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DEFAMATION AND THE FIRST AMENDMENT: THE END OF THE AFFAIR

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I. INTRODUCTION

A moment's reflection on the title of this Symposium—"Defamation and the First Amendment"—will help put into perspective the analysis and proposals of the three principal speakers. Until the decision in *New York Times Co. v. Sullivan*[1] twenty years ago, a symposium on defamation and the first amendment would have made about as much sense as a symposium on psoriasis and the first amendment: each of the terms refers to a matter of some independent interest, but the link between the two would not have been intuitively apparent. Had this Symposium been held ten years ago, we would have focused our attention on the extent to which *Gertz v. Robert Welch, Inc.*[2] indicated that first amendment considerations dominated ground previously occupied by the tort law of defamation. While some of the symposium's participants would undoubtedly have been alarmed by the Supreme Court's rejection of the *Rosenbloom v. Metromedia, Inc.*[3] "matters of public or general concern" trigger[4] for application of the *New York Times* actual malice rule,[5] the more significant comments about *Gertz* would have addressed the Court's extension of first amendment restrictions into additional aspects of the law of defamation. In light of that extension, the title of this Symposium, had it been held in 1974, might well have been "Defamation or the First Amendment."

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1. 376 U.S. 254 (1964).
2. 418 U.S. 323 (1974).
3. 403 U.S. 29 (1971).
4. *Id.* at 44.
5. *See* 376 U.S. at 279-80.

If this Symposium were to be held ten years from today, the link between the first amendment and the law of defamation probably would be substantially weaker than predicted in the first great rush of cases following *New York Times*.[6] At the very least, the expansion of first amendment protection of defamatory speech, and the intrusion of the first amendment into other tort actions,[7] will have slowed in the next decade.

The year 1984 may turn out to be as significant for defamation and the first amendment as 1964, the year of *New York Times*, and 1974, when *Gertz* was decided. If the recent defamation jurisdictional decisions[8] are any indication, I do not expect the Supreme Court to use the opportunity presented by the granting of certiorari in *Dun & Bradstreet, Inc. v. Greenmoss Builders*[9] to extend the scope of first amendment protection.[10] Indeed, it is not at

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6. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971); St. Amant v. Thompson, 390 U.S. 727 (1968); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Associated Press v. Walker, 388 U.S. 130 (1967); Rosenblatt v. Baer, 383 U.S. 75 (1966).

7. *See, e.g.*, Time, Inc. v. Hill, 385 U.S. 374 (1967).

8. Calder v. Jones, 104 S. Ct. 1483 (1984); Keeton v. Hustler Magazine, 104 S. Ct. 1473 (1984).

9. 104 S. Ct. 389 (1983).

10. During the presentation of these remarks in April, I speculated that the Court also might limit the scope of protection by deciding in Bose Corp. v. Consumers Union of United States, 104 S. Ct. 1949 (1984), that the qualified constitutional privilege of *New York Times* does not apply to product disparagement cases. In *Bose*, both the United States District Court for the District of Massachusetts and the United States Court of Appeals for the First Circuit held that the plaintiff was required to show actual malice in order to establish the defendant's liability in a product disparagement case. *See* Bose Corp. v. Consumers Union of United States, 692 F.2d 189 (1st Cir. 1982), *aff'd*, 104 S. Ct. 1949 (1984). The district court found actual malice, and entered a judgment for the plaintiff. Bose Corp. v. Consumers Union of United States, 529 F. Supp. 357 (D. Mass. 1981), *rev'd*, 692 F.2d 189 (1st Cir. 1982), *aff'd*, 104 S. Ct. 1949 (1984). The First Circuit reversed on the issue of liability, however, concluding that the trial judge had inferred actual malice too readily from the proof of falsity. 692 F.2d at 197.

