PUBLIC OFFICIALS AND LIBEL: IN DEFENSE OF *NEW YORK TIMES CO. v. SULLIVAN**

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INTRODUCTION

This Article will explore the role of civil libel[1] law in cases brought by public officials.[2] It will consider statements made *by*,

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[1] For purposes of this Article, libel will include slander, although sometimes the term defamation will be used to cover both libel and slander.

[2] The categorization of plaintiffs as public or private for civil damages purposes is not to be found in the common law, which focused on the subject matter of the communication and the context in which it was made. The public-private line evolved from the Supreme Court's efforts to give effect to state interests in maintaining a damage action for harm to reputation and to the constitutional interests in freedom of speech and press. The distinction, however, has long been important in criminal libel cases, going back to *scandalum magnatum*, and the court of star chamber. *See* Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875 (1949).

"Public official" has become a term of art in defamation law and it is so used throughout this Article. The Supreme Court has determined that "the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." Rosenblatt v. Baer, 383 U.S. 75, 85 (1966). Justice Brennan has also asserted that "[w]here a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, . . . the *New York Times* malice standards apply." 383 U.S. at 86.

Although the precise boundaries of the public official category remain unclear, some have argued that the lower courts have misread *Rosenblatt* by extending the public official designation to far too many low-level public employees. Elder, *Defamation, Public Officialdom and the Rosenblatt v. Baer Criteria—A Proposal for Revivification: Two Decades After New York Times Co. v. Sullivan*, 33 BUFFALO L. REV. 579 (1984).

Nonetheless, some propositions have become clearly established. All elected officials are clearly included in the public official category. Elder, *supra*, at 626-28. Candidates for elective office are also "uniformly" covered. Elder, *supra*, at 628-30. Note that Justice Stewart once suggested that they might more properly be called "public figures" to "avoid straining the common meaning of words." Monitor Patriot Co. v. Roy, 401 U.S. 265, 271 (1971). In *Roy*, the Court relied on Coleman v. McLennan, 78 Kan. 711, 724, 98 P. 281, 286 (1908), which had played such a major role in *Sullivan* itself, for the assertion that it was:

> of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state

as well as *about*, such persons. By focusing on reports involving public officials,[3] one can avoid becoming mired in a discussion of theories underlying freedom of speech and press.

For the purposes of this Article, it is possible to accept the arguably narrow view that the theme of self-governance is central to the first amendment[4] and is entitled to generous protection.[5] The term "self-governance" reflects the notion that the public holds residual power to determine the course of government—including the role of discussing government, the direction of government, as well as checking on the behavior of our officials. Although speech that is not an exercise in self-governance may receive the same or similar protection,[6] statements about public officials must receive great protection in any system that openly, or even surreptitiously, considers content when determining whether and how much to protect speech.[7]

Speech serves self-governance whether the report deals with

> and to society of such discussions is so vast, and the advantages derived are so great, that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great.

401 U.S. at 271-72 n.3 (citation omitted).

For the *Roy* court, the principle extended beyond "official conduct" to "anything which might touch on an official's fitness for office." 401 U.S. at 273-74 (quoting Garrison v. Louisiana, 379 U.S. 64, 77 (1964)). A candidate generally puts before the voters "every conceivable aspect of his public and private life that he thinks may lead the electorate to gain a good impression of him." 401 U.S. at 274. "Given the realities of our political life, it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks." 401 U.S. at 275; *see* Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971).

There is also agreement that appointed persons with the sort of actual or apparent power that Justice Brennan discussed in *Rosenblatt* are "public officials" for this purpose. Elder, *supra*, at 631-34.

[3] *See* Rosenblatt v. Baer, 383 U.S. 75, 86 n.13 (1966); *see also* Hutchinson v. Proxmire, 443 U.S. 111, 119 n.8 (1979) (not all persons on the government payroll are to be classified as public officials).

[4] Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971); BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 300, 308-09 (1978); *see also* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26 (1948); A. BICKEL, THE MORALITY OF CONSENT 62 (1975).

[5] *See, e.g.*, Connick v. Myers, 461 U.S. 138, 145 (1983) ("The Court has frequently reaffirmed that speech on public issues occupies the ' "highest rung of the hierarchy of First Amendment values," ' and is entitled to special protection.", *citing* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982), *citing* Carey v. Brown, 447 U.S. 455, 467 (1980)); *see also* FCC v. League of Women Voters of California, 104 S. Ct. 3106, 3117 n.13 (1984) (subsequent history omitted); Brown v. Hartlage, 456 U.S. 45, 53 (1982); Landmark Communications, Inc. v. Virignia, 435 U.S. 829, 838 (1978).

[6] Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 65-66 (1981); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231-32 (1977); Time, Inc. v. Hill, 385 U.S. 374, 387-88 (1967).

[7] *See, e.g.*, Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

"official conduct" or other aspects of the official's life. As the Supreme Court has observed,[8] virtually nothing about an elected public official or a candidate for public office can properly be excluded from the self-governance rationale for protecting speech.

The self-governance argument becomes less direct when the public official is appointed rather than elected, but the underlying rationale remains. Comments concerning appointed officials convey information that the public should have about the appointees themselves, as well as about how elected officials respond to negative reports about their appointees. It is hard to think of any reports about a cabinet official or an appointed judge that would not warrant the broadest protection for public discussion.

Under this rationale, although a protected statement must address the public official's suitability for the job, it need not deal solely with the matter of performance. Indeed, the line between a formal job description and the rest of a person's life may be illusory. A president's, mayor's, or popular police chief's vacation or evening with friends might raise public questions. The sweep of the self-governance rationale extends to this subject matter so long as it relates to the person's ability to perform effectively in office, or to what some voters might think is related to that person's suitability for public office.[9]

Focusing on self-governance, this Article will consider the role of the press as investigator and originator of stories published on the newspaper's own authority, rather than on the other two functions of the press—those of repeater and of critic.[10]

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[8] Monitor Patriot Co. v. Roy, 401 U.S. 265, 277 (1971).

[9] Journalists dispute when such information is appropriately published, even when confident that its truth can be established in court. *See* M. FRANKLIN, CASES AND MATERIALS ON MASS MEDIA LAW 209-10 (2d ed. 1982).

[10] The second role, that of repeater, is discussed briefly here.

At the Symposium at which these comments on *New York Times v. Sullivan* were delivered, I also explored the question of the relationship between libel suits by public officials and the role of the press as the repeater of comments made by others. The traditional common law rules made the repeater as responsible for spreading a defamation as the originator. The privilege of fair and accurate report was the major exception, but this exception tended to report only repetitions of statements made *by* public officials or heard in public proceedings. And even this privilege required that the report be fair and accurate at the repeater's peril.

One question was whether in such cases editors were sufficiently protected by the rule developed in the *Sullivan* case. This rule on the one hand would protect the editor from liability in cases in which the editor did not disbelieve or doubt the comments being repeated, though this might have to be established through litigation.

On the other hand, the *Sullivan* case would not protect an editor who published, say, a letter to the editor that defamed a public official if the editor had reason to doubt the

I. THE RULE AND THE RATIONALE

Perhaps the function most frequently associated with the

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contents of the letter. In such a case, the editor would have to investigate the letter's allegations and be satisfied about them or else decline to publish the letter.

But what if the editor thought the public should learn that some persons or groups in the community were unhappy with the conduct of certain public officials, and their reasons—even if the editor disbelieved the claims? Perhaps the most prominent case to address this puzzle has been Edwards v. Audubon Society, 556 F.2d 113 (2d Cir.), *cert. denied sub nom.* Edwards v. New York Times Co., 434 U.S. 1002 (1977), in which the court created the constitutional privilege of neutral reportage. This privilege appeared to protect a newspaper that, as part of a story, printed charges that one group was making against another group. So long as the newspaper treated the disputants fairly and did not take sides in the controversy, the court held that the newspaper could not be held liable for publishing material that it doubted. The case suggested several possible limitations addressing such matters as whether the group being quoted was a "responsible, prominent organization."

I suggested that the *Edwards* case had not been adequately justified in the half page devoted to this point in the reports. The case did not involve direct questions of self-governance, and thus did not come within the most widely accepted justification for protecting speech. It also was not a paradigm case of repetition, as a letter to the editor might be. The *Edwards* case involved statements made in the course of a reporter's determined efforts to learn more about a situation, and thus bears some resemblance to the investigative role of the press. It is not clear whether the same story can be divided into fragments, with some to be treated as investigation and others as repetition.

The discussion concluded that clear cases of repetition warranted constitutional protection when the subject matter involved public officials. The easiest case was the repetition of statements by public officials. In this context the traditional privilege of fair and accurate report acquires a constitutional dimension.

