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# Group Defamation and Individual Actions: A New Look at an Old Rule

Defamation law is primarily concerned with the protection of reputation. Good reputation is essential to a sense of human dignity, and is a valuable asset in business as well.<sup>1</sup> An action for defamation not only vindicates a person's good name<sup>2</sup> and redresses injury,<sup>3</sup> but it also deters the publication of defamatory statements.<sup>4</sup>

A member of a defamed group, however, lacks the means to vindicate his good name and redress his injury. Under current defamation law, a group member has no cause of action against the publisher of the defamation unless the group is very small or the defamatory statement applies specifically to the plaintiff. This rule is illogical, unfair, and no longer necessary. This Comment proposes abolishing the rule restricting defamation suits by group members. It argues that group members should be permitted to proceed in accordance with the general standards of defamation law. In decisions handed down during the last twenty years, the United States Supreme Court has reached an accommodation between free expression and protection of reputation that should be followed in cases of group defamation. These decisions also create a sufficient barrier against frivolous claims and windfall recoveries—the concerns that gave rise to the bar against individual actions for group defamation.

Part I sets forth the general rule of group defamation, the justifications for the rule, and the exceptions to it. Part II analyzes the justifications in light of recent Supreme Court cases, concluding that the justifications do not support a general rule barring individual actions when a group is defamed. Part III considers the exceptions to the general rule as sources of relief for injured group members, and analyzes other avenues of relief that have been suggested by courts and commentators. Part III concludes that none of these approaches provides adequate relief from the harsh operation of the general rule. Part IV

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1. L. ELDREDGE, *THE LAW OF DEFAMATION* § 2 (1978). See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974).

2. See *RESTATEMENT (SECOND) OF TORTS* § 623 note (1976); *id.* §§ 575, 622.

3. L. ELDREDGE, *supra* note 1, § 3, at 6; *RESTATEMENT (SECOND) OF TORTS* §§ 575, 621, 622, 623 note (1976).

4. L. ELDREDGE, *supra* note 1, § 3, at 6; *RESTATEMENT (SECOND) OF TORTS* § 623 note (1976).

proposes that an individual group member harmed by group defamation should be required to meet the same standards of proof as any other defamation plaintiff, and presents a framework to guide the application of general defamation law principles to cases of group defamation.

## I

## THE GROUP DEFAMATION RULE AND ITS EXCEPTIONS

A. *The General Rule*

Individual members of groups that have been defamed generally have no cause of action against the defamer. This rule follows from the requirement that in order to establish a prima facie case of defamation, the plaintiff must demonstrate that a "reasonable person" could perceive the defendant's statement to be "of and concerning" the plaintiff.<sup>5</sup> Unless the defamation designates the plaintiff so that those reading or hearing the publication understand that the plaintiff is implicated, the plaintiff's reputation cannot be tarnished.<sup>6</sup> Where a group is the object of defamation, the "of and concerning" requirement poses special difficulties. As group size increases, courts become skeptical that the defamation could reasonably be understood to refer to any individual group member.<sup>7</sup>

Additionally, courts have justified the denial of redress to individual members of defamed groups by arguing that group defamations lack the tendency to cause personal harm<sup>8</sup>—that reasonable persons do not take literally statements defaming groups of people, and understand such statements only as generalizations or exaggerations.<sup>9</sup> Further, as with any area of defamation law, courts are concerned with the chilling effect defamation suits may have on free expression.<sup>10</sup> Finally, courts have expressed the fear that permitting individuals to maintain actions in cases of group defamation would overwhelm the courts with

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5. RESTATEMENT (SECOND) OF TORTS § 564A (1976).

6. *See* *Geisler v. Petrocelli*, 616 F.2d 636, 639 (2d Cir. 1980). It is not necessary to prove that the defendant intended his statement to refer to the plaintiff; it is enough that the audience could perceive the plaintiff to be implicated by the content of the statement or even by extrinsic facts. *See infra* note 25. However, the holding in *Gertz* abolishing liability without fault may mean that it is now unconstitutional to hold a speaker strictly liable for defamation not intended to defame the plaintiff, at least as to a media defendant. R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS § II.8.1 (1980).

7. *See, e.g.*, *Golden N. Airways, Inc. v. Tanana Publishing Co.*, 218 F.2d 612 (9th Cir. 1954); *Neiman-Marcus v. Lait*, 13 F.R.D. 311 (S.D.N.Y. 1952); *Noral v. Hearst Publications, Inc.*, 40 Cal. App. 2d 348, 104 P.2d 860 (1940).

8. *See* *Wilner, The Civil Liability Aspects of Defamation Directed Against a Collectivity*, 90 U. PA. L. REV. 414, 419 (1942).

9. *Id.*; J. SALMOND, TORTS § 405 (9th ed. 1936).

10. *See infra* text accompanying notes 47-67.

lawsuits.<sup>11</sup>

The seeds of the general rule were planted in an old English case, *King v. Alme and Nott*.<sup>12</sup> In that case, the court stated in dictum that "where a writing . . . inveighs against mankind in general, or against a particular order of men, as for instance, men of the gown, this is no libel, but it must descend to particulars and individuals to make it a libel."<sup>13</sup> An American case, *Sumner v. Buel*,<sup>14</sup> misinterpreted this dictum to mean that no action for libel could lie unless a particular person was specifically mentioned.<sup>15</sup> From *Sumner* arose the modern rule barring individual actions in group defamation cases.<sup>16</sup>

The modern rule is exemplified by *Fowler v. Curtis Publishing Co.*,<sup>17</sup> where the defendants published an article portraying Washington, D.C. taxicab drivers as ill-mannered with patrons. Although the plaintiff, a Washington, D.C. taxicab driver, was prepared to offer evidence of his loss of business resulting from the defamation, the court refused to hear it, holding that an individual member of a group that has been defamed has no cause of action.<sup>18</sup>

## B. Exceptions to the Rule

### 1. The Small Group Exception

There are two exceptions to the general rule that individual members of a defamed group have no cause of action. The first exception allows group members to maintain individual actions where the defamation refers to every member of a small group, because in such cases, "[t]he words may reasonably be understood to have personal reference and application to any member of [the group], so that he is defamed as an individual."<sup>19</sup> Although few courts have announced fixed rules defining the number of members a small group may have,<sup>20</sup> most jurisdic-

11. See, e.g., *Michigan United Conservation Clubs v. CBS News, Inc.*, 485 F. Supp. 893, 900 (W.D. Mich. 1980), *aff'd*, 665 F.2d 110 (6th Cir. 1981). See also Reisman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727, 771-77 (1942).

12. 91 Eng. Rep. 790 (1700) (per curiam).

13. *Id.*

14. 12 Johns. 475 (N.Y. 1815).

15. *Id.* at 477-78.

16. See Note, *Liability for Defamation of a Group*, 34 COLUM. L. REV. 1322, 1322 & nn. 5-7 (1934).

17. 182 F.2d 377 (D.C. Cir. 1950).

18. *Id.* at 378.

19. *Neiman-Marcus v. Lait*, 13 F.R.D. 311, 315 (S.D.N.Y. 1952); *De Witte v. Kearney & Trecker Corp.*, 265 Wis. 132, 137-38, 60 N.W.2d 748, 751 (1953) (labor union officials defamed as a group; each of the four individuals in the group had a cause of action); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 111, at 750 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 564A comment b (1976); Annot., 70 A.L.R.2d 1382, 1389 (1960).

20. For a compilation of the prevailing limitations in various jurisdictions, see LIBEL DEFENSE RESOURCE CENTER, 50 STATE SURVEY (1982).

tions permit individual actions where the group members number twenty-five or fewer.<sup>21</sup>

The *Restatement (Second) of Torts* states that individual members of small groups may proceed even when the defamatory statement refers to only some of them.<sup>22</sup> Several courts have agreed with this extension of the small group exception.<sup>23</sup>

## 2. The Specific Application Exception

The second exception to the general rule arises when the defamation, though made in group terms, is really a veiled reference to a specific group member.<sup>24</sup> The rationale for this exception is that the

21. W. Prosser, *supra* note 19, § 111, at 750; RESTATEMENT (SECOND) OF TORTS § 564A comment b (1976).

22. RESTATEMENT (SECOND) OF TORTS § 564A comment c (1976). Where the group is very small, a statement directed at only a few, or even at one of the members may suffice to allow each member to sue. *See, e.g.*, RESTATEMENT OF TORTS § 564 comment c, illustration 2 (1938) (statement that some member of B's household has committed murder defames each member of B's household).

