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THE ANNENBERG LIBEL REFORM PROPOSAL: THE CASE FOR ENACTMENT

RODNEY A. SMOLLA*
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I. INTRODUCTION

Reform is always difficult, Machiavelli cautioned,

[b]ecause the innovator has for enemies all those who have done well under old conditions, and lukewarm defenders in those who may do well under the new. This coolness arises partly from fear of the opponents, who have the laws on their side, and partly from the incredulity of men, who do not readily believe in new things until they have a long experience of them.¹

For 200 years, the common law of libel operated under a complex and bizarre set of rules tilted heavily in favor of plaintiffs and against freedom of speech.² In 1964, the United States Supreme Court superimposed upon the common law, in *New York Times Co. v. Sullivan*,³ first amendment protections designed to offset the old one-sided rules and insure that the libel system provided sufficient breathing space for the tradition of "uninhibited, robust, and wide-open"⁴ debate that is the heart and soul of freedom in American life. The end product of this peculiar evolutionary process,

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1. N. MACHIAVELLI, *THE PRINCE* 29-30 (W.K. Marriott trans. J.M. Dent & Sons ed. 1958).

2. See Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1 (1983).

3. 376 U.S. 254 (1964).

4. *Id.* at 270.

however, was a strangely complicated, convoluted, and costly combination of common law and first amendment rules.⁵

In October of 1988, at a press conference in the Willard Hotel Office Building in Washington, D.C., the Libel Reform Project of the Annenberg Washington Program in Communications Policy Studies of Northwestern University publicly released a "Proposal for the Reform of Libel Law."⁶ Written in the form of a comprehensive model statute, with accompanying commentary, the Annenberg report recommended adoption of an entirely new approach to the law of defamation.

Reaction to the report was extraordinary in its breadth and intensity.⁷ The Annenberg recommendations apparently struck a number of responsive chords—not always harmonious—⁸generating a cacophony of public discourse ranging from euphoric praise to excoriating criticism. Virtually every major newspaper in the United States carried stories about the report;⁹ many publications ran editorials commenting upon it;¹⁰ and a virtual cot-

5. See generally R. SACK, *LIBEL, SLANDER, AND RELATED PROBLEMS* (1980); B. SANFORD, *LIBEL AND PRIVACY: THE PREVENTION OF DEFAMATION* (1985); R. SMOLLA, *LAW OF DEFAMATION* (1986).

6. THE ANNENBERG WASHINGTON PROGRAM PROPOSAL FOR THE REFORM OF LIBEL LAW (1988) [hereinafter ANNENBERG WASHINGTON PROGRAM]. The report is available at no charge from the Annenberg Washington Program in Communications Policy Studies of Northwestern University, The Willard Office Building, 1455 Pennsylvania Ave., N.W., Suite 200, Washington, D.C. 20004.

7. E.g., Frenette, *Libel reform proposal gets mixed reviews*, PUB. NEWS, Feb. 1989, at 22; 'Model' Libel Law Would Substitute Retractions for Money Damages, PUB. WEEKLY, Nov. 11, 1988, at 12; *Building a better libel law*, BROADCASTING, Nov. 7, 1988, at 54; *Panel proposes eliminating damage awards in libel suits*, PUB. AUXILIARY, Oct. 31, 1988, at 1; Di Vincenzo, *Libel law under scrutiny*, Daily Press (Williamsburg), Feb. 13, 1989, at B1, col. 1; Tybor, *Libel-law plan urges 'no-fault' trials*, Chicago Trib., Oct. 19, 1988, § 1, at 17, col. 1; Denniston, *'No-fault' cases proposed in lieu of libel lawsuits*, Baltimore Sun, Oct. 18, 1988, at 6, col. 6; Wermiel, *Libel-Law Plan Could Eliminate Damage Awards*, Wall St. J., Oct. 18, 1988, at B1, col. 3; *Review of libel law suggests big changes*, Iowa City Press Citizen, Oct. 17, 1988, at 1, col. 1.

8. See 'Model' libel law debated at Annenberg Washington seminar, BROADCASTING, Feb. 27, 1989, at 44 [hereinafter 'Model libel law debated'] (the proposal is "anti-speech" (quoting George Vradenburg III)); Bush, *After 25 Years, Change Is Liable For Libel Law*, Los Angeles Daily J., Mar. 9, 1989, at 1, col. 6 (the model statute "'would eviscerate libel law in the United States'" (quoting Jerome A. Barron)); Reuben, *Libel-law reform that would chill the working press*, Chicago Trib., Dec. 12, 1988, at 19, col. 2.

9. See *supra* notes 7-8, and *infra* note 10.

10. See Bush, *supra* note 8, at 11, col. 6 (attributing to David Anderson); Smolla, *A Streamlined, Rational Way to Handle Libel Disputes*, Chicago Trib., Jan. 2, 1989, § 1, at

tage industry of symposia and conferences sprang up in its wake to discuss it.¹¹ Legislatures, bar associations, press organizations, and other groups with influence on public policy took up the report for serious consideration and study.¹²

To a large degree, the dramatic response to the Annenberg report was a product of the process through which the project was conducted. Eleven distinguished experts on libel litigation were brought together by Newton Minow, Director of the Annenberg Washington Program, to study modern libel litigation and propose reforms. The members of the reform project represented a spectrum of constituencies because of the diversity of their political and professional backgrounds: Sandra S. Baron,¹³ Bruce E. Fein,¹⁴

11, col. 2; Fein, *How to Promote Fact Over Fiction*, Wash. Times, Nov. 15, 1988, at F3, col. 1; Mazer, *It's Time to Change Libel Law*, Wash. Post, Oct. 24, 1988, at A13, col. 4; see also Cooper, *Connecticut Bill Would Offer Alternative to Libelsuits*, Dallas Morning News, Mar. 7, 1989, at C9, col. 1 (supporting adoption of the Connecticut bill based on the Libel Reform Act).

11. Among such programs were "Is This the Way Out of the Libel Dilemma?: A Roundtable on the Proposal of the Annenberg Libel Reform Project," sponsored by the Annenberg Washington Program, the Institute of Bill of Rights Law of the College of William and Mary's Marshall-Wythe School of Law, and the Frances Lewis Law Center of Washington and Lee University, Washington, D.C. (Feb. 13, 1989); "Alternatives to Libel Litigation," sponsored by the American Bar Association Section on Communications Law, Honolulu, Haw. (Aug. 6, 1989); "The Annenberg Proposal," Program of the Proposed Section on Defamation and Privacy, Association of American Law Schools Annual Meeting, New Orleans, La. (Jan. 3, 1989); "A 25th Anniversary Commemoration of *New York Times Co. v. Sullivan*," (featuring a panel on the Annenberg Report), sponsored by the New York State Bar Association, New York City, N.Y. (Mar. 30, 1988); "Forum on Alternatives to Libel Litigation," sponsored by the Northwestern University Medill School of Journalism, the Illinois Bar Association, and the Northwestern Law School, Chicago, Ill. (Mar. 8, 1988); "Alternatives to Libel Litigation," a Nassau Conference sponsored by the New Jersey Press Association and Bench/Bar Media/Dialogues, New Brunswick, N.J. (Feb. 9, 1988) (transcript copy on file with author). For a summary of the participants' reactions to the Washington Program, see, e.g., Frenette, *supra* note 7, at 22; *Model' libel law debated*, *supra* note 8; Warren, *'Corrections and clarifications' on libel law reform*, Chicago Trib., Feb. 19, 1989, § 4, at 1, col. 2.

12. The Connecticut Legislature introduced a bill based on the Annenberg Program. See *No-fault libel law proposed in Conn.*, *EDITOR & PUB.*, Feb. 4, 1989, at 23; Cooper, *supra* note 10; Darby, *Libel bill would soften impact of lawsuits*, *J. Inquirer* (Manchester, Conn.), Jan. 21, 1989, at 12, col. 2. Congressman Charles Schumer (D-NY) is considering introducing a bill based on the report. Congressman Schumer had introduced a bill in 1985 with a no-fault declaratory judgment provision similar to the provision that was incorporated in part in the Annenberg proposal. See H.R. 2846, 99th Cong., 1st Sess. (1985).

13. Sandra S. Baron is Managing General Attorney in the National Broadcasting Company Law Department. Ms. Baron is responsible for legal matters involving NBC News and

Judge Lois G. Forer,¹⁵ Samuel E. Klein,¹⁶ Anthony Lewis,¹⁷ Roslyn

the NBC Television Stations Division news operations, as well as libel, privacy, copyright, trademark and other content-related issues for NBC News and other program divisions of NBC. She has held this position since 1985, having joined NBC in March 1983 as a General Attorney. Before joining NBC, she worked as an attorney with the Educational Broadcasting Corporation, operators of WNET, which she joined in May 1979. Like all other members of the Annenberg Project, Ms. Baron participated in the project as a citizen interested in reform, and not as an official spokesperson for her institution.

14. Bruce E. Fein is a leading conservative constitutional scholar. He served as General Counsel to the Federal Communications Commission from 1983-84, and has been both a Visiting Fellow for Constitutional Studies at the Heritage Foundation, and Supreme Court Editor of *Benchmark Magazine* of The Center for Judicial Studies.

15. The Honorable Lois G. Forer retired in 1987 as Judge of the Court of Common Pleas in Philadelphia, Pennsylvania, where she had served since 1971. She has been a prolific writer, authoring five books and scores of articles in journals and magazines, including writings on libel. Her latest book, published in 1987, is *A CHILLING EFFECT: THE MOUNTING THREAT OF LIBEL AND INVASION OF PRIVACY ACTIONS TO THE FIRST AMENDMENT*.

16. Samuel E. Klein, an attorney, has represented media clients for many years, including major metropolitan newspapers, national magazines, television and radio stations, local and weekly newspapers, and a coalition of Pennsylvania publishers and broadcasters organized to preserve and defend first amendment rights. Mr. Klein has been actively engaged in all phases of first amendment litigation. He has tried numerous defamation and invasion of privacy cases throughout the United States, and has handled major cases before trial and appellate courts involving access to information, reporters' rights to shield disclosure of sources, and numerous other press-related issues. Mr. Klein received the Sigma Delta Chi First Amendment Award from the Society of Professional Journalists in 1980 and 1984, and is the author of *MEDIA SURVIVAL KIT*, now in its fourth edition.

17. Anthony Lewis, two-time winner of the Pulitzer Prize, is a columnist for *The New York Times*. Before joining the Washington Bureau of *The Times* in 1957 to cover the Supreme Court, the Justice Department and other legal subjects, Mr. Lewis studied law at Harvard as a Nieman Fellow from 1956-57. In the following years he reported on, among other things, the Warren Court and the federal government's responses to the civil rights movement. He won his second Pulitzer Prize in 1963 for his coverage of the Supreme Court. He is the author of two books: *GIDEON'S TRUMPET* (1964), about the landmark Supreme Court case, *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *PORTRAIT OF A DECADE, THE SECOND AMERICAN REVOLUTION* (1964), about the great changes in American race relations.

