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Just as Alexander Bickel once accused the Warren Court of imagining the past and remembering the future,[1] so it is with the libel tort. My purpose in this essay is to "take stock" of the libel tort: to remember the past and assess the present so that we have a firm basis upon which to imagine the future. The past quarter-century has seen dramatic evolution of the libel tort, and it is now time to step back from that experience and assess the tort anew.

The subject of this essay is the changed libel tort.[2] The libel tort has experienced profound change throughout its long and often arduous history.[3] Indeed, change is perhaps more characteristic of the tort than constancy. The change on which I will focus is that which has transpired over the past quarter-century.[4] Unlike many past changes in the tort, which have been profound but focused on specific elements of the cause of action such as

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1. A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 13 (1970). Bickel attributed the phrase to L. B. Namier. *Id.; see* L. B. NAMIER, CONFLICTS 70 (1942); *see also* E. H. CARR, WHAT IS HISTORY? 162 (1962).

2. My principal focus in this article is libel law in the context of mass communication. The United States Supreme Court has suggested that the common law tort may persist largely untouched by constitutional privileges in the private libel setting. The private libel area seems to be governed by a concept of publication of essentially private, commercial, or special purpose information to a defined and strictly limited audience. This is a concept more akin to that of common law privilege than to a general rule of publication. The principal case in which the private libel concept has been applied is Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985), which involved a libel in a credit report. Some language in the *Greenmoss* opinion suggests that the concept of commercial speech underlies the private libel approach. The difficulty with attaching significant weight to the commercial speech aspects of *Greenmoss* is that, by the Court's own standards, the information communicated in that case, if true, would be of clear public value. In any event, a conclusion based on the commercial character of the offending statement would have to be the product of much more elaborate analysis than that announced in the *Greenmoss* case.

A waiver or contract theory might better explain the private libel distinction, but even within the confines of the transaction between the parties, which anticipates that one of the parties will act on the information, it is hard to understand the essentially unexplained conclusion that no first amendment interests exist as to the communication between Dun & Bradstreet and the purchaser of the information. It is perhaps sufficient to say, for present purposes, that the contours and rationale of the private libel cases remain to be explored in the Supreme Court's jurisprudence. Whatever the rationale, it appears at this point that the scope of the private libel category is so narrow in its probable application as to be de minimus, and perhaps irrelevant to the present or future libel tort.

3. *See* Donnelly, *History of Defamation,* 1949 WIS. L. REV. 99; Veeder, *The History and Theory of the Law of Defamation,* 4 COL. L. REV. 3 (1904), 3 COL. L. REV. 546 (1903).

4. The beginning point, for my purposes, is the United States Supreme Court's 1964 decision in New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

the defense of truth and expanded fact-finding authority of the jury,[5] the recent wave of change has reverberated throughout all of the central elements of the tort, fundamentally altering its character. The principal engine of change has been external to the tort itself, and the result has been revolutionary rather than evolutionary change.

In taking stock of today's libel tort, I will focus on four central elements of the cause of action: reputation, compensation, publication, and privilege.[6] Each element has experienced fundamental change, if not radical reformulation, over the roughly twenty-five years of development since *New York Times Co. v. Sullivan.*[7] My purpose is not to sanctify the common law, nor to condemn today's libel tort. My objective, instead, is to *remember* the common law, to trace the past quarter-century of change, and to identify the libel tort today. My conclusion is unsettling. The libel tort has changed from an action to compensate for damage to reputation caused by an unprivileged publication, to an action to impose a penalty on media for general publication in an irresponsible manner of an injurious and false factual statement about an individual or entity.

I. LIBEL AND REPUTATION

a. A Brief History of the Common Law Tort

Libel law always has had a peculiar, and often problematic, relationship to reputation.[8] In part this is because reputation is an elastic as well as a time- and culture-bound concept. Almost from its inception the libel action principally was associated with protecting the reputation or inviolability of government and the ruling classes, including feudal lords, monarchs, and the church.[9] The phrase "the greater the truth, the greater the libel"[10] was

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5. *See supra* note 3; Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law,* 16 STAN. L. REV. 789 (1964).

6. The elements of the defamation tort are variously stated, and there is wide room for interpretation as to the specific meaning of each element, however the elements are expressed. *See* RESTATEMENT (SECOND) OF TORTS § 559 (1976); Anderson, *Reputation, Compensation and Proof,* 25 WM. & MARY L. REV. 747 (1984) (noting varying meanings of reputation and compensation); Post, *The Social Foundations of Defamation Law: Reputation and the Constitution,* 74 CALIF. L. REV. 691 (1986) (noting varying meanings of reputation).

7. 376 U.S. 254 (1964).

8. As Dean Pressor put it: "It must be confessed at the beginning that there is a great deal of the law of defamation which makes no sense. It contains anomalies and absurdities for which no legal writer has had a kind word. . . ." W. KEETON, PROSSER AND KEETON ON TORTS 771 (5th ed. 1984) [hereinafter PROSSER AND KEETON ON TORTS]; *see* Anderson, *supra* note 6, at 747-48; Post, *supra* note 6, at 691.

Robert Sack, whose exceedingly able book LIBEL, SLANDER AND RELATED PROBLEMS reflects his comprehensive knowledge of libel law in all of its dimensions, has been even more graphic. *See* R. SACK, LIBEL, SLANDER AND RELATED PROBLEMS (P.L.I. 1980); text accompanying *infra* note 50.

9. *See* PROSSER AND KEETON ON TORTS, *supra* note 8, at 840 & nn.4, 5; Veeder, *supra* note 3. In his article, Veeder indicated that the libel tort preceded the rather infamous form of action in the Star Chamber, where its principal thrust was protection of government from

simply a terse way to express this central function of the original tort.

From these none-too-benign origins, the reputational interests reflected in the tort evolved. The movement from protection of authority and power from criticism toward protection of a broader range of individual reputational interests, and then toward protection of the individual's interests in community reputation, was gradual. Over the course of these changes, the tort was democratized; that is, the interests represented became more universally applicable to all citizens, and the imbalance between the state as the original claimant of protection and the citizen, who was first the object of the action before becoming its beneficiary, was corrected.

While the tort's evolution along these lines was tortured and gradual, three factors most contributed to the democratizing trend. The first was the defense of truth, which until rather late in the tort's long history was not available. The defense of truth wrested away the foundations upon which rested the tort's function of protecting rulers against criticism.[11] The defense of truth also symbolized a broadening of the tort's societal function: the action was now for a defamatory statement that could not be justified in truth, a formulation that reflected a more universal interest in freedom of the individual from wrongful and damaging characterization. Class boundaries were even further eroded by the second and more recent development: the abolition of seditious libel.[12] No longer could government be libeled. The focus, instead, was on individual persons and their reputational interests. Finally, the burden of proof on the defense of truth may have contributed to the tort's democratization—although by accident, as the burden of proof rules were largely remnants of the earlier regime. Placing the burden of proof of truth on the publisher of a libel made the libel action more accessible to individuals by effectively tipping the balance in favor of the defamed individual, who needed only to prove publication,

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seditious, or critical, utterance. In its earlier form it appears to have existed in local courts and in the ecclesiastical jurisdiction as an action to vindicate the reputation of the individual citizen in his or her community. Interestingly, the remedy in this early form of action was not money damages, but apology. Relatively little is known about the specific form and use of this action, although Veeder indicated that it appeared to have been used frequently, largely as a means of avoiding the necessity of duels or other types of vengeance, and as a means of penance, thus reinforcing the church's moral influence. As Veeder put it, the remedy was directed toward the moral misconduct of the speaker, not toward curing the harm to the defamed individual. *See* Veeder, *supra* note 3; *see also* Anderson, *supra* note 6.