But to protect reports of statements by public officials without protecting the repetition of statements about public officials, as did the common law, was thought to give insufficient weight to the importance of self-governance. It also put the judiciary in the position of officially favoring the dissemination of messages from one of the parties in the government-citizen relationship. Constitutional protection is warranted for the repetition of messages about public officials to the same extent as those from such officials. The discussion concluded with some discussion of the conditions and limitations of such a principle.

The third function of the press as critic has been constitutionally protected in principle, at least since Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974). In practice, the *Gertz* line between actionable "fact" and nonactionable "opinion" is sometimes not so clear. *E.g.*, Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219, 224 (2d Cir. 1985); Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 105 S. Ct. 2662 (1985) (Rehnquist, J., and Burger, C.J., dissenting). Despite the difficulty in application, the area presents no special questions or issues unique to public officials or to the press as opposed to nonmedia defendants. Some courts do appear more ready to find a statement to be nonactionable when it involves a public official, but this seems to be the creation of a protection other than one based on "fact"-"opinion" distinctions. *See* Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 875 n.192 (1984); Zimmerman, *Curbing the High Price of Loose Talk*, 18 U.C.D.L. REV. 359 (1985).

Although public officials are often plaintiffs in suits against ordinary citizens, this Article deals primarily with the press. It should be noted, however, that concern arises about intimidation by public officials when they threaten to or actually bring suit against individuals or nonmedia political groups. *See* E. PELL, THE BIG CHILL 159-88 (1984); Greenhouse, *Outspoken Private Critics of Officials Increasingly Face Slander Lawsuits*, N.Y. Times, Feb. 14, 1985, at B11, col. 1.

The paradigm mass medium—and still the one that conveys the largest quantity of information—is the daily newspaper. Although virtually all of this Article will apply to magazines, books, television, and radio, it will, for convenience, emphasize newspapers, since they are sued far more frequently than other media. Franklin, *Suing Media for Libel:*

press is its origination of stories. Stories published on the authority of the publication itself would include, for example, both a report that a corporate executive resigned yesterday and a report several weeks later stating the newspaper's investigation has revealed that he was forced to resign because of financial misconduct. Although sources may be quoted in the accounts, the authority and credibility of the newspaper itself are understood to be behind both stories.

The press's role as originator is central to most media libel cases.[11] The Supreme Court analyzed its first encounter[12] with the interplay between libel and the first amendment[13] by viewing the press as an originator in *New York Times Co. v. Sullivan*.[14] The holding of *Sullivan* removed some libel from one of the unprotected categories announced in the dictum of *Chaplinsky v. New Hampshire*.[15] Defamation of a public-official plaintiff now lacked constitutional protection only if the plaintiff could prove with convincing clarity that the false defamatory statement had been made with "actual malice."[16]

The *Sullivan* court rejected the strict liability of the common law[17] for a variety of reasons. Justice Brennan's majority opinion relied explicitly on the close resemblance between Sullivan's claim and a criminal prosecution for seditious libel.[18] It also suggested that citizens[19] ought to have a privilege to criticize public

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A Litigation Study, 1981 AM. B. FOUND. RESEARCH J. 795, 810 (62% of all cases tried and appealed were against newspapers; magazines were next at 14%) [hereinafter cited as Franklin, *Suing Media for Libel*].

11 Franklin, *Suing Media for Libel*, *supra* note 10, at 815.

12 *But see* Sweeney v. Schenectady Union Pub. Co., 122 F.2d 288 (2d Cir.), *aff'd per curiam by an equally divided Court*, 316 U.S. 642 (1942). While the Court was considering the *Schenectady Union* case, it decided Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (per curiam), with its famous dictum that libel, among other kinds of speech, had never been thought to raise "any Constitutional problem." 315 U.S. at 572.

13 Gitlow v. New York, 268 U.S. 652, 666 (1925) (the first amendment applies to the states under the fourteenth amendment).

14 376 U.S. 254 (1964). The fact that a paid advertisement was at issue in *Sullivan* offered a strong argument against treating the newspaper as an originator. Since the common law treated similarly the repeater of most libels as it did the originator, the Court considered the case as though the *New York Times* had made the statements in the advertisements on its own authority.

15 315 U.S. 568, 571-72 (1942).

16 Proof with "convincing clarity" is required for the element of "actual malice." 376 U.S. at 285-86. It may also be required on the issue of "falsity." *See* Firestone v. Time, Inc., 460 F.2d 712, 722-23 (5th Cir.) (Bell, J., concurring), *cert. denied*, 409 U.S. 875 (1972); *see also* Franklin & Bussel, *supra* note 10, at 856. The underlying question of whether plaintiff must prove the statement false or defendant prove it true is before the Supreme Court in Hepps v. Philadelphia Newspapers, Inc., 506 Pa. 304, 485 A.2d 374 (1984), *prob. juris. noted*, 105 S. Ct. 3496 (1985).

17 Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221, 1221-22 (1976).

18 376 U.S. 254, 273-77 (1964).

19 Nothing in *Sullivan* suggests anything special about the rights of the press as op-

officials that would be analogous to the privilege[20] long accorded to public servants.[21] Although the latter privilege was absolute at the higher reaches of government, it was generally qualified at the lower levels.[22] The Court did not suggest that the two privileges should dovetail precisely.[23]

The Court concluded that the rule of strict liability restricted

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posed to those of the four clergymen who were also defendants in the case. *But see* Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 632-33 (1975).

[20] 376 U.S. at 282-83. Note that the Court used "analogous" and called for a "fair equivalent" of the protection granted officials. It nowhere called for the "identical" protection. Legislative privilege is found in the federal and state constitutions. *Id.*; *see* Tenney v. Brandhove, 341 U.S. 367, 372-73, 375 n.5 (1951).

[21] W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 815 (5th ed. 1984); L. ELDREDGE, THE LAW OF DEFAMATION 339, 418 (1978).

[22] *See, e.g.*, Barr v. Matteo, 360 U.S. 564, 569-76 (1959); *see also* W. KEETON, *supra* note 21, at 821; L. ELDREDGE, *supra* note 21, at 388, 405.

[23] Legal and political restraints may limit the protection of those who have an absolute privilege in connection with the government role they play. The protection afforded by the privilege may be limited in scope. *See e.g.*, Cheatum v. Wehle, 5 N.Y.2d 585, 159 N.E.2d 166, 186 N.Y.S.2d 606 (1959) (no privilege for State Commissioner of Conservation making after dinner speech on subject within his domain). Those in elected positions who misbehave risk rejection at the polls. Those in legislative bodies risk formal censure or expulsion. Those who hold appointed positions risk censure from superiors and, in some cases, impeachment. Those in the lower echelons may be subject to civil service sanctions. *See* the memorandum circulated to all department and agency heads by Attorney General William P. Rogers after the decision in *Barr v. Matteo.* Rogers, Department of Justice Memorandum, July 13, 1959; *see also* Handler & Klein, *The Defense of Privilege in Defamation Suits Against Government Executive Officials*, 74 HARV. L. REV. 44 (1960).

The rationale for the protection is often based on the desirability of having elected and appointed government officials spending their time at their positions rather than defending their actions in court. The most famous formulation is that of Judge Learned Hand in Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). In a nonlibel case, he recognized that it would be "monstrous" to deny recovery against a government official if it were possible to confine litigation to those who were guilty. But:

> it is impossible to know whether the claim is well founded until the case has been tried, and . . . to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith . . . . In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officiers than to subject those who try to do their duty to the constant dread of retaliation.

177 F.2d at 581.

For the claim that the press should have symmetrical protection, see Roberts, *On Collision Course*, THE QUILL 14 (April 1985) ("the courts have created an awesome imbalance: public officials who can sue, but who cannot be sued; public officials who can speak out against anyone with impunity, but who can punish those who speak out against them. Where will it all lead? The prospects are bleak, and growing bleaker, for a society that has thrived upon robust debate and even raucous debate.") (citation omitted).

Another objectionable aspect of the asserted symmetry, in addition to the political restraints discussed, may be the usual inability of the government official to publicize the statement in question without the cooperation of the media.

the desirable end of wide-open public debate in two ways. First, in any debate some error is "inevitable," and a strict test of truth does not provide the necessary "breathing space" for freedom of expression.[24] Second, the financial burden of proving a challenged statement to be true and the difficulty of providing that proof in some situations deters speakers, even if their statements are in fact true.[25]

To prevent these would-be speakers from being "chilled,"[26] the majority required public-official plaintiffs to prove that the defendant knew that the defamatory statement was false at the time it was made, or published it "with reckless disregard of whether it was false or not."[27] The deliberate falsehood aspect has caused few problems and has been proven in very few cases.[28] The critical issue has become recklessness, a term that has been refined in several cases.[29]

Although the majority thought this standard would provide the appropriate level of protection for defendants,[30] it never explained why the feared chill could not be eliminated or sufficiently reduced by other techniques.[31] If some notion of fault was appropriate, the Court did not explain why negligence, for

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24 376 U.S. at 271-72.