18. Roslyn Mazer has spent her entire legal career at the Washington, D.C., law firm of Dickstein, Shapiro & Morin, where she has been a litigation partner since 1982. A substantial amount of her recent trial practice has been devoted to first amendment cases. She recently represented *The New Yorker Magazine* in *Rushford v. The New Yorker Magazine*, 846 F.2d 249 (4th Cir. 1988), a libel suit arising from Renata Adler's article on the *Westmoreland* and *Sharon* libel trials. She also represented the Association of American Editorial Cartoonists, the Authors Guild of America and satirist Mark Russell as *amici curiae* in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), the recent Supreme Court case involving first amendment protection of satiric works.

19. Chad Milton is one of the most knowledgeable press attorneys in the United States. Since 1978, he has been responsible for managing insurance litigation for all types of com-

A. Mazer,¹⁸ Chad E. Milton,¹⁹ Anthony S. Murry,²⁰ Herbert Schmertz,²¹ Richard M. Schmidt, Jr.,²² and Rodney A. Smolla.²³

The project was an experiment—as, in the words of Oliver Wendell Holmes, “all life is an experiment.”²⁴ The meetings of the eleven project members were intense and vigorous, at times verging on total breakdown. In the end, however, the experiment proved to be an extraordinary success. Out of the diversity and extended give-and-take of the group, substantial consensus emerged in the proposed Libel Reform Act.

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 Annenberg Project has substantially advanced public discussion of libel law and helped focus debate. The thoughtfulness and drafting clarity of the report drew bipartisan praise, even from those skept-

munications media in his capacity as Vice President and Assistant General Counsel for Media/Professional Insurance, Inc., the nation's largest underwriter of media insurance.

20. Anthony S. Murry served as Staff Attorney from 1982 to 1987 and as Vice President from 1986 to 1987 of the Capital Legal Foundation, a public interest law firm that advocates free enterprise on behalf of small businesses. Mr. Murry played a key role as principal deputy to lead counsel Dan Burt in the *Westmoreland v. CBS*, 596 F. Supp. 1170 (S.D.N.Y. 1984), libel trial. He has lectured at college campuses and appeared on television discussing public policy issues involving the *Westmoreland* case. After leaving the Capital Legal Foundation in 1987, Mr. Murry engaged in private practice in the Virgin Islands. He is now an attorney with the United States Department of Justice in the Civil Rights Division. Mr. Murry participated in the Libel Reform Project as a private citizen because of his expertise in the libel area, and not as a representative of the Department of Justice.

21. Herbert Schmertz is President of the Schmertz Company, a public affairs counseling company in New York City. He was previously Director and Vice President for public affairs of Mobil Corporation, where his portfolio included corporate public relations, domestic and international government relations, and investor relations. Mr. Schmertz retired from Mobil in 1988. He became particularly interested in libel issues through his role at Mobil during the *Tavoulareas v. The Washington Post Co.* litigation. See *Tavoulareas v. The Washington Post Co.*, 817 F.2d 762 (D.C. Cir.) (en banc), cert. denied, 484 U.S. 870 (1987).

22. Richard M. Schmidt, Jr., is a partner in the law firm of Cohn & Marks in Washington, D.C., specializing in communications law. From 1965 to 1968, Mr. Schmidt served as General Counsel and Congressional Liaison for the United States Information Agency and Voice of America in Washington, D.C. Since 1969, he has been both the General Counsel for the American Society of Newspaper Editors and the Washington Counsel for The Association for American Publishers, Inc. The journalism profession has recognized Mr. Schmidt's contributions through numerous awards and a fellowship in the Society of Professional Journalists, also known as Sigma Delta Chi.

23. See biographical entry at beginning of this article.

24. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

tical of its substantive recommendations.²⁵ Floyd Abrams called the report an "exquisitely toned balance."²⁶ Henry Kaufman described the report as the "most thoughtful"²⁷ of all recent libel reform proposals.

The composition of the eleven-member group that participated in formulating the proposal was striking, to say the least. Reaching a consensus among persons as ideologically diverse as Anthony Lewis, Bruce Fein, Richard Schmidt, Jr., and Herbert Schertz was unexpected.²⁸ Few could have imagined that one of General Westmoreland's former lawyers, Anthony Murry, and ardent defense attorneys like Samuel Klein, Roslyn Mazer, and Sandra Baron could ever agree.²⁹ When one adds to the mix the very different experiences of a distinguished trial judge and libel author, Lois Forer,³⁰ and a leading media insurance expert, Chad Milton,³¹ the sweeping agreement of the group seems even more remarkable.

The end product the group produced is not a series of watered-down compromises or a string of lowest common denominators. The group members were not shrinking violets. Debate was rigorous, but thoughtful. Unlike a labor negotiation in which people came to the table willing to treat the first amendment like a bargaining chip, the project was, instead, 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.³²

Why is it "the right thing to do"? The Annenberg Libel Reform Project had its genesis in the hypothesis that current libel law is

25. See, e.g., Johnston & Kaufman, "Annenberg, Sullivan at Twenty-Five, and the Question of Libel Reform," 7 COMM. LAW. 3 (1989).

26. F. Abrams, Remarks at Roundtable on the Proposal of the Annenberg Libel Reform Project, Washington, D.C., *supra* note 11.

27. Johnston & Kaufman, *supra* note 25, at 4.

28. See *supra* notes 14, 17, 21, and 22.

29. See *supra* notes 13, 16, 18, and 20.

30. See *supra* note 15.

31. See *supra* note 19.

32. ANNENBERG WASHINGTON PROGRAM, *supra* note 6, at 31.

not working well for anyone. Plaintiffs, defendants, judges, lawyers and academicians have all criticized modern libel law; in practice it neither adequately protects first amendment values nor provides plaintiffs with an efficient, meaningful forum for vindicating reputational damage.³³ The Annenberg Libel Reform Act proceeds from the premise that traditional libel suits for money damages are poor vehicles for resolving modern defamation disputes. If one strives to look at the current system objectively, without a pro-plaintiff or pro-defendant bias, the case for reform is overpowering.

A society starting from scratch to design the "perfect" legal mechanism for handling libel disputes would never arrive at the current system. It is costly, cumbersome, and fails to vindicate either free speech values or the protection of reputation.³⁴ Enormous defense costs of protracted litigation exert a chilling effect on the press,³⁵ while plaintiffs are left with no meaningful legal remedy for reputational injury.³⁶ Libel suits tend to drag on interminably, are enormously costly for both sides, and very rarely end in a clear-cut resolution of what ought to be the heart of the matter: a determination of the truth or falsity of what was published.³⁷

If the indictment of the current system is relatively familiar, however, and the theoretical case for reform fundamentally sound, the debate generated by the Annenberg proposal demonstrates clearly that moving from abstract discussion to concrete proposals is extremely difficult. The question posed by the Annenberg Program's reform proposal is not whether libel law should be reformed, but whether the proposal contains the *right* reforms. The Annenberg plan cannot please all of the people all of the time, but can it please enough of the people enough of the time? As historian

33. See generally R. BEZANSON, G. CRANBERG & J. SOLOSKI, *LIBEL LAW AND THE PRESS, MYTH AND REALITY* (1987) [hereinafter *LIBEL LAW & THE PRESS*]; R. SMOLLA, *SUING THE PRESS* (1986).

34. See R. SMOLLA, *supra* note 33, at 238-39.

35. See L. FORER, *A CHILLING EFFECT: THE MOUNTING THREAT OF LIBEL AND INVASION OF PRIVACY ACTIONS TO THE FIRST AMENDMENT* 29-31 (1987); Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 83 COLUM. L. REV. 603 (1983).

36. See generally *LIBEL LAW & THE PRESS*, *supra* note 33, at 170-83; L. FORER, *supra* note 35, at 112-39; R. SMOLLA, *supra* note 33.

37. See generally *LIBEL LAW & THE PRESS*, *supra* note 33.

Arthur M. Schlesinger, Jr. put it: "Change is threatening. Innovation may seem an assault on the foundations of the universe."³⁸

This Article summarizes the provisions of the Annenberg Libel Reform Act, canvasses the various criticisms and questions that have surfaced in the public debate over the Act, and argues for the Act's adoption. The defense of the Act is viewpoint-neutral, discussing both plaintiff and defense concerns.

II. A SUMMARY OF THE ANNENBERG PROPOSAL

A. *Philosophy*

The Annenberg report sets forth a comprehensive model Libel Reform Act, designed to encourage the dissemination of truth in the marketplace by emphasizing remedies other than money damages to facilitate the prompt and efficient resolution of defamation disputes. The driving philosophy behind the proposed Libel Reform Act is the conviction that the first amendment's guarantee of freedom of speech and the law of defamation should function in harmony to serve the compelling public interest in the discovery of truth. The Act sets forth a three-stage process for the resolution of disputes over allegedly defamatory statements, providing incentives for the parties to evaluate their positions early in the controversy and seek a mutually satisfactory resolution of the dispute.

B. *Retraction and Reply*

Stage I of the Act imposes forceful retraction and reply mechanisms, requiring every potential plaintiff³⁹ to seek from the defendant either a retraction or an opportunity to reply before filing suit.⁴⁰ If the plaintiff insists on a retraction, the defendant cannot satisfy the demand by offering an opportunity to reply instead.⁴¹ The plaintiff must seek the retraction or opportunity to reply

38. A. SCHLESINGER, *THE CYCLES OF AMERICAN HISTORY* 424 (1986).

39. For simplicity, throughout this Article "plaintiff" also includes "would-be plaintiffs" and refers to every defamed person who feels that he or she has been libeled, regardless of whether that person has brought suit.

40. LIBEL REFORM ACT § 3(a) (Proposed Draft 1988).

41. A defendant can always satisfy the requirements of Stage I if he or she grants a retraction, even if the plaintiff requests an opportunity to reply. *Id.* § 3(i).

within thirty days of publication of the defamatory statement;⁴² failure to do so bars the plaintiff from later bringing a defamation action against the defendant.⁴³ If the defendant honors the plaintiff's request within thirty days,⁴⁴ the plaintiff may not bring suit. Because the retraction and reply mechanisms in the Act are so powerful—they can instantly end the litigation—and because past experience under such statutory provisions indicates great potential for breakdown on matters of detail, such as timing, length, or placement, the Act and commentary elaborate in great detail the specifics of the retraction and reply devices.⁴⁵

C. *Declaratory Judgment*

Stage II takes effect if the plaintiff and defendant fail to resolve the dispute through the retraction or opportunity to reply provisions of Stage I. If the defendant refuses to grant the plaintiff's request for a retraction or opportunity to reply, the plaintiff may file suit. In Stage II, either the plaintiff or defendant may elect to try the suit as an action for declaratory judgment.⁴⁶ If either party exercises that option, the plaintiff forfeits the opportunity to pursue money damages,⁴⁷ and the defendant loses the protection of constitutional fault requirements of negligence or actual malice, as the case may be.⁴⁸

The only question decided at the declaratory judgment trial is whether the statement at issue was true or false.⁴⁹ The plaintiff bears the burden of proof on this issue, and must establish falsity by clear and convincing evidence.⁵⁰ The defendant's knowledge,

42. *Id.* § 3(d).

