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# A Declaratory Judgment Alternative to Current Libel Law

Marc A. Franklin†

The high-visibility libel cases of the last few years have focused public attention on the sensational aspects of defamation law. One by-product has been renewed criticism of the theory and practice of libel law. This Article presents a statutory scheme based, with minor changes, on a proposal I sketched several years ago.<sup>1</sup> Events since then, primarily the emergence of legislative proposals at the Congressional<sup>2</sup> and state levels<sup>3</sup> and recent commentary on my description,<sup>4</sup> warrant this step.

Plaintiffs, defendants, and observers have different perspectives on what is wrong with today's libel law. Some who think current law insufficiently protective of defendants stress the number of "groundless" cases in the courts and the enormous defense costs even in the vast majority of cases in which defendants prevail. Others emphasize the great danger to the survival of the "grass roots" press posed by suits brought by powerful plaintiffs against smaller media.<sup>5</sup> On the other hand, some who think that the law is too restrictive to protect plaintiffs point to the paradigm of the ordinary citizen who is hurt by errors in the urban newspaper.<sup>6</sup> Others focus on the citizen who is discouraged from seeking office or serving in government by fear of being libeled without recourse.<sup>7</sup>

Some plaintiffs seek recourse in terms of monetary damages; others

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1. Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. REV. 1 (1983).

2. See H.R. 2846, 99th Cong., 1st Sess. 1985 (introduced by Representative Charles Schumer) reprinted *infra* at p. 832 [hereinafter Schumer bill].

3. *E.g.*, S. 1979, 1985-86 Cal. Leg., Reg. Sess. (1986) (introduced by Senator Bill Lockyer).

4. *E.g.*, Cendali, *Of Things to Come—The Actual Impact of Herbert v. Lando and a Proposed National Correction Statute*, 22 HARV. J. ON LEGIS. 441, 478-79 (1985).

5. This concern also applies to suits brought by powerful plaintiffs against nonmedia defendants, such as political and tenant groups. *E.g.*, E. PELL, THE BIG CHILL 159-88 (1984).

6. *E.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 392 (1974) (White, J., concurring) (focus on the "ordinary citizens" and "defenseless individual" hurt by "the owners of the press" who, along with "stockholders," can better bear the burdens of libel).

7. B. FEIN, NEW YORK TIMES V. SULLIVAN: AN OBSTACLE TO ENLIGHTENED PUBLIC DISCOURSE AND GOVERNMENT RESPONSIVENESS TO THE PEOPLE 9-11 (1984).

may want only a chance to restore their reputations.<sup>8</sup> Even more so than in other civil actions, pecuniary awards are not the only form of recourse for defamation. A declaratory judgment approach offers a promising remedy for the parties and society.

The motivating force behind my critique and this draft proposal was my sense that libel law, particularly media libel law, has developed into a high-stakes game that serves the purposes of neither the parties nor the public.<sup>9</sup> I found the problem to be particularly acute for small media.<sup>10</sup> My goal was to frame a proposal that provides an alternative within the boundaries set by the Supreme Court's decisions.

The first step in developing alternatives to current libel law is to decide which goals have top priority and how much importance they deserve. Several are likely to warrant some weight. How important is it to adjudicate the truth or falsity of the defamation? How important is it to deter serious misbehavior at the prepublication stage? How important is it to protect defendants from fear of adverse monetary awards despite their prepublication behavior? How important is it to prevent extended pretrial discovery of editorial practices? How important is it to let plaintiffs seek damages where they can prove no special damages? In what situations can postpublication behavior best undo existing harm?

Ranking these goals is complicated by the fact that neither plaintiffs nor defendants are homogeneous groups. Plaintiffs vary from people who want only to clear their names, to those who feel the need to recover special damages they have suffered, to those who feel that they deserve general damages, to those who care more about intimidating the press than about gaining redress. Among defendants, there are media and nonmedia groups. In the media cluster, there are large and small media, profitable and unprofitable media. Of course, even among the large and profitable media, some focus on traditional news reporting, others on in-depth magazine stories, and others on sex or gossip. The nonmedia cases involve defendants engaged in political activities, former employers writing reference letters, and competitors fighting over business. It is difficult to develop legislation that takes account of these vast differences.

A second set of issues to be faced in developing alternatives is related to the first but is more technical, involving such questions as whether any changes should be state or federal, legislative or judicial, mandatory or optional. Further, should the legislature (or the courts)

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8. See Soloski, *The Study and the Libel Plaintiff: Who Sues for Libel?*, 71 IOWA L. REV. 217, 220 (1985) (summarizing results of Iowa study, based on interviews of 164 libel plaintiffs).