The Supreme Court could have used *Bose* to limit the application of the constitutional protection recognized in *New York Times* to defamation actions, thereby indicating that the expansion of that protection into other speech or press related tort actions is not constitutionally required. Instead, the Court limited its inquiry to whether the First Circuit should have engaged in "a de novo review, independently examining the record to ensure that the district court has applied properly the governing constitutional law and that the plaintiff has indeed satisfied its burden of proof." *Id.* at 195. Having reached the issue of the appropriate appellate standard of review, the Court could have restricted its opinion to a fairly narrow interpretation of rule 52 of the Federal Rules of Civil Procedure. *See* 104 S. Ct. at 1952-53. Given the wide discrepancy between judge and jury conclusions on the constitu-

all unlikely that the Court will decide during the October 1984 Term[11] that the *Gertz* prohibition of strict liability and its restrictions on the recovery of presumed and punitive damages do not apply to nonmedia defamation defendants.[12] Thus, while the relationship between defamation and the first amendment may never be—and indeed should not be—totally severed, the "affair" could well be on the wane.

II. Injury and Wrong

If the trend of placing constitutional restrictions on the tort law of defamation is approaching or has already reached its peak, two important consequences follow. First, the arena for the resolution of the conflict between speech and reputational interests shifts from the United States Supreme Court to the states and, second,

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tional issues involved, *see* Libel Defense Resource Center, Bull. No. 7, Independent Appellate Review in Libel Actions Since *New York Times v. Sullivan* (1983), and the general demise of heightened scrutiny for review of "constitutional facts" in such contexts as Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920), the Court easily could have decided that a sweeping endorsement of de novo review was inappropriate. The Court indicated, however, that whether the factfinder was a judge or a jury did not affect the rule requiring an independent review of the actual malice finding. *See* 104 S. Ct. at 1959.

Although the Court did not limit the scope of first amendment protection in *Bose*, the application of *New York Times* to product disparagement cases remains unclear. The Court expressly refused to decide the issue in *Bose*. *See* 104 S. Ct. at 1966. Moreover, Justices Rehnquist and O'Connor suggested that they might not apply *New York Times* when the issue is presented. *See id.* at 1967-68 (Rehnquist, J., dissenting) ("It is ironic . . . that a constitutional principle which originated in *New York Times* . . . because of the need to criticize the conduct of public officials is applied here to a magazine's false statements about a commercial loudspeaker system."). *See also infra* note 12.

11. After hearing arguments in *Dun & Bradstreet*, the Court scheduled the case for reargument in the October 1984 Term. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, 52 U.S.L.W. 3937 (U.S. June 26, 1984).

12. In *Dun & Bradstreet*, the Supreme Court of Vermont held that the *Gertz* standards of liability and damages did not apply to actions between private plaintiffs and nonmedia defendants. Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc., 143 Vt. 66, 461 A.2d 414 (1983), *cert. granted*, 104 S. Ct. 389 (1983). The court held that the federal Constitution did not require such an extension of *Gertz*, and declined to adopt the *Gertz* rules as a matter of state law. 143 Vt. at 75-76, 461 A.2d at 418-19. *But cf.* Jacron Sales Co. v. Sindorf, 276 Md. 580, 592, 350 A.2d 688, 695 (1976) (adopting the *Gertz* rules as a matter of state law). In scheduling *Dun & Bradstreet* for reargument, *see supra* note 11, the United States Supreme Court directed the parties to address whether the restrictions on presumed and punitive damages should apply to defamation actions involving nonmedia defendants or commercial or economic speech. *See* 52 U.S.L.W. at 3937.

the terms of the debate are altered to a significant degree.[13] Rather than focusing on the federal constitutional limitations on a state's tort law, the next rounds of the defamation debate are likely to resemble the controversy in some other branches of tort law.[14] In these next rounds, the reconciliation of competing interests is going to be made within the constraints of the political process. Rather than subjecting reputational interests to a first amendment trump, the participants in this debate ought to be increasingly responsive to more popular notions of the fair treatment of individuals and the control of largely unchecked institutions capable of inflicting serious harm.