43. The plaintiff may not bring a defamation action against any defendant unless the plaintiff alleges that he or she made a timely request for a retraction or opportunity to reply, and the defendant refused that request. *Id.* § 3(a).

44. *Id.* § 3(j). "In the case of a false and defamatory statement about a candidate for public office, however, the retraction or reply shall not be deemed timely unless it is published within a reasonable time under the circumstances prior to the election." *Id.*

45. *Id.* § 3.

46. *Id.* § 4(a), (e).

47. *Id.* § 4(b).

48. *Id.* § 4(c).

49. *Id.*

50. *Id.* §§ 4(d), 6(a).

recklessness, negligence, or malice is irrelevant.⁵¹ The final element of the declaratory judgment option is a fee-shifting provision: The losing party must pay the winner's attorneys' fees.⁵²

D. Suit for Damages

If neither the plaintiff nor the defendant selects the declaratory judgment option under Stage II, the dispute proceeds to Stage III. Under Stage III, the plaintiff may proceed with an action for damages, which in most respects resembles the traditional defamation action. In an action for damages, the plaintiff must show by clear and convincing evidence that the statement was false and defamatory.⁵³ Because legislation cannot modify constitutional doctrines,⁵⁴ the Act does not attempt to codify existing first amendment fault rules. Rather, it sets as a floor a universal requirement of negligence in all cases, leaving to judicial development the imposition of higher fault standards, such as actual malice, in appropriate cases.⁵⁵ If successful, the plaintiff may recover only actual damages;⁵⁶ the Act eliminates presumed and punitive damages.⁵⁷ In addition, no fee-shifting provision exists in Stage III, and each party must pay his or her own attorneys' fees.⁵⁸

E. Other Reform Provisions

In addition to the three-stage process for resolving libel disputes, the Annenberg proposal contains a number of other important reforms. The Act eliminates the distinction between media and nonmedia defendants,⁵⁹ as well as the distinction between libel and slander.⁶⁰ It curtails the use of alternative causes of action, such as

51. *Id.* § 4(c).

52. *Id.* § 10(b). While the Act contemplates that the loser will pay the winner's attorneys' fees as a matter of course, a safety valve provision allows the court to deny or reduce awards to any prevailing party who litigated "vexatious or frivolous claims or defenses." *Id.*

53. *Id.* § 6(a).

54. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

55. LIBEL REFORM ACT § 7.

56. *Id.* § 9(b).

57. *Id.* § 9(b), (d).

58. *Id.* § 10(c).

59. *Id.* § 1(c).

60. *Id.* § 9(a).

infliction of emotional distress and invasion of privacy.⁶¹ The Act strives to clarify the always elusive distinction between fact and opinion by employing a flexible multi-factor test for defining opinion, presumptively classifying certain genres of speech, such as editorials, letters to the editor, editorial cartoons, reviews, parody, satire and fiction, as opinion.⁶² Finally, the Act creates a broad "neutral reportage" privilege that protects a defendant who merely quotes another's defamatory statements, if the statements involve matters of public concern, the source is identified, and the statements are quoted accurately.⁶³

III. ANALYSIS

A. *Is the Proposal Fair to Plaintiffs?*

1. Overview

If libel reform is a zero-sum game, then plaintiffs and defendants cannot both be winners under the Annenberg plan. Reform, however, is not always a stark zero-sum exercise; the legal system may get so out of kilter that correctives can actually make life better for both sides.

Do plaintiffs get a fair shake under the Annenberg proposal? Are the retraction and reply mechanisms fair to plaintiffs, or do they create traps for the unwary? Does the provision eliminating any suit for money damages in the event that the defendant honors the request for a retraction or opportunity for reply in timely fashion unfairly strip the plaintiff of an entitlement to compensation for reputational injury suffered in the interim between the publication of the libel and the issuance of the retraction? Similarly, is it fundamentally unfair to allow the defendant, rather than only the plaintiff, to opt for the declaratory judgment remedy, thereby foreclosing any monetary relief, other than possible recovery of attorneys' fees, against the plaintiff's will? At the very least, should the Annenberg proposal have offered a somewhat less harsh compromise for plaintiffs by permitting them to recover special dam-

61. *Id.* § 1(a).

62. ANNENBERG WASHINGTON PROGRAM, *supra* note 6, at 20 (Section-by-Section Analysis § 3, ¶ 3 [hereinafter Commentary]); see LIBEL REFORM ACT § 2.

63. LIBEL REFORM ACT § 5.

ages—provable pecuniary out-of-pocket losses—even when the declaratory judgment procedure is invoked?

2. *Retraction and reply provisions*

Judge Pierre N. Leval, the thoughtful and highly respected federal district court judge who presided over the libel trial between General William Westmoreland and CBS,⁶⁴ emerged as one of the leaders of the attack on the Annenberg proposal.⁶⁵ The intensity of Judge Leval's critique caught the members of the Annenberg Project by surprise.⁶⁶ Judge Leval had authored an article in the *Harvard Law Review*⁶⁷ making precisely the same attack on the regime of *New York Times Co. v. Sullivan* that drove the Annenberg Project members toward their recommendations. Judge Leval had offered, in addition, what at first glance appeared to be a solution very similar to the Annenberg plan—the use of a declaratory judgment suit in lieu of a suit for money damages. Where then, was the disagreement among these two apparent allies?⁶⁸

Judge Leval perceived a number of critical differences between his proposal and the Annenberg plan. For example, in Judge Leval's scheme, the plaintiff's resort to a declaratory judgment would be purely voluntary, and could not be foisted upon the plaintiff against his or her will.⁶⁹ The Judge directed his most pointed attack, however, toward the Annenberg proposal's retrac-

64. See *Westmoreland v. CBS*, 596 F. Supp. 1170 (S.D.N.Y. 1984).

65. The Annenberg Program included one of General Westmoreland's lawyers, Anthony Murry, among its members. See *supra* note 20. General Westmoreland himself endorsed the proposal in a program examining the Annenberg plan, although he doubted it would have changed events in his case against CBS. General Westmoreland made his remarks at the Washington, D.C. conference on the proposal, which was broadcast live on C-SPAN. See *supra* note 11.

66. While the Annenberg members were subjectively surprised, from an objective point of view perhaps no surprise was warranted. From Judge Leval's perspective, the differences between his proposal and the Annenberg proposal were very substantial. Letter from Judge Pierre N. Leval to Rodney A. Smolla (July 7, 1989) (copy on file with author).

67. Leval, *The No-Money, No-Fault Libel Suit: Keeping Sullivan in its Proper Place*, 101 HARV. L. REV. 1287 (1988).

68. It should be stressed that Judge Leval's critiques have been pointed, but always collegial and constructive.

69. This issue is discussed in the next subsection. See *infra* pp. 42-47.

tion and reply mechanisms, which he characterized as traps for unwary plaintiffs.⁷⁰

The Act bars a plaintiff from bringing suit if he or she fails to demand a retraction or opportunity to reply within thirty days of the libel's publication.⁷¹ Judge Leval found this provision "quite unreasonable"⁷² for two reasons. First, an unschooled plaintiff may be unaware of the law and thus inadvertently find his or her suit barred because he or she failed to demand a retraction or an opportunity to reply within the mandated thirty-day period.⁷³ Second, a plaintiff may feel the effects of the libel, or discover the existence of the defamatory statement, only after the thirty days have expired.⁷⁴ As a result, the plaintiff may not recognize a need to pursue a retraction or an opportunity to reply until after the thirty-day period. In either case, the plaintiff's inaction not only excuses the speaker from granting a retraction or an opportunity to reply, it also immunizes the speaker from suit.⁷⁵

Judge Leval also criticized the Act's limit on the length of the plaintiff's allowed reply. The Act limits the reply to "the length of the material in which the defamatory statements of and concerning the plaintiff were published."⁷⁶ Judge Leval harshly faulted this opportunity to reply as "inadequate to plaintiff's needs and . . . unjustifiably unfair to plaintiff,"⁷⁷ stating four reasons for his objections. First, the Act limits the reply to the plaintiff's own statement; the plaintiff is unable to append supporting statements of knowledgeable third parties.⁷⁸ Second, Judge Leval found the re-

70. Letter from Judge Pierre N. Leval to Rodney A. Smolla (Sept. 6, 1988) (copy on file with author). Judge Leval's critique of the Annenberg plan was delivered publicly at a conference sponsored by the Annenberg Program in Washington, D.C. in February 1989. See *supra* note 11. The letter cited here summarizes those public remarks.

71. LIBEL REFORM ACT § 3(a), (d) (Proposed Draft 1988).

72. Letter from Judge Pierre N. Leval to Rodney A. Smolla, *supra* note 70; see Letter from Richard N. Pearson to Rodney A. Smolla (Feb. 16, 1989) (copy on file with author) (supporting Judge Leval's criticism of the Act's thirty-day period for demanding a retraction or reply).

73. Letter from Judge Pierre N. Leval to Rodney A. Smolla, *supra* note 70.

74. *Id.*

75. See *supra* note 42 and accompanying text.

76. LIBEL REFORM ACT § 3(g) (Proposed Draft 1988).

77. Letter from Judge Pierre N. Leval to Rodney A. Smolla, *supra* note 70.

78. See LIBEL REFORM ACT § 3(c), (g).

striction on the length of the reply unreasonable.⁷⁹ Third, the Act limits the plaintiff's reply to "rebuttal of the defamatory statements,"⁸⁰ with the result, for example, that the plaintiff would be unable to demonstrate the publisher's malicious intent. Finally, Judge Leval challenged the defendant's right to choose who shall read the plaintiff's statement in cases involving a radio or television defendant⁸¹ as denying the public the opportunity "to see and hear the plaintiff's impassioned, moving, personal statement, rather than a perfunctory reading of a denial."⁸²

As admirable as Judge Leval's articulate compassion for the interests of plaintiffs surely is, his attacks on the Annenberg proposal partake of a rhetorically hyperbolic flair that at times distorts the Act's provisions. Nothing in the Act prohibits a plaintiff from using the normal tools of persuasion and argument in his or her reply, or garnering whatever evidence is available, including citations or quotes from third parties. Nor is the plaintiff prohibited from establishing the defendant's malicious intent, when that proof is probative of truth or falsity.

Written rebuttals, of course, will be in the plaintiff's own words. Judge Leval is right in pointing out that in the case of broadcasts, the Act does not entitle the plaintiff to appear on the air personally. Some concessions to the nature of the medium were necessary, however, if the reply provisions were to have any practical chance of being utilized in the real world.