23. For example, in *Neiman-Marcus v. Lait*, 13 F.R.D. 311 (S.D.N.Y. 1952), individuals within a department store's twenty-five member male sales staff maintained an action against an author who had written that "most" of the salesmen were "faggots" and "fairies." *Id.* at 316; *see also* *Cushman v. Day*, 43 Or. App. 123, 130, 602 P.2d 327, 331-32 (1979) ("When all or a significant portion of a small group are defamed, each individual in the group may be found to have been defamed."). Yet, in *Neiman-Marcus* the court dismissed an action brought by some of the store's 382 saleswomen because of the group's size, even though the defendant had written that *all* of the saleswomen were "call girls." 13 F.R.D. at 316. *See also* *Montgomery Ward & Co. v. Skinner*, 200 Miss. 44, 25 So. 2d 572 (1946) (accusation that "one of you three" stole money defamed each of the three accused). *But see* *Cohen v. Brecher*, 20 Misc. 2d 329, 192 N.Y.S.2d 877 (1959) (statement that one of three was a criminal not actionable).

Some courts do not allow actions where the publication includes only a general reference to some members of a small group. *See, e.g.*, *Owens v. Clark*, 154 Okla. 108, 6 P.2d 755 (1931) (defamatory statements regarding "some" members of Oklahoma Supreme Court did not defame each judge); *Annot.*, 70 A.L.R.2d 1382 (1960); cases cited *id.* And some courts have kept from the jury actions brought by members of groups with less than twenty-five members. For instance, in *Service Parking Corp. v. Washington Times Co.*, 92 F.2d 502 (D.C. Cir. 1937), the court held that a group of ten to twelve downtown Washington, D.C., parking lot owners was not so small that defamation of the group's business practices could cause the group member plaintiff to be personally defamed. *Id.* at 503, 506.

At least two courts have refused to be bound by considerations of group size. In *Fawcett Publications, Inc. v. Morris*, 377 P.2d 42 (Okla. 1962), *appeal dismissed*, 376 U.S. 513 (1963), a second-string player on a seventy member college football team sued the defendant for publishing an article accusing the team's players of using amphetamines during games. The Oklahoma Supreme Court concluded that "while there is substantial precedent from other jurisdictions to the effect that a member of a 'large group' may not recover in an individual action for a libelous publication unless he is referred to personally, we have found no substantial reason why *size* alone would be conclusive." *Id.* at 51 (emphasis in original). Instead, because the team players were so well known and identified in connection with the team, the court held that the article libeled every member of the team. *Id.* at 52. A New York appellate court also recently demonstrated its willingness to look beyond group size. *Brady v. Ottaway Newspapers, Inc.*, 84 A.D.2d 226, 445 N.Y.S.2d 786 (1981).

24. *Marr v. Putnam*, 196 Or. 1, 18-20, 246 P.2d 509, 517 (1952) (quoting 33 AM. JUR. *Libel & Slander* § 192 (1936)); *Note, supra* note 16, at 1324.

individual is injured in such circumstances to the same extent as if the defamation had directly referred to that individual.<sup>25</sup> Thus, the specific application exception is not really an exception to the rule that members of a defamed group have no legal remedy for their injuries; rather, it is merely a recognition that one who is individually defamed can sue even if the defamation is disguised as a group slur.<sup>26</sup>

## II

### CRITIQUE OF THE JUSTIFICATIONS BEHIND THE GROUP DEFAMATION RULE

The various justifications for the group defamation rule, though facially attractive, are unpersuasive in light of recent developments in defamation law. This Part argues that general defamation law adequately addresses the concerns raised by courts in group defamation cases. Thus, a special rule for group defamation is unnecessary.

#### A. *The "Of and Concerning" Requirement*

##### 1. *Reference to the Plaintiff*

Courts often refuse to permit individual actions for group defamation, based on the belief that an individual plaintiff in such cases can-

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25. See *Marr v. Putnam*, 196 Or. 2, 16-20, 246 P.2d 509, 516-18 (1952); cases and commentaries quoted *id.*; RESTATEMENT (SECOND) OF TORTS § 564A comment d (1976). The defendant's intent is immaterial in determining to whom the statement applied. "The question 'is not who was aimed at, but who was hit.'" *Marr v. Putnam*, 196 Or. at 28, 246 P.2d at 521 (quoting *Laudati v. Stea*, 44 R.I. 303, 306, 117 A. 422, 424 (1922)); see *supra* note 6.

26. For example, in *Marr v. Putnam*, the Oregon Supreme Court allowed the owners of a radio repair service to proceed against the publisher of a local newspaper article alleging that a certain class of radio repair businesses were stealing their customers' radios. The article warned against the sharp practices of "these slickers" who, it claimed, commonly advertised by providing no information about their business other than a phone number for customers to call for free pickup service. Since the plaintiffs were the only radio repairmen in the area who advertised in this manner, the court held that those who read the article would believe it referred specifically to the plaintiffs. 196 Or. at 14-15, 246 P.2d at 515.

In one case worth noting, the Ninth Circuit, applying Oregon law, demonstrated a willingness to employ the specific application exception in an innovative inanner. *United Medical Laboratories v. CBS*, 404 F.2d 706 (9th Cir. 1968), *cert. denied*, 394 U.S. 921 (1969), concerned a series of broadcasts and press releases issued by CBS claiming that mail-order medical laboratories, such as the plaintiff, reached inaccurate test results 80% of the time. The trial court had rendered summary judgment in favor of the defendant due to the large size of the group defamed. In reviewing the judgment, the circuit court commented that the plaintiff's demonstration that it had lost business after the statements were published would have required the issue of specific application to advance beyond the summary judgment stage, but that other considerations required that the judgment be affirmed. The court thereby indicated that a showing of harm resulting from group defamation might bring a group member's action within the specific application exception, even in the absence of evidence that the defamation was directed at any particular group member. No court has yet applied the exception in this inanner.

not prove that the defamation was "of and concerning" him.<sup>27</sup> This literal and mechanical application of the "of and concerning" requirement is unsatisfactory for several reasons. First, it is unrealistic to assume that the recipients of publications that defame groups do not construe these publications to refer to the individual members who constitute those groups. To deny that false accusations leveled against a collection of individuals may cause its members to be shunned, feared, or hated does not comport with the realities of human behavior.<sup>28</sup> For instance, during the McCarthy era, accusations that certain organizations were overrun by Communists devastated the careers and personal lives of many group members.<sup>29</sup> These events demonstrate that group defamation can cause extensive individual harm. Thus, commentators almost universally agree that the group defamation rule is irrational.<sup>30</sup>

Second, under the current rule of group defamation, judges dismiss individual actions for group defamation on motions for summary judgment or dismissal, and on demurrer.<sup>31</sup> When judges find that group members could not possibly be injured by a defamation of their group, they remove from the jury its traditional function in defamation law—determining the actual effect of the publication. Yet, the defamatory nature of a publication should "be measured not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the aver-

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27. *E.g.*, *Golden N. Airways v. Tanana Publishing Co.*, 218 F.2d 612, 620 (9th Cir. 1954); *Neiman-Marcus v. Lait*, 13 F.R.D. 311 (S.D.N.Y. 1952).

28. The commentators are in agreement that individuals may be harmed through group defamation. *See, e.g.*, L. ELDRIDGE, *supra* note 1, § 10, at 57; Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 SUP. CT. REV. 281, 292-93; Brown & Stern, *Group Defamation in the U.S.A.*, 13 CLEV.-MAR. L. REV. 7, 23-29 (1964); Wilner, *supra* note 8, at 425, 432-33; Note, *supra* note 16, at 1324.

29. *See generally* J. ANDERSON & W. MAY, *MCCARTHY: THE MAN, THE SENATOR, THE "ISM"* (1952) (discussing McCarthy's slurs of government groups and individuals, and the aura of suspicion, fear, and hatred these accusations created).

30. *See, e.g.*, Reisman, *supra* note 11, at 770 ("[W]here the defendant is engaged in exploiting the anxieties or the sadism of his audience, and can count on built-in prejudice, he may increase his credibility as he increases the scope and violence of his lies."); Tanenhaus, *Group Libel*, 35 CORNELL L.Q. 261, 261 (1950) ("The disparagement of racial and religious groups not only hurts the groups as collectivities, and the individual members thereof, but adversely affects the stability and welfare of the community itself."); Note, *supra* note 16, at 1324 ("[E]ven a general derogatory reference to a group [affects] the reputation of every member . . .").