25 *Id.* at 279.

26 Schauer, *Fear, Risk, and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U.L. REV. 685, 704-05 (1978).

27 376 U.S. at 279-80.

28 *See, e.g.*, Cantrell v. Forest City Pub. Co., 419 U.S. 245 (1974); Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970); Guccione v. Hustler Magazine, Inc., 7 MEDIA L. REP. (BNA) 2077 (Ohio Ct. App. 1981), *cert. denied*, 459 U.S. 826 (1982).

29 *Compare* St. Amant v. Thompson, 390 U.S. 727, 731 (1968) ("there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.") (citation omitted) *with* Garrison v. Louisiana, 379 U.S. 64, 74 (1964) ("only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions.") (citation omitted). The subject of recklessness is discussed at length in Tavoulareas v. Piro, 759 F.2d 90, 114-35, *petition for reh'g granted en banc*, 763 F.2d 1472 (D.C. Cir. 1985).

30 This would include the nonmedia defendants as well.

31 These might have included some extra protection around the core notion of "falsity," such as requiring a clear and convincing showing by plaintiff, to assure that no true statement would be subject to sanction. Franklin & Bussel, *supra* note 10, at 851. Another alternative, suggested in petitioner's brief but not adverted to in the Court's opinion, was a limitation on recoverable damages. *See* Brief for Petitioner, New York Times Co., at 33-34, New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (even if a tort occurred, "there was no rational relationship between the gravity of the offense and the size of the penalty imposed. A 'police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive.' " Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)). "The proposition must apply with special force when the 'harsh' remedy has been explicitly designed as a deterrent of expression." Brief for Petitioner, New York Times Co., at 34.

example, would not suffice.[32]

The *Sullivan* court, then, used strong rhetoric to reject the state law of strict liability but offered no rationale for its chosen solution. At no point did the majority discuss the state's interest in permitting libel suits, or the possible needs of plaintiffs.[33] Yet the choice of "actual malice," in the face of two concurring opinions arguing for absolute privilege,[34] strongly suggests that the majority thought it was giving defendants as much protection as they needed to avoid the temptation to self-censor true statements, while withholding unlimited license to defame. This was made explicit a few months later in *Garrison v. Louisiana*,[35] in which the majority explained its refusal to protect known lies even when they involved political discussion:

> For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality . . . ." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 [(1942)]. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.[36]

It was not long before individual justices began to assert the affirmative values of libel law. Justice Stewart observed that:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.[37]

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[32] Justice Brennan does address the inadequacy of negligence in the false-light privacy case of Time, Inc. v. Hill, 385 U.S. 374, 389 (1967) ("A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait.") (citation omitted).

[33] Perhaps this omission was due to doubt as to whether Sullivan had suffered any harm.

[34] *See infra* text accompanying note 58.

[35] 379 U.S. 64 (1964). Professor Kalven thought that a shift in rationale had taken place between *Sullivan* and *Garrison*. Kalven, *The Reasonable Man and the First Amendment: Hill, Butts and Walker*, 1967 SUP. CT. REV. 267, 305 (1967).

[36] 379 U.S. at 75.

[37] Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring). The majority in *Rosenblatt* rejected Justice Douglas's suggestion that the standard might apply to a

He also identified public values that were furthered when courts protect reputation:

> [T]he preventive effect of liability for defamation serves an important public purpose. For the rights and values of private personality far transcend mere personal interests. Surely if the 1950's taught us anything, they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society.[38]

In the ensuing years, the Court extended the *Sullivan* rule to candidates for public office[39] and, in a shift of rationales, to public figures.[40] Then, in *Gertz v. Robert Welch, Inc.*,[41] the majority reaffirmed the results of the earlier cases but rejected what it understood to be their rationale:

> We think that these decisions are correct, but we do not find their holdings justified solely by reference to the interest of the press and broadcast media in immunity from liability. Rather, we believe that the *New York Times* rule states an accommodation between this concern and the limited state interest present in the context of libel actions brought by public persons.[42]

The controlling justifications for rigorous limits on libel suits brought by public persons were said to be their access to the press and their "assumption of the risk."[43]

II. In Defense of *Sullivan*

Although the Supreme Court continues to adhere to the "actual malice" rule for public officials, some critics attack the rule as insufficiently protective of libel defendants and propose absolute privilege; others attack it as too protective of media and propose that a negligence standard be used.[44]

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night watchman accused of selling state secrets. Such a conclusion "would virtually disregard society's interest in protecting reputation. The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." *Id.* at 86 n.13.

38 *Id.* at 93-94.

39 Monitor Patriot Co. v. Roy, 401 U.S. 265, 271-72 (1971); *see also supra* note 2.

40 Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967); *see also* Kalven, *supra* note 35, at 305.

41 418 U.S. 323 (1974).

42 *Id.* at 343.

43 *Id.* at 344-45 (*Gertz* on special role of candidates). It now appears that at least two Justices would no longer support the "actual malice" rule in public official cases. Dun & Bradstreet, Inc. v. Greenmoss Builders, 105 S. Ct. 2939, 2948 (1985) (Burger, C.J., and White, J., concurring).

44 *See infra* discussion following note 78.

This Article concludes that whether one relies on the *Sullivan-Garrison* approach or on *Gertz*, or draws on both, the result in *New York Times Co. v. Sullivan* is sound and should be preserved.

A. *Rejecting Absolute Privilege*

Arguments favoring a constitutional absolute privilege to criticize public officials have two bases. One is the claim that absolute privilege is appropriate in public-official libel cases because in a democracy citizens must be entirely free to discuss the conduct of government servants.[45] A second claim is that it is difficult to develop and administer any other sufficiently protective test. Even if something short of absolute privilege were preferable, the argument goes, no standard has been identified that would avoid imposing unacceptable risks on speakers. Speech that requires constitutional protection would be deterred by anything less than an absolute privilege. This argument would stress the weaknesses of the *Sullivan* rule, those foreseen[46] and unforeseen.[47]

Both arguments for barring libel suits by public officials,[48] one emanating from democratic principle, and the other emanating from more practical bases, warrant brief review.[49]

1. The Argument from Principle

The conventional first amendment view that bad speech is to be counteracted by "more speech" rather than by government sanctions builds on centuries of philosophy. This view was re-

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45 A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); Roberts, *supra* note 23, at 14.

46 *See* 376 U.S. at 293 (1964) (Black, J. concurring); *see also id.* at 297 (Goldberg, J., concurring).

47 *See* Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 437 (1975) (the actual malice rule often requires extensive discovery and lengthy trial because it has not lent itself to disposition at an earlier stage).

48 *See* Westmoreland v. CBS, Inc., 596 F. Supp. 1170 (denial, with leave to renew after trial, of CBS argument that "high" public officials can never sue for libel for charges made about their official conduct), *later proceeding*, 601 F. Supp. 66 (S.D.N.Y. 1984); *see also* Cranberg, *ACLU Moves to Protect All Speech on Public Issues from Libel Suits*, CIVIL LIBERTIES, Feb. 1983, at 2; *OKAY Defamation Actions Involving Private Individuals, Private Matters*, CIVIL LIBERTIES, June 1983, at 11; Cranberg, *ACLU: Second Thoughts on Libel*, COLUM. JOURNALISM REV., Jan.-Feb. 1983, at 42.

The argument that the public official has access to the media and thus has less of a need for a lawsuit to redress his or her grievances than other prospective plaintiffs, might not apply to some major public officials. An obvious example is the sitting judge who is ethically prohibited from calling press conferences or otherwise seeking to influence public sentiment in order to response to criticism. AMERICAN BAR ASSOCIATION CODE OF JUDICIAL CONDUCT Canon 3(A)(6) (1972).

49 *See* Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F.L. REV. 1, 22-28 (1983).

flected in Justice Brandeis's famous statement that "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[50]

The Court's implied rejection of this passage in the libel context[51] recognizes a distinction between the impact of false speech on society generally and the impact on a defamed individual. Justice Brandeis's own formulation arguably did not apply to libel cases because the evil, harm to reputation, occurs as soon as the audience hears the defamatory words.[52] The "processes of education" might be able to undo some of the harm, but cannot "avert" it since the injury has already been inflicted. Similarly, the statements of John Stuart Mill that are often quoted to suggest a full range of protection for speech were uttered in the context of criminal law and were not intended to apply to libel law.[53]

One could argue that the abolition of public-official libel actions would create healthy skepticism: readers would approach all stories with doubt.[54] It is hard to believe, though, that we would be better off as a society if we encouraged readers to mistrust accounts of everything they have not personally experienced. In a large and complex society it is unrealistic to expect many people to have first-hand knowledge of public events. If we were not able to rely on media reports, government officials might be able to gain control of public institutions without effec-

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50 Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., and Holmes, J., concurring).