Judge Leval is also absolutely correct in pointing out that the proposal forces a plaintiff to move swiftly by demanding a retraction or opportunity to reply within thirty days of the libel's publication. The unfairness the Judge complains of, however, is functionally indistinguishable from the inherent "unfairness" in any statute of limitations; the law tough-mindedly leaves behind plaintiffs who fail to sue within the prescribed period. The debate, then, must be narrowed to the length of the deadline, not its existence.

79. Letter from Judge Pierre N. Leval to Rodney A. Smolla, *supra* note 70; see Letter from Richard N. Pearson to Rodney A. Smolla, *supra* note 72. Professor Pearson argued that the plaintiff may often find this length inadequate to explain his or her position or to dispel the innuendo of the libelous piece. *Id.*

80. LIBEL REFORM ACT § 3(g).

81. *See id.*

82. Letter from Judge Pierre N. Leval to Rodney A. Smolla, *supra* note 70.

The Annenberg proposal forces the plaintiff to move fast—but for important reasons. If the Annenberg proposal were enacted, the tremendous public attention it would receive would make the speedy timetable common knowledge among members of the bar and public alike. The public interest in the prompt resolution of libel disputes justifies the short demand period. Because a central driving philosophy of the proposal is the prompt disposition of libel disputes at a time when the controversy is alive and matters, through resort to counter-speech remedies whenever possible, putting both plaintiffs and defendants on a fast track in pursuit of such remedies makes perfect sense. The plaintiff is *not* forced to file suit in this period, but merely to demand a retraction or opportunity to reply—a demand that starts an equally fast clock ticking against the defendant.

Judge Leval's arguments do illuminate one easily corrected oversight in the Annenberg retraction and reply provisions, however. Through either judicial construction or amendment of the Act's provisions, an exception should be made for plaintiffs who could not have known about the libelous publication through the exercise of reasonable care. This would, in effect, toll the thirty-day period in situations analogous to "latent condition" cases in products liability or medical malpractice litigation. A case in which the plaintiff is not quickly aware of a libelous publication will be rare, but when such lack of knowledge does exist and is not the plaintiff's fault, Judge Leval's point is well-taken.

On a broader level, Judge Leval's critique of the retraction and reply mechanisms fails to take into account the fact that the plaintiff has an absolute option to insist upon either of those two demands, and in the event of any ambiguity, the request will be construed as a demand for a retraction. As the official commentary to the Act explains:

The plaintiff always has an absolute right to demand a retraction in the first instance. (This provision is not to be a trap for the unwary plaintiff. If there is ambiguity as to whether the plaintiff has requested a retraction or a reply, the request is to be construed as one for a retraction.) A plaintiff who specifically demands a retraction, not an opportunity to reply, is entitled to a retraction before litigation is barred. Therefore, a defendant faced with such a plaintiff may not avoid litigation merely by

offering an opportunity to reply. The rationale for this provision is that the plaintiff has a right to a full repudiation of the defamation by the defendant, instead of the mere opportunity to reply, before the plaintiff is stripped of any litigation remedy.⁸³

Most fundamentally, however, many of Judge Leval's criticisms of details of the reply and retraction mechanisms fail to take into account the ultimate intention and assumption of the drafters: The reforms will work. The whole point of these provisions is to defuse and derail libel litigation at an early stage by resort to retraction and reply remedies whenever possible. The Annenberg Project members focused on why retraction and reply remedies do not seem to work today, and what can be done to make them work.

Retraction and reply provisions do not work today for several reasons. First, many states have no retraction or reply laws. Second, the provisions that do exist are often shot full of confusing loopholes and exceptions.⁸⁴ Third, these provisions do not end litigation, but merely diminish the amount or types of damages recoverable.⁸⁵ Fourth, and perhaps most critically, the provisions are so general and ill-defined in substance and procedure that the parties inevitably dissemble into disputes over timing, sufficiency, and placement.⁸⁶

Retraction and reply remedies are paper tigers unless they really count for something, like an end to litigation, and are drafted in anticipation of the squabbles and objections that plaintiffs and defendants are likely to engage in. The provisions must provide balanced and clear language establishing the rules of the game. A meaningful reply or retraction provision simply must have a clearly delineated "who, what, when, and where."

For example, take the question of the length of the allowed reply, one of Judge Leval's principal points of attack. This issue cannot be avoided. If the law is to provide for a reply, it must address the question: How long can the reply be? Is the reply to be limited

83. Commentary, *supra* note 62, § 3, ¶ 3.

84. See R. SMOLLA, *supra* note 33, at 241.

85. See, e.g., CAL. CIV. CODE § 48(a)(1) (West 1954); CONN. GEN. STAT. ANN. § 52, 237 (West 1960); LA. CIV. CODE ANN. art. 2315.1 (West 1979); ME. REV. STAT. ANN. tit. 14, § 153 (1965); N.C. GEN. STAT. § 99.2(a) (1979); OKLA. STAT. ANN. tit. 12, § 1446(u) (West 1961).

86. See *Burnett v. National Enquirer, Inc.*, 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983), *appeal dismissed*, 465 U.S. 1014 (1984).

to the length of the few damning phrases that actually contain the "smoking gun" language upon which the dispute is based? Or should no limitation be used—should the plaintiff be entitled to all the print space or broadcast time he or she wants to rebut the defamatory charges?

Judge Leval is too uncharitable in his characterization of the Annenberg answer to this question, acting as if the drafters chose the first option, unduly crimping the opportunity for a meaningful response. In fact, however, the proposal takes an intermediate position, precisely because an intermediate position is more likely to be palatable and invoked by both sides. The proposal takes great care to define the contours of its middle position. The Act states that the "defendant may require that the reply not exceed the length of the material in which the defamatory statements of and concerning the plaintiff were published, and that its form reasonably accommodate the nature of the medium in which it is to be published."⁸⁷ The Act further requires that "[t]he reply must be concise and limited to rebuttal of the defamatory statements."⁸⁸ The official commentary to this provision meets all of Judge Leval's concerns head-on:

The phrase "length of the material" refers to that portion of the prior communication in which the allegedly defamatory statements of and concerning the plaintiff were made. This length may be as great as that of an entire story or broadcast segment, for example, but only if the entire story or segment contained defamatory material of and concerning the plaintiff. Indeed, the reply will normally be longer than the single sentence or sentences in which the actual defamatory statements were made, if the story or segment included other material that could have been reasonably understood as supporting or explaining the defamatory statements. An entire ten paragraph article, for example, may be completely devoted to defamatory material of and concerning the plaintiff, even though only three sentences contain the actual defamatory language giving rise to the plaintiff's complaint. In such a case, the plaintiff would be entitled to reply space equal to the length of the entire article. On the other hand, a ten paragraph article may contain three sentences actu-

87. LIBEL REFORM ACT § 3(g) (Proposed Draft 1988).

88. *Id.*

ally defamatory of the plaintiff, within three paragraphs elaborating on those sentences. The rest of the article may not concern the plaintiff. In such a case, the length of the reply could be limited by the defendant to three paragraphs.⁸⁹

The reply provision is a compromise, of course, but it is a fair compromise and a practical one. Like many other provisions of the Act, it will force both sides in a defamation dispute to give a little. That, however, is exactly the point: With each side forced by the law to give a little, both sides, and the public, will gain a lot.

Having said all of this, however, I should strongly emphasize that Judge Leval's critiques have been enormously helpful. In the ongoing dialogue that must ensue in any thoughtful reform effort, his contributions have been extremely significant. While he has joined debate on many points, he has also articulated much common ground. He has written, for example:

If your bill expanded the notice period to 4 months (and limited it to a demand for *retraction*—not a demand for reply, which functions only as a trap*), an important part of my criticism would disappear. If you further gave the plaintiff the right to prompt rejection of the defendant's election of declaratory judgment, I would become an enthusiastic supporter of your bill. The bill would also be much improved if it allowed plaintiff to recover pecuniary loss in spite of defendant's election

*[author's footnote] To the extent plaintiff and defendant wish to terminate the matter based on publication of a reply, nothing stops them from agreeing to it. The sole function of the statutory provision would be to trap the unwary plaintiff[.]⁹⁰

3. *Eliminating plaintiff's damages*

Among the Annenberg proposal's most dramatic features are its provisions eliminating entirely any recovery for money damages. Such a result can occur in two ways: if the defendant honors the plaintiff's request for a retraction or reply, or if either the plaintiff or the defendant opts for declaratory judgment.

89. Commentary, *supra* note 62, § 3, ¶ 8.

90. Letter from Judge Pierre N. Leval to Rodney A. Smolla, *supra* note 66.

Criticism of these features exists on two levels. Some object strenuously to the whole idea of ever stripping a plaintiff of the right to sue for money.⁹¹ Others concede that sound public policy may require limiting, or abolishing altogether, monetary recovery in some defamation cases. The latter critics make a much more subtle and discriminating argument. They contend that in cases in which a retraction or opportunity to reply is offered, or in which a declaratory judgment remedy is obtained, limited special damages recovery should be available. This recovery should be for the plaintiff's pecuniary out-of-pocket losses suffered prior to the date of the retraction, reply, or declaratory judgment.⁹²

To reveal a bit of the Annenberg report's "legislative history," the issue of out-of-pocket damages was among the most hotly debated and painstakingly explored questions taken up by the project members. After great wailing and gnashing of teeth, the group reached a surprising consensus, voting unanimously to permit defendants to opt for the no-damages declaratory judgment procedure even against the will of plaintiffs, and voting ten to one (with Judge Lois Forer the only dissenter) not to permit "interim" special damages—damages accumulated prior to the issuance of the retraction, or reply, or the declaratory judgment. The Annenberg group's thought processes on this issue provide an important key to understanding the entire Annenberg report. Certainly, some plaintiffs will suffer demonstrable damages and nonetheless be shut out by a defendant who opts for the declaratory judgment procedure. Reforms must be designed for the large run of cases,⁹³ however, and reasons exist for believing that most plaintiffs will be

91. See, e.g., Reuben, *Reform Libel Law?*, A.B.A. J., Apr., 1989, at 43.

92. See Bush, *supra* note 8 ("major flaw" with the Act is that plaintiff with valid cause of action might still be denied recovery of "provable damages." (attributing to Marc Franklin)).

93. See Letter from Anthony S. Murry to Rodney A. Smolla (Mar. 1, 1989) (copy on file with author) ("[I]t is absurd to make social policy and skewer the whole system to allow for the rare case. You just can't run the railroad that way."); Letter from Richard N. Pearson to Rodney A. Smolla (Feb. 16, 1989) (copy on file with author) ("In framing what the best law is, we always have to take into account what happens to those on the fringes, but law cannot always be drafted to protect the farthest out case. Law pretty much has to take into account what we want to happen in the vast bulk of cases.").

much better off under the proposal.⁹⁴ A plaintiff who gets a speedy judicial declaration that the defamatory statements leveled against him or her were false, and who gets attorneys' fees, is better off under the proposal than under current law.⁹⁵ In fact, most plaintiffs will be made whole by such a declaratory remedy. In contrast, under existing law most plaintiffs lose after exhausting all appeals. Under the Annenberg proposal, those with meritorious claims on the issue of truth or falsity will at least have a fighting chance.