10. Prosser attributes this maxim to Lord Mansfield. PROSSER AND KEETON ON TORTS, *supra* note 8, at 840 & n.6.

11. *See supra* note 9.

12. Commentary and analysis pertaining to the repeal of the Sedition Act in this country, and to the larger question of the rejection of the concept of seditious libel, abound. Perhaps the most influential interpretation is found in *New York Times Co. v. Sullivan. See* New York Times Co. v. Sullivan, 376 U.S. 254, 273-78 (1964). Other writings on the subject particularly emphasize historical materials. *See* L. LEVY, LEGACY OF SUPPRESSION (1960); L. LEVY, FREEDOM OF THE PRESS (1984); Anderson, *The Historical Origins of the Press Clause,* 30 UCLA L. REV. 455 (1983); Blasi, *The Checking Value in First Amendment Theory,* 1977 AM. B. FOUND. RES. J. 521.

defamation, and harm, a task the associated rules of libel per se and general damages often made even easier.[13]

This is not to say that the common law libel tort ever completely was democratized, even in its fullest bloom. While the reputational interest evolved from protecting government from the governed to protecting the individual citizen's interest in "good name" in a relevant community, the tort's practical operation remained elitist. Libel actions almost always were employed by persons of sufficient influence or stature to make it worth their while to file suit; success in litigation, particularly the amount of money recovered, was directly related to a person's stature, wealth, and influence. In effect, therefore, the less one needed money to compensate for reputational harm, the more money one could recover.[14] Access to the legal system was not free, and publishers could still "stonewall" in the belief that relatively poor plaintiffs would not be able to bring suit, even if the publisher was aware of an error. After all, in an era of increasingly commercialized mass communication, publishers had a stake in their reputations, too. They still do. While "reputation" at common law was a broad and elastic concept, the types of statements that received the greatest protection, such as allegations of adultery, dishonesty in business or incompetence in professional affairs, and the like,[15] had a distinct upper-class bias. Finally, the tort's actual operation fell far short of consistently limiting its protection to freedom from unwarranted damage to reputation. The effective presumption of falsity at common law no doubt protected some reputations that were, in fact, undeserved. It was, however, "reputation" that was being protected by the common law, not truth.[16]

The common law tort also was attended with a complex and intricate set of privileges that further limited its practical operation and therefore restricted its universal application to all instances of individual reputational

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13. *See* PROSSER AND KEETON ON TORTS, *supra* note 8, at 840-42; R. Sack, *supra* note 8, at 129-42.

14. *See* PROSSER AND KEETON ON TORTS, *supra* note 8, at 842-45; Anderson, *supra* note 6, at 747. There was some hope that the requirement that plaintiffs show actual damages as a precondition to recovery under *Gertz v. Robert Welch, Inc.* might temper damage awards, especially by limiting the availability of general damages, which juries could presume and award without any direct proof. This appears not to have occurred, however, as actual damages under *Gertz* include such open-ended and incalculable matters as humiliation and embarrassment. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974); Anderson, *supra* note 6, at 756-58.

15. The special degree of protection accorded defamations pertaining to certain subjects, such as unchastity, crime, honesty in business and professional matters, and the like, arose initially in the slander tort, where the ordinary rule of presumed damage did not apply, and actual damage to reputation had to be proved, except in these per se categories. While they were not, as such, relevant in the libel setting, the influence of the per se categories also was felt in the libel tort context. *See* PROSSER AND KEETON ON TORTS, *supra* note 8, at 788-97; R. Sack, *supra* note 8.

16. *See* PROSSER AND KEETON ON TORTS, *supra* note 8, at 840-42; R. Sack, *supra* note 8, at 129-42.

harm.[17] For present purposes, the important point about the privileges is that they did not, as a general rule, affect or alter the nature of the underlying reputational interest.[18] The privileges typically were grounded in specific and limited settings in which the value of the challenged expression clearly outweighed the admitted harm to reputation, or in which the harm to reputation was strictly confined and therefore minimized when balanced against other social interests.[19] While complex and intricate, therefore, the privileges generally left the value and nature of the reputational interest unaffected; in theory, at least, there was no suggestion that in certain settings, or with certain classes of persons, reputation was less important or entitled to a different measure of legal respect.

Notwithstanding its many imperfections, by the 19th Century the libel tort was focused on community-based reputational or good name interests of the individual citizen, it was widely available and largely free of rigid and strictly circumscribed social class distinctions, and it was available to remedy injuries to a wide range of reputational interests. The libel tort applied equally to the integrity of governmental officials, the competence of a practitioner, or the success of a football coach. When combined with the availability of the contingency fee in this country, the rules of evidence and the burdens of proof were decidedly cast in the citizen-plaintiff's favor. The tort reflected the individual's interest in a community's perception of the plaintiff,[20] and concomitantly protected the dignity and autonomy of the individual in a larger and more complex society.

b. The Constitutional Privileges and Their Impact On Reputation

The common law of libel has been dramatically altered by a new and broadly-applicable set of privileges tied to the first amendment.[21] The privileges were first announced in the 1964 United States Supreme Court decision in *New York Times Co. v. Sullivan*,[22] and were based on the principle that "debate on public issues should be uninhibited, robust, and

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17. *See* PROSSER AND KEETON ON TORTS, *supra* note 8, at 815-38.

18. *See id.* at 815, 824-25. This is implicit, of course, in the very concept of "privilege" at common law, given its situation-specific character.

19. *See id.* at 815-38 (succinctly summarizing privileges).

20. The common law libel tort was "relational" in character. That is, it was not concerned with a plaintiff's own feelings, as such, except as an element of "parasitic" damages. Although harm to feelings, alone, may be cognizable under other torts, such as intentional infliction of emotional distress, the defamation tort, by contrast, is concerned with the opinions or perceptions of others in a community—that is, the plaintiff's good name as it relates to other persons and as it may be affected, in their minds, by a publication. *See* PROSSER AND KEETON on Torts, *supra* note 8, at 771; R. Sack, *supra* note 8; Green, *Relational Interests,* 31 ILL. L. REV. 35 (1936); Veeder, *supra* note 3.

21. The following discussion is drawn from R. BEZANSON, G. CRANBERG & J. SOLOSKI, LIBEL LAW AND THE PRESS: MYTH AND REALITY 2-3 (1987) [hereinafter LIBEL LAW AND THE PRESS].

