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## The Three Voices Of Libel

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## THE THREE VOICES OF LIBEL

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The libel tort has been a focus of attention since the 1964 Supreme Court decision in *New York Times Co. v. Sullivan*.<sup>1</sup> True to its character as a tort that has taken many forms and served changing public and private purposes throughout its long history, libel has fully occupied scholars for the past twenty-five years. The multiple dimensions of the tort—technical, procedural, substantive, sociological, and jurisprudential—have been assessed from nearly every vantage point.<sup>2</sup> While those who have studied the libel tort know its considerable depths, recent scholarship and judicial attention have begun to coalesce around three basic forms, or strata, of the tort. These three forms are the basic common-law tort, the modern constitutionalized tort, and the even more recent modification in the form of an action for declaratory judgment.<sup>3</sup>

The three basic actions in libel will be our focus. Our purpose is to outline the fundamental elements of each form, and to suggest relevant substantive, sociological, and jurisprudential differences in an effort to place

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1. 376 U.S. 254 (1964).

2. The diversity of the literature is rich. For a wide-ranging collection of essays on topics such as the sociological underpinnings of the tort, legislative reform efforts, the role of the jury, and empirical findings, see *Symposium: New Perspectives in the Law of Defamation*, 74 CALIF. L. REV. 677 (1986). For additional views through the lenses of journalists, practitioners, communication theorists, and several prominent libel plaintiffs, see *Symposium: Libel*, 90 DICK. L. REV. 539 (1986); *Symposium: Libel*, 38 MERCER L. REV. 753 (1987). See also Matheson, *Procedure in Public Person Defamation Cases: The Impact of the First Amendment*, 66 TEX. L. REV. 215 (1987) (procedural vantage point); Tiersma, *The Language of Defamation*, 66 TEX. L. REV. 303 (1987) (speech theory).

3. See, e.g., Anderson, *Reputation, Compensation, and Proof*, 25 WM. AND MARY L. REV. 747 (1984) (tracing evolving purposes of libel tort, and calling for reform of modern tort by instituting "actual injury" rule); Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CALIF. L. REV. 809 (1986) (proposing reform legislation giving libel plaintiffs choice of bringing declaratory judgment action on issue of truth or falsity, with no damages available); Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 CALIF. L. REV. 847 (1986) (outlining declaratory judgment approach introduced as "study bill" by Congressman Charles Schumer in 1985); *Proposal for the Reform of Libel Law, Report of the Libel Reform Project of the Annenberg Washington Program* (1988) [hereinafter *Annenberg Report*] (reform proposal that mandates pre-suit request for reply or retraction; provides for declaratory relief alternative; permits defendants to transform action for damages to action for declaratory judgment); Cook, *Reconciling the First Amendment with the Individual's Reputation: The Declaratory Judgment as an Option for Libel Suits*, 93 DICK. L. REV. 265 (1989) (reviewing purposes of this alternative).

each tort in comparative perspective. At the most general level, we will conclude that each tort is radically distinctive in the social and jurisprudential purposes it serves. The common-law tort serves the individual's ability to function in organized society through protection against reputational injury in the community context. The constitutional tort serves collective or public ends of self-government, reflecting and to some extent responding to our society's mendacity. The declaratory judgment tort serves the private and public interest in accuracy of information, and thereby exacts accountability from the media for the truth of publications.

The three torts and the three very different "voices" they project are remarkably diverse. They present the three choices that lie before us as the most recent era of attention paid the libel tort winds toward its conclusion.

### I.

Before exploring the social and jurisprudential differences among the three torts, the essential elements of each can be summarized. Our discussion will be necessarily brief, and will focus on the basic aspects of each tort particularly as they bear on our comparative analysis.

The common-law tort has witnessed great evolutionary change over its extended life.<sup>4</sup> From the beginning it has been a subtle, complex, and often byzantine collection of rules and presumptions. At the risk of some overgeneralization, however, its basic character can be distilled. The common-law tort protects the individual's interest in reputation in a community; indeed, the tort's elements relate closely to its concept of reputation. The essence of reputation at common law is membership in a structure—the condition of sameness, of nonalienation from the community, of belonging to an established order in which one might prosper. In the eyes of the common law, the individual's interest is freedom from reputational injury that would interfere with achievement or retention of a desired role in the community, and the security—of whatever kind—that such a community role makes possible. Accordingly, loss of reputation in the community through a disparaging statement about the individual is compensated by money damages.

