes harm. . . . Although it is true that one cannot realistically be deterred from harboring feelings of ill will toward another, one can be deterred from acting on that ill

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Tobacco Corp. v. Jacobson, 827 F.2d 1119, 1142 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1302 (1988); *see supra* note 76. It well may be the more pedestrian Simonds v. Blue Cross-Blue Shield of Mich., 629 F. Supp. 369 (W.D. Mich. 1986), in which the plaintiff received $103,691.94 for documented loss of business attributable to defendant's circulation of a defamatory letter, $10,000 for physical pain and suffering to which the plaintiff and his wife testified, and $150,000 for "emotional pain and anguish" from the defendant's accusations attacking his integrity and to which the plaintiff, his family, friends, and a clinical psychologist testified. 629 F. Supp. at 384-85; *see* S. HALPERN, *supra* note 22, at 154.

88. LeBel, *supra* note 28, at 273.

> The two items of damages [presumed and punitive damages] have different meanings and different rationales. . . . Presumed damages permit compensation for unproven harm, while punitive damages lack any overt compensatory rational. The fact that the Supreme Court has chosen to impose the same constitutional restrictions on their recovery should not lead to a routine failure to recognize their different nature and function.

Id. (footnote omitted).

89. Although the Supreme Court recently upheld the constitutionality of punitive damages in a tort action against a claim that they amount to an "excessive fine" impermissible under the eighth amendment (Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 109 S. Ct. 2909 (1989)), the Court expressed no opinion with respect to the constitutionality of punitive damages as a matter of due process. *Cf. id.* at 2923-24 (Brennan, J., concurring) (stating that the majority opinion "leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties.").

90. Constitutionally, a private plaintiff suing over a private defamation may recover punitive damages without a greater fault showing than is necessary for liability (Dun & Bradstreet Builders, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985)), and it is generally assumed that *Gertz* constitutionally permits punitive damages whenever the plaintiff demonstrates the *Sullivan* type of malice (*i.e.*, knowledge or reckless disregard as to falsity). The *Gertz* Court, however, spoke negatively, indicating only the impermissibility of presumed or punitive damages in the absence of such malice; *see* Lewis, *supra* note 7, at 616 (noting that Justice Powell's language "seems to leave open the possibility that punitive damages may in time be found too intimidating to free expression to be allowed at all").

> will in such a way as to harm the other. This is precisely the deterrent objective of punitive damages.[91]

Absent condemnation of all such private fines in all cases, it is difficult to condemn this kind of punishment imposed on one who has willfully and maliciously (in the true sense of the word) defamed another.[92]

THE DELICATE BALANCE IN INDELICATE HANDS: A UNITARY APPROACH TO REFORM

To retain both damages for intangible actual injury and punitive damages leaves much to the discretion of the jury, however well instructed. The desire to treat damages in defamation idiosyncratically, which lies at the heart of much of the well-considered reform proposals, springs from the conviction that the modern jury either cannot or will not perform its function properly. This conviction then informs a decision to remove as much as possible from jury consideration: if jury damages awards are too high, change the damages rule by eliminating damages or so severely restricting them that there is no room for jury discretion. The assumption is that, although equipped to deal with life and liberty, the jury's hands are too indelicate to be entrusted with matter touching on a fragile first amendment.

Excessive jury verdicts are a serious problem. Indeed, although the practical severity of the problem is ameliorated by the almost automatic judicial reversal of questionable jury verdicts,[93] that bizarre fact of appellate life highlights the cause for concern. However, it does not follow that there is something inherently inimical to the first amendment in the jury process. One does not call for the elimination of the jury in every case in which one of the parties might be unpopular or controversial. The broad generalization of media unpopularity is hardly a sufficient justification for displacing the jury in defamation actions. Rather than dismiss the jury, we

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91. DiSalle v. P.G. Publishing Co., 375 Pa. Super. 510, 558-59, 544 A.2d 1345, 1370 (1988), *app. denied*, 557 A.2d 724 (Pa. 1989), *cert. denied*, P.G. Publishing Co. v. DiSalle, 109 S. Ct. 3216 (1989).

92.