22. 376 U.S. 254 (1964).

wide-open."[23] Free and uninhibited expression, declared the Court, must extend to matters of self-government and to "issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."[24] In the libel setting, the command of the first amendment requires a rule that protects some falsity in order to assure that truth is neither punished nor deterred; the innocent mistake, therefore, should be free of liability lest publishers be deterred from publishing facts as they know them, at least with respect to public issues and public persons.

These purposes of the speech and press guarantees are effectuated through a set of *constitutional* privileges applicable to all libel suits involving publications in the media or in any form that is likely to reach general or nondifferentiated and nonspecial purpose audiences.[25] The privileges, while complex and often intricate, take three basic forms. First, all libel plaintiffs must prove that the offending statement was actually false as a precondition to recovery.[26] Second, any libel plaintiff also must prove that the offending statement was published negligently; that is, that the publication was unreasonable in light of what the publisher knew or should have known about its truth or falsity at the time of publication.[27] Third, libel plaintiffs classified as public figures by virtue of their public position or association with a controversial public issue must establish a higher level of fault than negligence. These public plaintiffs must prove that the publisher acted with actual malice; that is, that the statement was published with knowledge of its falsity, or recklessly in light of serious doubts actually entertained about falsity at the time of publication.[28] The negligence and actual malice privileges are fault privileges that focus on the subjective state of mind of the publisher at the time of publication.

The effect of the constitutional privileges is to make it more difficult for a plaintiff to succeed in a libel action involving media publication, and even more difficult if the plaintiff is a public official or a person who wields significant public influence. The privileges reflect a judgment that robust debate on public matters should be encouraged, and a companion judgment that the reputational interests of public persons require less protection in view of their public, rather than private, positions.

The effect of the constitutional privileges on the reputational element of the libel tort has been fundamental. While the common law privileges did not affect the libel tort's underlying concept of reputation, the constitutional privileges have altered the very nature of the reputational interest. This has occurred in two principal ways. First, the constitutional requirement that the plaintiff prove an offending statement's falsity has limited the

23. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

24. *Id.*

25. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

26. *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

27. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

28. St. Amant v. Thompson, 390 U.S. 727, 731 (1968); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

interest squarely to that in "true" reputation.[29] The protection only of "true" reputation substantially limits the universe of reputational interests that may claim protection, for many, if not most, reputations are in some measure undeserved. At the same time, the central relevance of a statement's falsity effectively has broadened the protected interest from that in outward-looking, or extrinsic, community-based reputation to an inward-looking, or intrinsic, freedom from psychic or emotional harm to the individual.[30] In effect, the balance struck at common law between the community's perception and the individual's personal dignity has been subtly shifted. No longer is protection of individual dignity as clearly limited only to cases in which community perceptions are also affected. Indeed, evidence of community perception of the plaintiff and community interpretation of the offending statement plays a decidedly secondary role in the adjudication process.[31] Issues of reputational harm and defamatory interpretation, if addressed, increasingly are considered matters of law for the judge, and instances of recovery in the absence of community-based reputational harm seem to be increasing.[32] Falsity is substituting for, if not swallowing up, reputation.

The second way in which the constitutional privileges have altered the underlying reputational interest is through the requirement that a plaintiff prove fault to recover in libel. The tort's recent focus on fault—negligence or recklessness in light of what was known about falsity or truth at the

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29. The requirement that a plaintiff prove falsity was announced in Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986). The exact scope of the *Hepps* rule, and its precise meaning in terms of the types of proof of falsity that can support the required finding, are unclear, especially in the nonconstitutionalized private libel setting discussed in note 2, *supra*. While plaintiffs did not usually bear a burden of proving falsity prior to *Hepps*, and while, before *Hepps*, few libel cases clearly addressed the truth issue, as such, subjective falsity—what was believed about truth *at the time of publication*—was then, and remains today, a pervasive issue in essentially all cases subject to constitutional privilege. Accordingly, falsity was a principal focus of the libel suit prior to *Hepps* (even though subjective falsity), with similar limiting consequences on the meaning of reputation. The change in the meaning of reputation predated *Hepps*, therefore, although for somewhat different reasons. *See* LIBEL LAW AND THE PRESS, *supra* note 21, at 191-97.

30. This was also a problem at common law, largely because of the presumption of harm to reputation and the open-ended measures of general damage. *See* PROSSER AND KEETON ON TORTS, *supra* note 8, at 794-97, 842-45; Anderson, *supra* note 6. A shift in the tort's focus toward falsity will accentuate this problem, as it even further will loosen the constraints imposed by the tort's relational focus. Falsity is not a relational concept, and the harm stemming from it need not, in contrast to reputation, be relational in nature. For a most insightful discussion of the nature and meaning of reputation in the libel tort, see Post, *supra* note 6.

31. For an extended discussion of the respective roles played by falsity and reputation in the litigation process, with discussion of cases that appear to involve recovery in the absence of community-based reputational harm, see LIBEL LAW AND THE PRESS, *supra* note 21, at 183-200; *see also* Anderson, *supra* note 6; Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 CALIF. L. REV. 847, 853-56 (1986).

32. LIBEL LAW AND THE PRESS, *supra* note 21, at 295 n.69; *see also* Anderson, *supra* note 6.

time of publication[33]—has become a dominant focus of the lawsuit, including at trial.[34] A plaintiff who succeeds in proving fault may often, as a practical matter, have made a sufficiently powerful showing to convince a trier of fact that both falsity and reputational harm have been established, without more.[35] In other words, proof that a fact was published in the face of serious doubts about its accuracy may make practically unnecessary any proof that the fact was actually incorrect, and may sufficiently anger the trier of fact that independent proof of reputation and actual injury in the relevant community is mere surplusage.

Of equal importance to the nature of the underlying interest in reputation, however, is the systematic effect of limiting recovery to cases in which both reputational harm (in its common law sense) and fault must be shown. Because a showing of fault often may substitute for an independent showing of harm to reputation, cases involving reputational harm may become only a subset of cases in which fault is present, rather than the converse. Put differently, recovery in litigation is not principally limited by proof of reputational harm, but rather it is limited by proof of fault. Most reputational harm goes uncompensated; proportionally more instances of negligent or reckless publication are compensated to the extent that fault can substitute for a showing of reputational harm.[36]

The failure of the constitutionalized tort systematically to reflect interests in reputation as opposed to responsible journalism is magnified by the types of reputational injury that tend to be protected. Because the fault privileges tend to be sensitive to matters of context, such as deadline pressure, coverage of public figures, and the like, and because the privileges quite explicitly are predicated on strengthening the protection of speech on public matters, recovery is less likely in the very cases deemed most deserving of protection at common law. Recovery for injury to the reputation of public figures—a category that includes, although is not limited to, the wealthy and powerful whose protection was greatest at common law—is much more difficult than recovery for injury to the reputation of a private individual.[37] While the

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33. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); St. Amant v. Thompson, 390 U.S. 727, 731 (1968); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); RESTATEMENT (Second) of Torts § 580B comment h (1977).

34. For a discussion of the role of fault in the actual adjudication of libel suits, as well as the impact of the fault showing on questions of falsity and reputational harm, see LIBEL LAW AND THE PRESS, *supra* note 21, at 104-07, 118-27, 191-200; Barrett, *supra* note 31, at 853-56.

