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Annenberg Proposal for the Reform of Libel Law: Reform or Regression?

A Defense of the Annenberg Libel Reform Proposal

BY RODNEY A. SMOLLA

The Case for Reform

The case for reforming the law of libel is familiar, and fundamentally sound. The question posed by The Annenberg Washington Program's reform proposal is not whether libel law should be reformed, but whether the proposal contains the right reforms.

The argument favoring reform is the most compelling if one strives to look at the current system objectively and neutrally, without a pro-plaintiff or pro-defendant bias. If one were starting from scratch to design the "perfect" legal mechanism for handling libel disputes, one would never arrive at the current system. It is costly, cumbersome, and fails to vindicate either free speech values or the protection of reputation. The enormous defense costs of protracted litigation exert a chilling effect on the press, while plaintiffs are left with no meaningful legal remedy for reputational injury.

The Defense Perspective

But what if one looks at the current system from a more selfish viewpoint? From the perspective of the press, for example, does the pursuit of reform make sense? Even the simple proposition that libel law *needs* reform is controversial. From the defense view, certainly, a case may be made for the status quo. The siege on the citadel has abated. Several years ago, an air of crisis existed. Suits against the press were increasing, and so were multimillion dollar damages awards. The libel insurance market was rapidly deteriorating. Supreme Court Justices were hinting that *Gertz v. Robert Welch, Inc.*, and perhaps even *New York Times Co. v. Sullivan* should be reexamined. And the *Sharon v. Time, Inc.* and *Westmoreland v. CBS* suits were in mid-swing, seeming to symbolize the escalating libel threat.

The crisis, however, ran its course. Most media defendants have recently experienced an easing in the number of libel suits they are facing. Insurance markets have adjusted. The Supreme Court in *Hustler Magazine v. Falwell*, through none other than Chief Justice William Rehnquist, went out of its way to endorse the basic principles of *New York Times*, *Gertz*, and their progeny. And the failure of either Defense Minister Ariel Sharon or General William Westmoreland to prevail in their suits illustrated to

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A DEFENSE

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plaintiffs and the plaintiffs' bar the futility of bucking the First Amendment in a libel suit. Defendants had reached the winter of their discontent.

Underlying Conditions Still Dangerous

The case for libel reform, however, is no less compelling in 1989 than in 1986. Indeed, the time for reform is never in the heat of a crisis, but after it, in the quiet between storms. Defendants may feel unthreatened at the moment, but there is no reason whatsoever to think that the libel crisis of three years ago could not suddenly reappear. Trends in litigation come and go. Underlying conditions have not changed. Plaintiffs are still quite capable of suing, often for hidden agendas. Judges are still quite capable of denying defense motions for summary

judgment. Juries are still prone to return large verdicts. And even though defendants have every reason to expect that their excellent record at the appellate level will continue, so will the high litigation costs of a system that provides most of its defense protection at the back end rather than the front end, of the litigation. So even if utterly unmoved by any feelings of sympathy for plaintiffs, the press has every reason to thoughtfully explore reform.

States as Laboratories

But if reform makes sense in the abstract, what about the particular? Is the Annenberg package defensible? Before turning to the merits, a number of preliminary points are worth making. The proposal is in the form of a model statute. The complete statutory text, and accompanying section-by-section explanatory analysis, form the heart of the report. If nothing else, the care with which

this reform blueprint was drafted has substantially advanced public discussion of libel law, and helped focus debate. The report deliberately avoids taking a position on whether the statute should be adopted at the state or federal level. The group was divided on the issue. Ultimately, one uniform nationwide law of libel makes sense to me, given the multistate nature of the modern communications industry, and the fact that there is, after all, only one First Amendment. But as Justice Brandeis pointed out, states are ideal laboratories for experiment in a federal system, and the notion of trying out the Annenberg proposal on an experimental basis at the state level would be a sensible way to proceed.

The Annenberg Group Deliberative Process

Secondly, the composition of the eleven-member group that participated in formulating the proposal is, to say the least, striking.