31. *See, e.g.*, *Michigan United Conservation Clubs v. CBS News, Inc.*, 485 F. Supp. 893 (W.D. Mich. 1980) (summary judgment), *aff'd*, 665 F.2d 110 (6th Cir. 1981); *United Medical Laboratories v. CBS*, 258 F. Supp. 735 (D. Or. 1966) (summary judgment), *aff'd*, 404 F.2d 706 (9th Cir. 1968), *cert. denied*, 394 U.S. 921 (1969); *Neiman-Marcus v. Lait*, 13 F.R.D. 311 (S.D.N.Y. 1952) (motion to dismiss); *Noral v. Hearst Publications, Inc.*, 40 Cal. App. 2d 348, 104 P.2d 860 (1940) (affirming grant of general demurrer). *See also* *Service Parking Corp. v. Washington Times Co.*, 92 F.2d 502 (D.C. Cir. 1937) (affirming directed verdict).

age reader."<sup>32</sup> The judge's role is to determine whether, in each case, the publication is capable of a defamatory meaning.<sup>33</sup> It is then for the jury to evaluate whether the plaintiff in the case was defamed.<sup>34</sup> It is considered an error for the court to deny the jury its role when "by any reasonable interpretation the language is susceptible of a defamatory meaning."<sup>35</sup>

Third, barring individual actions because of lack of reference to the plaintiff is unsatisfactory because more concrete means exist to prevent unharmed plaintiffs from bringing suit. In *Gertz v. Robert Welch, Inc.*,<sup>36</sup> the Supreme Court held that if the plaintiff cannot demonstrate that he has suffered "actual injury" from the defamation, he cannot recover damages.<sup>37</sup> Thus, it is unnecessary to dismiss a plaintiff under the abstract rationale that, not being individually referred to, he could not have been defamed, and thereby harmed. As the law of defamation stands after *Gertz*, if the plaintiff cannot demonstrate that he was harmed, his suit can be dismissed at an early stage. If the plaintiff was actually harmed, and can prove it, it is unfair and irrational to dismiss his suit simply because he was a member of a group.

## 2. *The Constitutional Dimension of the "Of and Concerning" Requirement*

Some commentators have stated that *New York Times v. Sullivan*<sup>38</sup> elevated the "of and concerning" requirement to a constitutionally mandated barrier against individual actions for group defamation.<sup>39</sup> However, such an interpretation is unwarranted. As *New York Times* involved a special fact pattern, it cannot be cited as a general bar against individual actions.

In *New York Times*, a commissioner of the City of Montgomery, Alabama instituted a libel suit against the newspaper for publishing an

32. *MacLeod v. Tribune Publishing Co.*, 52 Cal. 2d 536, 547, 343 P.2d 36, 44 (1959) (quoting *Bates v. Campbell*, 213 Cal. 438, 442, 2 P.2d 383, 385 (1931)).

33. *Cameron v. Wernick*, 251 Cal. App. 2d 890, 893, 60 Cal. Rptr. 102, 104 (1967).

34. *Id.* at 895, 60 Cal. Rptr. at 105.

35. *Id.* at 893, 60 Cal. Rptr. at 104.

36. 418 U.S. 323 (1974).

37. *See id.* at 349 ("It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury."). The Court has so far declined to define "actual injury," but has indicated that it is "not limited to out-of-pocket loss" and may include impairment of reputation, personal humiliation, and mental anguish. *Id.* at 350. The rule is to be administered through instructions to the jury and "all awards must be supported by competent evidence . . ." *Id.*

38. 376 U.S. 254 (1964).

39. *See Schuster v. U.S. News & World Report, Inc.*, 459 F. Supp. 973, 978 (D. Minn. 1978), *aff'd*, 602 F.2d 850 (8th Cir. 1979); RESTATEMENT (SECOND) OF TORTS § 564 comment g (1976); *id.* § 580A comment g; Nelon, *Media Defamation in Oklahoma: A Modest Proposal and New Perspective* (pt. 2), 34 OKLA. L. REV. 737, 738 (1981).



editorial advertisement describing alleged mistreatment of blacks by Montgomery police. Although the advertisement referred only to actions taken by "police" and made no mention of individuals, the Alabama Supreme Court found that the "average person" knew that the police were under the direction and control of a single commissioner,<sup>40</sup> and therefore allowed the plaintiff's suit to proceed.

The United States Supreme Court disagreed with the state court's judgment, arguing that it was "plain that these statements could not reasonably be read as accusing [the plaintiff] of personal involvement in the acts in question."<sup>41</sup> The Court therefore held that the "evidence was constitutionally defective . . . [insofar] as it was incapable of supporting the jury's finding that the allegedly libelous statements were made 'of and concerning' [the plaintiff]."<sup>42</sup>

Taken out of context, the latter passage could be read to elevate the "of and concerning" requirement to a constitutional level, and some authorities have interpreted it in this manner.<sup>43</sup> However, to extend this holding to erect a constitutional barrier against individual actions for group defamation ignores the setting of the case. *New York Times* was a case in which the Supreme Court was concerned with preserving the right to criticize government. It was this concern that lay behind the Court's reluctance to find that the statements contained in the advertisement were "of and concerning" the commissioner:

Raising as it does the possibility that a good-faith critic of government will be penalized for his criticism, the proposition relied on by the Alabama courts strikes at the very center of the constitutionally protected area of free expression. We hold that such a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations.<sup>44</sup>

Thus, the Court's holding was that an impersonal criticism of government cannot be the basis of an individual action for defamation.<sup>45</sup> The holding should not be read to bar, as a matter of constitutional law, individual actions for group defamation, even when the group is composed of government individuals.<sup>46</sup>

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40. *New York Times v. Sullivan*, 273 Ala. 656, 674-75, 144 So. 2d 25, 39 (1962), *rev'd*, 376 U.S. 254 (1964).

41. 376 U.S. 254, 288-89 (1964).

42. *Id.* at 288.

43. *See Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 86, 155 Cal. Rptr. 29, 43 (Files, J., dissenting), *cert. denied*, 444 U.S. 984 (1979); RESTATEMENT (SECOND) OF TORTS § 564 comment g (1976); *id.* § 580A comment g.

44. 376 U.S. at 291-92.

45. *Accord* R. SACK, *supra* note 6, § I.2.1, at 10; *id.* § II.8.6, at 123.

46. *See Brady v. Ottaway Newspapers, Inc.*, 84 A.D.2d 226, 445 N.Y.S.2d 786 (1981). In that case, the court held that although the defendant defamed a group of policemen, constitutional

### B. First Amendment Concerns

Very early on, courts expressed concern that free public discussion of important matters would be impeded if group members could sue for harm personally suffered as a result of group defamation.<sup>47</sup> Courts considered it especially important to safeguard the freedom to air openly comments about groups and organizations.<sup>48</sup> The tension between the free debate concerns and the interest in providing redress for individual injury was resolved in most group defamation cases in favor of the defendant.<sup>49</sup>

Although free discussion of groups may further public discussion of important issues, the constitutional decisions of the past two decades have drained this rationale of any vitality it once had. The Supreme Court has developed a complex set of rules in the area of defamation law to protect the right of free speech. Thus, the complete bar against individual actions in group defamation cases is an overbroad and unnecessary solution to the problem of the potential chilling of free expression.

In *New York Times v. Sullivan*,<sup>50</sup> the Supreme Court met the concerns about chilled speech straight on. The Court formulated the "actual malice" standard in order to accommodate both society's interest in public debate and the individual's interest in his reputation.<sup>51</sup> The Court first emphasized the importance of permitting free debate on issues of public importance. The Court repudiated suggestions it had made in the past that defamatory publications were not protected by the Constitution.<sup>52</sup> Viewing the defense of truth as insufficient to protect such expression,<sup>53</sup> the Court concluded that erroneous statements, which it considered inevitable in free debate, "must be protected if the

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concerns were not implicated. The defamation, the court reasoned, was of a specific group of individuals and therefore did not constitute an *impersonal* attack on government operations. *Id.* at 237 n.4, 445 N.Y.S.2d at 793 n.4.

47. *Ryckman v. Delavan*, 25 Wend. 186 (N.Y. 1840); Note, *Libel and Slander: Right of a Member of a Defamed Group to Recover in a Civil Action*, 29 CALIF. L. REV. 83, 84 (1940).