At common law the falsity of an offending statement is effectively presumed for all practical purposes, and the measure of damages is left to the broad discretion of the jury. While the common-law tort requires proof of reputational harm based on the perception of the injured party by others,

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4. W. KEETON, PROSSER AND KEETON ON TORTS 771-73 (5th ed. 1984); Donnelly, *History of Defamation*, 1949 WIS. L. REV. 99; Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 STAN. L. REV. 789 (1964); Anderson, *supra* note 3; Veeder, *The History and Theory of the Law of Defamation I*, 3 COLUM. L. REV. 546 (1903); Veeder, *The History and Theory of the Law of Defamation II*, 43 COLUM. L. REV. 33 (1904); R. SACK, LIBEL, SLANDER AND RELATED PROBLEMS (P.L.I. 1980); R. SMOLLA, SUING THE PRESS (1986). See Bezanson, *The Libel Tort Today*, 45 WASH. & LEE L. REV. 535 (1988) (noting changes in approach to reputation, compensation, publication and privilege).

this proof requirement is not often a major hurdle given the rules and presumptions that surround the issue. Indeed, the tort is very much geared toward the harmed individual, based as it is on the principal goal of protecting the individual's interest in his or her position in a community or in not being excluded from a community.<sup>5</sup>

In contrast, the constitutional libel tort focuses its protection on the publisher of information, thus reflecting in part a different concept of reputation. By 1964 the concept of "reputation" seems to have altered, resulting in a transformed tort. The old valued condition of sameness, of membership in an established order, became suspect in the libel context, particularly where public officials stood as plaintiffs.<sup>6</sup> "Reputation" acquired the connotation of "status quo" in a time of social ferment, and while its new connotation was never made explicit, the reputational interest had clearly suffered. What emerged was a "constitutionalized" libel tort protecting the publisher of accusatory (and often erroneous) information about the political-social status quo, rather than the public official, whose invocations of "reputation" seemed almost of another time and idiom.

Accordingly, the constitutional tort requires proof of both the factual falsity of an offending statement and its faulty publication. At least for most media publishers, fault generally requires conscious falsehood. In some cases negligence will suffice. Comparatively, reputational harm is not prominent. It is often—and safely—presumed. The focus on fault makes reputational harm seem less pressing as the focus of inquiry both related to falsity and to fault is text-based, and therefore, the community-based interest in reputational harm is hardly relevant, for what other people perceived is not really the issue. While harm must be proven, the rules are liberal and proof most often comes from the injured party. In any event, limitations that may stem from requirements that harm be proven are rarely relevant, because the constitutional requirements of proof of falsity and fault are so overwhelming that few cases survive them.

The declaratory judgment action represents an effort to strip the fault privileges away from the constitutional tort but retain the principal focus on factual falsity.<sup>7</sup> The declaratory judgment action, therefore, is based on

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5. The relevant community is a highly flexible concept, reflecting not only the scope and nature of a plaintiff's social, family, and professional relationships, but also reflecting the nature of the offending statement and the persons likely to be influenced by it. See W. KEETON, PROSSER AND KEETON ON TORTS 786-95, 842-43 (5th ed. 1984); Anderson, *supra* note 3. For a discussion of the types of plaintiffs who sue, the kinds of statements giving rise to suit, and the relevant "community" context in which harm was alleged, see R. BEZANSON, G. CRANBERG, & J. SOLOSKI, LIBEL LAW AND THE PRESS. MYTH AND REALITY 6-15, 19-25, 92-93, 152-62 (1987) [hereinafter LIBEL LAW AND THE PRESS].

6. Justice Black observed that "instead of being damaged Commissioner Sullivan's political, social and financial prestige [was] likely . . . enhanced by the *Times*' publication." *New York Times v. Sullivan*, 376 U.S. 254, 294 (Black, J., concurring). This comment suggested not simply that Sullivan's libel case was something of a sham but more generally that the interest in "reputation" as then understood was a concept whose persuasive power was at a low ebb.