How could consensus be reached by persons as ideologically diverse as Anthony Lewis, Bruce Fein, Richard Schmidt, and Herbert Schmeitz? How could one of General Westmoreland's former lawyers, Anthony Murry, and ardent defense attorneys like Samuel Klein, Roslyn Mazer, and Sandra Baron agree? When one adds to the mix the very different experiences of a distinguished trial judge, Lois Forer, and a leading media insurance expert, Chad Milton, the sweeping agreement of the group seems even more remarkable. The end-product this group produced is not a series of watered-down compromises, a string of lowest common denominators. The people in this group were not shrinking violets. The debate was vigorous, but thoughtful. This was no labor negotiation, in which people came to the table willing to treat the First Amendment like a bargaining chip. It was, rather, a conscientious exercise in problem-solving. As Chad Milton put it, "Many of us have adapted to the status quo, such that we may have a financial or emotional attachment to it, and there is always reluctance to try unknown paths. In that regard, this proposal urges us to set aside self-interest and expediency in favor of what is, in my view, the right thing to do."

The Right Thing to Do

Why is it "the right thing to do"? Let me address several of the principal objections and fears that the report has generated. This will be a "bipartisan" defense, discussing both plaintiff and defense concerns.

Would the statute trigger an increase in frivolous suits? This fear is grounded in the suspicion that plaintiffs will file suits and immediately opt for the declaratory judgment option, in which they no longer face the impediment of proving actual malice (or negligence, in private-figure cases), and may receive the "bonus" of attorney's fees if they prevail. The fear

is reasonable, and probably the type of question that can never be satisfactorily resolved until the statute is actually enacted somewhere and tried for several years. There are, however, reasons to believe that the fear is unfounded.

First, it must be remembered that *every* would-be plaintiff must, within thirty days of the publication of the defamatory statement, file a demand for a retraction or opportunity to reply, as a prerequisite to filing suit. This request "must specify the statements claimed to be false and defamatory and must set forth the plaintiff's version of the facts." The defendant then has thirty days to respond, and may absolutely bar litigation by honoring the defendant's request. This is a powerful defense option, for the defendant who has in fact been "caught red-handed" in a mistake now has the ability to completely eliminate exposure to litigation. More significantly, when the plaintiff's only complaint is that the published story contained defamatory implications, the defendant may avoid suit simply by retracting the implication.

Truth, under the Annenberg proposal, is made to stand naked in the declaratory judgment procedure, without the protective clothing of *New York Times*.

Secondly, even in the absence of a retraction or reply barring the suit, the plaintiff faces down-side risks of his own. The declaratory judgment mode is not a perfectly level playing field, but rather has a bias designed to protect First Amendment interests. The plaintiff has the burden of proving falsity, and must meet that burden with "clear and convincing" evidence. Much more significantly, the plaintiff must deal with the risk that he will be forced to pay the defendant's attorneys' fees if he does not prevail.

Third, the statute very carefully circumscribes the range of statements that qualify as defamatory. No statute will ever completely solve the intractable problem of separating statements of fact from statements of opinion. The Annenberg proposal, however, contains an elaborate definition of opinion that goes a long way toward insulating certain genres of speech by presumptively classifying them as opinion, including fiction, satire or parody, artistic, athletic, literary, academic, culinary, theatrical, religious, or political commentary, letters to the editor, editorials, and editorial cartoons.

If no statute will ever eliminate all problems of separating fact from opinion, a statute may come close to eliminating exposure to suit for neutral reportage. The proposal contains a broad neutral reportage privilege, barring liability for the repetition of the defamatory statements of others, when the quote is accurately reported, involves a matter of public interest, and the source is identified. Finally, the fear of frivolous suits is mitigated by the fact that the report requires a plaintiff to put up or shut up. The plaintiff must be able to articulate *prior to suit* what the facts are, and must have confidence in his or her ability to prove them. Under the current system, plaintiffs have their own ability to hide behind *New York Times Co. v. Sullivan*. They can file suit and then blame their failure to recover on the First Amendment's requirement that fault, in addition to falsity, be demonstrated. Under the proposal, the nuisance suit carries the risk of deeper embarrassment and liability for attorneys' fees.