48. *Ryckman v. Delavan*, 25 Wend. 186, 199-200 (N.Y. 1840). See *Brown & Stern*, *supra* note 28, at 21.

49. *E.g.*, *Ryckman v. Delavan*, 25 Wend. 186, 198-99 (N.Y. 1840). The court stated:

It is far better for the public welfare that some occasional consequential injury to an individual, arising from general censure of his profession, his party, or his sect, should go without remedy, than that free discussion on the great questions of politics, or morals, or faith, should be checked by the dread of embittered and boundless litigation.

*Id.* at 199.

50. 376 U.S. 254 (1964).

51. *Id.* at 279-80. The Supreme Court has not yet decided whether the actual malice standard applies to nonmedia defendants.

52. See, e.g., *Roth v. United States*, 354 U.S. 476, 482-83 (1957); *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952). See generally L. ELDREDGE, *supra* note 1, §§ 49-50; *New York Times v. Sullivan*, 376 U.S. 254, 268 & n.6 (1964) (discussing the law before *New York Times*).

53. 376 U.S. at 279.

freedoms of expression are to have the 'breathing space' that they 'need to survive.'"<sup>54</sup>

However, the Court indicated that free speech was not absolute, and must be balanced against the interests of the defamed individual. Accordingly, the Court held that plaintiffs who are public officials can recover only if they prove "actual malice." In other words, such plaintiffs must prove with "convincing clarity" that the defendant's statement was made "with knowledge that it was false, or with reckless disregard of whether it was false or not."<sup>55</sup>

The Court subsequently extended the same balancing of interests approach to other situations. In *Curtis Publishing Co. v. Butts*,<sup>56</sup> the actual malice standard was extended to those cases in which the plaintiff is a "public figure."<sup>57</sup> In *Gertz v. Robert Welch, Inc.*,<sup>58</sup> the Court indicated that even defamation of private individuals is entitled to constitutional protection. Under *Gertz*, private plaintiffs may not recover for defamation absent some showing of fault on the part of the defendant,<sup>59</sup> and are not entitled to punitive damages unless they can prove the defendant acted with actual malice.<sup>60</sup> In addition, *Gertz* held that all plaintiffs—public and private—must show actual injury in order to recover.<sup>61</sup>

Thus, the Court in *New York Times* and the later cases required plaintiffs to prove actual injury as well as the defendant's culpability. In imposing these requirements, the Court was balancing the competing, important interests in defamation cases. In contrast, the group defamation rule does not attempt to accommodate the competing interests. By barring defamation actions by members of large groups, the rule gives no credence to a group member's interest in reputation. Thus, the rule is at variance with the spirit of the recent Supreme Court cases.

Moreover, in light of the difficulty of meeting the requirements

54. *Id.* at 271-72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

55. *Id.* at 279-80, 285-86. "Public officials" are "those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) (footnote omitted). For a discussion of persons held to be public officials, see R. SACK, *supra* note 6, § V.2.1.

56. 388 U.S. 130 (1967).

57. "Public figures" include those who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974), and those who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved," *id.* See generally R. SACK, *supra* note 6, § V.3.1.

58. 418 U.S. 323 (1974).

59. *Id.* at 347-48. Once again, however, it is unclear whether the *Gertz* standard applies to nonmedia defendants, and courts are split on the question. See generally R. SACK, *supra* note 6, § V.9.4.

60. 418 U.S. at 349-50.

61. *Id.*

imposed by *New York Times* and its progeny, there is no need to adhere to a rule barring an entire class of suits in order to protect the quality of public debate. The requirements apply in cases of group defamation, and provide ample safeguards against the impairment of free expression. As many commentators have noted, the actual malice standard, which under the guidelines proposed by this Comment would be applicable in a large number of individual actions for group defamation,<sup>62</sup> is difficult to satisfy.<sup>63</sup> Depending on the standard adopted by a particular jurisdiction, it may also be hard to establish the requisite element of fault in suits by private persons.<sup>64</sup> Thus, the group defamation rule is unjustifiably stricter than the Constitution requires.

Finally, the Supreme Court has lately accorded increased weight to state interests in striking the balance between state and federal powers.<sup>65</sup> This trend has extended to defamation law, manifesting itself first in *Gertz*<sup>66</sup> and again in later decisions, where the Court has recon-

62. See *infra* notes 116-25 and accompanying text.

63. See, e.g., R. SACK, *supra* note 6, at xxv-xxvi; *id.* §§ 1.3, V.5.1.2, V.2.2-V.3. See also Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 867-68, 330 N.E.2d 161, 173 (1975) (subjective actual malice standard of *New York Times* is conceptually narrower than objective criminal recklessness).

The actual malice standard is particularly difficult to meet because it focuses on subjective factors, see R. SACK, *supra* note 6, § V.5.1.2, and must be proven with "convincing clarity" rather than by a mere preponderance of the evidence. *New York Times v. Sullivan*, 376 U.S. 254, 285-86 (1963).

64. Although *Gertz* held only that states may not impose liability without fault for defamation of private individuals, leaving it to each state to define for itself the appropriate standard of liability in such cases, several states have adopted the actual malice standard (or versions thereof) in defamation actions brought by private plaintiffs, at least where the defamation alleged concerns matters of public or general interest. See, e.g., *Gay v. Williams*, 486 F. Supp. 12 (D. Alaska 1979). Several other states have adopted a negligence standard, but where a media defendant is involved, some have chosen to define that standard in terms of whether the defendant departed from the customary practice in the industry. *Peagler v. Phoenix Newspapers*, 114 Ariz. 309, 560 P.2d 1216 (1977); *Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 321 N.E.2d 580 (1974), *cert. denied*, 424 U.S. 913 (1976); *Jacron Sales v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976). See generally R. SACK, *supra* note 6, § V.9.

65. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1068-69 & nn.18-20 (1977) (detailing the recent increase in concern for states' rights evidenced in the Supreme Court and the nation in general).

66. In *Gertz*, the Supreme Court stated:

The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose, for, as MR. JUSTICE STEWART has reminded us, the individual's right to the protection of his own good name

"reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system."

418 U.S. at 341 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1960) (Stewart, J., concurring)).

firmed the importance of state interests in protecting private reputation.<sup>67</sup> These recent decisions suggest that the automatic resolution in the defendant's favor of the conflicting constitutional and private interests in group defamation cases may be out of step with the general trend of defamation law, and should therefore be reevaluated.

### C. *The Threat of Increased Litigation*

The argument that allowing individual actions for group defamation would overburden the courts needs no lengthy analysis. The courts exist to resolve disputes and to provide redress for the injuries of those who come before them. In addition, courts are practiced at detecting frivolous claims and either disposing of them before trial is reached,<sup>68</sup> or exerting influence to bring about a voluntary pretrial resolution. And even if permitting individual actions would produce a flood of new lawsuits—an unlikely result<sup>69</sup>—the courts or legislatures could fashion a joinder rule that would require shared issues to be tried together in all actions arising from the same instance of defamation.<sup>70</sup>

The threat of increased litigation argument, like the chilling of expression and the lack of harm arguments, is a deficient justification for the group defamation rule. These justifications do not take into account the fact that Supreme Court precedent from the last twenty years provides a sufficient analytical basis for all defamation actions, including cases of group defamation. Therefore, the group defamation rule should be abandoned, and defamed group members should be ac-

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67. See, e.g., *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 164-65 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111, 133-36 (1979); *Herbert v. Lando*, 441 U.S. 153, 158-60 (1979). See also Van Alstyne, *The First Amendment and the Free Press: A Comment on Some New Trends and Some Old Theories*, 9 HOFSTRA L. REV. 1, 9 (1980) ("Lately, free-speech and free-press rights have run into a new mood [in the Supreme Court]—a mood that esteems repute more dearly than speech . . .").

68. For instance, courts may dismiss an action when the plaintiff's allegations demonstrate no cause of action, or grant summary judgment when the defendant has adequately established a defense that defeats the plaintiff's claims, or when the evidence inustered by the plaintiff is legally insufficient to sustain the action. The plaintiff's burden of proof in defamation cases has become increasingly harder to meet in recent years. See *supra* notes 50-61 and accompanying text. As a result, defendants should have little difficulty in obtaining summary judgment in cases where the plaintiff's claim is warrantless.