7. See generally Franklin, *supra* note 3.

the twin assumptions that fault requirements are too onerous and are often counterproductive, but that the community-based reputational interest of the common-law tort is anachronistic. "Reputation" is replaced by an interest in factual accuracy of publication—an interest not in sustaining ties to a community but in controlling the content of information in a society where "facts" are accumulated and dispersed on a vast scale often in permanent form for multiple purposes. In service of these principles the declaratory judgment action, which has many variants that will not be explored here,<sup>8</sup> requires a party who is the subject of a damaging statement to prove falsity. Proof of reputational harm is usually required, but the requirement tends to be nominal only as community-based perception, which is not governed by falsity, is not really relevant. Instead, harm exists de facto from the fact of having been the subject of a factually inaccurate statement about which the *subject* feels strongly enough to sue. As a quid pro quo for eliminating the requirement of proving fault, money damages are abolished, leaving a judgment or in some cases a required correction as the injured party's remedy. Some declaratory judgment proposals permit recovery of attorney fees. The declaratory judgment action offers something for both the plaintiffs (no fault) and the defendants (no money damages, less intrusive discovery). Its principal object, however, seems to be neither vindication of the individual's reputation in the community nor protection of the publisher from liability; instead, the principal object is vindication of truth as a matter of historical record.

## II.

Perhaps the basic difference among the three torts, and the one most laden with implication, concerns their underlying assumptions about the communicative process itself. First, each tort reflects a different set of assumptions about how communication works, and thus about the connection between accusatory communication and harm. Second, each tort differs in evaluating the social function of communication, and hence in calibrating the amount of legal control that the tort will provide.

We turn first to the torts' assumptions about the way in which communication operates. The common-law libel tort was based on an understanding of communication as an interactive process between communicator and recipients, a process marked by multiple interpretations as a message filters through different perceptions people bring to information and dif-

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8. The Schumer and Annenberg proposals allow a media defendant unilaterally to transform a plaintiff's action for damages into an action for declaratory judgment. See Barrett, *supra* note 3, at 864-76; *Annenberg Report*, *supra* note 3, at § 4(e). The Franklin proposal does not give media defendants such an option. See Franklin, *supra* note 3, at 836-42. Another variation of the declaratory judgment mode is the voluntary, out-of-court process devised by the Libel Dispute Resolution Program and the American Arbitration Association, in which a neutral third party makes a determination as to the truth or falsity of the statements in question. See Wissler, Bezanson, Cranberg, Soloski, *An Alternative to the Problems of Libel Litigation*, in 1988 ENTERTAINMENT, PUBLISHING AND THE ARTS HANDBOOK 99, 105-10 (1988).

fering social frameworks in which information takes on significance.<sup>9</sup>

For all this complexity, the common law was pragmatic as well. It did not become paralyzed by the multiplicity of attributed meanings. Instead, it assumed that in a communication's passage through a community, various interpretations would be verbalized, reworded, embellished, or stripped down, and finally would coalesce into a core message consistent with local idiom, prejudice, and values. This core message could fairly be judged the "audience interpretation." "Communication," then, was a phenomenon capable of provoking a virtually automatic chain of response and translation with meaning highly dependent on a common interpretive process.

In view of this dynamic interaction, it was a short step to assume that if the core meaning was accusatory, harm was likely—particularly as the collective interpretation was hardening within the community. Thus, a fairly direct cause-and-effect relationship was perceived between an accusatory interpretation and relational harm suffered by the subject.<sup>10</sup> The process of interpretation itself contributed in no small part to the relational damage.

Still, the common law did not insist on proving a cause-and-effect relationship in all cases. The presumption of damages reflected additional understandings of the communicative process. First, the presumption acknowledged that a communication, as interpreted, could cause far more subtle forms of loss than financial impact.<sup>11</sup> The presumption also reflected a notion that harm would be virtually inevitable in the community's very process of interpreting certain communications. Having interpreted a statement as accusatory, a person—and by extension, a community—would find it impossible to dislodge the accusatory meaning from consciousness; the apparent permanence of an accusation in the interpreting mind itself would constitute harm to the subject.

The common law, then, displayed a fairly sensitive grasp of the communicative process by centering on the role of community interpretation and the range of communicative damage, both tangible and intangible.

The constitutional tort, in marked contrast, radically diminishes the common-law tort's case-by-case focus on community interpretation and instead focuses almost wholly on the speaker's intention, as limited by the text or literal words used. In a constitutional libel case, the central question is the speaker's knowledge about the meaning of the statement: whether, in view of potential variances between the speaker's intended statement, the literal text, and the community interpretation, the speaker's claimed intention about meaning is credible. This inquiry into state of mind—into

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9. Bezanson & Ingle, *Plato's Cave Revisited: The Epistemology of Perception in Contemporary Defamation Law*, 90 DICK. L. REV. 585 (1986) (noting common-law attentiveness to audience interpretation, and criticizing constitutionalized tort, at least in celebrated *Bose* litigation, of neglecting "the capacity of readers to attribute meanings along a continuum and according to their own expectations and experiences").