9. Franklin, *supra* note 1, at 2-22.

10. *Id.* at 14-22; see also Nagel, *How to Stop Libel Suits and Still Protect Individual Reputation*, WASH. MONTHLY, Nov. 1985, at 12, 18 (proposing special rules for a "news organization that is too poor to afford even legal fees").

mandate a single remedy for a particular situation? If optional remedies are provided, who gets the option?

Addressing the problem of remedies, the role given to the damage action for libel depends on the perceived importance of a variety of factors. Traditionally, tort actions have achieved two basic goals: (1) compensating (usually innocent) plaintiffs who have suffered cognizable harm and (2) imposing costs on defendants to make them aware that their conduct has fallen below the socially acceptable level. When a damage award achieves both goals at the same time, the system works fairly smoothly. There is tension, however, when a damage award achieves only one of the goals, as is often the case in libel law. Although the idea of contributory negligence seems inapplicable to this area,<sup>11</sup> it is common to have two innocent parties in cases in which the defendant's conduct has not been socially unacceptable. In libel law, we are concerned about the dangers of unwarranted liability because of the chilling effect upon potential speakers.<sup>12</sup> Fortunately, in libel law, unlike personal-injury law, the injuries suffered by innocent victims often can be redressed in large part by remedies other than damages.

All of these considerations should shape the search for alternatives. Most current dissatisfaction with libel law is due to the failure of state courts and legislatures to appreciate these considerations and act within their respective domains to reduce libel law's high stakes. The Supreme Court alone cannot fine tune a system as complex as libel law. As long as plaintiffs have no alternative to a damage suit, it may not take much to induce them to sue. If they had a more effective way of restoring their reputations, they might not be so quick to trigger this expensive remedy, which is generally unsuccessful for plaintiffs and poses great danger for defendants.

Rather than discuss these competing goals in the abstract or even in the context of libel reform, I think it better to present my proposal, which is framed in a sequence that roughly parallels the Schumer bill<sup>13</sup> to permit easier comparison. Next, I discuss clarifications and changes from my earlier proposal. I then respond to criticism of the declaratory

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11. *But see* Note, *In Defense of Fault in Defamation Law*, 88 YALE L.J. 1735, 1747-49 (1979) (proposing to exclude evidence "that a plaintiff refused to disclose to the defendant in response to detailed defamatory charges and that was not otherwise reasonably available at the time of publication").

12. Franklin, *supra* note 1, at 13-22; Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 CALIF. L. REV. 847 (1986). *See generally* Schauer, *Fear, Risk, and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U.L. REV. 685 (1978) (discussing the role of the chilling-effect doctrine in first amendment jurisprudence, including libel law). Although I think the phrase "steering wide" captures better the concern of the Court in this area, *see New York Times v. Sullivan*, 376 U.S. 254, 279 (1963) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1957)), the phrase "chilling effect" for better or worse has become the dominant phrase.

13. *Supra* note 2.

judgment approach. Finally, I set forth the Schumer bill and compare the two.<sup>14</sup>

## I THE PROPOSAL

### The Plaintiff's Option Libel Reform Act<sup>15</sup>

#### SECTION 1. ACTION FOR DECLARATORY JUDGMENT THAT STATEMENT IS FALSE AND DEFAMATORY.

##### (a) CAUSE OF ACTION.

(1) Any person who is the subject of any defamation may bring an action in any court of competent jurisdiction for a declaratory judgment that such publication or broadcast was false and defamatory.

(2) Paragraph (1) shall not be construed to require proof of the state of mind of the defendant.

(3) No damages shall be awarded in such an action.

(b) BURDEN OF PROOF. The plaintiff seeking a declaratory judgment under subsection (a) shall bear the burden of proving by clear and convincing evidence each element of the cause of action described in subsection (a). In an action under subsection (a), a report of a statement made by an identified source not associated with the defendant shall not be deemed false if it is accurately reported.

(c) DEFENSES. Privileges that already exist at common law or by statute, including but not limited to the privilege of fair and accurate report, shall apply to actions brought under this Section.

(d) BAR TO CERTAIN CLAIMS. A plaintiff who brings an action for a declaratory judgment under subsection (a) shall be forever barred from asserting any other claim or cause of action arising out of a publication or broadcast which is the subject of such action.

#### SECTION 2. LIMITATION ON ACTION.

(a) Any action arising out of a publication or broadcast which is alleged to be false and defamatory must be commenced not later than one year after the first date of such publication or broadcast.