51 *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 n.9 (1973) (truth does not catch up with falsehood); *cf.* Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 U.C.L.A. L. REV. 915, 952-53 (1978) (noting tension between Brandeis's "marketplace" approach and the sentiment expressed at note 9 in *Gertz*).

52 *See, e.g.*, Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 910 (1963).

53 In his essay *On Liberty*, Mill asserted that " 'to argue sophistically, . . . to misstate the elements of the case, or misrepresent the opposite opinion . . . .' is done so often that it cannot be called "morally culpable; and still less could law presume to interfere with this kind of controversial misconduct." J. MILL, ON LIBERTY 47 (Blackwell ed. 1947), *quoted in New York Times Co. v. Sullivan*, 376 U.S. at 272 n.13. This passage appears in the discussion of general political speech, not in discussion of statements about persons.

Although Mill does not explicitly address defamation in that essay, he does assert that "[t]he only purpose for which power can be rightfully exercised over any member of a civilized community . . . is to prevent harm to others." J. MILL, ON LIBERTY 10-11 (D. Spitz ed. 1975) (footnote omitted). Elsewhere, Mill supports civil libel actions for false statements of fact. J. MILL, *Law of Libel and Liberty of the Press*, in JOHN STUART MILL ON POLITICS AND SOCIETY 143-60 (G. Williams ed. 1976); *see also* Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 U.C.L.A. L. REV. 1103, 1150 (1983).

54 F. HAIMAN, SPEECH AND LAW IN A FREE SOCIETY 52 (1981) (absolute privilege "might have the salutary effect of placing greater responsibility on the consumer of communication to become a more careful and critical . . . reader") (citation omitted).

tive public scrutiny.[55]

Finally, the Court sees the political danger of the deliberate lie to be a fatal obstacle to absolute privilege. Any help that false speech may offer in the search for truth[56] is far outweighed by the threats to individuals and to society from deliberately false defamatory speech.[57]

2. The Argument from Practice

The practical argument for absolute privilege emerges from the concurring opinions in the *Sullivan* case. Justice Black observed that nothing the judge told the jury in that case would have saved the New York Times Company from the $500,000 verdict. Absolute privilege was the only way to protect the press from such danger.[58]

Some are alarmed by the tendency of trial judges to deny summary judgments that appellate courts think appropriate, and by the tendency of juries to decide against the press despite inadequate evidence.[59] In each situation, however, there are ways to mitigate, if not eliminate, the potential dangers. As clearer standards emerge, we may need fewer appellate reversals and have fewer unnecessary trials.[60] Continued exercise of rigorous post-trial and appellate review has operated to reduce, if not eliminate, the dangers posed by runaway juries.[61]

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[55] Absolute privilege for public officials does not undercut the statement in the text because of the variety of constraints that may operate against government officials. *See supra* note 23. There may also be constraints on publishers, including reputation in the community among peers. *See infra* note 77. One must not overstate the influence of libel law on accuracy. A vast number of stories do not involve reputations and might be completely inaccurate under the most rigorous libel law.

It is possible that the emerging plethora of special interest media—written, aural, and visual—will demonstrate less interest in obtaining and retaining credibility among the general public because they are funded by, and serve, ideological groups.

[56] Elsewhere, Mill asserted that false statements may make valuable contributions to public debate because they may bring about " 'the clearer perception and livelier impression of truth, produced by its collision with error.' " J. MILL, ON LIBERTY, *supra* note 53, at 15, *quoted in* New York Times Co. v. Sullivan, 376 U.S. at 279 n.19 (1964). Again, Mill was discussing abstract political discourse. This value of false speech was rejected by implication in *Gertz*.

[57] Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974); Garrison v. Louisiana, 379 U.S. 64, 75 (1964); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[58] New York Times Co. v. Sullivan, 376 U.S. 254, 293 (1964) (Black, J., concurring). Of course, Justice Black also supported absolute privilege in public official cases on grounds of principle.

[59] *See* Franklin, *Suing Media for Libel*, *supra* note 10, at 804-06.

[60] *But cf.* Tavoulareas v. Piro, 759 F.2d 90, *petition for reh'g granted en banc*, 763 F.2d 1472 (D.C. Cir. 1985) (raising doubts about emerging clarity in the area). It must still be kept in mind that only the few trials involving prominent parties get press attention. The vast majority of summary judgments do not.

[61] *See* Bose Corp. v. Consumers Union, 466 U.S. 485 (1984) (the use of remittiturs also provide protection; *see also* Goodale, *Survey of Recent Media Verdicts, Their Disposition on*

A related argument is that only powerful plaintiffs can afford to proceed through new legal and financial hoops,[62] and that an action available to so few is not worth preserving. Although recent cases involving powerful plaintiffs with considerable legal resources have garnered massive publicity,[63] less prominent plaintiffs are also suing and getting to trial.[64]

It is true that powerful plaintiffs can impose enormous costs on media defendants even though their claims ultimately fail. Some recent cases, with legal fees in the millions for each party,[65]

Appeal and Media Defense Costs, in MEDIA INSURANCE 13, 20 n.20. (J. Lankenau ed. 1983). Two out of three plaintiffs lose their judgments on appeal. If substantial damage reductions were included, the fraction of victorious plaintiffs would be smaller. In most of the cases, the reversal results in dismissal and not in a remand. Franklin, *Suing Media for Libel*, *supra* note 10, at 806.

62 *See* Letter from Gara LaMarche, Associate Director of New York Civil Liberties Union, in N.Y. Times, Aug. 16, 1983, at A22, col. 4, asserting that "it is the libel laws themselves which are most often brandished as weapons. Far from being a means for the little person to stand up to powerful interests, they are most often invoked by the powerful to protect those interests." *Id.* Although some plaintiffs are powerful and may be using the action to silence defendants, the solution is not to abolish everyone's action but to restructure the action to reduce abuse and to permit ordinary citizens to obtain relief in appropriate cases.

The ACLU has also argued that the action does not compensate a significant loss. *See* Franklin, *supra* note 49, at 25 n.118. *But cf.* L. ELDREDGE, *supra* note 21, at 11 ("are there not many people, sensitive, honorable, high-minded people, who would prefer the loss of a leg to the loss of a good name?") (citation omitted).

63 Among the highly publicized trials are those of Carol Burnett, General Ariel Sharon, and General William Westmoreland. The ACLU has asserted that many plaintiffs and their supporters have a political orientation that sees the press as unduly "liberal." *See supra* note 62. At another time it was different. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Faulk v. AWARE, Inc., 19 A.D.2d 464, 244 N.Y.S.2d 259 (1st Dept.), *aff'd*, 19 N.Y.2d 899, 200 N.E.2d 788, 252 N.Y.S.2d 95 (1963), *modified*, 14 N.Y.2d 954, 202 N.E.2d 372, 253 N.Y.S.2d 990 (1964), *cert. denied*, 380 U.S. 916 (1965); W. DWYER, THE GOLDMARK CASE: AN AMERICAN LIBEL TRIAL (1984) (libel case brought in 1963 by man who had lost reelection to state legislature). It may be so again. *See, e.g.*, Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 105 U.S. 2662 (1985).

64 *See, e.g.*, News Pub. Co. v. DeBerry, 171 Ga. App. 787, 321 S.E.2d 112, *cert. denied*, 105 S. Ct. 2112 (1985) ($75,000 judgment for deputy sheriff upheld); McCusker v. Valley News, 121 N.H. 258, 428 A.2d 493 (1981), *cert. denied*, 454 U.S. 1017 (1981) (dismissing newspaper's appeal from denial of summary judgment in case brought by deputy sheriff); Burke v. Deiner, 190 N.J. Super. 382, 463 A.2d 963 (1983) (parking authority director's judgment upheld); Johnston v. Corinthian Television Corp., 583 P.2d 1101 (Okla. 1978) (summary judgment against high school wrestling coach vacated and case remanded for trial); Koch v. Laborico, 66 Or. App. 78, 674 P.2d 602 (1983) (summary judgment against police officer vacated and case remanded for trial). Since few plaintiffs in any group have much success, it is difficult to make much of the data.

65 The defense is said to have spent between $3 million and $4 million in *Herbert v. Lando* as of mid-1982. Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 83 COLUM. L. REV. 603, 611-12 (1983) (citation omitted). The *Sharon* case was estimated to have cost the plaintiff up to $1.5 million and the defense "well over" $1 million. Margolick, *Sharon Case and the Law*, N.Y. Times, Jan. 25, 1985, at B4, col. 1. Estimates on the costs in the *Westmoreland* case range from a total for both sides of $8 million, Hager & Rosenstiel, *Libel Battle: From Courts to Lawbooks*, L.A. Times, Feb. 20, 1985, at 1, col. 1, to $7 million for the plaintiff and $10 million for the defendant. *General Westmoreland Sounds Retreat*, BROADCASTING, Feb. 25,

show that defending these cases can be expensive, and perhaps chillingly so. But that situation does not necessitate a complete bar on all actions for libel. We should first consider ways to meet the problems within the existing substantive rules. For example, we might look to greater judicial control over discovery, including bifurcation or even trifurcation.[66] It is not clear that these mammoth cases are so often groundless that they should be singled out for extinction, or that all actions should be barred because the groundless ones cannot be identified.