So why not go further and permit plaintiffs who prevail at the declaratory judgment stage to recover special damages—provable pecuniary losses? The answer is fundamental to the entire debate over the Annenberg plan: Under current constitutional rules, making this concession would cause the whole structure of the Annenberg proposal to unravel.

At least when speech concerns matters of public interest, the first amendment rules emanating from the *New York Times Co. v. Sullivan*,⁹⁶ *Gertz v. Robert Welch, Inc.*,⁹⁷ and *Dun & Bradstreet Inc. v. Greenmoss Builders*,⁹⁸ decisions preclude awarding money damages without fault. Money damages may be awarded only upon a finding of actual malice in public figure and public official cases, and upon a finding of negligence in private figure cases. These rules have a profound impact on the options available for reform. Any libel legislation that allows money damage awards must include a trial over the defendant's fault. If the Annenberg proposal allowed the plaintiff to sue on a no-fault basis and still recover some damages, this would be plainly unconstitutional under existing law.⁹⁹

Construction of a hybrid declaratory judgment procedure is possible, however, in which a separate trial on special damages would

94. See Letter from Richard N. Pearson to Rodney A. Smolla, *supra* note 72. ("[Judge Leval] presented a compelling case, but one that by no stretch of the imagination of even the worst of the media baiters could be said to be typical.").

95. See Smolla, *supra* note 2, at 1-14, 92-94.

96. 376 U.S. 254 (1964).

97. 418 U.S. 323 (1974).

98. 472 U.S. 749 (1985).

99. The Annenberg proposal does permit recovery of attorneys' fees under the no-fault declaratory judgment procedure. The question of whether recovery of attorneys' fees without fault is constitutional is explored later in this Article. See *infra* notes 148-67 and accompanying text.

follow the no-fault trial on truth or falsity. The special damages trial could be predicated on fault as constitutionally mandated. Such a trial would be a disaster, however, because it would undermine the entire Annenberg plan and defeat the whole purpose of the declaratory judgment innovation. The second trial provision would open up every case to a mini-trial on special damages and fault, eviscerating the streamlining purpose of the declaratory judgment procedure.

Some critics may well want to gut the declaratory judgment procedure, at least if their real objection is to the whole notion of eliminating money damages. For two centuries we have been conditioned to think reflexively of money damages as the appropriate legal remedy for all tortious harms, including libel. Those who cannot escape that mind-set have no hope of conversion to the Annenberg plan, or any plan remotely like it. If one is willing to realize, however, that the traditional suit for money damages has proven an exceptionally poor vehicle for meaningful reputational redress, then one must be willing to roll up one's sleeves and push the pencil in an attempt to devise a balanced alternative. As tempting as a special damages exception is, there does not appear to be any way out of the box posed by first amendment fault requirements and the resulting mini-trial dilemma.

A final possibility remains to be explored: whether special damages should be permitted in those cases in which the *defendant* has chosen the declaratory judgment option. Should the Annenberg proposal have provided for special damages recovery in only those cases? The Constitution may mandate that a no-fault trial be a no-damages trial when the no-fault trial comes at the plaintiff's election. Plaintiffs cannot have their cake (not even that part of the cake represented by special damages) and eat it too; they cannot recover money damages and still opt out of all first amendment fault burdens.

In those cases in which the defendant chooses the declaratory judgment option, however, the policy call is much closer because the constitutional dimension drops out. When the plaintiff sues for money damages and the defendant plays the declaratory judgment trump card, the defendant voluntarily waives his or her first amendment protection. In such cases, the defendant can obtain a

traditional suit governed by *New York Times* or *Gertz* merely by not exercising the declaratory judgment option.

The Constitution should not be offended by putting it to the defendant to agree that, if the defendant chooses the declaratory judgment option, he or she will also be exposed to special damages liability on a no-fault basis. Presumably, defendants who are confident that no special damages exist, and they almost *never* do exist,¹⁰⁰ would still be willing in many cases to choose the declaratory judgment option and take their chances on special damages.¹⁰¹ On the other hand, when special damages do indeed exist, the defendant can always stay away from the declaratory judgment option and stick with a traditional damages suit and its constitutional fault provisions.¹⁰² This modification of the Annenberg plan as originally written would require plaintiffs to forfeit all damages recovery only when they have chosen the declaratory judgment procedure. When the choice is exercised by defendants, plaintiffs would still have a special damages "loophole" available.

The Annenberg Project did not elect the special damages alternative, primarily on the policy judgment that the net gains for those few plaintiffs with genuine out-of-pocket damages are dwarfed by both the net social losses imposed on all plaintiffs and defendants, and the costs to the legal system in creating any exceptions to the no-damages rule at the declaratory judgment stage. The Annenberg Project members thought that defendants would not exercise the declaratory judgment option for fear that the definition of "special damages" would prove too elastic a restraint on a plaintiff's recovery. The members believed that defendants would fear exposure to strict liability risks for what are really traditional nonpecuniary reputational injuries. This concern was augmented by other values that influenced the Annenberg Project members: simplicity, symmetry, and streamlining. If the very complexity of libel law is one of the major indictments of the current system,

100. See R. SMOLLA, *supra* note 33, at 241-42.

101. A plaintiff who makes frivolous claims for special damages might be penalized under the provisions of the Act governing the awarding of attorneys' fees. See LIBEL REFORM ACT § 10(b) (Proposed Draft 1988).

102. The Act abolishes all traditional *per se* and *per quod* rules on special damages. *Id.* § 9(a).

then simplicity should be an important "tie-breaker" when all other considerations are in rough equipoise.

The Annenberg Project's position on special damages, however, is one of the several judgments in the proposal on which it is not merely true that "reasonable persons could differ," but also true that a different conclusion could be reached without upsetting the entire structure of the plan. Thus, a "modified Annenberg," so to speak, that granted special damages on a no-fault basis when the defendant exercised the declaratory judgment option, might still be feasible, though on balance, inferior.

B. Is the Proposal Fair to Defendants?

1. From the press perspective, is reform needed at all?

From the perspective of the press, does the pursuit of libel reform make any sense? Even the simple proposition that libel law *needs* reform is controversial. Certainly from the defense viewpoint, a case may be made for the status quo. Many media lawyers point to the declining number of libel suits and the increasing success rate of the media in combatting libel actions, and question any need for libel reform.¹⁰³

Several years ago, an air of crisis existed within the defense bar. Suits against the press were increasing, and so were multimillion dollar damages awards. The libel insurance market was deteriorating rapidly. Supreme Court Justices were hinting that *Gertz v. Robert Welch, Inc.*,¹⁰⁴ and perhaps even *New York Times Co. v. Sullivan*,¹⁰⁵ should be reexamined.¹⁰⁶ Further, the *Sharon v. Time*,

103. See Scardino, *Panel Backs Libel Law Shift*, N.Y. Times, Oct. 18, 1988, at 24, col. 3 (attributing to George Freeman, a lawyer for The New York Times Company); DeVore, *The Annenberg Libel Proposal* 5-7 (Dec. 28, 1988) (unpublished manuscript). The estimates of the decline in libel litigation vary. See generally Scardino, *Libel Suits Wane, Press Study Finds*, N.Y. Times, Dec. 3, 1988, at 52, col. 4 ("Since 1985, the number of libel suits has declined 17%, compared to the average number filed from 1981 through 1985."); Stille, *Libel Law Takes On a New Look*, Nat'l L.J., Oct. 24, 1988, at 1 (reporting that libel suit filings have decreased between 25-40% since 1985).

104. 418 U.S. 323 (1974).

105. 376 U.S. 254 (1964).

106. See *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 767-74 (1985) (White, J., concurring); *id.* at 764 (Burger, C.J., concurring).

*Inc.*¹⁰⁷ and *Westmoreland v. CBS*¹⁰⁸ suits were in full-swing, seeming to symbolize the escalating libel threat.

The crisis ran its course, however. Most media defendants have recently experienced an easing in the number of libel suits they face.¹⁰⁹ Insurance markets have adjusted. The siege on the citadel has abated. In *Hustler Magazine v. Falwell*,¹¹⁰ the Supreme Court went out of its way to endorse the basic principles of *New York Times* and *Gertz* through none other than Chief Justice William Rehnquist. The failure of either former Israeli Defense Minister Ariel Sharon or General William Westmoreland to prevail in their suits illustrated to plaintiffs (and to the plaintiffs' bar) the apparent futility of bucking the first amendment in a libel action. Defendants had survived the winter of their discontent.

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 not feel threatened 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. Some of these mega-verdicts may still be affirmed on appeal.¹¹¹ Although 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 of the litigation, rather than the front end. Even if it is utterly unmoved by feelings of sympathy for plaintiffs, the press thus has every reason to explore reform thoughtfully.

Admittedly, many members of the press are not unwilling to pursue reform. They are unwilling, however, to leave their fate in the hands of either state legislatures or the United States Con-

107. 599 F. Supp. 538 (S.D.N.Y. 1984).

108. 596 F. Supp. 1170 (S.D.N.Y. 1984).

109. See *supra* note 103.

110. 108 S. Ct. 876 (1988).

111. See *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1302 (1988).

gress.¹¹² The press fears that the political process of legislative enactment could distort the Annenberg proposal and thus upset the delicate balance of the Annenberg Act as written.¹¹³ The media also worries that legislators will seek to add intentionally repressive features to the Act.¹¹⁴ On balance, many press representatives prefer a methodical, deliberate, case-by-case approach to reform.¹¹⁵ The current system may be the best indictment of the press' argument. The sweeping structural changes contemplated by the Annenberg plan, such as the retraction and reply provision, simply could not be accomplished by judicial decision. More significantly, case-by-case development could never create the mechanism at the heart of the Annenberg plan—the declaratory judgment procedure. In fact, debate over that element of the Annenberg plan emerged as the proposal's primary battleground.

2. *The declaratory judgment*

a. *Overview*

Many defense representatives have voiced fears concerning the declaratory judgment provisions of the Annenberg proposal. The Act's removal of the defendant's first amendment safeguards in a declaratory judgment trial creates a frightening Faustian bargain, and many press lawyers are understandably wary about surrendering the constitutional protections that have provided them an effective shield from libel judgments for the last twenty-five years.¹¹⁶ Feeling safe under the present law, they are unwilling to venture into the Act's unknown legal world.¹¹⁷ According to media lawyer

112. *E.g.*, Johnston & Kaufman, *supra* note 25, at 6-7; Bush, *supra* note 8, at 1, col. 6 (attributing to Floyd Abrams); *New Proposal to Deal With Libel*, A.B.A. J., Jan. 1989, at 34 (attributing to Henry Kaufman); Di Vincenzo, *supra* note 7 (attributing to Donald Reuben); DeVore, *supra* note 101, at 5; C.T. Dienes, *Libel Reform: An Appraisal*, Remarks at the Detroit Media Law Conference, Mar. 8, 1989, at 16-17 (copy on file with author).