35. *See, e.g.,* Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), *cert. denied,* 429 U.S. 1062 (1977); Lawlor v. Gallagher Presidents' Report, Inc., 394 F. Supp. 721 (S.D.N.Y.), *remanded,* 538 F.2d 311 (2d. Cir. 1975); *see also* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986); LIBEL LAW AND THE PRESS, *supra* note 21, at 191-97 & n.69.

36. For a more thorough discussion of this argument, see LIBEL LAW AND THE PRESS, *supra* note 21, at 182-219.

37. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347, 349-50 (1974). Actual success rates are consistent with the higher privilege obstacles for public plaintiffs. *See* LIBEL LAW AND THE PRESS, *supra* note 21, at 112-27; Franklin, *Suing the Media for Libel: A Litigation*

common law, as noted earlier, was imperfect and somewhat class-biased in its greater protection of the wealthy and powerful, it is nonetheless likely that, as a rule, the greatest reputational damage to a career or to an economic livelihood will occur with such persons. If this proposition is accepted, the conclusion seems inescapable that the constitutional privileges have limited the instances of the tort's operation to the very cases in which the least reputational harm has occurred.[38]

The cumulative impact of the constitutional privileges has been subtly but radically to change the "reputational" character of the libel tort. The common law tort was premised on harm to reputation. Today the tort protects against injurious falsehood. The common law tort was extrinsic in nature and focused principally on individual reputation in the community. Today the tort is largely intrinsic, with the dominant focus on falsity and the individual's resulting emotional harm. At common law a chief focus in litigation was disparagement of reputation. Today the chief focus in litigation is on the responsibility of the publisher. The common law concept of reputation largely has been submerged by, if indeed it has not entirely succumbed to, the constitutional emphasis of falsity and fault. Plaintiffs whose reputational interest was most protected at common law face the greatest obstacles to recovery and succeed least often. More fundamentally, recovery by any plaintiff is more likely to be the product of chance than of any systematic pattern reflecting reputational interests.

II. LIBEL AND COMPENSATION

At least in its more recent common law form, the goal of libel law has been compensatory; punishment and deterrence have been secondary objectives.[39] This is implicit in the strict liability character of the libel tort, for through strict liability the action reflected the idea that what was important was whether someone was hurt, not why or by whom.[40] Punitive damages required an additional evidentiary showing by a plaintiff, and one that was quite distinct from the types of proof required to support the underlying action.[41]

To be sure, the common law's success in isolating its compensatory purposes often was obscured by the peculiar and complex elements of the tort and burdens of proof on damages. For instance, the rule of strict liability, which foreclosed the publisher from escaping liability because of

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Study, 1981 AM. B. FOUND. RES. J. 795 [hereinafter Franklin, *Suing the Media*]; Franklin, *Winners and Losers and Why: A Study of Defamation Litigation,* 1980 AM. B. FOUND. RES. J. 455 [hereinafter Franklin, *Winners and Losers*].

38. *See* LIBEL LAW AND THE PRESS, *supra* note 21, at 193-95.

39. *See* PROSSER AND KEETON ON TORTS, *supra* note 8, at 842-47; Anderson, *supra* note 6.

40. *See* PROSSER AND KEETON ON TORTS, *supra* note 8, at 804-05, 814-16; R. Sack, *supra* note 8.

41. *See* PROSSER AND KEETON ON TORTS, *supra* note 8, at 845-47; R. Sack, *supra* note 8.

inadvertence or absence of fault, represented an explicit social judgment to place the risk of loss on the risk-taking publisher.[42] This undeniably had the effect of deterring or inhibiting publication; indeed, this was the very purpose of the strict liability rule, for the publisher was in the best position to avoid the harm in the first instance. But the deterrence function of the common law did not disguise the compensatory goal of the tort. It coexisted with and supported the compensatory goal.

A second way in which the compensatory function of the tort often was obscured was the measure of damages. Apart from punitive damages, which rested on a special showing, the remaining compensatory damages were governed by rules that, while understandable, often led to awards whose relation to compensation were problematic at best. Many libels required no proof of damages whatsoever, but instead left the jury a largely unconfined discretion to place a value on the non-economic and often purely internalized and emotional injuries which befell the libel victim.[43] Even if proof of "actual" damages was required, the measure of such damages was sufficiently elastic as not to pose a large barrier, and upon proof of such actual damages as humiliation and suffering, the open-ended "general damages" were available.[44]

The damage rules were a common-sense product of the fact, intuitively known at common law and recently confirmed in the present day,[45] that actual economic damages ordinarily do not flow from a libel, and if they do they often are impossible to prove. Instead, the damage caused by libel is truly reputational and relational, and its manifestations are deeply personal and psychological, not financial.[46] The common law, however, attempted compensation for such injuries in money, and of course the libel tort is hardly unique in this respect. The result was that damage awards often would bear no relationship to or foundation in actual economic harm, and therefore would appear arbitrary and partake of punishment. This was so even though the measure of such general damage awards was the plaintiff's loss rather than, in the case of explicitly punitive awards, the publisher's pocketbook. And the element of punishment was indeed present, for it is one thing to award damages on the ground that the publisher is in the best position to avoid the harm, and quite another to say that the publisher

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42. *See* PROSSER AND KEETON ON TORTS, *supra* note 8, at 804-05, 814-16.

43. *Id.* at 842-45; Anderson, *supra* note 6.

44. *See* PROSSER AND KEETON ON TORTS, *supra* note 8, at 842-45; Anderson, *supra* note 6.

45. *See* LIBEL LAW AND THE PRESS, *supra* note 21, at 19-29, 78-95; Barrett, *supra* note 31; Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CALIF. L. REV. 809 (1986) [hereinafter Franklin, *A Declaratory Judgment*]; Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. REV. 1 (1983) [hereinafter Franklin, *Good Names*].

46. For information on the types of injury experienced by libel plaintiffs, and the reasons they sue, see LIBEL LAW AND THE PRESS, *supra* note 21, at 6-18, 78-95; *see also* Anderson, *supra* note 6; Barrett, *supra* note 31; Franklin, *A Declaratory Judgment, supra* note 45; Franklin, *Good Names, supra* note 45.

bears not only the burden of avoiding harm, but the burden of unforeseeable impact on the victim's emotional stability as well.

The fact that the rules of damage as well as the rule of strict liability made the compensatory objective of the libel tort unapparent in some instances did not change the tort's basic compensatory character. Strict liability and compensation are perfectly compatible, and the imperfections of translating psychological and reputational harm into money were neither unique to the libel tort, nor so fundamentally problematic as to undermine it. The fact was and remains today that money is a necessary medium in the legal system, and at common law there was no obvious logical alternative. Because falsity of an offending statement was neither an element of the tort nor a precondition to recovery of damages, a nonmonetary remedy of correction did not make sense.[47] Legally cognizable harm could flow from a true or nondisprovable statement as well as a false statement because the legally protected and compensated interest was reputation, not injurious falsehood.