69. As a practical matter, the difficulty of meeting the proof requirements in defamation actions (especially those relating to malice, lack of privilege, and special damages, where required, as well as actual injury) makes it unlikely that a change in the group defamation rules would result in any significant amount of new litigation. Beyond this, individual group members may find it economically advantageous to join their claims, where they may do so, thus minimizing the additional burden courts would have to bear.

70. At least one other commentator has suggested joinder of claims as a way to alleviate the burdens that might result from a multiplicity of lawsuits based on a single instance of defamation. See Note, *supra* note 16, at 1328-29.

corded relief. The next Part analyzes forms of relief that have been suggested by courts and commentators.

### III

#### POSSIBLE AVENUES OF RELIEF

An injured member of a group that has been defamed may pursue various avenues of relief. He can try to fit into one of the exceptions to the group defamation rule. If neither of these applies, the courts and literature have suggested other possible avenues: an action by the defamed group itself; criminal prosecution of the defendant; individual suits for equitable relief; and individual pursuit of redress under other causes of action. This Part examines these suggested forms of relief, and concludes that none provides a viable solution for individuals injured by group defamation.

##### *A. The Exceptions*

As previously noted, the two exceptions to the general rule prohibiting individual actions for group defamation are the small group exception and the specific application exception. The first allows members of small groups to sue individually for personal harms resulting from libel or slander directed at their group.<sup>71</sup> The second permits a group member to sue if the circumstances under which the defamatory statement was made could lead a reasonable person to understand that the statement specifically referred to the plaintiff.<sup>72</sup>

The small group exception suffers from two main inadequacies. First, the limit of group size bears no convincing relationship to the harms against which defamation law protects. Commentators agree that the small group exception is irrational;<sup>73</sup> yet, only two American courts have ventured to reject group size as a controlling factor.<sup>74</sup> It may be true in some cases that the "suspicion" cast upon,<sup>75</sup> and therefore the harm suffered by, individual members of a defamed group decreases as group size increases. However, this does not justify barring all actions by members of groups consisting of more than twenty-five persons. Group size should be a factor in the determination of whether

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71. See *supra* notes 19-23 and accompanying text.

72. See *supra* notes 24-26 and accompanying text.

73. See, e.g., *L. ELDREDGE*, *supra* note 1, § 10, at 55-64; *Brown & Stern*, *supra* note 28, at 435-36; *Wilner*, *supra* note 8, at 428-29.

74. *Brady v. Ottaway Newspapers, Inc.*, 84 A.D.2d 226, 445 N.Y.S.2d 786 (1981); *Fawcett Publications, Inc. v. Morris*, 377 P.2d 42 (Okla. 1962), *cert. denied*, 376 U.S. 513 (1964). See *supra* note 23.

75. One commentator suggests that the "intensity of the suspicion cast upon the plaintiff" should determine whether a statement defamatory of a group can serve as the basis of an action by an individual member. Note, *supra* note 16, at 1325.

an individual member has been implicated and harmed.<sup>76</sup> But a strict bar based on any particular group size is arbitrary and unfair.<sup>77</sup>

Second, the exception ignores factors other than size that may affect whether a reasonable person could understand the statement to apply to individual group members. For instance, a statement that each prospective member of a certain group is required to commit an act of violence against a black person can inflict the same amount of harm on each group member, regardless of whether the group has twenty or two hundred members. This is because the statement implicates and is inclusive of each and every group member.<sup>78</sup>

The specific application exception provides even less relief from the general rule of group defamation than does the small group exception. As noted above,<sup>79</sup> it is not actually an exception to the general rule; rather it only allows an individual to maintain an action when the statement, though disguised as a group reference, is reasonably understood to be directed at a particular individual.<sup>80</sup> Thus, this exception provides no redress to a group member injured because his group, not he, was defamed.

### B. *Actions by the Defamed Entity*

Permitting a defamation suit by the defamed group as an entity<sup>81</sup> answers several of the problems raised by group defamation cases. For instance, a suit by the defamed entity would not present the "of and concerning" dilemma, since the defamation would literally be of and concerning the plaintiff (the group). This approach would also avoid the multiplicity of lawsuits that courts fear would result if individual actions were permitted, and would avoid the chill that some believe would arise from the specter of multiple suits.

Nonetheless, as an alternative to permitting individual group members to sue and recover for group defamations, group actions have

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76. See *infra* notes 112-15 and accompanying text.

77. Especially irrational is the extension of the exception adopted by some jurisdictions that permit individual group members to maintain actions even though the defamation is directed at only *part* of the group, while still denying members of large groups the opportunity to prove and recover for their individual injuries arising from defamation directed at all the group's members. See *supra* notes 22-23 and accompanying text.

78. Other factors logically affecting how much an audience might attribute defamation to individual group members include how easily the members can be identified as belonging to the group, how well known the individual members are, and how strongly worded the defamation was. See *Fawcett Publications, Inc. v. Morris*, 377 P.2d 42, 51-52 (Okla. 1962), *cert. denied*, 376 U.S. 513 (1964); Note, *supra* note 16, at 1325-26. See *infra* notes 112-15 and accompanying text.

79. See *supra* text accompanying notes 24-26.

80. See *supra* note 26 (discussing *United Medical Laboratories v. CBS*, 404 F.2d 706 (9th Cir. 1968), *cert. denied*, 394 U.S. 921 (1969)).

81. The commentators who have advocated this alternative include Reisman and Tanenhaus. See Reisman, *supra* note 11, at 756-57; Tanenhaus, *supra* note 30, at 265.

certain shortcomings. First, not all groups suffering harm from defamation are able to bring actions to recover for such damage. The capacity of a group to sue for defamation depends on whether the jurisdiction in which it desires to sue recognizes it as an entity capable of bringing an action.<sup>82</sup> In addition, some groups are unable to bring suit because they are too unorganized or internally divided to take cohesive action.<sup>83</sup> Second, group actions are inadequate because for a group to sue, the defamation must be of the group as a whole, and not just of a certain subgroup. For example, in *Los Angeles Fire & Police Protective League v. Rogers*,<sup>84</sup> the unincorporated association of all members of the Los Angeles Fire and Police Departments did not have standing to sue where the defamation in question concerned only the police officers, not the firefighters. Finally, a group suit would not allow group members to recover personally for damage done to their individual reputations or for mental distress. By leaving subgroups and individuals without a remedy for reputational harms, the group suit fails to provide a satisfactory solution.

### C. Criminal Prosecution

A possible solution occasionally pursued in the past is punishment of the defendant under a criminal defamation statute.<sup>85</sup> However, this possibility raises substantial problems. First and most significantly, the courts and critics regard such statutes to be of doubtful constitutionality. Although in *Beauharnais v. Illinois*,<sup>86</sup> the Supreme Court upheld

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82. See RESTATEMENT (SECOND) OF TORTS § 562 & comment a (1976). While some jurisdictions permit unincorporated associations to maintain actions, others do not. Moreover, many groups will not even meet the legal definition of an unincorporated association.

"Involuntary" groups appear especially unlikely to be permitted to sue. Involuntary groups are those whose constituents have not knowingly formed a group, and who share no common group name or purpose, but who still constitute a group by virtue of their similar positions, similar jobs, businesses or traits, or participation in similar activities. Such groups would include a collection of independent parking lot businesses, see *Service Parking Corp. v. Washington Times Co.*, 92 F.2d 502 (D.C. Cir. 1937), a department store's staff of salespeople, see *Neiman-Marcus v. Lait*, 13 F.R.D. 311 (S.D.N.Y. 1952), and "people who are unable to sell their devalued buildings," see *Granger v. Time, Inc.*, 174 Mont. 42, 44, 568 P.2d 535, 537 (1977).

83. See *Reisman*, *supra* note 11, at 773. Most "involuntary" groups, *supra* note 82, probably lack the cohesion collectively to instigate a lawsuit.

84. 7 Cal. App. 3d 419; 86 Cal. Rptr. 623 (1970).

85. See, e.g., *Beauharnais v. Illinois*, 343 U.S. 250 (1952), affirming a criminal conviction under an Illinois statute that made it a crime publicly to exhibit or publish any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which . . . exposes the citizens . . . to contempt, derision, or obloquy or which is productive of breach of the peace or riots.

*Id.* at 251 (citing Act of June 29, 1917, § 1, 1917 Ill. Laws 362, 363, repealed by Act of June 30, 1961, § 35-1, 1961 Ill. Laws 1983, 2044). See generally Leavy, *Protection from Group and Class Defamation by Extremists*, 40 L.A.B. BULL. 23, 25-27 (1964).