(b) It shall be a complete defense to an action brought under Section 1 that the defendant published or broadcast an appropriate retraction before the action was filed.

(c) No pretrial discovery of any sort shall be allowed in any action brought under Section 1.

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14. Professor Barrett comments at length on my proposal and on the Schumer bill, *supra* note 12. For a comparison of the financial impact of these proposals on publishers, see Franklin, *The Financial Impact of Libel Reform on Repeat Players* in *THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS* (E. Dennis & E. Noam eds.) (forthcoming).

15. This proposal will be referred to herein as *POLRA*.

(d) When setting trial dates, courts shall give actions brought under Section 1 priority over other civil actions.

### SECTION 3. PROOF AND RECOVERY IN DAMAGE ACTIONS.

(a) In any action for damages for libel or slander or false-light invasion of privacy, the plaintiff may recover no damages unless the plaintiff proves both falsity and actual malice by clear and convincing evidence.

(b) Punitive damages may not be awarded in any action for libel or slander or false-light invasion of privacy.

(c) A plaintiff who brings an action for damages for libel or slander or false-light invasion of privacy shall be forever barred from asserting any other claim or cause of action arising out of a publication or broadcast which is the subject of such action.

### SECTION 4. ATTORNEYS' FEES.

(a) GENERAL RULE. Except as provided in subsection (b), in any action arising out of a publication or broadcast which is alleged to be false and defamatory, the court shall award the prevailing party reasonable attorneys' fees.

#### (b) EXCEPTIONS.

(1) In an action for damages, a prevailing defendant shall not be awarded attorneys' fees if the plaintiff sustained special damages and the action is found to have been brought and maintained with a reasonable chance of success.

(2) In an action brought under Section 1, a prevailing defendant shall not be awarded attorneys' fees if the plaintiff has brought and maintained the action with a reasonable chance of success and presented, or formally tried to present, to the defendant evidence that the statement was false and defamatory before the action was filed.

(3) In an action brought under Section 1, a prevailing plaintiff shall not be awarded attorneys' fees if the plaintiff has prevailed on the basis of evidence that the plaintiff did not present, or formally try to present, to the defendant before the action was filed.

(4) In any action brought under Section 1 in which the defendant has made an appropriate retraction after the filing of suit, the plaintiff shall be treated as the prevailing party up to that point and the defendant shall be treated as the prevailing party after that point.

### SECTION 5. EFFECTIVE DATE.

This Act shall apply to any cause of action that arises on or after the date of the enactment of this Act.

## II EXPLANATORY COMMENTS

My goal has been to put into statutory framework the prose objec-

tives asserted in my original critique.<sup>16</sup> A few changes and clarifications should be noted.

### A. Elimination of the Praction Conference

This proposal does not contain a provision for a praction conference as my earlier article suggested. In light of the results of the Iowa Study<sup>17</sup> and the criticisms of Professor Barrett,<sup>18</sup> I now think that, although such a conference is desirable, the marginal gain does not justify requiring all plaintiffs to present their evidence of falsity to defendants in advance of a declaratory judgment action.<sup>19</sup> Mandating such conferences may also be unnecessary. First, since most plaintiffs seek corrections immediately after the appearance of the claimed error<sup>20</sup> and state that they would be satisfied with a correction,<sup>21</sup> they probably will present evidence of falsity to defendants voluntarily prior to suing. Second, the proposal uses fee incentives to encourage plaintiffs to present their evidence of falsity at an early stage.<sup>22</sup> Some plaintiffs who currently harass defendants with damage actions may also try to use the declaratory judgment action for harassment. Plaintiffs using the declaratory judgment action may hope for a default, which could make the defendant look even worse than he now looks after a successful but expensive

16. See Franklin, *supra* note 1, at 35-49.

17. Bezanson, Cranberg & Soloski, *Libel Law and the Press: Setting the Record Straight*, 71 IOWA L. REV. 215-33 (1985).

18. Barrett, *supra* note 12, at 877-78.

19. In my earlier Article, *supra* note 1, I referred to the nonmonetary action as a "restoration" action. Contrary to Professor Barrett's hunch, *supra* note 12, at 848-49, I did not choose the name to suggest that plaintiffs are made whole by this remedy—any more than other tort plaintiffs are made whole by damages. The word "restoration" is more accurate than the word "vindication," which has been used in this context, see Hulme, *Vindicating Reputation: An Alternative to Damages as a Remedy for Defamation*, 30 AM. U.L. REV. 375 (1981); Note, *Vindication of the Reputation of a Public Official*, 80 HARV. L. REV. 1730 (1967), but here "declaratory judgment" is used because that is the procedural device employed and is consistent with the Schumer bill's terminology. See *infra* text accompanying notes 95-96.