10. For an interesting analysis centered on defamatory language as accusatory, and suggesting a distinction between accusations and reports, see Tiersma, *supra* note 2.

11. W. KEETON, PROSSER AND KEETON ON TORTS 842-45 (5th ed. 1984).

knowledge of the message and awareness of its alleged falsity—predicates liability almost exclusively on the communicator.<sup>12</sup> If the speaker successfully claims ignorance of extrinsic meaning either through oversight or stupidity, there is no liability. The speaker is not liable even for literal falsehood, much less for foreseeable harm in an extrinsic interpretive setting. The literal text can absolve the speaker no matter what the speaker's intent if falsity cannot be proven, but literal falsity or actual harm will not yield liability unless it was intended by the speaker. In any given case, the audience and its interpretation are virtually irrelevant, except as an indirect, occasional check on the credibility of the speaker's claimed meaning.

Given the constitutional tort's focus on falsity and fault, what can be said about its view of the nature of the communicative process? At least two perspectives are possible. First, while the constitutional tort may de-emphasize the community and its interpretation, the tort remains fully aware of the interpretive dynamics and wholly shares the common law's expectation of the cause-and-effect relationship between communication and harm. Thus, the only difference between the two torts is that the common-law tort strives to provide a realistic remedy for plaintiffs, while the constitutional tort essentially sacrifices plaintiffs to other priorities.

An alternative view would be that the constitutional tort assumes that the interpretive dynamic of communication works on another level altogether. The constitutional tort's concern is communication of an "issue-regarding" kind; this tort may assume that "public communication" *in general* elicits its own sort of interpretation within an issue-regarding community. Since liability is available in far fewer cases than at common law, the constitutional tort may contemplate a community that is to a certain extent attuned to the frequent incompleteness, if not exaggeration, of much public communication—a community accustomed to the "ongoing" quality of public discussion, and thus habituated to reserving judgment. In this view the constitutional tort has its own appreciation of the interpretive dynamic of communication, and is supremely skeptical about any direct cause-and-effect relationship between public communication and individual harm. That is, the tort doubts that accusatory public communication actually injures a plaintiff to any significant degree. Rather, the public perceives such messages as issue-oriented, and discounts the personal components as hyperbolic or nondefinitive.<sup>13</sup>

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12. As the *Annenberg Report* states: "Libel suits only occasionally resolve the most critical issue from the plaintiff's perspective—whether the defamatory statement was true or false. The litigation often focuses on the defendant's alleged malice or recklessness rather than on the question of truth. . . . After years of litigation, the court either fails to set the record straight or does so too late for the decision to be meaningful or useful." *Annenberg Report*, *supra* note 3, at 10. For a study of strategies of proving the communicator's fault, see Bloom, *Proof of Fault in Media Defamation Litigation*, 38 VAND. L. REV. 249 (1985). One by-product of the fault inquiry is that, in effect, it enables courts to set journalistic standards. See Cranberg, *Libel Judges Are Setting Standards for the Press*, 42 *Washington Journalism Review* (Sept. 1989).

13. The role of hyperbole in the communicative process was an element in *Ollman v.*

Thus, the constitutional tort remains ambiguous about its assumptions concerning the communicative process. Perhaps the tort employs both approaches described above. Its requirement that "private plaintiffs" prove falsity and fault (a far greater burden than at common law) may reflect the first approach—the awareness of cause-and-effect communicative impact but the sacrifice of plaintiffs to higher values. The tort's even more burdensome requirements for public officials and public figures may reflect the second approach—that the community is accustomed to filtering issues from personalities, that personal harm from accusatory public communication is slight, and that higher values again should prevail.

The declaratory judgment action has its own view of communication. It is not concerned with a community's interpretation of messages case-by-case, or public communication's dialectic of exaggeration and skepticism. The declaratory judgment views communication neither as talk nor politics, but as artifact. It views mass communication in particular as the impersonal creation of a factual historical record. It seeks to check the communicative process much as interest groups and other parties seek to check the administrative process.<sup>14</sup> And the goal of checking the process is to correct the product through additional publication—to set the record straight about lives and events whose stories, given modern technology, now become part of a permanent, retrievable archive. Thus, in the declaratory judgment action factual error is the gravamen, and meaning is not a function of audience interpretation of the message or the genre of communication. Rather, the declaratory judgment tort parses the language, and while it does so with a view toward reasonable interpretation or meaning, its focus is not on the audience in any but the most abstract sense. In other words, the tort does not rest on the dynamics of perception, interpretation, and meaning in the context of a particular community with particular values. Nor does it appear to rest on any assumption that individual harm is predictably caused by communication, as the individual's harm does not seem to be the principal wrong to be remedied.