David Anderson's views on proof of injury to reputation[15] should be judged as a contribution to that debate,[16] and his conclusion should be rejected. Anderson urges the elimination of presumed harm to reputation from the law of defamation, and insists on proof of actual harm to reputation as a prerequisite to any defamation recovery.[17] Comparing the tort of defamation to the general trends in tort law, Anderson describes the focus of tort law as having shifted from wrong to injury, and notes that this shift has not occurred in the law of defamation, leaving defamation as "the only

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13. This latter point is true only insofar as state courts do not feel compelled by state constitutional provisions to expand the protection afforded by the federal Constitution. At some point in a continued expansion of state constitutional free speech and free press guarantees, the states should begin to run into side constraints in the form of constitutional provisions for equal protection, due process, and access to courts or remedies for wrongs.

14. The current effort to reform products liability law through federal legislation provides an example. *See Hearings on S. 44 Before the Subcomm. on the Consumer of the Senate Comm. on Commerce, Science and Transp.*, 98th Cong., 1st Sess. (1983). S. 44 was revised in the Staff Working Draft of October 19, 1983, approved by the Senate Commerce Committee on March 27, 1984, and reported to the Senate on May 23, 1984. *See* 130 CONG. REC. S6360 (May 23, 1984); 12 PROD. SAFETY & LIAB. REP. (BNA) 261-70 (Mar. 30, 1984). State statutory reforms before the shift to federal legislative efforts are collected in Birnbaum, *Legislative Reform or Retreat? A Response to the Product Liability Crisis*, 14 FORUM 251, 269-85 (1978).

15. Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747 (1984).

16. I do not understand Anderson to be basing his proposed reform of defamation law on constitutional grounds. As such, his analysis provides a welcome relief from the typical efforts to turn all defamation issues into matters of constitutional import. *See, e.g.*, Van Alstyne, *First Amendment Limitations on Recovery from the Press—An Extended Comment on "The Anderson Solution,"* 25 WM. & MARY L. REV. 793 (1984).

17. Anderson, *supra* note 15, at 758.

tort that allows substantial recovery without proof of injury."[18] Even if that depiction of tort law trends is accurate,[19] Anderson attaches too little importance to the most significant lesson to be drawn from his summary: at the core of every successful[20] defamation case, there is going to be a wrong. The major significance of *New York Times* and *Gertz* is that defamation is the first tort in which, as a federal constitutional matter, wrongful conduct by the defendant has been made an essential element of the plaintiff's prima facie case.[21]

The nature of the wrongful conduct in current defamation law is firmly grounded in the reputational interest of the victim. The wrong consists of publishing false statements of fact that have the demonstrated capacity[22] to injure the reputation of the victim,

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18. *Id.* at 748.

19. A respectable body of scholarly and judicial opinion indicates that even strict products liability cases have not abandoned the underlying concept of the defendant's wrongful conduct. *See, e.g.*, Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955 (1976); Wade, *A Conspectus of Manufacturers' Liability for Products*, 10 IND. L. REV. 755 (1977).

20. A successful outcome in a defamation case is, of course, a matter of perspective. I am using the term to indicate a plaintiff's success in establishing each of the elements of the prima facie constitutional and state tort law case. At the Practicing Law Institute (PLI) symposium, *New York Times v. Sullivan: The Next Twenty Years* (Mar. 8-9, 1984), chaired by Richard N. Winfield, "success" in a defamation action meant almost exclusively judgments for media defendants, with a more modest degree of success consisting of plaintiffs' judgments being set aside by appellate courts. The more extreme ideas of success seem to consist of media defendants securing judgments on the pleadings well before any plaintiff with the gall to threaten the underpinnings of constitutional government by filing a defamation action ever has an opportunity to subject the media defendant to the indignity of a discovery process capable of producing evidence of the defendant's fault! This attitude would explain the critical reaction to Herbert v. Lando, 441 U.S. 153 (1979), displayed at the PLI Symposium.