20. Half of the plaintiffs in the Iowa study went to the media before they spoke to an attorney. Soloski, *supra* note 8, at 217, 219-20. The study further found that "nearly three-quarters of the plaintiffs on their own, through their attorney or with their attorney, contacted the media prior to filing their libel suit. Nearly all of the contacts with the media occurred within two days of publication or broadcast of the alleged libel." Statement of John Soloski at Joint ABA-ANPA Task Force National Symposium on Libel, tape 2, at 9 (Mar. 21, 1986) (on file with author) [*hereinafter* Soloski statement].

21. Soloski, *supra* note 8, at 220; Soloski statement, *supra* note 20, tape 2, at 8-9.

22. *POLRA*, *supra* note 15 and accompanying text, § 4(b)(2)-(b)(3). This does not limit the evidence that the plaintiff would be able to introduce at the trial, though it does affect the question of shifting fees. Although *POLRA* does not go so far, I think it might be appropriate to permit the trial judge to award fees to a losing defendant where it appears that the plaintiff deliberately withheld evidence of falsity until trial. This would suggest that the plaintiff's goal was not to demonstrate falsity as soon as possible, but rather to engage the defendant in a legal proceeding that could have been avoided. The related question of the role of discovery in the declaratory judgment action is discussed *infra* in the text accompanying notes 79-84.

defense. Awarding fees to the prevailing party discourages this possibility and encourages early good-faith discussions.

### B. *Extension to All Defendants*

My earlier critique addressed the problem of media defendants only, although it was clear then<sup>23</sup> and is still now<sup>24</sup> that nonmedia defendants, particularly those involved in political disputes, are at serious risk of being sued for libel. Nonmedia defendants, such as persons who write letters to the editor<sup>25</sup> and persons who circulate petitions,<sup>26</sup> need the protection of this proposal as much as, if not more than, media defendants. First, these targets are particularly vulnerable to suits when the plaintiffs are motivated more by the desire to squelch criticism than to restore their reputations. Second, even the small media, as "chilled" as they may be by the current situation, have insurance, lawyers, professional editors, and reporters who know at least a few ground rules of libel. Nonmedia defendants, on the other hand, usually lack insurance and sophistication in the area of libel law, and their frequent lack of a corporate structure makes them extremely vulnerable to the threat of damage liability.<sup>27</sup>

There is also no reason why a plaintiff who claims to have been defamed by a nonmedia defendant should be denied access to the declaratory judgment alternative. Some plaintiffs may find that the declaratory judgment action is less attractive against nonmedia defendants because plaintiffs may not be able to bargain for a retraction that will reach the same audience that received the initial statement. Nevertheless, even nonmedia defendants may be able to reach their original audience fairly effectively in some cases, as where the claim arises from a mass mailing. In any event, retraction, though often an important private remedy in libel cases, is not a central feature of the declaratory judgment approach. This approach relies instead on the potential force and effect of an authoritative determination. The goal of a quick determination of falsity, thus, might appeal to both sides. Not allowing a plaintiff to pursue a

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23. See E. PELL, *supra* note 5, at 159-88.

24. E.g., Greenhouse, *Outspoken Private Critics Increasingly Face Slander Lawsuits*, N.Y. Times, Feb. 14, 1985, at B11, col. 1 (nat'l. ed.); Pring, *Intimidation Suits Against Citizens: A Risk for Public-Policy Advocates*, NAT'L L.J., July 22, 1985, at 16.

25. E.g., Karnell v. Campbell, 206 N.J. Super. 81, 501 A.2d 1029 (1985).

26. E.g., Good Government Group of Seal Beach, Inc. v. Superior Court, 22 Cal. 3d 672, 586 P.2d 572, 150 Cal. Rptr. 258 (1978), *cert. denied*, 441 U.S. 961 (1979).

27. If the defendant's election under the Schumer bill, *supra* note 2, can ever be justified, which I doubt, see *infra* text accompanying notes 103-32, the worthiest recipient might well be certain nonmedia defendants. However, the bill excludes this group of potential libel defendants from coverage because of its focus on media defendants. Schumer bill, *supra* note 2, § 1(a)(1). Note that a few states may permit successful libel defendants to recover their costs. CAL. CIV. PROC. CODE § 1021.7 (Deering 1972).

declaratory judgment action against a nonmedia defendant serves no apparent social policy.<sup>28</sup>

Accordingly, this proposal benefits media and nonmedia defendants. First, the proposal makes damage actions less threatening to defendants by reducing available damages and increasing the likelihood that defendants can recover fees. Second, the public will probably know of the existence of the nonmonetary alternative to big damage actions and question the motives of powerful plaintiffs who choose to sue for absurd amounts of money. The availability of a low-stakes alternative uniquely suited to resolving disputes over falsity quickly will undercut claims of simply setting the record straight and expose nuisance suits as such.