> As we recently observed, "[c]ourts in libel cases should be guided by the same general rules regarding damages that govern other types of tort recovery." . . . Therefore, perceiving no reason to abandon the traditional requirement for a showing of actual or apparent ill will toward the plaintiff before allowing punitive damages, we hold that a public official, who must prove actual malice to establish liability in a defamation action may not also recover punitive damages absent an additional finding that the defendant acted with common law malice in publishing the defamatory statement.

Id. But cf. Van Alstyne, *supra* note 75, at 803-07 (arguing against punitive damages awards in civil libel cases).

93. Matheson, *supra* note 75, at 280 ("appellate courts have reversed approximately eighty percent of the jury verdicts entered against publishers") (footnote omitted); *see* Bezanson, *supra* note 60, at 790 ("Most plaintiffs lose in court."); Franklin, *Proposal*, *supra* note 31, at 4-5.

might better consider why juries have so much difficulty handling the problems of defamation.

What is immediately apparent is the issue of capability in the face of inordinate complexity. The defamation rules and distinctions have reached such a plane of intricacy that it is not reasonable to expect clear and consistent jury behavior.[94] That juries have overcome apparent prejudice is not remarkable; it is remarkable that on occasion they have been able to penetrate the maze of defamation and to reach reasoned decisions.[95] Simplification of the law of defamation—the goal of virtually all reform proposals—also can serve to rationalize the jury process. Neither reform nor effective protection of the press need be at the expense of the jury. Meaningful reform need not be predicated on the assumption of incompatibility between the jury system and the Constitution. A simplified and less confusing and expensive defamation scheme, with comprehensible fault and damages standards, also would be more manageable for a jury.

The various declaratory judgment proposals do simplify the defamation complex, but at too great a cost to the interest in reputation. Perhaps motivated by a desire to avoid constitutional problems by eliding them, the proposals create a parallel remedial system—essentially a dismembered defamation tort—rather than confront the need to reexamine and reformulate the present constitutional structure.[96] The fault/damages trade-off, while striking at the heart of the darkness of defamation law, also misconceives the relationship between the components and the consequences of that

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94. *See* Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221, 1233-35 (1976) (describing twenty-three discrete "decision points" in the typical defamation action).

> Securing to persons and other legal entities the good reputation to which they are entitled and which they have earned, without discouraging the free flow of ideas and information so important to a free society, has proven a difficult task. . . . The maintenance of this balance has . . . engendered a complex doctrinal structure. . . . The complexity of the law alone is enough to provoke serious criticism. Distinctions that often seem to be theoretically sound become impractical in the actual administration of justice. [T]he notion that a jury can make practical use of theoretical distinctions is simply a fallacy.

Id. at 1224 (footnotes omitted). "[C]ritics of the current body of defamation law often point to the 'actual malice' issue as one that is extraordinarily difficult for juries, and perhaps even judges, to grasp." LeBel, *supra* note 28, at 305 (footnote omitted).

95. Exemplary is the particularized jury verdict in *Sharon v. Time, Inc.*, in which the jury found the utterance false and defamatory but the defendant's conduct lacking in "malice" albeit negligent; *see supra* note 46. *See also* LeBel, *The Infliction of Harm Through the Publication of Fiction: Fashioning a Theory of Liability*, 51 BROOKLYN L. REV. 281, 349 n.269 (1985) ("Although it is fashionable to denounce juries in defamation cases, a couple of recent cases reveal that juries may be able to understand perfectly well what is at stake in such cases.").

96. The Washington & Lee proposals do attempt a limited reformulation with respect to the allowance of highly restricted special pecuniary damages without a showing of fault. THE MODEL COMMUNICATIVE TORTS ACT, Comment to § 3-101. The assumption is that the absence of presumed and punitive damages and the severe limitations on proven compensatory damages, together with maintenance of the procedural inhibitions on the plaintiff allow the scheme to pass constitutional muster. *Id.*

relationship. If one eschews reflexive antipathy to substantial compensation for the victim of irresponsible conduct, it becomes apparent that the pernicious complexity and expense does not stem from the existence of *a* fault requirement or the availability of damages. Rather, the complexity and expense arise from a multi-tiered fault structure, with *Sullivan* "malice" at the apex, intertwined with a set of damages rules that varies with degrees of fault. A damages-based remedial scheme for defamation, predicated upon the existence of actual injury, consistent with that applicable to other torts,[97] and not burdened with distinctions based on the public or private nature of the parties or the utterance, can be applied fairly and effectively in the context of a similarly unitary fault structure. Creation of a workable and meaningful structure requires rethinking of the bases of present constitutional doctrine.