Falsity, not harm to an individual's reputation, lies at the heart of the declaratory judgment tort. Indeed, the declaratory judgment action abjures any assumption that communication is a personal, complex, and dynamic phenomenon with significance only in a particular environment. Differences in the process of communication and the meaning and weight of a statement that exist in such varied settings as political campaigns, public discussion of private morals, or cocktail party slanders are given scant attention.

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Evans and Novak, 750 F.2d 970 (D.C. Cir. 1984) (en banc) (Starr, J. for the majority; Bork, J., concurring), dealing with fact/opinion doctrine, but it deserves study as a key underlying aspect of much communicative tort law.

14. In a sense, this is a twist on Justice Stewart's statement that "(t)he primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the government as an additional check on the three official branches." Stewart, "*Or of the Press*," 26 HASTINGS L. J. 631, 634 (1975). The declaratory judgment action becomes a vehicle to check the checking institution of the press.



Instead, it is the words used, with meaning ascribed in the abstract, that is important. In contrast to the common-law tort, where what was heard is important, and the constitutional tort, where what was intended is determinative, the declaratory judgment tort focuses on what was said.

The nature of communication thus prompts a variety of descriptive models. Each is subject to question. Is communication as direct a cause of harm as the common law would have it? Is "public" communication as nuanced and indirect as the constitutional tort seems to say? And in the bureaucratic vision of the declaratory judgment action, are words and phrases as conducive to parsing for "truth" as the tort would hope?

### III.

The differences in assumption about the nature of the communicative process reflect and perhaps cause related differences in the value each tort gives to communication in a social setting. It is here that important differences in the purposes of the torts begin to emerge.

The common-law tort with its focus on extrinsic community interpretation is communitarian in nature. It protects the individual's identity in society, and therefore safeguards against the individual's unwarranted exclusion from his or her social arrangements at whatever level. The heart of the tort is disparagement in the context of existing family, social, and community relations, not falsity. Indeed, this is the significance of the adage that at common law, the greater the truth, the greater the libel. While truth can absolve the speaker at common law, truth is the speaker's burden, and truth functions fundamentally as a justification for a statement being made, not as a negation of libel. At common law, therefore, the tort protected the individual, regardless of station in society, in his or her capacity to function in organized social arrangements.

The constitutional tort neither protects the individual nor stabilizes the individual's ability to function in the full range of communities. Instead, the constitutional tort focuses virtually all of its attention on the social value of communication by protecting the speaker no matter what the price exacted in the individual's relationships, and it reflects broader societal characteristics by protecting virtually all expression of a public nature notwithstanding falsity and without serious regard to the harm inflicted. In this respect the constitutional tort is a manifestation of the often brutal, false, and calculatedly self-serving quality of our system of political and public dialogue. The speaker's intention and motive are determinative in order that the speaker be in full, unilateral control of liability. The level of tolerance afforded expression is extreme, reflecting society's deep-seated commitment to communication as a valued instrument of freedom and self-government, notwithstanding the costs individuals must bear in service to that end. The individual's interest in nonexclusion from his or her specific relationships is subordinated to the individual's duty to the larger social relationships fostered by open and uninhibited expression.

The declaratory judgment tort does not, at least in purpose, foster either the individual's personal relationships in the community or the general

social value of uninhibited expression on public matters, although it protects both values to a meaningful extent by negating the extremes of each of the other torts. The declaratory judgment tort does, however, serve a distinct and affirmative purpose. It exacts accountability to truth on the communicator, and it does so particularly for the press. The press is an institution whose function is central to political freedom, but it is also an institution with largely unchecked power.<sup>15</sup> Legal liability premised only on the press' intention as a speaker affords too great a freedom, particularly in a political culture that values truth and views free expression as a means to truth, not as an end in itself. Therefore, the "check" of truth on the press' power not only strikes a sensible chord, but it also advances another more fundamental social value—truth in information upon which people act. The check of truth also affords a measure of protection to the harmed individual—not complete protection to be sure, but at least the prospect that the most serious injuries to public persona can be corrected by truth rather than money.