### C. *The Role of Retraction*

Although a judicial declaration of falsity is valuable, an appropriate retraction is preferable to a judicial declaration issued after a disputed hearing.<sup>29</sup> A plaintiff who would be satisfied by a declaratory judgment should be at least as satisfied with an appropriate retraction. An appropriate retraction not only establishes the falsity of the challenged statement, but also constitutes an admission and publication of the correct facts.<sup>30</sup> My proposal therefore provides that an appropriate retraction forecloses a declaratory judgment action, but not a damage action.<sup>31</sup> If

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28. The only plausible one, that nonmedia defendants might be further chilled by not being able to defend on actual-malice grounds, seems not to be borne out because of the impact damage suits are having on such groups under current law. *See supra* note 24.

29. The word "appropriate" is always to be implied when retractions are discussed. It is simply not the case that any correction will suffice. *See infra* note 30 (discussing judicial handling of retraction). A private agreement may also be appropriate. Apart from a payment of money, this might include an agreement by a media defendant to publish a reply or a letter to the editor to resolve the dispute. Even if such an undertaking does not involve a formal settlement of the dispute, it may satisfy the needs of the plaintiff to such an extent that further legal action is unnecessary.

30. The issue is the adequacy of the retraction and not plaintiff's sense of that adequacy. The adequacy of a retraction is a question within the traditional purview of courts. *See, e.g.,* *Boswell v. Superior Court*, 125 Ariz. 307, 609 P.2d 577 (1980); *see also* Annotation, *Libel and Slander: Who is Protected by Statute Restricting Recovery Unless Retraction is Demanded*, 84 A.L.R. 3d 1249 (1978) (discussing who is eligible to take advantage of a retraction statute). The introduction of constitutional fault rules has removed much of the value from retraction statutes and they no longer play a major role in litigation. Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1439-43 (1975).

It is likely that the creation of a declaratory judgment action will sharply increase the number of retractions made by libel defendants. To the extent legal questions arise—what parties are covered, the placement of the retraction and the language used—they are much more easily resolved than the average substantive libel question. It might also be noted that a defendant who has decided that a retraction is appropriate can avoid virtually all questions of adequacy by generously admitting the error, rather than by trying to say as little as a lawyer thinks permissible.

31. *POLRA*, *supra* note 15 and accompanying text, § 2(b). *But see* Cendali, *supra* note 4, at 500 (proposing that an appropriate "correction" will bar a damage action except for special damages). Professor Barrett asserts that my 1983 Article provided that a reasonable retraction barred a damage action. Barrett, *supra* note 12, at 873. His efforts to enlist me as a past supporter of

the defendant publishes an appropriate retraction once the plaintiff begins the declaratory judgment action, the retraction is not a complete defense. Instead, the defendant is treated as the prevailing party after the retraction and may recover attorneys' fees. This provision thus encourages the plaintiff to settle once the defendant issues the retraction.<sup>32</sup>

#### D. *The Questions of Existing Privileges*

The state rules for absolute and qualified privileges have developed over the years to protect defendants from the strict-liability standard of the common law. The privileges deny relief to some plaintiffs who are the objects of false and defamatory statements in order to encourage certain speech. It is important to consider whether these privileges are necessary under my proposal since it would encourage speech by reducing fears of damage awards.

The courts accord most absolute privileges only to government officials. These absolute privileges are intended to permit government officials to carry out their duties free from the burden of defending libel cases.<sup>33</sup> The need for such privileges would continue, and perhaps be

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a defendant's option can only be achieved by taking my words out of context and by adding two sets of ellipses to a crucial sentence. The first sentence on which he relies appears in a section devoted to discussion of the action for restoration. Franklin, *supra* note 1, at 40. The immediate context involves encouraging the parties to negotiate before going into court. *Id.* at 41-42. The entire sentence reads: "In such a case [one in which the plaintiff has already sued for restoration] the plaintiff will lose the right to a restoration judgment and also the right to bring a damage action [since they are mutually exclusive and plaintiff has already elected restoration] upon defendant's publication of the disputed, now approved, retraction." *Id.* at 42. Little of the 1983 proposal and Article would have made sense if the plaintiff could be deprived of a damage action at any time by an unrequested retraction. *Id.* at 37-47. It would make no more sense to say that the plaintiff's act of demanding a retraction, as part of general negotiations and before deciding on an election, waived the right to bring a damage action. That is no way to encourage negotiations.