86. 343 U.S. 250 (1952).



an Illinois criminal statute outlawing the publication of matter defamatory of racial or religious groups, that decision has been questioned. The case was decided by a five-to-four margin, with strong dissents,<sup>87</sup> and the Supreme Court has never relied on it as controlling precedent. In addition, the Supreme Court itself,<sup>88</sup> and at least three circuit courts<sup>89</sup> have questioned the validity of the decision.

On a more practical level, criminal defamation laws are virtually nonexistent in modern criminal codes.<sup>90</sup> But even if such statutes exist and are constitutional, no group libel is actionable under them unless it presents a "clear and present danger" of causing violence.<sup>91</sup> It is thus evident that if criminal actions for group defamation can be maintained at all, they will only be permitted under a very limited set of circumstances.

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87. Justice Black found the statute to be an unconstitutional censorship of the contents of the defamatory publications. 343 U.S. 267-75 (Black, J., dissenting). Justice Reed said that the statute was unconstitutionally vague. 343 U.S. at 277-84 (Reed, J., dissenting). Justice Douglas argued that the first amendment mandates that no restraints be put on free speech. 343 U.S. at 284-87 (Douglas, J., dissenting). Justice Jackson stated that states should have the right to impose group libel sanctions, provided they allow for a defense of truth, consider privileges, and apply the "clear and present danger" test. 343 U.S. at 287-305 (Jackson, J., dissenting).

88. In *Garrison v. Louisiana*, 379 U.S. 64 (1964), the Supreme Court found a general criminal libel statute unconstitutional because it did not contain the constitutional requirement that the libel pose a clear and present danger of causing a breach of the peace. *Id.* at 70. Justice Brennan's majority opinion quoted from the *Model Penal Code's* comment disapproving criminal libel statutes:

It goes without saying that penal sanctions cannot be justified merely by the fact that defamation is evil or damaging to a person in ways that entitle him to maintain a civil suit. Usually we reserve the criminal law for harmful behavior which exceptionally disturbs the community's sense of security. . . . It seems evident that personal calumny falls in neither of these classes in the U.S.A., that it is therefore inappropriate for penal control, and that this probably accounts for the paucity of prosecutions and the near desuetude of private criminal libel legislation in this country. . . .

*Id.* at 69-70 (quoting MODEL PENAL CODE § 250.7 comments at 44 (Tent. Draft No. 13, 1961)).

89. In *Tollett v. United States*, 485 F.2d 1087 (8th Cir. 1973), the Eighth Circuit questioned the validity of statutes such as that at issue in *Beauharnais* in light of the Supreme Court's decision in *Garrison*. The court also recognized that the interests served by criminal libel statutes—"the public right to tranquility" and "the private right to enjoy integrity of reputation"—do not require criminal libel prosecutions for their protection. *Id.* at 1095-96. Maintenance of the peace cannot serve as a justification for criminal punishment when there is no threat of imminent violence, the court noted, and individuals can protect their reputations through civil suits. *Id.* at 1095. Similarly, the D.C. Circuit, in *Anti-Defamation League of B'nai B'rith v. FCC*, 403 F.2d 169 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 930 (1969), in upholding an FCC decision to renew the license of a radio station that broadcast anti-Semitic material, commented that *Beauharnais* had been left "more aud more barren" by subsequent first amendment cases. *Id.* at 174 n.5. The Seventh Circuit has more recently questioned the constitutionality of the *Beauharnais* decision. *Collin v. Smith*, 578 F.2d 1197, 1204-05 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978). See also *Collin v. Smith*, 447 F. Supp. 676, 693-97 (N.D. Ill.) (discussing *Beauharnais's* limited vitality), *aff'd*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

90. See *Arkes*, *supra* note 28, at 283-84. Only two of these statutes still exist. CONN. GEN. STAT. § 53-37 (West 1960); MASS. ANN. LAWS ch. 272, § 98c (Michie/Law. Co-op. 1980).

91. See *Garrison v. Louisiana*, 379 U.S. 64, 70 (1964).

Finally, criminal punishment is an incomplete remedy for one harmed by defamation of a group to which he belongs. While a criminal action would deter such defamation as effectively as would a civil action, and might lead to the vindication of the plaintiff's reputation, no damages may be sought in a criminal action to compensate the plaintiff for the harm to his reputation or for other injuries suffered as a result of the defamation. Furthermore, since criminal actions are controlled by government prosecutors, this remedy does not even afford the group member control over whether an action is instituted against the defendant.

#### D. *Individual Suits for Equitable Relief*

Another avenue for an injured member of a defamed group would be an individual action for equitable relief, seeking either an injunction, an order compelling retraction, or a declaratory judgment that the defamatory statement was untrue.<sup>92</sup> While equitable actions of this nature have not often been pursued as remedies for defamation, the American Law Institute has recommended that they be given more serious consideration.<sup>93</sup> Although such actions might well aid in restoring the reputation of the defamed group member, courts unwilling to recognize the harms suffered by individual group members as a sufficient basis for an action for damages would probably be similarly disinclined to recognize them as a basis for equitable action.

Moreover, courts tend to consider equitable relief to be generally unsuitable in defamation actions, believing the legal remedy both adequate and appropriate.<sup>94</sup> Additionally, since there is no established practice of bringing declaratory judgment actions for defamation or of seeking orders compelling retraction, it is unclear what rules would apply to such actions, or what difficulties might arise in attempting to establish such claims. For instance, although the constitutionality of compelled retractions has apparently never been tested, the potential for conflict between this remedy and free speech principles is clear.<sup>95</sup> As for declaratory judgment actions, some jurisdictions deny such re-

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92. See RESTATEMENT (SECOND) OF TORTS § 623 note at 326 (1976).

93. *Id.*

94. Annot., 47 A.L.R.2d 715, 716-21, 724-25 (1956).

95. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 254-58 (1974) (containing a broadly worded condemnation of a statute forcing newspapers to publish replies of candidates criticized in editorials). *But see* R. SACK, *supra* note 6, § VII.5.2 (pointing out that two justices concurred in *Tornillo* specifically because the constitutionality of retraction statutes was not addressed and suggesting that the issue may therefore remain open). But even if compelled retractions are constitutional, they are an inadequate remedy, for they cannot reach all those who heard or read the original defamation. Beyond this, retraction has not been treated as a complete substitute for damages, but only as a source of mitigation of harm. See L. ELDREDGE, *supra* note 1, § 96 at 544.

lief even in general defamation actions.<sup>96</sup> Furthermore, courts are hesitant to grant injunctions in first amendment cases, even in those few settings where they may be useful, because such relief may amount to unconstitutional prior restraint.<sup>97</sup> Finally, these remedies do not allow the individual to receive monetary compensation for injuries actually suffered, and thus do not adequately protect individuals' reputations or deter harmful slurs.

### *E. Suits by Individuals Alleging Other Causes of Action*

In an attempt to circumvent the inadequacies of group defamation law, defamation plaintiffs may seek redress through claims for disparagement of goods or services<sup>98</sup> or through claims of intentional infliction of emotional distress. But these causes of action also fall short of providing a satisfying solution.

Claims for disparagement of goods or services present significant hurdles for the plaintiff. First, such actions are appropriate only in a commercial context where the derogatory statement was made concerning the quality of a product or service offered for sale by the plaintiff and resulted in "special," pecuniary damages such as a decline in business or a loss of employment opportunities.<sup>99</sup> Second, plaintiffs suing under a disparagement theory bear a particularly heavy burden of proof, which perhaps explains why this cause of action is rarely pursued even outside the context of group defamation. Not only must the plaintiff prove that the statement published was false and defamatory (as in an action for defamation), but he must also prove (1) lack of privilege; (2) malice; (3) special damages;<sup>100</sup> (4) that the plaintiff's damages resulted directly and immediately from the disparagement; and (5) that the defendant's statement played a "material and substantial part" in inducing others not to deal with the plaintiff.<sup>101</sup> Even when

96. See RESTATEMENT (SECOND) OF TORTS § 623 note at 327-28 (1976).

97. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam); *Near v. Minnesota*, 283 U.S. 697 (1931); Annot., 47 A.L.R.2d 715, 726 (1956). But see *Leavy*, *supra* note 85, at 27-29 (arguing that injunctive relief is merited in cases of group defamation).