If presumed damages were eliminated and punitive damages made unequivocally dependent upon a clear and convincing showing of intention to harm,[98] little justification would remain either for differentiating liability on the basis of who the plaintiff is or for the pernicious *Sullivan* malice standard of fault. Rather, a unitary fault standard,[99] predicated on comprehensible concepts of professionalism, can complement a unitary damage standard to form a clear, consistent and workable frame of reference for redressing injury to reputation. Effective constitutional checks on the process then can be provided by extending to all defamation cases the existing constitutional procedural structure relating to the burden and quantum of proof and the scope of appellate review. To the extent our proper concern is with jury bias, the set of constitutional procedural hurdles in the path of the defamation plaintiff provides an offsetting and controlling mechanism.[100]

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97. *See supra* notes 74-92 and accompanying text. A damage-based remedial scheme would contemplate (i) compensatory damages for all actual harms, tangible and intangible, proximately caused by the defendant; and (ii) punitive damages where intention to harm, common-law malice, is also demonstrated. *Id. See also* Halpern, *supra* note 7, at 316-20.

98. Clearly, limiting compensatory damages to "actual injury" in all cases and conditioning punitive damages on demonstrated ill-will (at least if such demonstration were in addition to a proof of present constitutional malice) produces a damage complex patently more restrictive than that presently permissible and one invulnerable to constitutional attack absent a general interdiction of punitive damages.

99. The unitary system described here is more fully elaborated in Halpern, *supra* note 7, at 320-25.

> A unitary algorithm for damages and procedure is desirable, but if we are to have simplified reform without an alternative noncompensatory system, the fault complex itself must be changed. A unitary system, applicable to all claims irrespective of the nature of the parties or of the utterance, is the sure way to remedy the epicyclic, unpredictable, and inordinately expensive present system. The need to determine the public or private nature of both the plaintiff and the utterance, and the application of an array of standards following from those determinations, taxes not only the resources of the parties but also the capability of the judicial system.

Id. at 320-21 (footnotes omitted).

100. *See* Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of*

In the context of procedural rules amplified to apply to all defamation plaintiffs and to every element of the cause of action—requiring, for example, every plaintiff to prove both falsity and fault by clear and convincing evidence, under a *de novo* judicial review standard—the draconian knowledge-or-reckless disregard burden is essentially obviated. However, there is no sound justification for returning to the aberrational strict, no-fault liability of the common law. The declaratory judgment proposals, in trading fault for damages, assault both reputation and speech. Although it is doubtful at best that a no-fault declaration of falsity can provide effective redress for the injured plaintiff,[101] if and to the extent that it does, then it also inhibits the publishing defendant.[102] It is too late in our development of both concepts of reputation and the ambit of free speech to revert to any form of strict liability for speech. The enduring values of *Sullivan* are its procedural overlay on the defamation cause of action and the change from absolute to fault-based liability. Eliminating fault by eliminating damages is a radical (even if constitutional) departure from the *Sullivan* accommodation that does not effectively serve the important interests underlying that accommodation.

On the other hand, what was central to *Sullivan* was the fault concept itself, and not the choice of a particular fault standard. That standard, which has been at the core of the present chaotic state of the law, should no longer serve as the linchpin of the constitutionalized law of defamation.[103] In lieu of a formulation that has produced an expensive and ineffective status-based jurisprudence of defamation, we need, consistent with the great body of tort law, a single, uniform fault standard predicated on the defendant's behavior, rather than on the defendant's cognitive state.