The Plaintiff's Perspective

Do plaintiffs get a fair shake under this proposal? If defendants may distrust the declaratory judgment option as an invitation to frivolous suits, plaintiffs may claim foul in the taking away of their right to money damages in any case in which the defendant forces the

case into the declaratory judgment mode. Certainly, there will be some plaintiffs who will suffer demonstrable damages and nonetheless be shut out by a defendant who opts for the declaratory judgment procedure. Reforms, however, must be designed for the large run of cases, and there are reasons for believing that most plaintiffs will be much better off under the proposal. A plaintiff who gets a speedy judicial declaration that the defamatory statements leveled against him were false, and who gets attorneys' fees, is better off under the proposal than under current law. Most plaintiffs will in fact be made whole by such a declaratory remedy. After all appeals are exhausted, most plaintiffs lose under existing law. Under the proposal, those with meritorious claims on the issue of truth or falsity will usually win.

But why not permit plaintiffs who prevail at the declaratory judgment stage to still recover for special damages—provable pecuniary losses? To permit this would be to defeat the whole purpose of the declaratory judgment innovation, for it would open up every case to a mini-trial on special damages, and defeat the streamlining purpose of the declaratory judgment procedure.

Constitutional Questions

Is it constitutional to expose a defendant to liability for attorneys' fees without the benefit of the actual malice or negligence fault protections of *New York Times* and *Gertz*? Again, this is a question that cannot be answered definitively until the statute is tried and tested in court. A number of arguments support the constitutionality of the fee-shifting provisions of the proposal. The closest analogy under existing law is the Civil Rights Attorneys' Fees Awards Act of 1976. In civil rights litigation, the Supreme Court has held that a prevailing plaintiff may recover attorneys' fees even against a defendant that enjoys

qualified or absolute immunity from damages, if the plaintiff prevails on claims for injunctive or declaratory relief. The analogy is apt, because immunity doctrines in civil rights cases are designed to insulate officials from the chilling effect of litigation, unless they have knowingly violated settled constitutional rights. This bears a striking resemblance to the "breathing space" rationale of *New York Times*, and if anything, is an even more intense commitment to avoiding "chilling effects." Yet even in these civil rights cases, the Court has drawn a sharp distinction between liability for damages and liability for attorneys' fees.

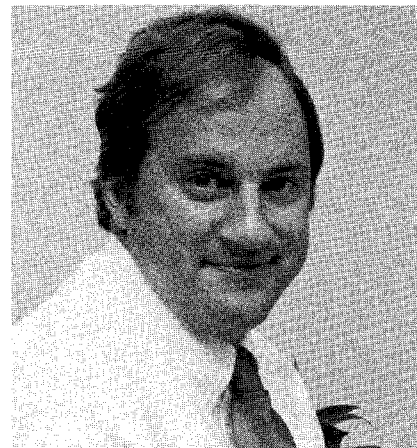
On a less legalistic plane, it must be remembered that the fault standards of *New York Times* and *Gertz* were crafted to protect First Amendment values in the context of a traditional common law suit for money damages. If the net "chilling effect" of all the provisions of the comprehensive new reform structure would be less than that of the old system (including *New York Times* and *Gertz*) then the fee-shifting device should be constitutional.

Truth in the Marketplace

There are many other interesting issues posed by the proposal, and they cannot all be addressed in this space. The discussion in the last paragraph, however, touches on a final, more global point, worth emphasizing in conclusion. The various provisions of the proposal are meant to work together, to create a matrix of incentives that encourage both sides to examine their positions self-critically, and settle in the early stages of the dispute. Philosophically, these incentives combine to make the prompt dissemination of truth in the marketplace the central driving purpose of the reform. Some may object to this preoccupation with truth, fearing that the First Amendment has been sacrificed on truth's altar. This is a somewhat awkward position to

be in (How can one be against truth?), but despite its surface unseemliness, it is an objection that I take very seriously. For one might argue forcefully that the classic Holmes/Brandeis free speech tradition will not countenance government as truth's arbiter. The only test of truth is the market, and government has no business declaring it, in this libel reform statute or anywhere else.

This argument, however, proves too much. For if followed to its logical end it would unravel even the current law of libel, in which the judicial system does, after all, purport to pass on truth or falsity as part of the litigation. Truth, under the Annenberg proposal, is made to stand naked in the declaratory judgment procedure, without the protective clothing of *New York Times*. But freedom of speech is not left more exposed by this statute. When all of the proposal's provisions are taken in combination, free speech values are enhanced, and worthy plaintiffs are offered a meaningful remedy. The Annenberg proposal suggests that reforming libel law may not be a zero-sum game after all. We will never find out, of course, until some brave legislature gives it a try.



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