98. See, e.g., *Fowler v. Curtis Publishing Co.*, 182 F.2d 377 (D.C. Cir. 1950) (action for both libel and disparagement for publication of article depicting taxicab drivers in plaintiff's city of business as ill-mannered, brazen, and contemptuous of their patrons accompanied by a photograph of taxicab owned by plaintiff).

99. See generally R. SACK, *supra* note 6, § IX.8.3-4.

100. *Id.*; RESTATEMENT (SECOND) OF TORTS §§ 623A, 626 (1976). The special damage requirements are often especially demanding. See, e.g., *Fowler v. Curtis Publishing Co.*, 182 F.2d 377, 379 (D.C. Cir. 1950) (plaintiff must show "either the loss of particular customers by name, or a general diminution in business [along with] extrinsic facts showing that such special damages were the natural and direct result of the false publication") (quoting *Erick Bowman Remedy Co. v. Jensen Salsbery Laboratories*, 17 F.2d 255, 261 (8th Cir. 1926)).

101. *Kirsch v. Barnes*, 153 F. Supp. 260 (N.D. Cal. 1957); *Gardner v. West-Col, Inc.*, 136 Vt.

these onerous requirements are met, the remedy provided by the disparagement action is incomplete, as it does not allow recovery for "general," intangible damages such as emotional distress and harm to personal reputation.<sup>102</sup>

A third problem with disparagement actions is that the "of and concerning" requirement probably bars suits by individual members of a group whose products have been collectively disparaged. One district court has already indicated in dicta that it understands the requirement to apply,<sup>103</sup> and in light of the similarities between defamation and disparagement actions, other courts may be inclined to agree.<sup>104</sup>

One article has proposed that an action for intentional infliction of emotional distress be pursued in group defamation cases.<sup>105</sup> While this approach may be useful in some cases, its utility is limited to a narrow class of actions. Courts generally impose strict culpability requirements, permitting such actions only where the defendant intentionally or recklessly caused the plaintiff mental suffering.<sup>106</sup> Further, the cause of action is normally limited to those cases in which the plaintiff has suffered a severe degree of emotional distress as the result of the defendant's "extreme and dangerous" conduct exceeding all reasonable bounds of decency.<sup>107</sup> These stringent requirements prevent this cause of action from serving as a significant source of recovery for individual harms arising from group defamation.

#### IV THE PROPOSED STANDARD

This Comment proposes that an individual member of a defamed group of any size be permitted to maintain an action for his personal injuries if he can satisfy the requirements of general defamation law. This Part examines those requirements and comments on their application in the context of group defamation.

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381, 392 A.2d 383 (1978); W. PROSSER, *supra* note 19, § 128 at 920. See Annot., 74 A.L.R.3d 298, 301 (1976).

102. See RESTATEMENT (SECOND) OF TORTS § 623A (1976).

103. *Smith-Victor Corp. v. Sylvania Elec. Prods., Inc.*, 242 F. Supp. 302, 307 (N.D. Ill. 1965). However, to support its proposition, the court in *Smith-Victor* cited only *National Refining Co. v. Benzo Gas Motor Fuel Co.*, 20 F.2d 763 (8th Cir.), *cert. denied*, 275 U.S. 570 (1927), an action for libel.

104. See, e.g., *Michigan United Conservation Clubs v. CBS*, 485 F. Supp. 893, 904 (W.D. Mich. 1980), *aff'd*, 665 F.2d 110 (6th Cir. 1981) (reasoning that the false-light invasion of privacy and the defamation causes of action are sufficiently similar to justify applying the "of and concerning" requirement in the former class of actions).

105. See *Brown & Stern*, *supra* note 28, at 29-32.

106. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

107. *Id.*; *Callaraina v. Associates Discount Corp.*, 69 Misc. 2d 287, 329 N.Y.S.2d 711, 714 (1972).

### A. *The Elements*

#### 1. *The "Of and Concerning" Requirement*

This Comment proposes that a plaintiff be allowed to satisfy the "of and concerning" requirement by demonstrating that he is a member of the defamed group, and that a reasonable person could understand the defamation to apply to the plaintiff through his affiliation with the group. While expanding the availability of recovery for defamation by eliminating the arbitrary size limit of the current construction of the "of and concerning" requirement, this rule would still allow the courts to protect defendants from frivolous suits.

The "of and concerning" requirement poses mixed questions of fact and law. To comply with the standards suggested here, judges must refrain from precluding an action solely on the basis of group size. Instead, an individual member's action must be permitted to proceed to the jury if the plaintiff can establish to the satisfaction of the judge<sup>108</sup> that the plaintiff was a member of the group defamed, and that a reasonable person could conclude that the defamation applied to the plaintiff through his affiliation with the group.<sup>109</sup> If the plaintiff does not demonstrate his implication or group affiliation, this rule would allow the court to dismiss the action or render summary judgment in favor of the defendant. Under the proposal, courts could also dismiss suits where the plaintiff presented insufficient evidence of any other element required to maintain a defamation action,<sup>110</sup> or where the statement amounted only to an "impersonal criticism of government" not

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108. This requirement is already imposed on those plaintiffs who seek to maintain individual actions as members of a small group that has been defamed. *Blaser v. Krattiger*, 99 Or. 392, 395, 195 P. 359, 360 (1921); W. PROSSER, *supra* note 19, § 112, at 750.

109. Defamation law already recognizes that an individual may have a cause of action for defamation even if the statement does not obviously disparage him by name, if it could reasonably be understood to so apply. This is the basis for both the small group and specific application exceptions to the general group defamation rule. It is also the basis for the general defamation rule of libel per quod, whereby a person may sue for defamation even where he must plead extrinsic facts and special damages to establish that the statement could reasonably be understood as libelous. R. SACK, *supra* note 6, §§ II.7-II.7.8. The rule proposed here extends and defines the application of these principles in the context of group defamation.

110. To state a cause of action for defamation, a plaintiff must allege that the defendant published a false and unprivileged statement that a reasonable person might consider to refer to the plaintiff and to have injured his reputation. See L. ELDREDGE, *supra* note 1, § 2 at 3. But see R. SACK, *supra* note 6, § VII.2.3 n.28 (whether presumed damages might still be recovered when actual malice is shown remains unsettled); RESTATEMENT (SECOND) OF TORTS § 621 caveat at 319 (1976) (declining to take a position on the issue). Additionally, the Supreme Court's decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), requires all defamation plaintiffs to show they suffered actual injury as a result of the defendant's statement, *id.* at 349. Beyond this, if the publication is not defamatory on its face, or does not come within one of the categories of slander per se, the plaintiff is also required to plead that he has suffered pecuniary damages. R. SACK, *supra* note 6, §§ II.7-II.7.8. Finally, the plaintiff may be required to allege and prove that the defendant was culpable. *Id.* §§ V.1-V.9.4.1.

actionable under *New York Times*.<sup>111</sup>

Under the proposed rule, the court would consider several factors to determine whether the plaintiff's action should proceed. These include: (1) the capacity of the defamation to inflict harm; (2) the degree to which the statement "descends to" or implicates individual group members—that is, how likely it is that a reasonable person would consider the statement to be true of the individual group members, rather than to be true only of the group generally;<sup>112</sup> (3) the size and fluidity of the group's membership as well as the ease with which group members may be identified; and (4) the persuasiveness of the plaintiff's showing that he has in fact sustained an actual injury to his reputation as a result of the defamation.<sup>113</sup>

If the plaintiff's action survives the court's legal determination under the "of and concerning" and other requirements, and assuming that no other legal bars have been found to require dismissal or summary judgment of the action, the issue would then be permitted to proceed to the factfinder. The factfinder would consider the evidence and would make a final determination of whether the defamation was reasonably understood to apply to the plaintiff group member. In so doing, it should be instructed to consider the same factors<sup>114</sup> that the court previously considered.<sup>115</sup>

## 2. *Fault*

The constitutional standards imposed on defamation actions prevent plaintiffs who are public officials or public figures from recovering

111. See *supra* notes 38-46 and accompanying text.

112. With regard to this consideration, statements that appear on their face to be merely careless overgeneralizations, or that otherwise should not reasonably have been taken literally, or which would normally be discounted by the reasonable reader or listener by virtue of common knowledge or experience may not implicate individual group members enough to be actionable.

113. One early commentator suggested that similar factors determine the "intensity of suspicion" that group defamation casts upon individual group members, and should guide courts in deciding whether the defamation is actionable. See Note, *supra* note 16, at 1324-26.