It is hard to measure the effects of these giant cases. Big media apparently find paying big legal fees less important than winning the suit and keeping their reputations intact.[67] Still, some media giants may think twice about dealing with a topic that promises to produce a lawsuit, even one they are sure to win.[68] Although massive legal fees and expenses occur in relatively few cases,[69] these cases strongly affect the premiums for libel insurance for all media, raising rates[70] and diminishing coverage.[71]

The matter is much more serious for very small media, where serious staff disruption can be caused by one extensive discovery proceeding, or bankruptcy by a single award.[72] Although

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1985, at 35, 37. David Boies, the attorney for CBS, says that a figure of $10 million for both sides "may be in the ball park." *Sorting Out the Lessons of "Westmoreland,"* BROADCASTING, May 20, 1985, at 50, 54.

66 *See* Herbert v. Lando, 441 U.S. 153, 197 (1979) (subsequent history omitted) (Brennan, J., dissenting in part) (suggesting that plaintiff be required to make a showing of falsity before being able to inquire into matters relevant to actual malice).

67 *See* Hager & Rosenstiel, *supra* note 65, at 12 (quoting A. Rosenthal, editor of the *New York Times*, as saying "I don't want to be Pollyannaish, but I don't see any great disaster pending. I can see a problem, but we are big boys, and we take care of problems.").

68 *See* Henry, *Libel Law: Good Intentions Gone Awry*, TIME, Mar. 4, 1985, at 93, 94 (quoting Ben Bradlee, Executive Editor of the *Washington Post*, as saying that in light of the costs of the Tavoulareas case—before the appellate decision—"the next reporter who tells me he's got a hell of a story that's going to cost me that much money had better have something more than a guy helping his son in business.").

69 Only about one case in four reaches trial. Franklin, *Suing Media for Libel*, *supra* note 10, at 803-04. Although discovery can be expensive, cases that go to trial are the most expensive. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 14 (1983) (tried libel case costs three times as much to litigate as one resolved by summary judgment).

70 Hager & Rosenstiel, *supra* note 65, at 12 (reporting 50% rate hike by one of the handful of large libel insurers); Jones, *Organizations Aid Officials Who Believe They Were Defamed*, N.Y. Times, Oct. 16, 1984, at B4, col. 2.

71 Jones, *supra* note 70, at B4, col. 2 (reporting that many papers will have to share 20% of all legal expenses in addition to retentions, and that retentions may double).

72 For the story of *The Milkweed*, a one-person newsletter that was nearly destroyed by the burdens of defending a mammoth libel claim, see *The Little Guy in the Big Suit*, COLUM. JOURNALISM REV., Jan.-Feb. 1983, at 42. The Alton Telegraph's resort to the bankruptcy law after a defamation judgment is reported in Green v. Alton Telegraph Printing Co.,

it does not seem appropriate to try to frame constitutional rules to meet the special needs of "small" media, some nonconstitutional changes should especially help these entities.[73]

3. The Attitude of the Press

Finally, in spite of their potential financial gain, larger and more prestigious publishers oppose the doctrine of absolute privilege.[74] Although here, as elsewhere,[75] the established media leaders may not speak for the smaller media, the number of libel cases filed by plaintiffs with media ties suggests a fundamental rejection, within the media world itself, of absolute privilege.[76]

The preeminent publications may fear that under the doctrine of absolute privilege the less responsible media would prosper at the expense of those who are responsible. Further, they may fear that a legal backlash might develop if serious abuses occurred. There is also the concern that if libel cases are barred, the credibility of the press as a whole will suffer. Readers will have reason to doubt certain kinds of stories. Although incentives other than libel law, such as fear of public humiliation,[77] should reinforce the pursuit of accuracy, these extralegal sanctions have limited value. Some publishers may have underdeveloped professional standards; others may prefer to profit from propagating falsehoods.[78]

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107 Ill. App. 3d 755, 438 N.E.2d 203 (1982); *see also* Wall St. J., Sept. 29, 1983, at 1, col. 1.

73 For example, Montana has enacted legislation to limit punitive damages to $25,000 or 1% of the defendant's net worth, whichever is greater. MONT. CODE ANN. § 27-1-221(6)(b) (1985). For other efforts to address the problems of small media, see Franklin, *supra* note 49, at 29; Note, *The Constitutionality of Punitive Damages in Libel Actions*, 45 FORD. L. REV. 1382, 1416-24 (1977). For the role of insurance and its special impact on smaller media, see Franklin, *supra* note 49, at 18-22.

74 Franklin, *supra* note 49, at 26-27 n.129.

75 *Id.* at 27 n.125.

76 *Id.* n.126. Recent examples, none involving public officials, include WSTP-TV v. Vick, 11 MEDIA L. REP. (BNA) 1543 (Fla. Cir. Ct. 1985); Bee Pub., Inc. v. Cheektowaga Times Inc., 107 A.D.2d 382, 485 N.Y.S.2d 885 (4th Dept. 1985); Fried v. Daily Review, 11 MEDIA L. REP. (BNA) 2145 (Cal. Ct. App. 1985) (not officially reported).

77 Recall the furor when the *Washington Post* had to return a Pulitzer Prize because the report "Jimmy's World" was a fabrication. *A Searching of Conscience*, NEWSWEEK, May 4, 1981, at 50. Also, in the aftermath of its publication of the forged *Hitler Diaries*, *Der Spiegel* lost massive advertising and 10% of its circulation. TIME, Aug. 29, 1983, at 41.

78 In these cases, the availability of a libel action might help press credibility:

> Knowing that the defamation suit exists as a check against falsehood and damaging inaccuracy, and knowing that other members of the community also know it, the private citizen is able to place more complete faith in the truthfulness of reports about which that citizen could not possibly have direct knowledge or experience. The existence of such a check relating to that part of the news which is within the knowledge and experience of the reader thus secures a public good in addition to a private remedy for a personal injury. Such a public good should not be taken lightly.

B. *Arguments for a Negligence Standard Based on Speech Considerations*

Few libel cases reach the jury[79] and even fewer are ultimately successful.[80] Thus, it is not surprising that some have argued that the *Sullivan* standard erects too high a barrier. One author, Bruce Fein, has argued that "fidelity to constitutional norms and informed public dialogue" would be enhanced by permitting public officials to recover damages upon a showing of "negligent misstatement of facts."[81] Fein presents four major arguments for retreating from *Sullivan*.

The first is that the Court overestimated the likely level of self-censorship and underestimated the social benefits to intelligent decisionmaking that would be achieved by "fostering the dissemination of facts in lieu of falsehoods concerning government activity." He asserts that "logic and experience" suggest that if a negligence standard were used, the inhibition would be "attenuated at best."[82]

Even if Fein is correct,[83] a negligence standard would not be noticeably more protective than strict liability was in the common law period. A study of negligence cases in those states that permit private plaintiffs to recover under such a standard, suggests that virtually every case goes to a jury, with the usual finding of negligence not being upset on appeal.[84] Apparently no appellate court has reversed a trial judgment for a plaintiff in a *Gertz* case solely on the ground that negligence had not been shown.[85] This

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Hunsaker, *Freedom and Responsibility in First Amendment Theory: Defamation Law and Media Credibility*, 65 Q.J. OF SPEECH 25 (1979). Hunsaker's approach is analyzed and rejected in F. HAIMAN, *supra* note 54, at 51-52 (1981).

79 Franklin, *Suing Media for Libel*, *supra* note 10, at 804.

80 *Id.* at 806.

81 B. FEIN, NEW YORK TIMES V. SULLIVAN: AN OBSTACLE TO ENLIGHTENED PUBLIC DISCOURSE AND GOVERNMENT RESPONSIVENESS TO THE PEOPLE 1 (1984).

82 *Id.* at 4.

83 Fein supports his assertion by noting the Court's suggestion that commercial speech is resistant to chilling, citing Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976). The Court's analysis on this point is in dispute. *Cf.* Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U.L. REV. 1212, 1218 (1983) ("the hardiness analysis is just a logical mistake") (citation omitted). Even if the analysis of advertising is sound, it seems unlikely that news reporting is as hardy. A seller must advertise its product, but newspapers can decide which items to publish and which high-risk items to avoid. Even if Fein's analogy is persuasive on that point, he applies it only to federal public officials suing established large media. He does not consider the special problems of small media and local political figures.