#### IV.

It will not come as a surprise that the "sociological" characteristics of the three libel torts reflect in large part the differences in the torts' assumptions about communication and the distinct social purposes each tort serves. Under the heading of "sociological" characteristics we include the types of parties for whom relief is accessible, the types of harm remedied, and the relief available as well as its likelihood.

The common-law tort is oriented toward the individual and the remedying of personal harm through damages. The elements of required proof—publication, disparagement of reputation in a community, and resulting harm—are relatively straightforward, and are far from difficult to establish. Consequently, the likelihood of success in litigation is substantial, particularly in relation to the other torts.<sup>16</sup>

The common-law tort is as "classless" as any of the torts. While persons who are likely to initiate suit will tend to come from the more wealthy and prominent segments of society, as is the case with any form of litigation, common-law doctrine poses no obstacles to members of any segment of society, as the definition of reputational community is broad

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15. Perhaps this was one reason that Judge Sofaer's use of special verdicts in the case of *Sharon v. Time* was so widely-noted. Jurors separately announced verdicts on falsity, defamation, and actual malice. See R. SMOLLA, *SUNG THE PRESS* 91-92 (1986). General Sharon's attorney said, "It provide[d] the opportunity for a plaintiff who proves falsity to be vindicated." Richard M. Goldstein, quoted in Kaplan, *The Judge's Postmortem of the Sharon Libel Trial*, Nat. L. J., Mar. 18, 1985, at 1, 27.

16. Professor Epstein points out that "the general tendency in defamation cases has always been for a powerful rule of strict liability" given that "the (d)efamation is made to third persons about the plaintiff, so that prima facie the plaintiff is in no way responsible for the commission of the wrong and typically could do very little, if anything, to protect himself." Epstein, *Was New York Times v. Sullivan Wrong?*, 53 CH. L. REV. 782, 797 (1986).

and flexible. Moreover, the significant doctrinal advantages given plaintiffs at common law, such as the requirement of showing disparagement and harm but not falsity or fault, makes the likelihood of success greater, and therefore makes the legal system more accessible through contingency fee arrangements. Because the likelihood of success falls along the normal distribution experienced generally in civil litigation, negotiation and settlement are encouraged, with money being the principal medium of compromise. The statements subject to litigation tend to span a broad range of personal and public interests.

The greatest risk for the press that the common-law tort poses is experienced by large publishers due to the relatively high risk of liability, the difficulty of predicting harm, and the open-ended damage rules. On a comparative basis, at least, the risk is also greatest for the "legitimate" press whose care in publication will be less effective in preventing harm inasmuch as the interests of individuals in their relationships is often unknown, and because good faith belief in truth is not a defense.

While the common-law tort most advantages lower and middle class plaintiffs and most threatens the legitimate and large publishers, the constitutional tort does almost precisely the opposite. Because of the difficulty of overcoming the fault privileges in the constitutional tort, the required proof of falsity, and the resultantly high risk of loss even in the most egregious case, the legal system is effectively foreclosed to all plaintiffs except those with very substantial wealth or very considerable power.<sup>17</sup> Contingency arrangements are not easily available to those who cannot afford a lawyer, and even those cases first brought on contingency tend to wither away once the obstacles become clear. Only the powerful plaintiffs, the representation of whom is itself valuable to an attorney, can exact contingency arrangements.

The constitutional tort thus remains most available to the wealthy and powerful. They can afford to engage an attorney. While success or the obtaining of damages is unlikely, damages are *very* high if the plaintiff succeeds. Perhaps as important, the wealthy and powerful plaintiff achieves vindication and punishment of the press by the press' coverage of the suit, regardless of the outcome. And ultimate loss on the merits of the suit—on the accuracy of the offending statement—is rare, as the fault privileges typically resolve the case in advance of such a determination. Even more typically, once filed and once publicized, the suit is dropped or left dormant. Because of the probability that the defendant will completely defeat the action due to the fault privileges, and because the plaintiffs' motives tend not to be financial, settlement is rare and is effectively discouraged.

In addition, the risks that the constitutional tort imposes tend to be exactly the opposite of those presented at common law. Those placed at

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17. For information on the composition of plaintiffs in libel cases, costs of litigation, and related fee arrangements in media libel cases, and the outcomes reached in media and nonmedia cases, see *LIBEL LAW AND THE PRESS*, *supra* note 5, at 69-72, 118-44, 146-51.

greatest risk—of loss and of the very large damage awards a showing of negligence or malice brings—are small publishers<sup>18</sup> for whom the cost of the discovery process can be prohibitive and thorough investigation conforming to the best professional norms may be difficult, and the most scurrilous publishers whose business is based on rumor and falsehood. The irresponsible press is also placed at risk by the common-law tort; it is simply the subject of more focused risk in the constitutional action, as the elements of proof relating to purposeful falsehood and shoddy procedures are a central part of the inquiry in a constitutional libel case.