21. This statement needs to be qualified, of course, to whatever extent the *Gertz* prohibition of strict liability is inapplicable to cases involving private plaintiffs and nonmedia defendants. I detect in the scholarly literature represented by Professor Anderson's paper little concern for nonmedia interests, and will assume for the rest of this Commentary that the prototypical defamation action contemplates a media defendant.

22. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). The holding that states can define the fault standard in private plaintiff cases, as

> "long as they do not impose liability without fault, . . . obtains where, as here, the substance of the defamatory statement 'makes substantial danger to reputation apparent.' . . . Our inquiry would involve considerations somewhat different . . . if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential."

Id. at 347-48 (footnote omitted).

with at least some degree of fault in not keeping those false statements of fact out of public circulation. When a plaintiff can prove that the defendant acted in that wrongful manner, no compelling reason exists to let the defendant escape legal responsibility for its conduct simply because the manner in which the defendant's wrong harmed the plaintiff happened to be something other than provable injury to reputation. Limiting defamation in the way Anderson proposes involves an excessively rigid conceptualization of this tort action that is present nowhere else in tort law. In the traditional intentional tort actions, for example, intent to commit one category of harm can satisfy the intent element when the plaintiff actually suffers a different category of harm.[23] Under the standard American approach to proximate cause in negligence actions, the unforeseeability of the precise manner in which a foreseeable victim suffers a foreseeable type of harm will not preclude the defendant's liability, and the classification of the type of harm that is foreseeable is subject to broad interpretation.[24]

III. The Presumption of Harm

Any analysis of the effects of presuming harm to reputation must proceed from two premises that Professor Anderson's paper recognizes only sporadically, if at all. The first premise is that the existing parameters of constitutional protection of speech and the press in defamation cases are, and should remain, well entrenched. Public officials and public figures must establish *New York Times* actual malice in order to recover,[25] private individuals must show at least negligence to recover from media defendants,[26] and presumed and punitive damages are unavailable absent a showing of actual malice.[27] That level of constitutional protection faces no credible threat of contraction. Accordingly, the analysis of the effects of presumed harm to reputation must distinguish between cases in which the plaintiff can prove actual malice and those in

23. *See* Prosser, *Transferred Intent*, 45 Tex. L. Rev. 650 (1967).

24. *See, e.g.*, Petition of Kinsman Transit Co., 338 F.2d 708 (2d Cir. 1964).

25. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Associated Press v. Walker, 388 U.S. 130 (1967); New York Times Co. v. Sullivan, 376 U.S 254 (1964).

26. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).

27. *Id.* at 349-50.

which the plaintiff can establish only a lesser measure of fault.

The second premise that Anderson seems to ignore is that a distinction should be drawn between presumed harm to reputation and presumed damages. A presumption of harm to reputation supplies the injury element of the tort action of defamation, and brings defamation into the tort mainstream that Anderson describes.[28] A presumption of damages, on the other hand, entitles the tort plaintiff to compensation even in the absence of any proof of actual loss. Although presumed damages permit a factfinder to make an award of damages with no proven factual basis, presumed harm to reputation does not necessarily have to be translated into any monetary recovery for the plaintiff. As I understand Anderson's arguments, his concern with presumed damages leads him to an unwarranted attack on the presumption of harm to reputation.

When the two premises are combined, the apparently drastic consequences of presuming harm to reputation shrink to reasonable proportions. If the plaintiff can prove only that the defendant was negligent in publishing false statements of fact about the plaintiff, the amount of the plaintiff's recovery will be limited to those damages that the plaintiff can prove. Although the actual injury requirement of *Gertz*[29] means that a presumption of harm to reputation might still play an important role in a case governed by *Gertz*, this presumption does not result in a presumption of damages for the presumed harm. If the plaintiff is unable to prove any actual harm to reputation, then the plaintiff will recover no damages for reputational harm.