84 Franklin, *What Does "Negligence" Mean in Defamation Cases?*, 6 COMM/ENT L.J. 259 (1984). *But cf.* Bloom, *Proof of Fault in Media Defamation Litigation*, 38 VAND. L. REV. 247, 386 (1985) (defendants prevailed in 14 of 42 negligence cases).

85 LIBEL DEFENSE RESOURCE CENTER BULLETIN No. 6, at 35, 42 (1983).

should not be surprising since the plaintiff often starts with an admittedly incorrect fact and can usually suggest at least one "reasonable" course that would have permitted the newspaper to avoid the error, or to discover it before publication. These include: waiting for a later police report; holding the story for a day to try to reach someone who was unreachable; or checking with a third witness, even though the first two seemed to agree on what happened.[86]

Beyond failing to recognize how low a threshold negligence turns out to be in practice, Fein mistates the role of libel insurance. He contends that liability insurance is readily available and that urban dailies can obtain coverage for a few thousand dollars.[87] But he fails to mention that libel liability policies contain substantial retentions or deductibles, which leave newspapers with an exposure of thousands of dollars for each claim. This provision is intended to make the insured think carefully about what it publishes,[88] which in turn leads editors to consider whether the subject of the story is likely to sue—even if the claim is groundless. Now that libel insurance is becoming more expensive and providing less coverage,[89] the pressures on media owners are growing.

Although Fein's argument that a negligence standard would lead to less false information is sound, would the probable reduction in the flow of true information outweigh that benefit? For reasons suggested here and elsewhere,[90] the answer is likely to be

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86 This is not to say that the concept of negligence has no meaning when applied to media. There has been a case in which a media defendant was alleged to have broadcast a fictional program that inspired viewers to replicate a form of assault featured on the program. However, the court chose not to frame a conventional negligence analysis. Olivia N. v. National Broadcasting Co., 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1981). The same might occur in other personal injury situations.

The difficulty in the area under discussion is that the engine of fault is being powered by the fuel of falsity. If a plaintiff can persuade a jury that defamation and falsity occurred, the case might almost be one of *res ipsa loquitur*, though the Restatement counsels against such a result. RESTATEMENT (SECOND) OF TORTS § 580B comment g (1977). But that approach is not necessary because of the ease with which other checks might be used.

These jury results may be spawned by considerations which affect defendants in other areas of tort law. But they may also serve as a shield for juries' desires to punish unpopular newspapers. *See* Van Alstyne, *First Amendment Limitations on Recovery from the Press—An Extended Comment on "The Anderson Solution,"* 25 WM. & MARY L. REV. 793 (1984).

87 *See* B. FEIN, *supra* note 81, at 4.

88 *See* Hager & Rosenstiel, *supra* note 65, at 12.

89 *See supra* notes 70-71.

90 It is noted elsewhere that even the actual malice rule may not be enough to rouse the smaller publications to the challenge because of the costs of winning suits. At the constitutional level, it is important to prevent the introduction of excessive impediments to coverage. But one may not be able to rely on the first amendment alone to create the

affirmative, particularly for small media.

Fein's second argument is that, at least in the federal arena, the Court has failed to consider the array of safeguards against official misconduct that already exist. Given sunshine acts, ethics-in-government legislation, inspectors general, and civil service regulations, Fein concludes that "there is no plausible danger that if the zeal and insouciance with which the mass media assail public officials were marginally blunted" the educational process upon which self-government relies "would be fatally impaired, or that the incidence of government maladministration or corruption would increase."[91]

Unfortunately, Fein here considers only the federal government. Even in that sphere one may doubt the effectiveness of internal sources in restraining or exposing corruption and maladministration. One need only consider the treatment of whistleblowers. In state and local governments, these internal devices are often primitive or nonexistent.[92] In principle, Fein's argument rejects what some see as a constitutional recognition of a watchdog role for the press.[93] In practice, a shift from the *Sullivan* standard to negligence would produce more than a "marginal" blunting.

Third, Fein argues that "government responsiveness" requires that our top elected officials be able to appoint loyal middle-level officials who will be able to control the sometimes recalcitrant civil service. The actual malice rule is said to contribute "in an amount unquantifiable, to dissuading prospective political appointees from offering their talents to vindicate the policies of the president and the electoral process. [Any judicial decision that is] inconsiderate of this transcendent constitutional goal is immediately suspect."[94]

Surely the lower salaries, uprooting of families, leaving of friends, the unpleasantness of the confirmation process, and public disclosure of assets, which often accompany entry into public

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desired climate. Statutory change might help foster that climate. *See* Franklin, *supra* note 49, at 29; *see also* Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1313 (1976).

91 B. FEIN, *supra* note 81, at 9.

92 Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RESEARCH J. 521, 539.

93 *See, e.g.*, Anderson, *The Origins of The Press Clause*, 30 U.C.L.A. L. REV. 455 (1983); Stewart, *supra* note 19.

94 B. FEIN, *supra* note 81, at 10, *citing* AMERICA'S UNELECTED GOVERNMENT 68-69 (J. Macy, B. Adams & J. Walter eds. 1983); *see also* Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1114-15 (1979).

life, must have a far more significant impact on career decisions than does the actual malice rule.

Fourth, Fein suggests that the Court has recently given reputation a higher status than it received in 1964.[95] Yet *Gertz*, upon which he relies, reaffirmed the actual malice rule for public officials. Even though the rationale has changed, the reaffirmation was unequivocal. Fein also cites constraints on government revelations that might hurt an individual's reputation or privacy, but these examples do not justify a principle that would reduce the protection given citizens' speech about public officials.[96]

In sum, Fein's attack on the actual malice rule fails. The result reached in *Sullivan* and adhered to in *Gertz* is superior to the one proposed by Fein.[97]

C. *Arguments for a Negligence Standard Based on Personal Injury Analogies*

Although Fein argued that changing *Sullivan* would purify the flow of information, other advocates of reduced protection for the press have relied on the analogy of the personal injury action. They ask why a newspaper that causes harm should be treated any more leniently than a manufacturer who puts out a defective product.[98] Two responses are appropriate.

The first emphasizes that although mass producers can de-

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95 B. FEIN, *supra* note 81, at 11. After Fein wrote his book, Chief Justice Burger and Justice White expressed their doubts about *Sullivan* in separate concurring opinions. Dun & Bradstreet, Inc. v. Greenmoss Builders, 105 S. Ct. 2939, 2948-54 (1985).

96 Cutting the other way is Paul v. Davis, 424 U.S. 693 (1976) (refusing to find constitutional basis for defamation suits in an action under 42 U.S.C. § 1983 (1982)). *Dun & Bradstreet, Inc. v. Greenmoss Builders* could support Fein if the case is applied to attacks by mass media on public officials.

97 Perhaps a lower standard joined with a sharp limitation on damages would be more defensible. "Actual injury damages" is not a promising line. Franklin, *supra* note 84, at 280-81. Herbert Wechsler, who argued *Sullivan* for the *New York Times*, is reported to have had second thoughts only about not having emphasized damages arguments. Lewis, *Annals of Law—The Sullivan Case*, NEW YORKER, Nov. 5, 1984, at 84:

> The question was whether to attack the established doctrine on punitive and general damages—to argue that the Constitution limited libel damages to the amount of proved financial injury. I've often wondered whether, if libel law had gone off on that point in the Sullivan case, people might not be happier today. But as a matter of the strategy of advocacy I think my judgment was right. The way of awarding damages was so well established throughout the English-speaking world that I decided it would be unwise to attack it. The judicial reaction would have been negative then.

Id.; *see also* Van Alstyne, *supra* note 86, at 801-02. In 1964, the "net income" of The New York Times Co. was $4,253,000. Darrow, *Times v. Sullivan*, PRESSTIME, March 1984, at 13.

98 *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 369, 388-92 (1974) (White, J., dissenting); *see also* Radolf, *Representer of "Defamed People,"* ED. & PUB., April 6, 1985, at 10 (interview with James E. Beasley, a Philadelphia trial lawyer, who was quoted as saying "[n]ews is for sale. It's a product . . . . Nobody lets General Motors put a defective

cide whether to stay in business or whether to continue a product line, once that decision is made, the product is produced in quantity with safeguards that cover the entire output. In contrast, each item in a newspaper involves a separate editorial decision. The editor or publisher must decide whether each item is worth the potential costs in litigation and in possible liability. This, together with the special structure of libel insurance mentioned earlier,[99] tends to make editors wary of taking risks that they perceive to be unnecessary. As a result, the editor may choose to drop the item in question. No apparent harm is done, but the flow of information has been reduced and a true and useful item may have been killed. The chilling potential here is undeniable and the situation is fundamentally different from that facing the manufacturer.[100]

The second, more theoretical, response comes from Professor William Van Alstyne, who warns that the ordinary tort calculus is inherently destructive of constitutional claims that stand in the way:

> The common law tradition struggles for detachment. It has no reason to weigh the defending, solvent newspaper's interest as initially better than the needs of the grieving plaintiff. Indeed, to the extend that part of the common law tradition is, inexorably, to seek some means of redressing every harm not literally and solely self-inflicted, the subconscious weighting in these cases will be favorable to each plaintiff with any sort of colorable claim upon the resources of the defendant. All of this, however, tends literally to leave the first amendment out of account. It assumes that the first amendment is also neutral.[101]

Van Alstyne argues that the common law process of case-by-case adjudication produces expanding spheres of liability.[102] One might quarrel with the theoretical inevitability of this result, but certainly the recent history of common law tort supports Van Alstyne.