113. See Frenette, *supra* note 7 (attributing to Harry Johnston).

114. See Bush, *supra* note 8 (attributing to Floyd Abrams).

115. *E.g.*, *New Proposal to Deal With Libel*, *supra* note 112 (attributing to Henry Kaufman).

116. *E.g.*, *Study Urges Law Be Changed To Reduce Libel Litigation*, Wash. Post, Oct. 19, 1988, at A3, col. 5 (attributing to Henry Kaufman).

117. Di Vincenzo, *supra* note 7 (attributing to C. Thomas Dienes). Dienes stated bluntly the media viewpoint: "We know we're safe under the present law; we don't know what this would do. . . . Why should we take the chance?" *Id.*

C. Thomas Dienes, a highly respected press lawyer and academic, for most media defendants, "the potential savings in litigation costs from a declaratory judgment alternative [are not] worth the loss of the constitutional privilege, with its high probability of a media win."¹¹⁸

The press critique has centered on three themes: first, that the proposal would generate an increase in frivolous litigation; second, that the proposal places an unrealistic and anti-speech emphasis on litigation over "truth"; and third, that the shifting provisions for attorneys' fees entail liability without fault in violation of the first amendment.

b. Will the act generate an increase in frivolous litigation?

The fear that the statute would trigger an increase in frivolous litigation is grounded in the suspicion that plaintiffs will file suits and opt immediately for the declaratory judgment option, and thus avoid the impediment of proving actual malice, or negligence, in private figure cases, while potentially receiving the bonus of attorneys' fees if they prevail. Floyd Abrams warned: "The main danger of the proposal is that it could lead to an explosion of new libel litigation in which people seek declarations that something that was said about them was not true."¹¹⁹ Others claimed that the focus of litigation would shift merely from the defendant's fault under current law to other contentious points under the proposed Act.¹²⁰ Some critics believe "suits are just as likely to be fought over a journalist's viewpoint, or opinion, or over the plaintiff's interpretation of the facts presented."¹²¹ Other commentators point to current litigation involving state retraction statutes as evidence of the Act's potential for increasing litigation.¹²² Many plaintiffs

118. C.T. Dienes, *supra* note 112, at 15.

119. *Panel proposes eliminating damage awards*, *supra* note 7, at 3 (quoting Floyd Abrams); see Warren, *Westmoreland, CBS Oppose Libel Law Plan*, Chicago Trib., Feb. 14, 1989, at 5, col. 1 (The Act "would make filing suits easier." (quoting George Vrandenburg III)).

120. *E.g.*, C.T. Dienes, *supra* note 112, at 16.

121. See *A Step Toward Common Sense on Libel*, Chicago Trib., Oct. 29, 1988, § 1, at 10, col. 1; see also C.T. Dienes, *supra* note 112, at 16; Tybor, *supra* note 7.

122. *E.g.*, Frenette, *supra* note 7 ("It's very easy to say 'retraction,' but as long as there are lawyers to fight issues, there will be fights." (quoting Harry Johnston)).

under the current libel system already "assert legally suspect claims [in an effort to] put pressure on the defense to settle a legally meritless action."¹²³ By removing the media protections established in *New York Times Co. v. Sullivan*, the Act arguably encourages plaintiffs to file frivolous suits to harass the media.

These fears are reasonable. They represent the types of questions that can never be resolved satisfactorily until the statute is actually enacted somewhere and tried for several years. Several reasons suggest, however, that many of these fears are ungrounded. First, the Act provides that *every* would-be plaintiff must file a demand for a retraction or opportunity to reply within thirty days of the publication of the defamatory statement as a prerequisite to filing suit.¹²⁴ This request "must specify the statements claimed to be false and defamatory and must set forth the plaintiff's version of the facts."¹²⁵ The defendant then has thirty days to respond and may absolutely bar litigation by honoring the plaintiff's request.¹²⁶ This is a powerful defense option because the defendant who has in fact been "caught red-handed" in a mistake now has the ability to eliminate completely 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.¹²⁷

Second, even in the absence of a retraction or reply barring the suit, the plaintiff faces downside risks that work to deter frivolous suits. The declaratory judgment option 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.¹²⁸ More significantly, the plaintiff must deal with the risk that he or

123. *E.g.*, Johnston & Kaufman, *supra* note 25, at 7-8.

124. LIBEL REFORM ACT § 3(a) (Proposed Draft 1988).

125. *Id.* § 3(e).

126. *Id.* § 3(a), (i), (j).

127. Commentary, *supra* note 62, § 3, ¶ 3. This is an extremely significant provision. Many modern cases are based not on what was said in an article or broadcast, but on what was left unsaid. This provision of the Annenberg proposal allows a defendant to avoid liability by renouncing such defamatory implications.

128. LIBEL REFORM ACT §§ 4(d), 6(a).

she will be forced to pay the defendant's attorneys' fees if he or she does not prevail.¹²⁹

Third, the statute circumscribes very carefully the range of statements that qualify as defamatory. No statute will ever solve completely the intractable problem of separating statements of fact from statements of opinion.¹³⁰ 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. These genres include fiction, satire or parody, artistic, athletic, literary, academic, culinary, theatrical, religious, or political commentary, letters to the editor, editorials and editorial cartoons.¹³¹

Fourth, if no statute can ever eliminate all problems of separating fact from opinion, a statute may come close to eliminating exposure to suit for neutral reportage.¹³² The Annenberg proposal contains a broad neutral reportage privilege, barring liability for the repetition of the defamatory statements of others when the

129. *Id.* § 10(b).

130. See R. SMOLLA, *supra* note 5, § 6.01-12.

131. Commentary, *supra* note 62, § 2, ¶ 3.

132. The common law rule followed in most jurisdictions prior to 1977 rendered a person liable for "republishing" of libelous statements originated by others. See R. SMOLLA, *supra* note 5, § 4.13. The common law employed the fiction that the republisher "adopts" the defamatory statement as his or her own. *Id.* This rule tends to hamstring the press when the original speaker's *very making of the defamatory statement* is newsworthy. *Id.* § 4.14. In *Edwards v. National Audubon Society*, 556 F.2d 113 (2d Cir. 1977), *cert. denied sub nom. Edwards v. New York Times Co.*, 434 U.S. 1002 (1977), the Second Circuit adopted what has come to be known as the "neutral reportage" privilege. Under this privilege, the press may republish defamatory statements of another as long as the very making of the statements is newsworthy, the statements are made by a responsible public figure, official, or organization, the statements are made about a public figure, official, or organization, and the press coverage of the statements is "neutral." *Id.* at 120; see, e.g., *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 67-69 (2d Cir. 1980); *Dixon v. Newsweek, Inc.*, 562 F.2d 626, 630-31 (10th Cir. 1977); *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1126-27 (N.D. Cal. 1984); see also R. SMOLLA, *supra* note 5, § 4.14. The neutral reportage concept has gained increasing judicial acceptance, but is still far from being a majority rule among the states. See *id.* § 4.14[4]. The Annenberg proposal adopts a broader neutral reportage privilege than existing case law by abandoning the requirement that the person quoted be "responsible." The rationale for this extension is that individuals who might well be deemed "irresponsible" by most persons may nevertheless make public statements that are newsworthy and that deserve to be reported. The quid pro quo under the Annenberg proposal is that the source of the quote must be identified. This requirement prevents the press from hiding behind "anonymous sources."

quote is accurately reported, involves a matter of public interest, and the source is identified.¹³³

Finally, the fear of frivolous suits is mitigated by the fact that the Annenberg proposal requires a plaintiff to "put up or shut up." Prior to suit the plaintiff must be able to articulate what the facts are, and must have confidence in his or her ability to prove them.¹³⁴ 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. Under the proposal, the nuisance suit carries the risk of deeper embarrassment for plaintiffs as well as liability for attorneys' fees.¹³⁵

c. *Does the act place "truth" on too high a pedestal?*

In the opening sentence of its preamble, the Annenberg Libel Reform Act states that "[t]he purpose of this Act is to provide an efficient and speedy remedy for defamation, emphasizing the compelling public interest in the dissemination of truth in the marketplace."¹³⁶ This bold assertion sets the philosophical tone for the entire proposal. Truth carries some heavy baggage, however.

Perhaps Emily Dickinson had it right when she admonished her readers to "[t]ell all the truth but tell it slant":

Tell all the truth but tell it slant,
Success in circuit lies,
Too bright for our infirm delight
The truth's superb surprise;

As lightning to the children eased
With explanation kind,
The truth must dazzle gradually
Or every man be blind.¹³⁷

The Annenberg proposal has been criticized for *not* "telling it slant," for placing "truth" upon a pedestal that is both unrealistic

133. LIBEL REFORM ACT § 5 (Proposed Draft 1988).

134. *Id.* § 3(e).

135. *Id.* § 10(a)-(b).

136. *Id.* at preamble.

137. Dickinson, *Tell All the Truth But Tell It Slant*, BOLTS OF MEMORY 233 (M. Todd & M. Bingham eds. 1945).

and unconstitutional. This attack on the proposal proceeds on two levels: first, that the proposal is naive in its assumption that "truth" is determinable or that it exists at all; and second, that it represents a sort of Orwellian 1984-ish thought police/truth squad assault on the Holmes/Brandeis first amendment tradition of a marketplace of ideas.

The Annenberg proposal thus has been criticized as forcing "judicial determinations of the often elusive concept of truth,"¹³⁸ and "grossly underestimating the difficulty of determining truth/falsity."¹³⁹ To make matters worse, proving "truth" is typically the most costly part of a libel defense.¹⁴⁰ George Vradenburg III, Vice President and General Counsel of CBS, viewed the proposal as "'anti-speech,' " one that "'strikes at the heart of the concept that speakers are not guarantors of truth.'"¹⁴¹ Chicago press lawyer Don Reuben agreed and charged virulently that the Act would discourage aggressive reporting. "If the publisher abandons all the constitutional defenses accorded to him by the [first] amendment to avoid paying damages," Reuben argued, "it becomes easier for plaintiffs to prevail and thus more likely that there will be harm to the reporter's professional reputation and standing."¹⁴² According to Reuben, the media will be less willing to fight for its reporters if the threat of large damage awards no longer exists. As a result, he predicted, the Act "will likely chill the hell out of the working press, the reporter and the editor."¹⁴³

In answering these critiques, one must separate serious philosophical objections from rhetorical hyperbole. Unfortunately, the "truth" attacks can be misleading because they are often attacks not really aimed at the Annenberg proposal's method of litigating truth, but rather at the possibility of liability without fault as part of the proposal's declaratory judgment scheme. The sore point is not so much truth, as liability without fault. The proof of this is quite straightforward: The Annenberg proposal contains *nothing*

138. Tybor, *supra* note 7.

139. C.T. Dienes, *supra* note 112, at 15.

140. DeVore, *supra* note 103, at 4.

141. 'Model' libel law debated, *supra* note 8 (quoting George Vradenburg III).