Professor Barrett also misreads my statement that a retraction would "foreclose" either action. *Id.* at 43-44. This sentence refers to a situation in which a publisher is "convinced it had made an error but that it was not liable for damages . . ." *Id.* at 43. In that situation, the parties would focus on the restoration action—in which the plaintiff had to demand a retraction before suing for restoration. If the publisher retracted, the plaintiff would be unable to pursue the restoration action because retraction preempts the action—and the plaintiff would be unable to win a damage action because, by hypothesis, it would not lie on the merits. This is the only plausible reading, given the next paragraph with its emphasis on negotiations preceding election and the recognition that the demand for retraction must precede a restoration action. *Id.* at 44. Again, it is inconceivable that serious negotiations before election that included plaintiff's demand for a retraction could amount to waiver. Finally, Professor Barrett's reading is inconsistent with several other passages in the Article. *Id.* at 36, 43, 45, 46.

32. *POLRA*, *supra* note 15 and accompanying text, § 4(b)(4). Because the test is the appropriateness of the retraction and not the reasonableness of the plaintiff's belief, plaintiff's reasonable but erroneous rejection of an appropriate retraction will not prevent fee shifting.

33. *E.g.*, *Barr v. Matteo*, 360 U.S. 564, 571 (1959). An extended explanation of the doctrine appears in *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950), in which Judge Learned Hand stated:

[I]t is impossible to know whether the claim is well founded until the case has been tried,

even greater, if a new action were added to the plaintiff's arsenal. There seems to be little reason to delete the absolute privileges in these cases.

Closely related to these privileges, and of great importance to the media, is the privilege of fair and accurate report, which facilitates wide-open public debate.<sup>34</sup> This privilege allows defendants being sued for repeating statements made by another to escape liability since they never vouched for their truth in the first place. It would be perverse to use the declaratory judgment action to put the defendant in the position of having to defend the truth of another's statement. In this situation, the plaintiff should pursue whatever remedies may be available against the originator of the statement.<sup>35</sup>

Thus, the privileges for government officials and for fair and accurate report should remain effective. It is true that the goal of a declaratory judgment action is to increase the number of libel cases that reach the question of truth and falsity. Nevertheless, the goal is not to reach 100% of all challenged statements. Such a goal would burden defendants by creating substantially more cases that need defending. More importantly, the loss of state privileges would counteract the overall goal of the new remedy—to reduce the current reticence of some defendants to speak freely about persons who they think are likely to sue.

### E. *The Federal-State Question*

In my original critique, I did not resolve the question of whether the

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and . . . to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. . . . In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

*Id.* at 581.

34. See R. SACK, *LIBEL, SLANDER, AND RELATED PROBLEMS* 144-51, 316-25 (1980); B. SANFORD, *LIBEL AND PRIVACY* 179-84, 370-93 (1985).

35. The other qualified privileges, such as common interest or the protection of one's or another's interest, see W.P. KEETON, D. DOBBS, R. KEETON, D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* § 115, at 824-36 (5th ed. 1984), do not seem to present serious problems today. They seem to be fairly far from the concern that generates proposals of reform—the encouragement of more wide-open public debate. My inclination is to leave these in place as well.

It seems increasingly clear that fair comment and opinion privileges are not privileges but part of the plaintiff's case on falsity. See *Philadelphia Newspapers, Inc. v. Hepps*, 106 S. Ct. 1558 (1986); Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825 (1984). But see Barrett, *supra* note 12, at 863 n.100 (discussing the role of fair comment and opinion privileges in declaratory judgment actions). My proposal's requirement that damage actions be based on actual malice, see *infra* text accompanying notes 55-67, has the incidental benefit of eliminating the vexing state-law questions of when defendants lose the current qualified privileges. See Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 78-81 (1983).

state or federal government should consider libel reform. I have concluded for two reasons that the introduction of my proposed declaratory judgment remedy in libel cases might best occur at the state level. First, the libel suit has long been a state-law action. Any proposed action must be meshed with existing law. States vary in attitudes toward litigation in general, toward libel law in particular, and toward the role of media. Probably as a result, journalists appear to differ in their sensitivity to the pressures of libel law. The presence or absence of such legal devices as retraction statutes probably influences media perceptions of the need for reforms. The state legislature is in the best position to account for these variances and make reforms consistent with current law.