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product on the street. Why should a newspaper be allowed to put out a defective product with impunity?") (citation omitted).

99 *See supra* notes 70-71.

100 Anderson, *supra* note 47. Note also in this connection that some support absolute privilege on the ground that harm to reputation is less significant than physical injury. *See supra* note 11. Those who would weaken the protection of libel defendants focus on the defendant's side of the picture by analogizing large publishers to mass producers of consumer items. Their arguments tend to assume that the plaintiffs' harm in libel cases is comparable to that suffered in physical injury cases.

101 *See* Van Alstyne, *supra* note 86, at 817.

102 *Id.* at 816.

As he notes,[103] the tort concepts of negligence and proximate cause have evolved to the point where they pose only minor obstacles to the injured plaintiff. Tort law has become a one-way street to ever-increasing liability. Van Alstyne argues that when cherished constitutional values such as freedom of speech and press are at stake, we must hold the line.[104] "False positives" that deny first amendment rights are no more tolerable than those that lead to the denial of physical liberty. Although Van Alstyne recognizes that libel law, if it is worth having, must consider the interests on the plaintiff's side that argue for recognition,[105] he reminds us that it is, after all, the first amendment that is implicated when we administer this compensatory machinery.

Unfortunately, juries and some courts seem incapable of remembering this when they administer the negligence standard in libel law.[106] The dynamics are such that the standard is virtually no protection: the natural evolution of the negligence standard through case-by-case adjudication ultimately leads to a sacrifice of the first amendment values at stake. Even if this were thought tolerable in private-plaintiff cases (because speech interests are generally thought to be less central), the erosion cannot be accepted in suits by public officials because such speech is at the core of the first amendment protections. These values cannot be set aside so that tort law may proceed in its usual unencumbered fashion.[107]

D. *Standards "Between" Actual Malice and Negligence*

Much of the concern expressed about the actual malice rule has been based on the rule's subjective quality. Plaintiffs have contended that the requisite states of mind are difficult to prove. Defendants have contended that the focus on subjectivity produces lengthy, expensive, and intrusive discovery and often propels cases toward a trial in which confusion may prevail.[108]

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103 *Id.* at 821-22.

104 *Id.* at 821.

105 *Id.* at 823.

106 *Id.* at 822.

107 *See* Anderson, *supra* note 47, at 460 ("the hope that [reasonable care] will prevent unnecessary self-censorship is illusory. No one with the slightest appreciation for the myriad uncertainties of common law negligence would rely on the belief that reasonable care will preclude an adverse verdict") (citation omitted). *But cf.* Bloom, *supra* note 84.

108 *See, e.g.*, Herbert v. Lando, 441 U.S. 153 (1979) (subsequent history omitted). Trial judges have resorted to a variety of techniques to help jurors understand the case. In the *Westmoreland* trial, for example, Judge Leval used a "large criss-cross board" to tell jurors whether evidence could be considered on the issue of truth or on the issue of actual malice, or both. Farber, *A Reporter's Notebook: The Jargon of CBS Trial*, N.Y. Times, Oct. 29, 1984, at A21, col. 3. In conversation, Steven Shiffrin has suggested that if the standard were framed in objective language, defense efforts to show how much care was

Whether some objective standard more protective than negligence might provide a better accommodation for both parties in the long run—more victories (possibly with lower damages) for victims of seriously substandard reporting or editing, and cheaper, less intrusive victories for media defendants whose behavior clearly did not violate the standard—depends on several factors.

The first is the nature of the standard selected. Two standards have already been articulated, one by Justice Harlan in *Curtis Publishing Co. v. Butts*,[109] and one by the New York Court of Appeals in the *Chapadeau* case.[110] Justice Harlan, writing for four members of the Court in *Butts*, asserted that "public figures" should be able to recover for libel upon a "showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[111]

The Harlan standard was intended to make it easier to impose liability on media than was possible under the actual malice rule. Framing the standard in terms of "responsible publishers" is likely to cause difficulties for aggressive publications[112] and perhaps for smaller ones that operate on tight budgets without the services or staffs of "responsible publishers." Although such a standard might be refined to mean "responsible publishers of the same size and financial grounding as the defendant," the situation is sufficiently doubtful to warrant caution.

In *Chapadeau*, the court rejected the opportunity to apply negligence in all cases involving private plaintiffs. Instead, it decided that in cases with public aspects, the plaintiff must establish that the "publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties."[113]

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exercised would become the focus of the jury charge, rather than simply being evidence, as it is today, that can be taken into account on the subjective question. The crucial empirical point appears to be how many juries, once finding that a defendant was grossly irresponsible, would then fail to find "actual malice."

109 388 U.S. 130, 155 (1967).

110 Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975).

111 388 U.S. at 155. Justice Harlan prefaced this test with the admonition that it applied only to statements "whose substance makes substantial danger to reputation apparent." *Id.*

112 *See, e.g.*, Tavoulareas v. Piro, 759 F.2d 90, 120-21, *petition for reh'g granted en banc*, 763 F.2d 1472 (D.C. Cir. 1985) (allowing jury to consider the aggressiveness of *Washington Post* as one element of the actual malice question); *see also* Anderson, *supra* note 47, at 455 (bias against aggressive press if standard is tied to "reasonable" journalism).

113 38 N.Y.2d at 199, 341 N.E.2d at 571, 379 N.Y.S.2d at 64. The *Chapadeau* court

This formulation, obviously influenced by the Harlan test, raises several of the same questions and uncertainties.

In addition to the frequency of recovery under these alternative standards there is the question of how much a successful plaintiff will recover. To determine the impact of any change, the total costs of damage awards and legal defense in all cases under the two systems must be compared. The difficulty of measuring and controlling compensatory (and possibly punitive) damages in these cases is one of the most serious drawbacks to any rule that opens the way to more recoveries. A significant increase in editorial concern about suits by public officials, because of financial or other costs, could be offset only by the clearest social benefits from a new approach.

Perhaps the most dubious aspect of moving to some form of "gross irresponsibility" standard is the fact that the plaintiff would presumably still be free, though no longer required, to explore the possibility that the defendant uttered the falsehood deliberately or recklessly. In tort law generally, the plaintiff is able to find out whether the defendant committed the tort intentionally even though negligence would be enough for liability. The plaintiff might be motivated by the availability of punitive damages as the fault becomes more serious, or by an unwillingness to rely on the lower standard. In libel cases would the introduction of "gross irresponsibility" be accompanied by a reduction of the intrusive aspects of discovery? Otherwise, those plaintiffs who desire to harass the media would not be deterred at all by the change. Indeed, it would simply add another weapon to their arsenal.

One additional, and symbolically dubious, cost of using a variation of the "responsible publisher" standard would be the need to develop a separate standard for nonmedia defendants.

We have been coping with the actual malice rule for twenty years. Any proposed alteration presenting new uncertainties would have to offer great social benefits to be worth the transi-

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used a " preponderance of the evidence" standard, which may be permitted by *Gertz* in cases involving private plaintiffs. In public official cases, the "convincing clarity" standard applies. New York Times Co. v. Sullivan, 376 U.S. 254, 285-86 (1964).

Although this discussion of alternative formulations has assumed that the same criterion for proof would apply no matter which standard was adopted, it is likely that those who advocate a negligence standard would also advocate the preponderance approach. This would further increase editorial concern because of the danger of error in the fact-finding process.

Equally troubling would be the possibility that in suits by public officials, the independent review required by Bose Corp. v. Consumers Union, 466 U.S. 485 (1984), might not apply.

tional friction. At this time, the extent of the gains appears too limited and uncertain to justify overturning the actual malice rule.

III. CONCLUSION

It is one thing to assert that the Supreme Court reached the right constitutional result in *Sullivan*. It is quite another to express much satisfaction with the current state of libel law. Public officials have correctly perceived that they now have little opportunity to restore their reputations through the legal process, much less collect damages for harm suffered. It may be that they sue for lack of any other legal avenue.[114] At the same time, defendants feel insecure about being sued and incurring substantial defense costs, in addition to the risk of being held liable for a judgment.[115]

Although the Supreme Court will continue to render constitutional decisions that may have significant impact on the contours of constitutional doctrine and libel law,[116] it is illusory to expect the Court, with a limited number of constitutional decisions, to be able to develop the fine tuning that the clash of these two formidable regimes requires. It seems likely that legislation will come to play an increasingly important role in the libel law of the future.