142. Reuben, *supra* note 8, § 1, at 19, col. 2.

143. *Id.*; see *New Proposal to Deal With Libel*, *supra* note 112, at 34 (attributing to Don Reuben); Reuben, *supra* note 91, at 43.

more onerous to the press in its mechanism for determining truth than does existing law. Indeed, the Annenberg proposal is in several respects more generous to the press than existing law.

First, the Annenberg proposal adopts the "substantial truth" concept—if the "gist" or "sting" of the defamatory statement is accurate, the plaintiff may not prevail merely by demonstrating minor inaccuracies of detail.¹⁴⁴ Second, the Act requires the plaintiff to bear the burden of proving falsity with clear and convincing evidence in all cases, thus going beyond current constitutional requirements.¹⁴⁵ Finally, through its expansive protections for opinion and neutral reportage,¹⁴⁶ the Annenberg proposal narrows the range of actionable dispute over truth or falsity far more than existing law.

The disingenuity of the attack on the "truth-centricity" of the Annenberg proposal is demonstrated further by the inexorable logical force of one elemental proposition: Designing *any* libel system that does not include truth or falsity as an issue for litigation is impossible. At base libel is a lie. If libel is to be litigated, courts must determine who is a liar and who is not. Assaulting the Annenberg plan for placing truth on a "pedestal" is thus misleading and deflects debate from a far more serious concern. The Annenberg proposal's mechanism for litigating truth ought not to be debated; the debate should focus instead on its mechanism for determining truth without regard to fault.

The proposal's various provisions are meant to work together, to create a matrix of incentives that encourage both sides to examine their respective positions critically and to seek to 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, and eliminating fault at the declaratory judgment stage is indeed integral to that scheme. Yet this is no reason to characterize the Annenberg plan as having some sort of perverse preoccupation with truth, a preoccupation in which the first amendment is sacrificed on truth's altar.

144. LIBEL REFORM ACT § 6(b) (Proposed Draft 1988); Commentary, *supra* note 62, § 6, ¶ 2.

145. See *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986).

146. LIBEL REFORM ACT §§ 2, 5.

In the final analysis, the only test of truth is the marketplace, and the government has no business declaring what truth is, in the Annenberg libel reform statute or anywhere else. Nothing in the Annenberg proposal, however, diminishes the classic dictum that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion"¹⁴⁷

Some treat the dictum prohibiting governmental declarations of orthodoxy as prohibiting any governmental determinations of truth. This argument proves too much, however. If followed to its logical end, it would unravel even the current law of libel, in which, after all, the judicial system does purport to pass on truth or falsity as part of the litigation. Under the Annenberg proposal, truth is made to stand naked in the declaratory judgment procedure, without the protective clothing of *New York Times Co. v. Sullivan*. Yet this statute does not leave freedom of speech any more exposed. When all of its provisions are taken in combination, the proposal enhances free speech values, and offers worthy plaintiffs a meaningful remedy. This net effect is endangered by the ultimate question posed by the Annenberg proposal. That question is wrapped up in what some have called the Achilles' heel of the entire Annenberg plan: the constitutionality of the fee-shifting without-fault provision of the declaratory judgment procedure.

d. Constitutional concerns

i. Overview

The key issue in the Annenberg proposal is the constitutionality of exposing a defendant to liability for attorneys' fees without the benefit of the actual malice or negligence fault protections of *New York Times* and *Gertz*.¹⁴⁸ The argument against the constitutionality of the Act is a straightforward syllogism: (1) The first amendment principles of *New York Times* and *Gertz* bar liability for damages without fault. (2) Liability for attorneys' fees cannot be distinguished from liability for money damages. (3) The An-

147. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

148. For a review of these protections, see R. SMOLLA, *supra* note 5, §§ 2.01-.04, 3.01-.05.

nenberg proposal's imposition of liability for attorneys' fees without fault is unconstitutional.

Floyd Abrams, a preeminent media attorney whose reaction to the Annenberg proposal was generally, but guardedly, favorable, questioned the constitutionality of the declaratory judgment provision on those grounds.¹⁴⁹ Richard Winfield, another prominent press attorney who reacted positively to much of the Annenberg proposal, similarly questioned the fee-shifting element of the declaratory judgment mechanism, calling it the plan's "Achilles' heel."¹⁵⁰

Defense of the fee-shifting device in the declaratory judgment stage contains two principal arguments. First, a distinction has been made historically between substantive legal rules governing immunity from liability, and rules governing litigation costs and attorneys' fees. Second, the fee-shifting provision must not be examined in isolation from the rest of the Annenberg proposal. If the "net chilling effect" of all of the Act's provisions on free speech is less than existing law under *New York Times* and *Gertz*, then as a package the entire plan, including the fee-shifting provision, is constitutional.

ii. *Distinguishing attorneys' fees from damages*

Only legal minds would elevate the distinction between "substance" and "procedure" to roughly the importance of the law of gravity in the world of physics.¹⁵¹ Yet a powerful legal tradition of distinguishing rules of substance from rules of procedure exists, and part of that tradition includes the legitimacy of subjecting litigants who have been given an advantage in the substantive law to procedural rules that are neutral in operation.¹⁵² The first amend-

149. *New Proposal to Deal With Libel*, *supra* note 112, at 34 (attributing to Floyd Abrams); see *Study Urges Law Be Changed*, *supra* note 116, at A3, col. 5 ("[T]here is a very live issue as to whether the proposal is constitutional in the first place." (quoting Floyd Abrams)).

150. R. Winfield, Remarks at the Roundtable on the Proposal of the Annenberg Libel Reform Project, Washington, D.C., *supra* note 11.

151. See, e.g., *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945); *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974); Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

152. See, e.g., *Hanna v. Plumer*, 380 U.S. 460 (1965).

ment arena has long been a fertile ground for litigation on this point. At times, the Supreme Court has imposed on litigation special procedural rules more protective of free speech interests to reinforce substantive constitutional principles.¹⁵³ At other times, however, the Court has held first amendment litigation subject to whatever procedural rules would otherwise apply, on the theory that the substantive law provisions provide sufficient constitutional protection and that additional procedural safeguards would be an overprotective form of "double counting."¹⁵⁴ The Supreme Court has invoked this notion of procedural neutrality on a number of occasions in the libel area.¹⁵⁵

As is so often the case, in the few instances in which the distinction between substance and procedure really matters, it proves an illusive distinction to apply. How should the fee-shifting provision of the Annenberg plan be characterized? Dismissing the provision as merely procedural would be facile. Money is money, however, and if a defendant writes a check for \$200,000 at the end of the case, how can it make a constitutional difference that the check is for attorneys' fees rather than compensatory or punitive damages? More importantly, the fee-shifting provision is included in the Annenberg plan as part of the overall *substantive* balance. To tout the fee-shifting device as part of the Act's carefully constructed balance of interests, and then to turn around and pretend as if it did not count when the constitutionality of the Act is assailed, would be duplicitous. How then, should this use of an attorneys' fees rule that is "procedural," but designed to affect the substantive balance, be analyzed?

The closest existing analogy is the experience under the Civil Rights Attorneys' Fees Awards Act of 1976.¹⁵⁶ That act allows recovery of attorneys' fees by prevailing parties in actions brought under various federal civil rights acts.¹⁵⁷ In many civil rights actions, however, governmental entities and public official defendants enjoy either qualified or absolute immunity from liability for

153. See *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984).

154. *Calder v. Jones*, 465 U.S. 783, 790 (1984); see *Keeton v. Hustler Magazine*, 465 U.S. 770, 778 & n.10 (1984); R. SMOLLA, *supra* note 5, § 12.07[2].

155. See R. SMOLLA, *supra* note 5, §§ 12.02[3][b], 12.07[2].

156. 42 U.S.C. § 1988 (1976).

157. See *City of Riverside v. Rivera*, 477 U.S. 561 (1986).

damages.¹⁵⁸ Even in situations in which the defendant enjoys immunity from damages, the plaintiff is nevertheless permitted to sue for declaratory and injunctive relief.¹⁵⁹

From time to time in current federal civil rights practice, these declaratory or injunctive relief actions present a situation analogous to the Annenberg declaratory judgment mechanism: A defendant immunized from liability pursuant to substantive law immunity rules is nevertheless a losing party for the purposes of declaratory or injunctive relief. May such a defendant be saddled with attorneys' fees? In *Supreme Court of Virginia v. Virginia Consumers Union*,¹⁶⁰ the Supreme Court said yes. Notwithstanding the substantive law immunities cloaking the defendants (Justices on the Supreme Court of Virginia) with protection against money damages liability, they could still be subjected to the fee-shifting provisions of the Civil Rights Attorneys' Fees Awards Act.

The analogy here is tighter than it might appear at first. The substantive law immunities in federal civil rights practice are almost identical in jurisprudential function to the immunities created under *New York Times Co. v. Sullivan* and its progeny. Like the actual malice requirement of *New York Times*, the prevailing doctrine for official immunity under *Harlow v. Fitzgerald*¹⁶¹ exists to permit breathing space adequate for the performance of discretionary functions by executive officials. Indeed, the Supreme Court has been consistently *more* concerned with reducing "chilling effects" on governmental officials than on members of the press. In discussing the balance of interests posed by qualified official immunity, the Court has included among the social costs "the expenses of litigation, the diversion of official energy . . . [and] the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'"¹⁶²

158. See, e.g., *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984); *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Edelman v. Jordan*, 415 U.S. 651 (1974). See generally P. SHUCK, *SUING GOVERNMENT* (1983).

159. See *Pulliam v. Allen*, 466 U.S. 522 (1984).

160. 446 U.S. 719 (1980).

161. 457 U.S. 800 (1982).

162. *Id.* at 814 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)).

After *New York Times*, the press has always sought, but never received exceptional sensitivity to "self-censorship" by officials. The substantive law doctrines the Supreme Court created make it harder today to sue a public official and win damages than to sue a newspaper and win damages. *Despite this fact*, the Court has permitted attorneys' fees against such officials, even when the plaintiff's victory is merely declaratory or injunctive.¹⁶³

iii. *The net chilling effect*

Analogies are indispensable to legal argument, but seldom dispositive. For instance, the experience under the Civil Rights Attorneys' Fees Awards Act should be enough to defeat mechanical reliance on the simplistic syllogism that equates attorneys' fees to damages as establishing an open and shut case against the Annenberg proposal. The matter proves to be rather more open. In fact, the analogy to the federal civil rights practice proves only that it is *possible* to treat attorneys' fees differently from money damages. It does not prove that the balance of interests struck by the Annenberg proposal is an appropriate candidate for such treatment.