The presumption of harm to reputation can operate in the plaintiff's favor in a case subject to the *Gertz* rules by permitting the plaintiff to surmount Anderson's proposed hurdle of proof of injury to reputation and proceed to prove and recover damages for any actual injury that was inflicted by the defamatory statements. If the plaintiff can establish to a factfinder's satisfaction that the defamatory statements caused emotional distress, to take the most frequently asserted nonreputational harm, a state may allow the plaintiff to recover damages for that harm.[30] Even in this situation,

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28. *See supra* text accompanying note 18.

29. *See* 418 U.S. at 349-50.

30. *See* Time, Inc. v. Firestone, 424 U.S. 448, 460-61 (1976).

however, the plaintiff's recovery will be subject to the usual tort doctrinal safeguards. For example, the emotional distress must be a foreseeable consequence of the defendant's wrongful conduct, the emotional distress must be proximately caused by the defendant's wrongful conduct, and some rational basis must support the amount of the award.

In a case in which liability is based only on the defendant's negligence, a presumption of harm to reputation does not result in the defendant being liable for anything other than the provable harm actually suffered by the plaintiff. The problems of quantifying and defending claims for items of damages such as emotional distress are matters that the tort bar has had to confront for years. If those matters are exceptionally terrifying to defamation defendants, the solution is more appropriately sought in an improved defamation defense bar[31] and an insurance mechanism that accurately reflects the exposure to liability for such items of damages as emotional distress.[32]

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31. During the presentation of papers and comments on those papers at this Symposium in April, a number of participants made statements to the effect that "I don't know what negligence means." I see no reason why an admitted failure to comprehend a liability theory for which we have approximately a century and a half of accumulated experience should be considered a persuasive argument for the defamation defense bar. Perhaps paying some careful attention to the tort milieu in which defamation cases are located, rather than engaging in first amendment posturing, would produce a deeper understanding of the tort doctrines that apply to defamation.

The choice of counsel for CBS in the Westmoreland suit may illustrate the point I am making. *See* Westmoreland v. CBS, Inc., 10 MEDIA L. REP. (BNA) 1215 (S.D.N.Y. 1984). Apparently recognizing that the most significant characteristic of Westmoreland's action was that it was a "big case," similar to an antitrust action, CBS obtained the services of David Boies, an exceptionally able lawyer who had no previous defamation experience, but who did have experience with massive antitrust litigation. *See generally* J. STEWART, THE PARTNERS: INSIDE AMERICA'S MOST POWERFUL LAW FIRMS 62-104 (1983). That experience seems to be a better rationale for hiring Mr. Boies than his ability to try a case before a South Carolina jury. *But see* D. KOWET, A MATTER OF HONOR 234-35 (1984). In smaller cases, defamation defendants might be well served by lawyers who are experienced in jury trials of tort actions other than defamation, particularly in representing defendants, such as insurance companies or physicians, who elicit little sympathy from the typical juror.

32. Some of the financial pressure of defamation judgments could be relieved by insuring against liability. The type of insurance crisis that occurred in medical malpractice, *see* Brant, *Medical Malpractice Insurance: The Disease and How to Cure It*, 6 VAL. U.L. REV. 152 (1972), and products liability might be avoided if media insurance is underwritten in such a way that premiums accurately reflect media exposure to liability for such nonreputational damages as emotional distress.

The more problematic situation occurs when a presumption of harm to reputation enables the plaintiff to recover damages for harm that the plaintiff did not prove he actually suffered. The major safeguard for defamation defendants in this situation, of course, is the constitutional requirement that, to recover presumed damages, the plaintiff must make the threshold showing of *New York Times* actual malice. When the plaintiff is able to establish that the defendant knew that the statements it published about the plaintiff were false, "that the defendant in fact entertained serious doubts as to the truth" of the statements,[33] or that the defendant published the statements despite a "high degree of awareness of . . . probable falsity,"[34] arguments about the adverse consequences of imposing liability on the defendant leave me unmoved. We cannot realistically expect a defendant whose conduct has been proven to constitute fault of the magnitude of *New York Times* actual malice to escape liability solely because the plaintiff has been unable to establish any actual harm to reputation. Requiring proof of actual harm to reputation in such cases is an idea that deserves little support in the tort law forum in which the nonconstitutional aspects of a modern law of defamation are going to be defined.