The constitutional privileges have transformed the remedial function of the libel tort from compensation for relational harm to compensation for emotional distress and punishment of irresponsible publication. This change has been subtle, and is a matter of degree, not of kind. At common law proof of relational harm was a precondition to recovery for a broader array of personal emotional harm. Today proof of falsity, not of relational harm, is the only real precondition to recovery. Moreover, the role of compensation in the remedial function of today's libel tort is secondary, not primary. Indeed, particularly in the public libel cases, the dominant function is punishing irresponsible publication, and any compensatory function, even for emotional harm, is distinctly secondary. The reasons for these changes are threefold.

First, today the libel action is dominated by the issues of falsity and fault. The dominant focus of the law, and the principal focus in litigation, is not the impact of a libel on community-based reputation. Instead, the focus is on the falsity of the offending statement, its personal consequences to the individual, and the negligence or malice of the publisher in light of what was believed about a statement's truth at the time of publication. In view of this, it is hardly surprising that a jury's remedial focus would be influenced by considerations of fault, and would be shaped by a cleaner and more objective, yet remedially more open-ended, finding of falsity rather than the more ambiguous and circumstantial, yet remedially more circumscribed, judgment of harm to reputation.[48]

One might posit, however, that fault should not distort the jury's compensatory function, for just as the deterrence implicit in strict liability was compatible with compensation, a higher threshold of fault-based deterrence also should be compatible with compensatory objectives. The problem

47. PROSSER AND KEETON ON TORTS, *supra* note 8, at 840-42; Anderson, *supra* note 6.
48. *See supra* notes 31, 34.

with this line of reasoning is that deterrence based on strict liability is widely systematic. That is, it applies across-the-board to all cases, and requires no special evidentiary showing. Fault-based deterrence has neither characteristic. It does not apply across-the-board, but only to a subset of the cases in which defamation and harm have occurred. More importantly, fault requires a special evidentiary showing, and that showing bears no logical relation either to the existence of reputation or to the presence or measure of harm to reputation.[49] This makes it very likely that extraneous fault-based factors that dominate the trial will bear on the jury's compensatory determination, and makes a shambles of any systematic pattern of compensating reputational harm. As Robert Sack has expressed it, "[t]he few plaintiffs who succeed resemble the remnants of an army platoon caught in an enemy crossfire. Their awards stand witness to their good luck, not to their virtue, their skill, or the justice of their cause. It is difficult to perceive the law of defamation, in this light, as a real 'system' for protection of reputation at all."[50]

The final impact of the constitutional privileges on the compensatory purposes of libel law results from the de facto, if not de jure, coincidence of proof of liability and proof of punitive damages. The coincidence is explicit in the public figure libel cases, in which it has been held that punitive damages may not be awarded except upon a showing of actual malice, a showing that is also a precondition to liability itself in such cases.[51] While the required showing of common law malice has not been eliminated as an additional obstacle to punitive damage recovery if a state's underlying common law requires it, even in such cases proof of actual malice will almost always, as a practical matter, satisfy the common law standard of malice as well. In public cases, therefore, a jury's decision on liability automatically will carry with it the availability of punitive damages, and the juries are so instructed. The risk is great in such cases that compensation and punishment will not only become intertwined issues, as they are in the negligence-based fault cases, but that they will become identical issues, and that both the jury and the plaintiff's lawyer will find the largely unconfined discretion of punitive damage awards to be more hospitable than the more circumstantially confined, and reviewable, determination of compensatory damages.[52] In effect, the constitutional privilege rules have made public figure libel claims all-or-nothing games, with punishment rather than compensation being the dominant consideration in shaping a remedy, and with punishment being the sole explanation for the results achieved if the cases are judged on a systematic level.

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49. The fault showing concerns the publisher's state of mind with respect to the truth or falsity of a statement at the time of the statement's publication. *See* LIBEL LAW AND THE PRESS, *supra* note 21, at 191-200; Barrett, *supra* note 31, at 853-56.

50. R. Sack, *supra* note 8, at xxvi.

51. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

52. *See, e.g.,* Brown & Williamson v. Jacobson, 14 Media L. Rep. 1497 (7th Cir. 1987).

A final point should be made about the impact of the fault-based constitutional privileges on the compensatory function of the libel tort. The fact that money remains the medium of libel remedies has facilitated the influence exerted by the fault privileges on the jury's decisions about harm and its compensation. Yet this is, upon reflection, a strangely incongruous result in a tort now based on falsity. When the interest reflected in the tort was reputation, the common law damage remedy was understandable because nonmonetary remedies logically were impossible. When the interest reflected in the tort became protection against injurious falsehood—whether the injury be limited to reputation or, as today, to a broadened array of predominantly intrinsic, emotional harm—the need for money damages as a medium of compensation became less evident. Indeed, in an ironic way, this is reflected in the very conduct of parties to libel suits today. For many plaintiffs, and particularly for the public plaintiffs, the act of bringing suit itself may achieve both reputational and psychological compensation. What remains of such cases after suit is brought is a straightforward action for punitive damages. In terms of the plaintiff's interests, therefore, the jury's role may be utterly irrelevant to compensation.

III. The Publication Requirement

At common law, a plaintiff bore the burden of proving publication as an element of the libel tort.[53] The requirement generally was not onerous, but it served at least two functions beyond the obvious one of establishing that the communicative tort was, indeed, communicative. The first function was to provide a framework within which to judge questions of privilege. Communications between husband and wife, for example, or between employer and employee in the employment setting, were usually privileged.[54] Proof of the form and setting of publication was necessary to define the potential privilege issues.

The second and more basic function of the publication requirement was to define the relevant community in which the claimed reputation existed, and to set evidentiary boundaries on the proof of disparagement or reputational harm.[55] The libel tort was relational in character; it was based on a reputation perceived by others, and on harm to that reputation in the eyes of others. If publication occurred in a community in which the plaintiff had no reputation, and therefore could experience no diminution of reputation, there would be no actionable libel. Likewise, if the plaintiff had a reputation in a particular community, but the disparaging statement either was not published in that community or was not believed or construed to be disparaging, no harm to reputation in that community would have occurred, and no libel action would lie.[56]

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53. *See* Prosser and Keeton on Torts, *supra* note 8, at 780-83, 797-802, 815-39.
54. *Id.* at 824, 828-32.
55. *Id.* at 797-802.
56. *Id.* at 779-85.

The common law publication requirement served these essential and highly discriminating functions of defining the ambit of common law privilege and constructing the meaning of words quite effectively. Both of these functions of the publication requirement have been undermined by the constitutional privileges of falsity and fault. While we have not normally considered these changes as relating to the publication element, their impact is best understood in that context.

The principal effect of the constitutional privileges has been to change the focus of the publication element from a fact-specific and circumstantial element to a monolithic and categorical one. The constitutional privileges have created a general division of the publication concept between libels in private or limited publication settings and libels occurring in mass communication settings.[57] Libelous statements whose publication is quantitatively limited and whose limitation is roughly coextensive with a special purpose or function performed through publication—such as a credit report intended for a purchaser of the report and not for general circulation[58]—have been largely untouched by the constitutional privileges. Outside of this limited publication setting, if mass communication or communication available to an undifferentiated audience is involved, the constitutional privileges apply in full force.