On this point, everything discussed in this Article comes full circle. That no act of legislation may modify the Constitution is as elementary as *Marbury v. Madison*.¹⁶⁴ The Supreme Court has interpreted the first amendment as outlawing money damages without fault in most libel cases. If damages include attorneys' fees, then the game is over for this provision of the Annenberg plan, pure and simple. In making this interpretation, however, thoughtful reviewing courts will be forced to look at how this fee-shifting rule fits into the overall matrix of criss-crossing incentives in the Annenberg plan. After all, the plaintiff *also* bears the risk of paying the defendant's attorneys' fees.¹⁶⁵ Many other provisions of the Annenberg proposal exert similarly restraining pressures on the plaintiff or provide mitigating relief for the defendant.¹⁶⁶ The best question to ask of the Annenberg proposal's fee-shifting rule is

163. See Supreme Court of Va. v. Virginia Consumers Union, 446 U.S. 719 (1980).

164. 5 U.S. (1 Cranch) 137 (1803).

165. LIBEL REFORM ACT § 10 (Proposed Draft 1988).

166. See *supra* text accompanying notes 124-35.

thus a question of wider focus: Taken as a whole, does the Act increase or decrease the chilling effect on defendants? If, in combination, the provisions of the plan advance rather than retract the first amendment protections of *New York Times*, the plan should be declared constitutional.

Constitutional principles cannot be applied with such stilted, stagnant lack of imagination as to doom all innovative legislative alternatives. The Court in *New York Times* applied one set of correctives to one mode of dealing with libel disputes. In effect, the Court said, "If your libel system is going to be constructed this way (traditional tort suits for damages) then you must add these fault rules." The Court did not say, however, that the libel system *must* be constructed in the traditional way, nor did it say what rules it would impose on imaginative alternatives.

What is the "net chilling effect" of the Annenberg proposal? For the reasons detailed throughout this Article, the conviction of the project's membership is that, as a package, the proposal is more generous to free speech values than the existing system, even under *New York Times*. In the end, however, that judgment rests on empirical assumptions about the behavior of plaintiffs and defendants that will never be proved or disproved convincingly until the statute is tested in action for a number of years. Such experimentation awaits some bold and innovative legislature to give it a try.

3. *Small media outlets and nonmedia defendants*

Mainstream corporate media interests have dominated the defense perspective commentary on the Annenberg proposal. The Annenberg proposal applies to small media outlets and to nonmedia suits every bit as much as the corporate press, however, and attention is owed to their concerns.¹⁶⁷

a. *Small media outlets*

Smaller press outlets have tended to be more enthusiastic about the Annenberg proposal than the larger, more powerful media

167. See generally T. LITTLEWOOD, *COALS OF FIRE: THE Alton Telegraph LIBEL CASE* (1988).

voices. Congressman Charles Schumer observed this same pattern in the reaction to the declaratory judgment bill he introduced in Congress, a bill that contained several provisions picked up in the Annenberg package.¹⁶⁸ For small media outlets—college or “alternative” radio stations, the neighborhood newspaper, flyers, newsletters and magazines distributed by public interest groups, churches and neighborhood organizations, and the rich and diverse collection of underground and avant garde “readers” and “voices” distributed free of charge throughout American cities—the Annenberg proposal offers many improvements on the existing libel system. The Annenberg proposal’s emphasis on nonmonetary remedies may be particularly helpful in alleviating the special chill on first amendment freedoms that the existing system places on small media. These small media outlets may be much more intimidated by the threat of punishing damages awards than their larger corporate counterparts, and they are far less able to absorb both the attorneys’ fees and the drain on staff resources that accompany protracted litigation.¹⁶⁹ In combination, the retraction, reply, and declaratory judgment devices offer small media significantly less exposure to catastrophic loss.

b. Nonmedia defendants

From the beginning of the modern first amendment era in libel law, considerable debate has raged over whether principles enunciated in cases such as *Gertz v. Robert Welch, Inc.*,¹⁷⁰ should be deemed applicable to nonmedia defendants.¹⁷¹ In cases in which

168. See *supra* note 12.

169. See T. LITTLEWOOD, *supra* note 167.

170. 418 U.S. 323 (1974).

171. See generally Brosnahan, *From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and The First Amendment*, 26 HASTINGS L.J. 777 (1975); Christie, *Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches*, 75 MICH. L. REV. 43, 50 (1976); Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77 (1975); Nimmer, *Introduction—Is Freedom of the Press A Redundancy: What Does it Add To Freedom of Speech?*, 26 HASTINGS L.J. 639, 649 (1975); Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U.L. REV. 1212, 1269 n.328 (1983); Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915 (1978); Smolla, *supra* note 2, at 29-33, 90; Stewart, “*Or of the Press*”, 26 HASTINGS L.J. 631 (1975); Watkins & Schwartz, *Gertz and the Common Law of Defamation: Of Fault, Nonmedia Defendants, and Conditional Privileges*, 15 TEX. TECH. L. REV. 823, 831-63 (1984).

the plaintiff was a public official or public figure, decisions held generally that the actual malice standard governed nonmedia speakers as well.¹⁷² In cases in which the plaintiff was a private figure, however, some states held *Gertz* specifically inapplicable to nonmedia defendants.¹⁷³

The Supreme Court has never resolved the issue clearly,¹⁷⁴ but indications suggest that a majority of the Court believes the same first amendment rules should govern all libel cases, without regard to the media or nonmedia status of the defendant.¹⁷⁵ In *Dun & Bradstreet, Inc. v. Greenmoss Builders*,¹⁷⁶ for example, none of the Justices relied on the media/nonmedia distinction,¹⁷⁷ and the opinions of Justice White, and of Justice Brennan (joined by Justices Marshall, Blackmun, and Stevens) rejected the distinction outright.¹⁷⁸

172. See, e.g., *Avins v. White*, 627 F.2d 637, 649 (3d Cir.), cert. denied, 449 U.S. 982 (1980); *Davis v. Schuchat*, 510 F.2d 731, 734 n.3 (D.C. Cir. 1975); *Woy v. Turner*, 533 F. Supp. 102, 104 (N.D. Ga. 1981); *Antwerp Diamond Exch., v. Better Business Bureau*, 130 Ariz. 523, 527, 637 P.2d 733, 737 (1981); *Rodriguez v. Nishiki*, 65 Haw. 430, 436, 653 P.2d 1145, 1150 (1982); *Michaud v. Inhabitants of Livermore Falls*, 381 A.2d 1110, 1113 (Me. 1978).

173. See, e.g., *Rowe v. Metz*, 195 Colo. 424, 425-26, 579 P.2d 83, 84-85 (1978); *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 257-58 (Minn. 1980); *Wheeler v. Green*, 286 Or. 99, 110, 593 P.2d 777, 784 (1979); *Harley-Davidson Motorsports v. Markley*, 279 Or. 361, 371, 568 P.2d 1359, 1365 (1977); *Denny v. Mertz*, 106 Wis. 2d 636, 660-61, 318 N.W.2d 141, 152-53, cert. denied, 459 U.S. 883 (1982); *Calero v. Del Chem. Corp.*, 68 Wis. 2d 487, 504-05, 228 N.W.2d 737, 747-48 (1975).

174. The Supreme Court seemed to eschew the media/nonmedia distinction in *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749 (1985). See *infra* notes 175-78 and accompanying text. In *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986), however, the Court conspicuously articulated its holding as limited to media defendants. *Id.* at 779 n.4.

175. See R. SMOLLA, *supra* note 5, § 3.02[2].

176. 472 U.S. 749 (1985) (plurality opinion).

177. The plurality opinion written by Justice Powell noted that the *Gertz* first amendment protections "were not 'justified solely by reference to the interest of the press and broadcast media in immunity from liability.'" *Id.* at 756 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974)).

178. *Id.* at 773 (White, J., concurring) ("Wisely, in my view, Justice Powell does not rest his application . . . on a distinction drawn between media and nonmedia defendants. On that issue, I agree with Justice Brennan that the First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech."); *id.* at 781 (Brennan, J., dissenting) (The "[media/nonmedia] distinction is irreconcilable with the fundamental First Amendment principle that '[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source . . .'" (quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978))).

The Annenberg proposal similarly rejects any distinction between media and nonmedia defendants.¹⁷⁹ All provisions of the Annenberg Libel Reform Act apply to private figure nonmedia defamation actions every bit as much as defamation suits brought by a powerful government official against the *New York Times*.

The Annenberg proposal nevertheless recognizes that nonmedia defamation disputes may present circumstances often quite distinct from typical media cases. Defamation arising from employees suing former employers after termination provides perhaps the best example of a burgeoning area of defamation practice involving fact patterns substantially different from the standard libel suit against the press. Rather than carve a separate law of libel for such cases, however, the Annenberg proposal instructs courts to construe the Act flexibly and liberally to vindicate the Act's purposes in the wide variety of different factual circumstances in which defamation may occur. In this respect, the Annenberg Project proceeds from the conviction that the defamation system in the private nonmedia context also has a great deal to gain from an emphasis on nonpecuniary counter-speech remedies. In the context of workplace defamation, for example, the employee wronged by a libelous letter of recommendation may utilize the retraction or declaratory judgment remedies to secure a correction of his or her work record when it is most important—quickly after termination when the employee is seeking a new job. On the other hand, employers are relieved somewhat from the burden of libel suits brought as a substitute for wrongful discharge actions and largely for their nuisance value.

IV. CONCLUSION

One can hardly imagine another area of American law so prone to intense and emotional posturing by the contending forces as libel law. Cool thinking is difficult in the charged atmosphere of libel reform debate. The Annenberg libel reform proposal requires both sides to take some leaps of faith. Plaintiffs must have faith that they can indeed be made whole—or at least substantially more whole than under current law—by a system that emphasizes

179. LIBEL REFORM ACT § 1(c) (Proposed Draft 1988).

counter-speech and the determination of truth rather than money damages. Defendants must have faith that the Act will not encourage frivolous litigation, or create an Orwellian truth squad.

The tension between freedom of speech and freedom from unwarranted reputational attack will always exist. The Annenberg proposal is a creative attempt to make constructive use of that tension. The proposal attempts to channel the self-interests of the parties away from deadlock and toward mutual resolution of the dispute without resort to suits for money damages. As its central philosophy, the proposal embraces the conviction that the first amendment and the redress of reputational injury, although in tension, need not work at cross-purposes. The objective common to both is the pursuit of truth. The Annenberg proposal's emphasis on the encouragement of the discovery of truth is nothing to be ashamed of. Traditional first amendment theory relies on consideration of a multiplicity of viewpoints as the best process for advancing knowledge.¹⁸⁰

The proposal is not perfect—no reform package ever will be—but it is thoughtfully balanced and contains many provisions that improve significantly on the often perverse and irrational rules of existing law. Justice Brandeis encouraged the states to serve as laboratories for experiment.¹⁸¹ The Annenberg experiment deserves a try.

180. See T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 7 (1963).

181. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).