The real concern with presumed damages seems to be not so much that the defendant is liable, but rather the amount of the defendant's liability.[35] In addressing that concern, Professor Anderson's proposed abolition of the presumption of harm to reputation is insufficiently responsive both to the level of the defendant's fault and to the plaintiff's interest in being protected from the harmful effects of that wrongful conduct. Anderson's approach is apt to lead to the kind of trap that is illustrated in *Keeton v. Hustler Magazine*,[36] in which the Supreme Court upheld New Hamp-

33. St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

34. Garrison v. Louisiana, 379 U.S. 64, 74 (1964).

35. For this reason, punitive damages seem to pose more of a problem for media defendants than either presumed harm to reputation or presumed damages. The most critically needed reform of defamation law concerns punitive damages, and should proceed along two tracks: first, punitive damages should be limited to cases in which the defendant knew the defamatory statements were false; and second, insurance coverage for punitive damages should be permitted in defamation cases.

36. 104 S. Ct. 1473 (1984).

shire's jurisdiction over *Hustler* magazine. The Court acknowledged New Hampshire's interest in providing a forum for libel actions, but described that interest in terms that introduce a purpose for defamation law that previously had not been embraced as explicitly by the Court. From the premise that "[f]alse statements of fact harm both the subject of the falsehood *and* the readers of the statement,"[37] the Court concluded that the state "may rightly employ its libel laws to discourage the deception of its citizens."[38] Anderson's thesis that "compensating individuals for actual harm to reputation is the only legitimate purpose of defamation law today"[39] appears less tenable when the Supreme Court appears to be actively engaged in an expansion of the recognized purposes of defamation actions. I would prefer to see the debate on defamation focus on the individual interest in reputation, rather than a state's interest in protecting its citizens from false statements, but my concern is that reshaping defamation law in the way that Anderson proposes would make defamation law increasingly less able to provide adequate protection for the reputational interest, and would thus foster a search for alternative or supplemental interests for defamation law to serve.

IV. The Remedy of Repair

If the *Gertz* rule permitting presumed damages upon proof of *New York Times* actual malice remains in effect, I would offer the defamation defendant the opportunity to take advantage of a counterpresumption. The presumption of damages, even as it is currently limited by *Gertz*, is justified only by a reasonable confidence that statements with the capacity to injure a person's reputation actually produce that injury, even if not in a readily identifiable way. If this unidentifable harm can be made the subject of a presumption that it exists, I propose a corollary presumption that the unidentifiable harm can be alleviated. Accordingly, if the defendant would take an amount of resources equivalent to those used to defame the plaintiff[40] and devote those resources to coun-

37. *Id.* at 1479.
38. *Id.*
39. Anderson, *supra* note 15, at 749.
40. These resources include the cost of reportorial and editorial functions, publicity, dis-

tering the false statements of fact, I would presume that any unidentified injury to reputation had been remedied. This presumed remedy thus eliminates the ability of the defamed individual to obtain monetary compensation for unproven harm to reputation, even after a showing of actual malice.

My proposal is not a retraction proposal,[41] nor is it merely a declaratory judgment of falsity.[42] Most significantly, it does not require the major modifications of defamation law called for in Anderson's proposed abolition of the presumption of harm to reputation[43] or in Marc Franklin's proposed action for restora-

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tribution, and any other efforts that go into publicizing the defamatory statements about the plaintiff.

41. A retraction could merely withdraw what had been published about the plaintiff. My proposed remedy of repair would require the defamation defendant to explain the defamatory statement, and the circumstances that caused the defendant to publish it. Unlike a retraction, which may not be as prominently displayed or located in a position comparable to the original defamation, the repair would occupy as much space or time as the defamatory communication. Supervision of the repair would involve a minimal effort by the trial judge or a master appointed for the purpose.