It is perhaps ironic, although surely not surprising, that the cost of broader protection for individual reputation at common law is greater exposure of the legitimate press to liability, and that the cost of protecting the legitimate press in the constitutional action is the effective legal disenfranchisement of lower and middle income plaintiffs. This irony, perhaps more than any other factor, accounts for Justice Powell's sensible insight that the better answer might lie in damage limitations rather than in the creation of complex substantive privileges.<sup>19</sup> This same insight is the premise upon which the declaratory judgment action was crafted: no privileges, no damages. But upon reflection it is far from clear that the compromise struck in that particular form of libel tort would have the intended effect. In many respects the declaratory judgment action offers the worst of both worlds from a "sociological" point of view.

The declaratory judgment action requires proof of falsity by the plaintiff, and relieves the plaintiff of the burden of proving fault, but affords no damages. For many plaintiffs—particularly for the wealthy and powerful with legitimate claims—this strikes an advantageous balance. But for the lower and middle income plaintiffs who bore the principal burden of the constitutional tort, this provides precious little. It is the lower and middle income plaintiffs whose injury is most likely to be economic. More importantly, without the prospect of money damages, lower and middle income plaintiffs will not be able to afford a lawyer, and therefore will still be effectively foreclosed from the legal system for vindication of their claim. In addition, because falsity, not reputational harm in the community, is the

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18. For an account of a case in which a "modestly profitable, family-owned and operated newspaper that had been in the community for almost a century and a half" went bankrupt following libel litigation, see T. LITTLEWOOD, *COALS OF FIRE, THE ALTON TELEGRAPH LIBEL CASE XV* (1988). Information on the type, size, and circulation of media defendants is provided in *LIBEL LAW AND THE PRESS*, *supra* note 5, at 19-21, 271 n.7, 283-84 n.76. Not surprisingly, most media defendants are local newspapers with modest circulation (15,000 to 50,000).

19. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). In his opinion for the Court, Justice Powell wrote:

The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. \* \* \* The largely uncontrolled discretion of juries . . . unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms . . . , invit[ing] juries to punish unpopular opinion . . . .

*Id.*

focus of the declaratory judgment case, the tort is likely to be overprotective for the wealthy and powerful plaintiffs who retain access to the legal system, for they will be able to remedy falsehood even when it has resulted in no material, personal reputational harm. The harm, instead, is the publication of false fact.

For the press the balance of advantage and disadvantage is complex in the declaratory judgment tort. The legitimate press could be exposed to broad liability for error; indeed, in theory it could be exposed to such liability more broadly than is the case with either the common-law or constitutional torts, as error, not reputational harm, is at issue. Yet the extent of exposure will be greatly reduced. Intrusive inquiry into the publication and editorial process will be largely eliminated, and money damages will no longer be possible. Defense costs as well will likely be reduced. Particularly in view of the fact that suits by low and middle income plaintiffs will likely be economically foreclosed by the absence of money damages, the legitimate press—large and small—will on balance benefit from the declaratory judgment tort.

The more irresponsible segments of the press, however, will benefit much more. These publishers also will gain from the reduction in access to the legal system by low and middle income plaintiffs, and they will benefit very substantially from the elimination of damages. For these publishers, both the common-law and constitutional libel torts posed a significant economic threat, for even under the constitutional regime, proof of reckless indifference to truth could result in massive punitive awards. The elimination of this economic threat would free irresponsible publishers from a potentially decisive factor in the publication decision.

On a more general level, the declaratory judgment remedy poses a broader risk to the press. This peril is the risk of liability across a broad range for factual error—a risk never experienced by the press in the past. While the remedy for error is no more than correction, something the press professes to do in any event when error is discovered, the instrument of enforcement under the declaratory judgment action would become the courts, not the press itself. The declaratory judgment action, in short, exacts broad-based accountability on the press. While the action is perhaps an understandable antidote to the press' ineffective self-regulation,<sup>20</sup> this fact discloses the principal characteristic of the declaratory judgment libel tort. Whether intended or de facto, the declaratory judgment action exacts press accountability. The standard of accountability is truth. Its effective operation is in the sphere of public debate and discussion of public people. Its impact, if not its goal, would be the counteracting of falsity with truth, although only when the wealthy or powerful have a stake in the cleansing process, and only when the judicial process is able to untangle truth from falsehood.<sup>21</sup>

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20. See Project, *Standards Governing the News: Their Use, Their Character, and Their Legal Implications*, 72 IOWA L. REV. 637 (1987).