114. See *supra* notes 112-13 and accompanying text.

115. For example, a jury might be instructed as follows:

With regard to the defendant's publication [insert publication] which was made concerning the group of which the plaintiff is a member, you are required to determine whether the statement was also reasonably understood to apply to the plaintiff as a member of the group. In making this determination, you may, but need not, take into consideration such factors as:

(1) Whether, considering the language and content of the statement, an average [reader] [listener] would understand the statement made concerning the group to also be true with regard to the plaintiff;

(2) The size of the group and the ease with which its members can be identified;

(3) The intensity of the harmful nature of the statement; and

(4) The likelihood that the statement was actually understood to be true with regard to the plaintiff as reflected by all the evidence that tends to prove or disprove that the plaintiff's reputation was actually harmed by the statement.

for injuries caused by defamation absent proof that the defendant acted with actual malice.<sup>116</sup> Private plaintiffs must also establish that the defendant acted culpably, although the states are free to define for themselves the standard of fault, as long as they do not impose strict liability.<sup>117</sup> Applied to individual actions for group defamation, these standards provide the necessary safeguards for free and open public debate.

While a group may be composed predominantly of private individuals, the group itself may have attracted intense public interest. In this case, the group has taken on a status distinct from that of its collective members and could be considered a "public figure group." Examples of such groups include the Sierra Club or the National Organization for Women. When a private member of such a group sues, a question arises as to whether the defendant's conduct should be evaluated under the actual malice standard, since the defamation was directed toward a "public figure group," or under the standard applicable to private plaintiffs, since the plaintiff is in fact a private individual.<sup>118</sup> A similar question arises when the defendant has defamed a "private group," such as a homeowners' association, yet the individual group member who sues is either a public figure or a public official.

This Comment proposes that the appropriate standard of liability be determined by the status of the group. The Supreme Court created the actual malice standard to encourage vigorous public debate and to protect the rights of those who would speak out on issues of public concern.<sup>119</sup> When the defamation is directed at a group in the public eye, these considerations come into play, just as they do when the defamation is of an individual in the public eye. Similarly, when the defamation concerns a "private group," society's interest in the defendant's publication decreases, and the interest of both the group and its members in maintaining their good reputations increase in importance.<sup>120</sup>

It could be argued that there is a tension between the rule proposed here and the policy considerations relied on by the Supreme Court in *Gertz* to justify its choice of fault standards in individual defamation cases. *Gertz* set forth two reasons why the actual malice standard should not be extended to private individuals. First, public officials and public figures have greater access to the media than do

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116. See *supra* notes 50-57 and accompanying text.

117. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974). See *supra* notes 58-61 and accompanying text.

118. "Public official groups" are those groups composed of individual public officials. Therefore, individual actions by group members for defamation directed at such a group would not present a dilemma as to the standard of conduct to be established.

119. See *supra* text accompanying notes 50-61.

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

private individuals, and can therefore more easily rebut defamatory statements made about them.<sup>121</sup> Because private individuals are thus comparatively more vulnerable to injury, the state's interest in protecting them is greater.<sup>122</sup> Second, public officials, by "seek[ing] governmental office," and public figures, by affirmatively "thrust[ing] themselves to the forefront of particular public controversies," have taken on a risk of harm from defamatory falsehood.<sup>123</sup> The private individual, on the other hand, "has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood."<sup>124</sup>

In light of this reasoning, the rule suggested here may appear unfair to "private" plaintiffs who are members of public groups. However, two considerations mitigate the apparent injustice. First, the "public figure group" of which the plaintiff is a member may be willing to devote its group resources to countering the defamation, which would permit the individual plaintiff at least vicarious access to the media to rebut the false charges. Second, private persons who accept membership in a "public figure group" have assumed the burdens, as well as the benefits, of voluntary association with a controversial or well-known group. And though "public" plaintiffs who are members of private groups would have a lighter burden of proof than if they had been defamed personally, this is not unfair to the defendant. As the defendant defamed a private entity, society's interest in the publication is less than if the defamation had been of a public entity, and thus the actual malice standard should not apply.<sup>125</sup>

### 3. Actual Injury

The rule set forth in *Gertz* requiring defamation plaintiffs to demonstrate actual injury as a prerequisite to recovery, and limiting their damages to such injury (unless actual malice is proven)<sup>126</sup> would also apply to actions brought by members of defamed groups. The requirement that a group member demonstrate that he has sustained actual injury as a result of the group defamation would also answer the courts' concern that permitting individual actions would subject those who defame groups to liability for imaginary harms.<sup>127</sup> Additionally, it is only fair to allow individual group members who can demonstrate

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121. *Id.* at 344.

122. *Id.*

123. *Id.* at 344-45.

124. *Id.*

125. *See supra* text accompanying note 120.

126. *See supra* notes 36-37 and accompanying text.

127. *See supra* text accompanying notes 8-9.



that the defendant's statement has actually harmed them to proceed just as any other plaintiff.

#### 4. Causation

Before *Gertz* instituted the requirement that defamation plaintiffs must prove actual injury in order to recover, damage to reputation was presumed from the defamation itself<sup>128</sup> and the plaintiff was able to recover general damages. However, when the publication was not defamatory on its face, plaintiffs had to prove special damages to recover. A plaintiff who wished to prove special damages had to demonstrate that such damages proximately resulted from the defamation.<sup>129</sup> This requirement ensured that the speaker was liable only for harm caused by his conduct, and not for harm that the plaintiff would have suffered even absent the defamation. This causation requirement for special damages has not been mentioned in cases and commentary after *Gertz* in the context of actual injury.

Under the standards proposed in this Comment, members of groups that have been defamed must not only prove that they suffered actual injury, but also that such injury was a proximate result of the defamation. This requirement would guard against the possibility that those who defame groups would be punished for society's ills. For example, one who publishes an article defamatory of lawyers should not be liable to an individual lawyer whose business is slow. Unless that lawyer can prove that her loss of business was proximately caused by the defendant's publication, it is most likely that society's general mistrust of lawyers was at the root of the individual lawyer's loss of business.

#### B. Damages

One criticism of allowing individual actions for group defamation stems from the fear that a multiplicity of actions could expose defendants to liability severely out of proportion to the harm the speakers have actually inflicted. The size of recent jury verdicts in defamation actions is a valid concern, and one that has been the subject of much commentary.<sup>130</sup> The solution to this problem as it pertains to general defamation law is beyond the scope of this Comment, for it must be derived from an overall evaluation by the courts and legislatures of various means to control poorly exercised jury discretion.

Fortunately, however, several approaches exist to minimize the

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128. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

129. L. ELDREDGE, *supra* note 1, § 32; W. PROSSER, *supra* note 19, § 112 at 762.

130. For one commentator's view of this problem, see R. SACK, *supra* note 6, § VII.2.4. See also *id.* VII.4.1 app. at 365-68.

possibility of overcompensation in the context of individual actions for group defamation. First, judges must instruct juries that compensatory damages are limited to actual injury, as demonstrated by competent evidence.<sup>131</sup> In this regard, judges should carefully instruct juries to consider all the circumstances of the defamation in determining damages,<sup>132</sup> including the extent to which the plaintiff was personally implicated by the statement, the intensity and harmful nature of the words spoken, and group size. Second, judges should aggressively exercise their power of remittitur to reduce overgenerous verdicts. Finally, legislatures should examine the possibility of fashioning some form of joinder requirement to further minimize the possibility that juries will view the injuries suffered by the individual group member in isolation, rather than as deriving from defamation of a larger group. By employing these safeguards, an element of supervision and control over jury discretion may be introduced that would minimize the unique liability risks posed by the recognition of individual actions for group defamation.

#### CONCLUSION

Group defamation is an evil that may harm not only the group itself, but also individual group members. The standards proposed by this Comment would allow group members to maintain individual actions and to recover for group defamation where they could establish that, under the circumstances, the defamation was reasonably understood to apply to the plaintiff as a member of the group. In addition, these plaintiffs would have to satisfy all the other requirements imposed by general defamation law. While permitting individual actions might appear to pose dangers of unwarranted or excessive liability and impaired public discussion, careful application of the rules of defamation law developed both at common law and under recent constitutional decisions would adequately control these risks. The interests of speakers would thus be protected, while individual group members would be afforded redress for harms they suffered as a result of group defamation.

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131. *See supra* text accompanying note 126.

132. *See supra* note 115.

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