The result of the bifurcation of the tort through the concept of publication has been that a wholly distinct set of rules focused on falsity and fault applies in the mass publication environment. This result, in turn, has affected various common law concepts that were products of or were shaped by the publication requirement, such as community perception of reputation, reasonable interpretation of a potentially ambiguous statement, and innuendo. The impact has taken many forms.

First, because falsity is one of the preconditions to success in all mass publication settings,[59] the approach to such questions as interpretation, innuendo, and community perception has been narrowed.[60] Interpretation

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57. The distinction between media and nonmedia libels was implied in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) and Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986). It explicitly was drawn in terms of the purpose and subject of a communication, and its limited distribution. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985). For a discussion of the private libel category, see *supra* note 2.

58. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

59. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

60. This is not to say, however, that at common law, courts consistently dealt with questions of interpretation and meaning in a purely audience and community-based fashion. Issues of defamation, including reputation and harm to it from an offending statement, often were treated as questions of law, and direct evidence of audience interpretation, for example, frequently was not required. Yet even when considered as questions of law, the objective was to measure community-based perception and understanding. The fact that this was not consistently accomplished exemplifies one of the many imperfections of the common law, but not the underlying nature of the inquiry. *See* PROSSER AND KEETON ON TORTS, *supra* note 8, at 773-85. For an insightful and critical analysis of the common law's imperfections in assessing reputation and harm, see Anderson, *supra* note 6.

issues must now be framed in terms of falsity, not perception of reputation. Perhaps more importantly, falsity is not a community-based issue, and therefore sensitivity to setting and external perception is no longer a major factor in the plaintiff's proof or, for that matter, in available defenses.[61]

The second consequence of the different approach in mass communication settings derives from the requirement that plaintiffs prove fault. Fault requires proof of publisher intent or state of mind. It is all too easy to allow a finding of fault, or specific intent, to substitute for issues that otherwise should be considered in relation to audience definition and audience interpretation.[62] The requirement that plaintiffs prove fault, while onerous, has the practical effect of relieving them of the burden of direct proof of defamation and reputational harm in the relevant community in which publication occurred, and shifts this burden to the defendant. To put it differently, if the plaintiff can prove that the publisher was aware of and intended to convey a damaging fact, arguments that a reader or viewer would not so interpret the statement are left to the defendant, and even if they are made they are likely to fall on deaf ears. Of course, the publisher always can claim that it did not intend to convey a given fact by the statement, but this is dangerous, for if the jury disbelieves the disclaimer in light of its own interpretation of the offending statement, actual malice will have been proved.[63]

Finally, the separate approach to publication for mass communication libels has by necessary implication augmented the jury's direct and unassisted interpretive role, for by definition mass audiences are ambiguous and highly diverse, and it is in this setting that our understanding of the dynamics of communication is poorest. If audiences are homogeneous and confined geographically, culturally, and in time, we have at least some measure of confidence in our intuition about questions of reputation, interpretation, and likely harm, and in any event some constraints can be placed on the evidentiary function. With mass audiences, which are faceless and highly

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61. For a discussion of the focus of the libel tort on falsity-related issues at the expense of concern with actual harm to reputation, see LIBEL LAW AND THE PRESS, *supra* note 21, at 195-200; Barrett, *supra* note 31, at 853-56. For a discussion of the practical consequences of focusing on falsity and fault on the adjudication of a recent libel case, see Bezanson & Ingle, *Plato's Cave Revisited: The Epistemology of Perception in Contemporary Defamation Law*, 90 DICK L. REV. 585 (1986).

62. An example is Bose Corp. v. Consumers Union, 466 U.S. 485 (1984); *see* Bezanson & Ingle, *supra* note 61.

63. This has become a particular problem in recent libel cases. *See, e.g.*, Brown & Williamson v. Jacobson, 14 Media L. Rep. 1497 (7th Cir. 1987). If a statement is capable of being interpreted two ways, one falsely defamatory and the other not, a defendant may choose to deny any intention to have communicated the defamatory meaning. By such a denial, the defendant will have implicitly, and often will have explicitly, admitted that the damaging interpretation would, if intentionally expressed, be clearly false, and knowingly so. The danger lies in the jury's belief that the damaging interpretation was not intended. If the jury disbelieves the publisher's statement that the damaging version was not intended, or that the publisher was unaware that such an interpretation could be given the statement, proof of knowing publication of false fact will have been established by the defendant's own admission.

diverse, no limitations on evidence concerning reasonable interpretation, inference, innuendo, or perception of reputation can be ascertained, much less enforced, and we know only that the range of possibilities is largely unlimited.[64] The only way to resolve these issues in the mass communication setting is to treat them as matters of law, as the current approach to the impenetrable distinction between fact and opinion illustrates,[65] or to leave jurors discretion to arrive at their own conclusions on the basis of their personal judgment, assisted by the evidence introduced at trial. Evidence introduced at trial, however, usually consists only of the text or tape of the alleged libel, evidence of the publisher's awareness of possible falsity, and the testimony of the reporter and the plaintiff. Any effort to judge the highly circumstantial questions of reputation and interpretation in the dynamic context of actual communication effectively is precluded in the mass communication setting, therefore, and this result is effected both through the bifurcation of the publication concept and through the emphasis on falsity and fault which the bifurcation reinforces.

IV. The Changing Concept of Privilege

Much already has been said about privileges, especially the constitutional privileges of negligence and malice, as well as the requirement that plaintiffs prove falsity, which is something of a privilege and something of a new element of the public libel tort. I will not repeat here all that previously has been said about constitutional privileges. Instead, I will discuss the common law and constitutional privileges in general terms, and explore the implications of the more monolithic constitutional privileges on the libel tort today.

Perhaps the most complex and confounding aspects of the common law libel tort were the privileges. This was not only because of their quantity, but also because they tended to be highly intricate and based on relatively subtle determinations. Nonetheless, the common law privileges had at least one common characteristic: they were discrete and situation-specific, and reflected a judgment about the social value of particular publication in limited situations, such as communication between husband and wife, reporting on matters of public record, or evaluative statements on public issues when the facts underlying the evaluation or conclusion were sufficiently set out that the reader could fairly judge the validity of the evaluative statement.[66] The privileges did not, as a general rule, change or in any way affect the elements of the underlying libel claim, such as the nature or value

64. *See* Bezanson & Ingle, *supra* note 61, at 587-91, 600-03.

65. For an example—unfortunately not uncharacteristic—of the approach courts are taking in attempting to define as a matter of law the distinction between fact and opinion, see Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984).