Second, this area is ideal for state experimentation. Despite first amendment limits on state power in libel law, the states still have room to experiment with ways to create greater satisfaction for all concerned. The current law is seriously deficient and statutory reform is worth attempting, but the implications are not yet clear enough to warrant a national approach.<sup>36</sup>

#### F. Fees

Although my statutory proposal contains some fee provisions that were not explicit in my original critique, these provisions are better discussed in connection with the fee provisions of the Schumer bill.<sup>37</sup>

### III

#### DEFENDING THE DECLARATORY JUDGMENT APPROACH

In this Part, I address criticisms of the declaratory judgment approach in general and my proposal in particular. Criticisms that center on comparisons with the Schumer bill are discussed in Part IV.

#### A. *Is the Proposal Unconstitutional?*

Two constitutional questions might be raised about the proposal.<sup>38</sup> The first concerns the permissibility of entering a declaratory judgment against a media defendant without any showing of fault. The second relates to the permissibility of fee shifting without a showing of fault.

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36. To the extent that problems common to several states can be resolved uniformly, as perhaps with differing statutes of limitations, Congressional action might well be appropriate. See Schumer bill, *supra* note 2, § 2 (providing for a one-year statute of limitations in both damage and declaratory judgment actions). See generally Levine, *Preliminary Procedural Protection for the Press from Jurisdiction in Distant Forums after Calder and Keeton*, 1984 ARIZ. ST. L.J. 459 (discussing court-created procedural protections for small-media defendants sued in distant jurisdictions where their circulation is limited). Perhaps questions involving the availability and pricing of libel insurance also are appropriate for national attention.

37. See *infra* text accompanying notes 133-43.

38. Cendali, *supra* note 4, at 479.

The argument underlying both questions is that even if damages are not involved, first amendment doctrine forbids entry of any judgment against media defendants without a showing of fault.<sup>39</sup> This exception to strict liability at common law for media defendants derives from *Gertz v. Robert Welch, Inc.*,<sup>40</sup> and is still viable after *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,<sup>41</sup> which seems unlikely to affect many mass-media cases.<sup>42</sup>

Considering the underlying rationale of the doctrine and the Court's attempts to diminish the chill on media defendants while preserving the state's interest in protecting reputation,<sup>43</sup> the declaratory judgment provision should not be adjudged unconstitutional. First, the chilling effect has been produced by fear of large damage awards, which induce large and unrecoverable defense costs. The declaratory judgment action eliminates this fear of damages by reducing incentive to sue and allowing for awards of fees.

Second, even if the declaratory judgment action increases media defense costs by increasing the number of libel suits brought,<sup>44</sup> the defendant still can default and avoid those costs. While default is not an attractive alternative for any responsible defendant,<sup>45</sup> especially a media defendant that values its reputation for truth and accuracy, the proposal contemplates situations in which a defendant may feel justified in default-

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39. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1973) (in order to recover general compensatory and punitive damages for defamation of a private plaintiff by a media defendant, plaintiff must show actual malice); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1963) (in order to recover damages for defamation, public official must show that the media defendant acted with actual malice).

40. 418 U.S. 323 (1973).

41. 105 S. Ct. 2939 (1985). In *Greenmoss*, the Court held that *Gertz* did not apply to a case between a company and a credit reporting agency. The agency falsely reported to five subscribers that plaintiff had filed for bankruptcy. *Id.* at 2941. The Court held that the private plaintiff did not have to show actual malice in order to recover presumed or punitive damages since the false report was not a matter of public concern. *Id.* at 2948.

42. The Court's focus in *Greenmoss* on content, context, and form makes it unlikely that many media stories about private persons will fall within it. It is doubtful, for example, that the Court would have ruled the same way had the identical story with the same error caused in the same manner appeared in a traditional newspaper. The focus on the narrow audience and their obligation to keep the information confidential seemed central to the plurality's approach.

43. *Gertz*, 418 U.S. at 340-41; *Greenmoss*, 105 S. Ct. at 2944-46.

44. Although the number of libel suits may increase because plaintiffs no longer need to prove fault, aggregate costs of libel defense should decline. Expenses probably would fall, because declaratory judgment actions will not involve litigation over fault, which is the focus of the present extensive discovery. See Barrett, *supra* note 12, at 855-57. Shifting defense costs would also reduce the aggregate expenditures of media.

