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REFORM LIBEL LAW?

Last fall the Libel Reform Project of Northwestern University's Annenberg Washington Program unveiled a far-reaching proposal for reshaping libel law. Instead of a trial by jury for damages, the parties can elect a no-fault trial for a declaratory judgment.

Media defendants would lose their constitutional defenses just as plaintiffs would lose windfall recoveries—however, both stand to gain from a speedier judicial

determination of the truth, say advocates of the proposal.

Chicago media lawyer Don Reuben is alarmed by the proposal, which he predicts will chill aggressive reporting by making it easier and cheaper to sue the media.

Law professor Rodney Smolla, the reporter for the Annenberg group, disagrees. He believes that there are better ways than trial for resolving most libel disputes.

Here is their debate.

YES: RODNEY SMOLLA

Don Reuben, a virtuoso trial lawyer and a great defender of the First Amendment, warns of a "draconian onslaught" against the free press. I disagree.

The threat he identifies is a proposal for libel reform issued last fall by a study group I chaired at Northwestern University's Annenberg Washington Program. Reuben claims that if that proposal were enacted as law, fewer newspaper publishers and TV station owners would fight libel lawsuits to the death, which would "chill" vigorous reporting.

He's right on the first point. There would be many fewer long, expensive libel suits—that's a major objective of the proposal. But there's no reason to believe that media executives wouldn't back their reporters just as vigorously as they do under the present system. And the proposal would lift the threat of excessive damages that has its own "chilling effect" on aggressive reporting.

The 11 members of our bipartisan panel agreed on a compromise model law because the current libel system isn't working well for anyone. Legal costs for each side often run into six or seven figures.

The awards won by plaintiffs are often lost on appeal. Meanwhile, the defendants face huge financial risks and may have their newsrooms tied

up with depositions for months.

The public also loses under the current system, which actually undercuts one of the great purposes of the First Amendment—encouraging the dissemination of truth through robust and uncensored debate. After years of litigation, the court either fails to set the record straight or does so long after the public has absorbed the libelous version of the facts.

Libel suits have grown unwieldy and their outcomes unsatisfying in large part because the central question in libel trials shifted with *New York Times v. Sullivan*. Instead of focusing on whether the plaintiff was libeled, the issue became whether the defendant was at fault. This shift in focus was necessary to protect free speech, moving away from the self-censorship that occurred under the old common-law rules. But the question was so complex to litigate that the proceedings grew out of proportion and the rulings were muddled by the question of fault.

BACK ON TRACK

The proposed reforms would refocus the courts on the key question: Was the defendant libeled? Under the proposal, the plaintiff must seek a retraction or an opportunity to reply before filing a libel suit. If the news medium gives the plaintiff a chance to set the record straight, there's no suit. If not, the plaintiff can file suit, but either side has the option to convert the case into a suit for a "declaratory judgment" rather than a traditional suit for damages.

Money damages would be taken completely out of the picture. This no-fault trial would focus entirely on the truth or falsity of the alleged libel.

If neither side chose the declaratory judgment route, there could be a more traditional suit for damages, with a few key changes. Only actual damages would be awarded. "Punitive damages," designed purely to punish the defendant, and "presumed damages," awarded automatically without proof of injury, would be abolished.

Reuben predicts that, by making it quicker and easier to take your local news people to court, the proposal would clog the courts with a boom in libel suits. No one can know the net effect of the reforms; without experience with such a law, however, there are reasons to believe it would head off many suits instead of increasing the number filed. If caught "red-handed" in an error, the defendant would have the incentive to completely eliminate exposure to litigation by publishing a retraction or reply. And if the complaint were over innuendo instead of facts, as in many libel suits today, the defendant could avoid suit simply by retracting the alleged defamatory implications.

The Annenberg proposal is filled with incentives to encourage amicable settlement before matters go to trial. The litigants wouldn't have the glorious fight to the death, but in comparison, they'd both emerge as winners. And so would the public, with a streamlined, rational way to handle disputes. ■



NO: DON REUBEN

Proclaiming that libel juries have run amuck, the Annenberg policy study group has produced a proposal for libel reform that would allow publishers to avoid lawsuits by printing retractions. Once a lawsuit is filed, either side could defeat the right to a jury trial by electing a no-damage declaratory judgment.

The parties would litigate the truth of the alleged libel, and no constitutional defenses would be available to the publisher. If the plaintiff prevails, he has a judicial declaration that the libel is false, but receives no money damages—even if he has suffered severe emotional distress or economic losses. The plaintiff has lost the right to a jury trial and money, but the plaintiff and the publisher have saved in legal fees. And, according to the Annenberg report, they have had the benefit of a quicker judicial determination.

Criminal cases, actions for injunctions or receiverships, and national emergencies such as railroad strikes already receive priority by the judiciary. If the Annenberg-type declaratory suit is made easy and inexpensive, the volume of lawsuits it generates could be burdensome to the judiciary. Also, the constitutionality of depriving libel victims of their right to a jury trial is unclear.

Of all civil litigation, the libel suit

may be best suited for trial by jury. It is a trial to determine the effect of a particular publication on one's reputation. Who is better equipped to decide this than jurors from the plaintiff's community, who are familiar with both the media defendant and the plaintiff's reputation?

There is another, even more compelling reason for rejecting the Annenberg recommendations, which would likely chill the hell out of the working press, the reporter and editor. In fact, the Annenberg idea is a draconian onslaught against the First Amendment—all for the benefit of owners and profits. In a typical libel suit, the reporter, rewrite person or TV producer might be named as a defendant but would not pay any of the freight of the lawsuit—legal fees, costs or judgment. Yet in the many libel suits I have defended, I have yet to see the reporter not thoroughly immersed, committed and deeply concerned.

ULTIMATE STAKES

It is the reporter's accuracy, integrity, professional reputation and standing that are ultimately at stake. Except in rare instances, the loss of a libel suit does not usually materially affect circulation, ratings or advertising revenues. The corporate types pay some money, but that's all they lose. Even in highly publicized cases, the likelihood of permanent damage to the publisher's image or well-being is non-existent.

If the publisher abandons all the constitutional defenses afforded by

the First Amendment to avoid paying damages, it becomes easier for plaintiffs to prevail and thus, chill aggressive reporting. Also, if the publisher or owner—who often understandably has the mind-set of a business executive—has no financial exposure, the zeal for a vigorous defense might lessen or disappear.

Because it is unlikely that the proposals would be adopted by the bench, the Annenberg reforms would have to be adopted by 51 legislative bodies—Congress and the 50 states. It boggles the mind to believe that legislators who have their own special love-hate relationship with the press would act fairly or uniformly so that there is one clear, unambiguous system, not 51 different systems.

The Annenberg recommendations manifest a profound fear of juries and the jury system. Apparently, media executives are so afraid of trial by jury that they would commit the future of libel law to legislatures and judges alone. Yet who is suited to determine the injury to the plaintiff?

The Annenberg group muffed a good opportunity to make a positive contribution to the law of libel and the First Amendment. The report does have some merit in criticizing punitive damages, and this subject needs examination.

But most certainly they could have avoided an approach in which the biggest and most dramatic loser of First Amendment freedoms would be the working press, from Dan Rather down to the local stringer for a weekly gazette. ■