66. For a concise discussion of the various absolute and qualified privileges, see Prosser and Keeton on Torts, *supra* note 8, at 815-39.

of a reputational interest at stake. The privileges were, moreover, defenses, with the burden of proof resting squarely on the publisher.[67]

The constitutional privileges are of a very different character. First, they are more categorical in application, in that they are not based on discrete and limited publication settings nor on the particular nature and circumstances of the offending publication, but instead on the identity of the subject of the publication.[68] In all but one respect, the application of constitutional privilege and the degree of protection it affords depends not on when and to whom the publication was made, but on whether the individual subject of the offending statement was a public or private individual. The only exception to this rule occurs when the application of *any* privilege is placed in issue. In such cases, the limited or general availability of the statement is decisive, although for the large class of media libel cases, this issue is resolved by definition.[69]

Second, unlike the common law privileges, the burden of proof on issues of constitutional privilege does not rest exclusively on the publisher. Once the privilege issue is raised, the plaintiff bears at least a share of the burden on the issue of plaintiff status, and the plaintiff bears the burden of proving negligence or malice by the heightened clear and convincing evidence standard.[70] With respect to the falsity privilege, the plaintiff bears the full burden of proving that the offending statement was false, although the standard of proof is as yet unclear.[71]

Because for all practical purposes constitutional privilege is an issue in all media libel cases, with the only open question being the level of privilege, the issues of subjective falsity, negligence, or malice tend to dominate the pretrial and trial processes.[72] This is all the more inevitable because the privileges constitute complete defenses, and consist largely of questions of law or constitutional fact. Therefore, privilege defenses tend to be raised immediately, are the subject of motions for summary judgment or dismissal in virtually all cases, and are substantially adjudicated prior to trial.[73] For

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67. *Id.* at 835. Once privilege was established, of course, the burden shifted to the plaintiff to prove abuse of the privilege.

68. That is, the privileges depend on whether the plaintiff is a public figure or a private person, which in turn will determine whether the applicable constitutional privilege is malice or negligence, respectively, for media or general circulation libels. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1984).

69. *See supra* note 2.

70. *See* PROSSER AND KEETON ON TORTS, *supra* note 8, at 806-10; R. Sack, *supra* note 8. The burden of raising privilege "probably" rests on the defendant, to use Keeton's terminology. Once claimed, the level of privilege is a function of plaintiff status, which is a matter of law, and at least as a practical matter the plaintiff often bears a large burden in establishing the lower level of privilege if the issue is contested.

71. *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

72. *See* LIBEL LAW AND THE PRESS, *supra* note 21, at 104-07, 127-44, 183-91; Franklin, *Winners and Losers, supra* note 37.

73. LIBEL LAW AND THE PRESS, *supra* note 21, at 127-44.

those cases that do reach trial, privilege issues continue to dominate the evidentiary and fact-finding processes.[74]

Prior to the recent decision in *Philadelphia Newspapers, Inc. v. Hepps*[75] nearly eighty percent of the seriously litigated media libel cases were resolved prior to trial, and therefore prior to any adjudication of the common law issues of publication, reputational disparagement, and harm.[76] In almost all such cases, the basis for decision was privilege; that is, even if the offending statement was defamatory at common law, no liability could attach because negligence or malice could not be shown.[77] Even for those cases in which trials were held, the result of the adjudicatory process was likely to be based on, or to be explainable by, a lack of fault.[78]

Even after *Hepps,* which requires the plaintiff in most media cases to allege and prove falsity, fault-based privilege issues are likely to continue to dominate the pretrial resolution of libel cases. The falsity issue, or privilege, is dominated by questions of adjudicative fact that are unlikely to be resolved in advance of trial, especially given the greater evidentiary difficulty of proving falsity as opposed to truth. In contrast, the fault-based privileges are much more dominated by questions of law and involve heavy burdens of proof on factual issues. Fault questions will, therefore, likely continue to dominate pretrial activity in media libel cases. And while *Hepps* promises to make the issue of falsity more dominant in those cases reaching trial, the ambiguities in the required proof of falsity coupled with the exonerating effect of the fault privileges may still leave the resolution of cases that are tried ambiguous, at least in the absence of bifurcated verdicts.

The continued dominance of fault in the resolution of media libel cases will perpetuate a characteristic of the libel system that may well tend to encourage libel suits, at least by the most public of the public figure plaintiffs. Notwithstanding its faults, its cost, and its intrusiveness, today's libel system virtually assures victory to both parties. For the plaintiffs, the act of suing itself achieves substantial vindication, and the promise of punitive awards upon a showing of malice—often a predicate to liability itself—encourages such plaintiffs and their contingency-fee lawyers to persist in litigation once suit is commenced.[79] Even for those plaintiffs whose motives may be impure—those who have been damaged by a true statement—the libel system provides substantial comfort, for a loss in litigation, even after trial, rarely poses a risk of a straightforward decision on truth. A loss based instead on lack of malice is, for such plaintiffs, both explainable and, in an ironic way, face-saving, for such a decision assumes (although

74. *Id.* at 183-95.

75. 475 U.S. 767 (1986).

76. *See* LIBEL LAW AND THE PRESS, *supra* note 21, at 118-44; Franklin, *Suing the Media, supra* note 37.

77. *See* LIBEL LAW AND THE PRESS, *supra* note 21, at 118-44; Franklin, *Suing the Media, supra* note 37.

78. LIBEL LAW AND THE PRESS, *supra* note 21, at 183-204.

79. *Id.* at 92-95.

without deciding) that the challenged statement was false and damaging, but not negligently or recklessly published.

Likewise, the fault privileges may encourage media defendants to defend a libel suit in the face of uncertainty about the accuracy of what was published, and even in the face of known error. The current libel system gives media defendants two clear incentives to litigate. First, media defendants almost always win, at least when that issue is judged by the incidence of success in court.[80] The risk of financial loss through a judgment is slim. Even in the five to ten percent of the cases that are lost in court, the awards are relatively small by the time the appellate review process has run its course.[81]

The second incentive is protection of reputation. Reputation for accuracy is an important commodity for most media, and it is becoming more important with expanded commercialization of media. In an increasingly competitive environment, "reputation" is as important from a marketing perspective as from a professional one.[82] For those who translate "reputation" into "not admitting error,"[83] the fault privileges provide meaningful refuge, as the failure of the legal system to address the question of falsity in the vast majority of cases avoids the embarrassment of admitting error or apologizing, and allows the dispute to be reformulated by the media into the safer environment of press freedom.

V. The Libel Tort Today

There is reason to believe that the claims of threatened press freedom are being viewed with growing skepticism by a public that does not believe that every libel case involves such issues, and by a public that disbelieves the implicit assertion of invincibility.[84] There is also reason to believe that

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80. *Id.* at 118-27.

81. *Id.* at 144-46.

82. *Id.* at 40-41; *see* D. Whitney, *Begging Your Pardon: Corrections and Corrections Policies at Twelve U.S. Newspapers,* Gannett Center for Media Studies, Working Paper (1986).

83. There are, of course, many other good, or at least understandable, reasons for not admitting error, including the natural resistance to pressure by news organizations, claims by allegedly damaged parties that are based on ambiguous assertions of error, and unreasonable demands for apology when that response is not warranted. There are, as well, libel plaintiffs who will sue irrespective of the publisher's response. Suffice it to say that there are a constellation of reasons that might account for a publisher's refusal to apologize or correct, even if the published facts appear incorrect. The publisher's reputation is but one of the reasons.