Although specifically I propose a fault requirement based upon "professional negligence," holding the professional disseminator of information to the standards of that profession,[104] there may be other similarly based

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Religion, 102 HARV. L. REV. 933, 955 nn.81, 82 ("Courts have used the . . . techniques of adjusting burdens and standards of proof to offset potential jury bias against the institutional press in defamation cases. . . . No device for eliminating jury bias can claim to be one hundred percent effective, although perfection may be an unrealistic and constitutionally unnecessary goal.").

> The procedural hurdles—shifting to the plaintiff the burden of proving fault and falsity clearly and convincingly, with close, independent appellate scrutiny of the fact finding process—appear to be the most clearly principled and readily workable way of accommodating the defamation cause of action to the first amendment.

Halpern, *supra* note 7, at 320 (footnote omitted).

101. *See supra* notes 49, 63-73 and accompanying text.

102. Although I seriously question the potency of the scheme, if in fact the retraction/declaration model has teeth, then those teeth must bite.

103. As I have suggested, "[t]he actual malice standard essentially has served to undercompensate the injured victim of defamation while unduly burdening the entire litigation process. It has produced 'grossly perverse results'." Halpern, *supra* note 7, at 321 (quoting Justice White in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 774 (1985)).

104. *See* Halpern, *supra* note 7, at 323-25.

formulations that would serve as well. Whatever the precise formulation, the aim should be a serious and workable fault criterion related to the conduct of the defendant. What is important and necessary is the creation of a unitary, simplified litigation structure containing both heavy constitutional procedural burdens on the plaintiff and more comprehensible fault and damage rules by which a jury may be guided to provide effective compensation and redress for the defamation victim injured through the fault of the defamer. There is no real disagreement over either the need to remove the complicating ornamentation from the structure of the law of defamation or the need to provide fairness to the injured plaintiff and protection for the innocently erroneous defendant. As the movement for libel reform gathers more momentum, it is imperative, beyond the specifics of the reformulation, that we not make the defamation action even more idiosyncratic. In examining this communicative tort, the concern for communication should not overwhelm the tort.

The Supreme Court, for now, has chosen to avoid the difficult and necessary reexamination of a constitutionalized law of defamation.[105] The serious issues of fundamental values cannot indefinitely be elided or disposed of by easy formulae. Meaningful reform, through the states or the Supreme Court,[106] the legislature or the judiciary, requires candid confrontation with the complex reality underlying these issues.[107] The interest in reputation can be protected in a manner consistent with the first amendment without

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> The inquiry under such a standard is not a general search for reasonableness, nor is it directed to the truly elusive determinations of state of mind that our present standards require. Rather, the issue is the more specific, objective one of behavior under existing and peer-recognized professional standards. For the press, the analogue is to the fault standards applicable to medical or legal malpractice claims—claims whose resolution certainly have far reaching consequences for the defendants, transcending simply money damages. To make clear that liability will attach to the demonstrated departure from standards that exist as criteria of professional conduct is not leaving first amendment protection only to the responsible journalist; it is asking, just as we ask our doctors and lawyers, that one who purports to be a professional behave professionally.

Id. at 325 (footnote omitted).

105. The doctrine formed over a quarter century by changing and shaky Court majorities (*see supra* notes 8-15) exhibits an inertial quality: the concern was extension of the specific *Sullivan* standard rather than realistic review and considered judgment over the continuing utility of that standard.

106. Arguably (much as THE MODEL COMMUNICATIVE TORTS ACT argues in the Comment to § 3-101, although to a different purpose) the limitation of compensatory damages to actual injury and addition of an intention to harm requirement to punitive damages, together with extension of the inhibitory procedural rules to all plaintiffs and all elements of the defamation cause of action, provide a sufficient constitutional shelter for speech to support a professional negligence fault standard in all cases. However, that conclusion does require a rethinking of *Sullivan* and a substantial overruling of *Gertz* and the rationale of *Greenmoss*.

107. "By giving us a view of the past that is complex, challenging, and sometimes puzzling, [history] can warn against understanding both the perils and possibilities of the present—and of the future—in simplistic terms." N. ROSENBERG, *supra* note 1, at 268.

eviscerating the tort or grossly distorting the function of the jury. The totality of our value system—the individual and societal values in reputation, in speech and in the jurisprudential process itself—must be respected if reform is to produce a positive good.