21. Some commentators argue that courts should not be arbiters of truth. See J. Kirtley,

## V.

The three libel torts speak in radically different voices. The common-law tort speaks to the private interest in reputation and stability within the community. It is broadly accessible, although imperfect in many respects. It reflects a more local, even pastoral set of interests, protecting the individual against unwarranted exclusion from society; it seems premised on a communitarian, local culture, and a tenor of public debate that acknowledges high standards of care and gentility; it makes the press the handmaiden of the individual.

The voice of the constitutional tort reflects a less appealing but perhaps more real culture marked by mendacity. The cultural values underlying the constitutional tort are impersonal, national, and highly individualistic. Individual freedom of expression is the highest value, even if the "individual" is a powerful organization; other values of community and reason are subordinate. Wide-open, uninhibited debate, even on factual matters, is the preferred norm. Falsity has value in such a system, even when it does great harm to the individual. Expression, particularly by the organized press, is instrumental as a check on power. The freedom accorded expression, therefore, must reflect the culture in which expression operates as an antidote. If the culture is perceived as mendacious—as marked by self-interest and deception—so also must its antidote be free to pursue self-interest and deception. For the constitutional tort, political speech is most valued, controversy is most encouraged, and the calculated lie is the principal object of legal redress. For most other harms occasioned by libel, the legal system plays no effective role. The voice of the legal system reflects the essential character of the culture, and in an individualistic, national, mendacious culture the force of law is limited to what is most central.

The voice of the declaratory judgment libel tort is accountability of the press, although the declaratory judgment action also reflects a view of society much like that of the constitutional tort. Through its limited remedies, its focus on false fact rather than on reputation, and its absence of money damages, the declaratory judgment action is effectively limited in its operation to the field of public expression concerning public—wealthy and powerful—people. Its functioning thus essentially reflects the individualistic, national, and impersonal view of our culture. But in this setting, at least, the declaratory judgment tort reflects a discomfort with the ends equals

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*Proposal to Reform Libel Law Has Troubling Aspects*, EDITOR & PUBLISHER, Nov. 5, 1988, at 52. But Justice White states that "the logical consequence" of such a view "is that the First Amendment forbids all libel and slander suits, for in each suit, there will be no recovery unless the court finds the publication at issue to be factually false. Of course no forum is perfect, but that is not a justification for leaving whole classes of defamed individuals without redress . . . ." *Dun and Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 768 n.2 (White, J., concurring) (1985).

means mentality of the constitutional tort—a discomfort with the proposition that mendaciousness justifies mendaciousness, that the perceived prevalence of self-serving deceptiveness in the political system warrants legal protection for it in the system of free expression. In its place, the declaratory judgment tort permits a relatively unthreatening antidote of truth, in the hope, it seems, that through truth some semblance of other important values in public discourse can be retained. Whether this goal can be accomplished without changing the underlying culture—indeed while leaving it in place and giving it even more breathing room—cannot be known. It can be doubted to be sure, but the declaratory judgment libel tort has yet to be given a chance to dispel the skepticism.

What can be said, however, is that in significant respects the libel tort is, as it has always been throughout its history, a voice of the culture in which it operates. Over its long history it has been transformed from a means of suppressing dissent and consolidating power to a means, reflected in its current constitutional form, of fostering dissent, encouraging uninhibited debate, and debasing political power. Just as surely as in the past, the libel tort will continue in the future to reflect our culture—both its current condition and our collective aspirations for its future.

In the three libel torts, we hear three radically different cultures. One is local, communitarian, and individual or personal. One is national, individualistic, and impersonal. One exacts accountability—not to the individual but to a more abstracted idea of truth. One is congenial, one is mendacious, and one is idealistic. Our purpose is not to identify the best alternative. While we may have preferences, the important point is that the three torts are not better or worse than the other. They are different. The proper choice is the voice with which we want to speak, and that choice, if we are correct, belongs to us all, not as a product of democratic process or analytic distillation, but as a reflection of our culture.