84. A recent Gallup Survey examined public attitudes about libel suits against the press. Half of the people responding felt that libel suits by public officials were a good thing; ninety percent said that news organizations should face libel suits if they say something wrong; three quarters said there should be no liability if what was published were true, but over two-thirds said the publisher should be liable if the facts are wrong, even if they were believed to have been true at the time of publication. *See* Bezanson, *Straight Talk About Libel and the Press,* 25 Iowa Advoc. 49 (1987). The results of the Gallup Survey are on file with the Iowa Libel Research Project.

in some quarters the press is beginning to recognize that admitting error when it occurs is more conducive to credibility and reputation than denying it at every turn. These are hopeful signs, and they suggest that in some measure, at least, the players in the libel system may begin to address the libel problem more constructively. Yet the recent evolution of the libel tort and the libel system has transpired without an awareness of the more insidious side of the well-intentioned changes that have occurred over the past quarter-century. The libel system today defines its resolution of libel disputes in terms of fault, not reputation, its harm, or even falsity. The parties therefore still have every legal incentive to litigate, because the libel system's resolution is so ambiguous that both parties can, and do, win.

Perhaps this is as it should be. What more could we ask of a dispute resolution process than that both parties save face? For my part, however, I would hope for such a system to be explicit about its objectives, not silent. I would also hope for a legal system that does not seek to achieve one goal—protection of reputation—yet fails in every legally explicit measure to do so. I would not want a legal system based on protecting certain legally defined reputational interests, but in which the reputational protection actually achieved is the result of accident, force, or the will of the plaintiff, and is in no measure a reasoned product of the legal system itself. Finally, I would prefer a legal system that encourages the parties voluntarily to resolve their *real* dispute, and involves the courts only as a last resort, rather than a system that often provides little incentive to settle claims and instead may make litigation the remedy of first resort.

These difficulties are not unique to the most recent developments in libel law. The libel tort always has existed in a setting of charged interpersonal dynamics. Its often byzantine nature has made "rationality" of litigation an elusive goal, at best. But a fair appraisal of the libel system from the perspective of the past quarter-century makes clear that the changes wrought by constitutionalization of the tort have exacerbated the difficulties—have taken us from bad to worse, perhaps—and have extended the distance between the goals of libel law and what actually occurs in the libel system today.

Pressure for reform of the libel tort is coming from many quarters, and takes many forms. The proposals range from elimination of the *Sullivan* privileges to the creation of new causes of action, the development of declaratory judgment remedies, the use of voluntary nonlitigation alternatives, and the practice of bifurcating jury verdicts.[85] Whatever the alternative, the proposed reforms manifest an increasing level of discomfort with the existing libel system.

My purpose is not to prescribe a cure for the libel system, however, but rather to diagnose its condition. It is clear that there exist many possible

85. No effort will be made here to catalog all of the proposed reforms, nor to list their many authors. Many of the reform proposals are touched upon in Franklin, *A Declaratory Judgment, supra* note 45, and Barrett, *supra* note 31.

directions for reform, if we are to seek reform, and many of the proposals mentioned above, as well as countless others, respond to real problems. But reform must be built on a clear understanding of where we have been, and where we are today. Therefore my principal purpose is to describe the libel tort today, and to compare it with the common law tort of yesterday.

While the changes in today's libel tort from the mid-20th Century common law tort are many, a few are of overriding importance. The common law tort was premised on protecting reputation, and it achieved this purpose effectively although imperfectly.[86] Today the reputational footings of the libel tort are obscure, at best. Fault is the principal driving force behind liability. What is now important is how, why, and by whom someone has been impugned, not whether someone has been hurt. More basically, the tort's central focus on species of falsity has caused a quite remarkable change in the meaning of the underlying interest in "reputation." Through the rule of strict liability and the treatment of "truth" as a defense of justification rather than a negation of reputation, the common law tort was focused on a community-based idea of an individual's interest in the perception of self by others. Reputation today is not only more firmly tied to truth than it was at common law but, more importantly, it is effectively governed by truth. Community perception and interpretation is today of marginal significance, if any, because proof of falsity and the subjective intent of the publisher have been substituted for the difficult and discrete extrinsic questions of actual reputation and community perception. By practical consequence rather than logical necessity, "reputation" today means the individual's freedom from false assertion, a distinctly non-community-based idea, and the concept of justification is concentrated on the issue of factual falsity rather than public interest. "Reputation," in short, today means an individual's freedom from emotional distress caused by an intentionally false accusation.

The infusion of fault has changed both the focus of litigation and the systematic operation of the libel tort. The focus of libel litigation in the mass media setting is now on blameworthiness. The fault issues are inextricable from the underlying issues of liability, such as reputation and harm. In part this is because fault questions are, in fact, relevant to those issues, but they are only relevant in a rough and circumstantial way at best. In larger part the fault issues are inextricable because evidence of constitutional fault is compelling in its force and clarity when compared to the less conclusive forms of direct evidence of reputation and harm. When the impact of fault is combined with the difficulties of preserving inviolate the ambiguous questions of harm and compensation, the result is a tort whose basic character is decidedly punitive.

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86. The imperfections, in the view of many, vastly outweighed the benefits. *See supra* note 8. The point is not, however, that we should return to the common law tort, nor that it was a model to which we should revert, but rather that, while imperfect in execution, it did focus more clearly and cogently on reputation, in theory.

Finally, the severance of private libel from libel through mass communication has allowed the law of media libel to take its own course, freed of the moorings of the common law. Ironically, the system of constitutional privileges has helped loose the common law constraints. It is doubly ironic that a systematic overview of the operation of the libel tort in the most constitutionally protected mass communication setting leaves one with the singular impression that the incidence of liability bears no meaningful relationship to reputation, compensation, or falsity. This is so, of course, because in large measure the libel tort no longer concerns any of these interests.

At least in the mass communication, or media, setting, the libel tort today represents a very different set of interests from those reflected in the common law tort. The interests are essentially regulatory and punitive. The libel tort today represents a civil penalty for general publication in an irresponsible manner of an injurious falsehood about a person or entity. A finding of falsity is based on the content of the challenged statement and the subjective intent of the publisher, not on its meaning as understood in the real dynamics of actual communication. Injury is premised upon the logical consequences of the false fact and attendant emotional stress, not on community-based perceptions of reputation and harm. Irresponsibility is based on judicially-created standards of journalistic process and editorial judgment, not on concepts of privilege that reflect social value and abjure judgments of fault.

Whatever may be said against or in favor of such a tort, it is a far cry from the common law concepts of reputation, compensation, publication, and privilege. 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. For those whose interest is in protecting the press from unnecessary inhibition and government control of the standards of journalism, today's libel tort is anathema, for the chief consequence of libel today is inhibition of the press from violating judicially-crafted standards of journalism. Finally, for 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.

Whether in our instinct for reform we should return to the imperfectly realized common law interests or formulate new approaches that depart from both our present and our past, we need to build change on an understanding of where we are today and how we got there. For my part, today's libel tort is profoundly and fundamentally disquieting in a society that attempts to strike a balance between reputation and freedom of expression. Change in the libel system is therefore an imperative. But this should be neither a shocking nor an unsettling conclusion, for change is the one common thread that extends throughout the libel tort's long and arduous history.