There is substantial working room for legislatures within the current constitutional framework. Among the possibilities with the greatest impact on public officials are statutes that create an opportunity for plaintiffs to obtain a declaratory judgment that the defamatory statements about them were false. This nonmonetary remedy can be created without altering the existing tort law[117] or with coordinated changes in the tort remedy.[118] A very important current proposal gives the defendant the controlling decision on whether the litigation will involve damages or a

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[114] Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 231 (1985) (although public plaintiffs lose libel suits more often than any other group, they believe that the suits achieve something and they "are virtually unanimous in their determination to sue again if faced with the same situation.").

[115] *See supra* text accompanying notes 59-66 and note 86.

[116] *E.g.*, Hepps v. Philadelphia Newspapers, Inc., 506 Pa. 304, 485 A.2d 374 (1984), *prob. juris. noted*, 105 S. Ct. 3496 (1985); Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563 (D.C. Cir. 1984), *cert. granted*, 105 S. Ct. 2672 (1985).

[117] Cal. S.B. No. 1979 (introduced Feb. 18, 1986 by Sen. Lockyer); *see infra* Appendix at 77 for the full text of this Bill.

[118] Franklin, *supra* note 49, at 35-49.

declaratory judgment.[119] Another approach would focus on the retraction device rather than the declaratory judgment.[120]

A possible future path would retain the tort action without nonmonetary alternatives, but with limits on the various damage elements. As some states introduce statutory limits on pain and suffering in some tort actions,[121] others might analogize that situation to general damages in libel cases and adopt similar limits—either absolute or perhaps framed as a multiple of any proven special damages. States that permit punitive damages might limit them in amount or require that they bear some relationship to other parts of the damage award or to the defendant's assets.[122]

Another route to legislative change might be tied to the shifting of fees in damage actions.[123] This could be done whether or not the plaintiff had other available options.

With this array of possible constitutional and subconstitutional developments, the law of libel promises to be active in both the judicial and legislative arenas in the coming years. But in this excitement, and possible turmoil, we must not forget that *New York Times Co. v. Sullivan's* approach to libel suits by public officials was correct.

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119 H.R. 2846, 99th Cong., 1st Sess. (1985) (introduced by Rep. Schumer); *see infra* Appendix at 76 for the full text of this Bill.

120 Cendali, *Of Things to Come—The Actual Impact of Herbert v. Lando and a Proposed National Correction Statute*, 22 HARV. J. LEGIS. 441 (1985).

121 *See* Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, *appeal dismissed*, 106 S. Ct. 214 (1985) (White, J., dissenting) (upholding statute limiting to $250,000 the amount recoverable for pain and suffering in malpractice case).

122 MONT. CODE ANN. § 27-1-221(6)(b) (1985) (limiting punitive damages in cases not involving "actual fraud or actual malice" to "$25,000 or 1% of the defendant's net worth, whichever is greater.")

123 H.R. 2846, *supra* note 119, at § 4.

APPENDIX

H.R. 2846

A BILL

To protect the constitutional right to freedom of speech by establishing a new cause of action for defamation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. ACTION FOR DECLARATORY JUDGMENT THAT STATEMENT IS FALSE AND DEFAMATORY.

(a) CAUSE OF ACTION.—

(1) A public official or public figure who is the subject of a publication or broadcast which is published or broadcast in the print or electronic media may bring an action in any court of competent jurisdiction for a declaratory judgment that such publication or broadcast was false and defamatory.

(2) Paragraph (1) shall not be construed to require proof of the state of mind of the defendant.

(3) No damages shall be awarded in such an action.

(b) BURDEN OF PROOF.—The plaintiff seeking a declaratory judgment under subsection (a) shall bear the burden of proving by clear and convincing evidence each element of the cause of action described in subsection (a).

(c) BAR TO CERTAIN CLAIMS.—A plaintiff who brings an action for a declaratory judgment under subsection (a) shall be forever barred from asserting any other claim or cause of action arising out of a publication or broadcast which is the subject of such action.

(d) ELECTION BY DEFENDANT.—

(1) A defendant in an action brought by a public official or public figure arising out of a publication or broadcast in the print or electronic media which is alleged to be false and defamatory shall have the right, at the time of filing its answer or within 90 days from the commencement of the action, whichever comes first, to designate the action as an action for a declaratory judgment pursuant to subsection (a).

(2) Any action designated as an action for a declaratory judgment pursuant to paragraph (1) shall be treated for all purposes as if it had been filed originally as an action for a declaratory judgment under subsection (a), and the plaintiff shall be forever barred from asserting or recovering for any other claim or cause of action arising out of a publication or broadcast which is the subject of such action.

SEC. 2. LIMITATION ON ACTION.

Any action arising out of a publication or broadcast which is alleged to be false and defamatory must be commenced not later than one year after the first date of such publication or broadcast.

SEC. 3. PUNITIVE DAMAGES PROHIBITED.

Punitive damages may not be awarded in any action arising out of a publication or broadcast which is alleged to be false and defamatory.

SEC. 4. ATTORNEY'S FEES.

In any action arising out of a publication or broadcast which is alleged to be false and defamatory, the court shall award the prevailing party reasonable attorney's fees, except that—

(1) the court may reduce or disallow the award of attorney's fees if it determines that there is an overriding reason to do so; and

(2) the court shall not award attorney's fees against a defendant which proves that it exercised reasonable efforts to ascertain that the publication or broadcast was not false and defamatory or that it published or broadcast a retraction not later than 10 days after the action was filed.

SEC. 5. EFFECTIVE DATE.

This Act shall apply to any cause of action which arises on or after the date of the enactment of this Act.

S.B. No. 1979

An act to add Section 48.6 to the Civil Code, relating to defamation.

LEGISLATIVE COUNSEL'S DIGEST

SB 1979, as introduced, Lockyer. Defamation.

Under existing law, a person injured by a defamatory statement may bring an action for damages.

Under existing law, a public official or public figure is generally required to prove that a defamatory statement by a media publisher was made with malice.

This bill would provide that a public official or public figure may bring an action for declaratory relief based upon a media publication or broadcast for a judgment declaring that the publication or broadcast was false and defamatory. It would not be a defense that the publication or broadcast was without malice, ill will, or other improper motive. The bill would prohibit an award of damages but attorney's fees could be awarded to the prevailing party.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds that the current judicial mechanism for redress of defamation of a public official or public figure by a media defendant fails to provide justice for either party.

The current remedy of a suit for money damages produces an unacceptable risk of suppression of free speech and public access to vital information.

Concurrently, the plaintiff in such an action is rarely interested in monetary redress but rather seeks vindication of his or her reputation.

It is, therefore, the intent of the Legislature to provide a concurrent remedy to a suit for money damages which avoids costly and protracted litigation on the issue of defamation of a public figure or public official, and establishes a remedy which truly protects the defamed individual and at the same time encourages the robust exchange of ideas which is so vital to our democracy.

SEC. 2. Section 48.6 is added to the Civil Code, to read:

48.6. (a) A public official or a public figure who is the subject of a publication or broadcast made in a newspaper, magazine, radio or television broadcast, or any other print or electronic media, may bring an action for declaratory relief action for a judgment that the publication or broadcast was false and defamatory.

(b) Notwithstanding any other provision of law, it shall be no defense to an action brought under this section that a publication or broadcast was made without malice or ill will or any other improper motive of negligence.

(c) In any action brought under this section, the plaintiff shall be required to prove by clear and convincing evidence that the publication or broadcast was false and defamatory.

(d) No damages may be awarded in any action brought under this section, whether or not those damages are for compensation or for punishment and by way of example. Any person who commences an action for relief under this section shall be barred from asserting or pursuing any other claim or cause of action arising out of the publication or broadcast, and shall be deemed to have waived the right to assert any such claim.

(e) In any action arising under this section, the court shall award reasonable attorney's fees to the prevailing party except as follows:

(1) The court may reduce or disallow attorney's fees if there is an overriding reason to do so.

(2) No attorney's fees shall be awarded against a defendant that proves that it exercised reasonable efforts to determine that the publication or broadcast was not false and defamatory.

(3) No attorney's fees shall be awarded against a defendant that published a correction or retraction no later than 10 days after the action is filed.

(4) No attorney's fees shall be awarded against a plaintiff unless it is proved that the action was brought or maintained without a reasonable chance of success.

(f) An action under this section shall be subject to the period of limitations of Section 340 of the Code of Civil Procedure.