An effective repair need not disadvantage the defamation defendant. A detailed explanation of the circumstances under which the defamatory statement was published may provide the public with a better sense of the pressures surrounding the publication or broadcast, as well as the standards that were used to ensure accuracy. If the defendant has adopted more safeguards since the defamation was originally communicated, describing the improvements should have a favorable impact on the image of the defendant.

42. *See* Schaefer, *Defamation and the First Amendment*, 52 U. COLO. L. REV. 1, 17-18 (1980). My remedy of repair would not replace an award of damages for any actual injury the plaintiff has suffered. If a monetary award is needed to attract adequate counsel and to encourage plaintiffs to risk litigation, the remedy of repair would not eliminate the potential for such monetary relief.

43. Anderson is too modest in his description of his proposal that defamation be modified so that proof of actual harm to reputation is required in every case. My proposal does not require any change in the nature of defamation. Anderson's proposal shifts the focus from the wrong—publication of a communication that tends to injure reputation—to the injury caused by the wrong. My proposal promises to reduce the amount of liability in those cases in which *Gertz* permits a presumption of damages, but continues to allow victims of defamation to recover for actual harm in cases where the Constitution forbids presumed damages. Anderson's proposal carries no guarantee of reduced liability when actual harm to reputation can be established—in fact, he sketches a number of interesting new avenues to pursue in "proving harm"—but his proposal does serve to bar recovery for actual nonreputational harm, such as mental distress, when a defamation victim cannot also prove harm to reputation.

I must confess to a certain feeling of chagrin at espousing what is essentially the proposition, "If it ain't broke, don't fix it." Nevertheless, the presumption of harm to reputation that Anderson attacks carries with it no more than liability for actual harm, except in those cases in which the plaintiff establishes actual malice. In those latter cases, my proposal ef-

tion.[44] My presumption of repair would be available to a defendant after litigation under the existing constitutional and state tort law rules governing defamation resulted in a finding that the defendant was liable. Furthermore, the presumption would be available as a substitute for an award of damages only for the unproven reputational injury element of the tort. To avoid any *Miami Herald Publishing Co. v. Tornillo*[45] problems with state compulsion of the media, the defendant would have the option of selecting the remedy of repair as an alternative to the award of reputational injury damages.[46]

V. CONCLUSION

A remedy of repair is a promising proposal with which to enter the arena for determining the nonconstitutional elements of a modern defamation law. Anderson's proposal, in contrast, would allow too many defamation defendants to escape liability for their wrongful conduct, and would prevent too many injured parties from receiving compensation for actual harm simply because of an inability to prove actual harm to reputation. Although not going so far as to suggest that the media should be prepared to "minimize [their] losses,"[47] I believe that the media would not be well-advised to insist on proposals that are as unaccommodating to defamation victims as Anderson's elimination of a presumption of harm to reputation. If defamation law, with its constitutional restraints, is not permitted to protect the interests of defamation victims adequately, courts may respond by acknowledging the efforts of creative lawyers to find new methods of protecting those inter-

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fectively and efficiently removes the ability of the plaintiff to translate the constitutionally permissible presumed damages into an award of monetary damages.

44. *See* Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F.L. REV. 1, 29-49 (1983). My proposal would not require the plaintiff to make an election between a damages remedy and the remedy of repair. *Cf. id.* at 43 (requiring the plaintiff "to make an irrevocable election between the damage route and the restoration action"). Because the remedy of repair would not be a substitute for all monetary relief, but only for unproven reputational damages, the proposal does not require any modification of the existing rule that each party bears its own attorney's fees. *Cf. id.* at 36.

45. 418 U.S. 241 (1974).

46. I would extend this option so that it also covers any award of damages contemplating future harm to reputation. *See* Anderson, *supra* note 15, at 769-70.

47. Schauer, *Public Figures*, 25 WM. & MARY L. REV. 905, 935 (1984).

ests—methods that may not carry with them the existing constitutional safeguards of speech and the press.