45. Most plaintiffs are not likely to gain much from a defendant's default. A plaintiff fearing that the defendant is likely to default might seek a guarantee from the defendant that it will not default if the plaintiff chooses the declaratory judgment path. The likelihood of default, the impact of that default on the plaintiff, and the plaintiff's expectation of success in a damage action are likely to affect the plaintiff's choices and negotiations. See *infra* note 119 and accompanying text.

ing. For example, if the costs of defending a factually complex case would deplete the resources of a small newspaper, the publisher might decide to default and explain that behavior to the readership. That scenario is roughly analogous to the choice many newspapers face today when they assert the defense of actual malice in an effort to avoid litigating falsity. On the other hand, plaintiffs who do not view a default judgment as an admission might instead bring damage actions against defendants with a proclivity to default.<sup>46</sup> In these cases the plaintiff must still show actual malice.<sup>47</sup>

Despite its viability as an alternative, default probably will not occur often enough to deprive plaintiffs of a remedy. Because the fear of liability is gone and defense costs will probably be lower and possibly recoverable, I would expect defaults by responsible publishers to be few and far between. Accordingly, the proposal will reduce chill by reducing media defendants' fear of large damage awards and giving them an opportunity to default in any event.

Finally, the Court's willingness to delete the actual-malice requirement for punitive damages in *Greenmoss*<sup>48</sup> suggests that the Court is less concerned about chill (at least in private-plaintiff cases) than it was previously. Considering the significant decrease in chill with the declaratory judgment action and the Court's lessened emphasis on chill, the Court probably would uphold a no-fault declaratory judgment.

The second, related constitutional question concerns fee shifting in the declaratory judgment action absent a finding of fault. The above explanation of how my proposal will reduce chill<sup>49</sup> applies here as well and the Court should not be compelled by prior holdings to invalidate the fee-shifting provision. The possibility of recovering fees may be important in encouraging use of the declaratory action and therefore decreasing chill upon media defendants. Even if the Court were to disallow that portion of the fee-shifting provision that allows the plaintiff to recover fees without a showing of fault, many plaintiffs might still be willing to spend their own funds to get a quick adjudication of falsity in a declaratory judgment action. Nevertheless, a plaintiff's inability to recover costs may cause serious problems for those who cannot afford an unreimbursable fee. These plaintiffs might find it easier to get a lawyer on a contingency basis and bring a damage action, even with a small chance of success. Although that might expose a losing plaintiff to liabil-

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46. The deterrence from the threat of damage actions is lost under the Schumer bill's defendant's option. See *infra* note 119. Professor Barrett nowhere discusses the implications of default on the Schumer bill. With the plaintiff controlling the option, the plaintiff may be able to bargain against default by conditioning his election of the declaratory path.

47. *POLRA*, *supra* note 15 and accompanying text, at § 3(a).

48. 105 S. Ct. at 2946.

49. See *supra* text accompanying notes 43-48.

ity for fees because that portion of the fee-shifting provision might be severable, how likely is the successful defendant to press for fees in a case in which the plaintiff could not afford a lawyer for a declaratory action?

Even if the Court held that the defendant must be found at fault to shift fees, a statute allowing the plaintiff to show fault by proving that the defendant's refusal to offer or make a proper retraction was unreasonable may be a solution. For example, a refusal might be unreasonable if the plaintiff showed the defendant strong evidence of falsity and the defendant had nothing substantial to rebut it. The liability for attorneys' fees would be based on conduct after the publication. *Gertz* need not be read as requiring that the "fault" here be found in behavior that preceded the publication. Indeed, using postpublication fault is more protective of the media because it provides the defendant with another chance to correct its mistake and avoid financial liability, often with the information provided by the plaintiff.<sup>50</sup> Therefore, the constitutional arguments against the declaratory judgment action and fee-shifting provision of my proposal can be answered.

### B. *Rejection of All Adjudication*

Those who flatly reject the libel damage action will likely also reject a declaratory judgment approach. They favor absolute privilege, arguing that a judicial declaration of truth or falsity is not the way to air or resolve fact disputes.<sup>51</sup> This "marketplace" view instead assumes that the public can become informed about both sides of a dispute and can reach a judgment on the merits.

As long as the fact dispute involves major issues of governance and policy, even an admittedly flawed marketplace, with its unequal voices and unequal spending, is acceptable.<sup>52</sup> When false statements by the media injure an individual, however, leaving correction to the general marketplace of ideas is less attractive. The injured person's ideal remedy is likely to be a speedy retraction or correction that reaches the same audience as the original charges, as well as possibly damages. But government power to order the retraction or correction, even if constitutional,<sup>53</sup> is too dangerous to accept. Short of such coercion, which the

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50. See Franklin, *supra* note 1, at 47-49; see also Barrett, *supra* note 12, at 858-59 (treating fees as costs).

51. See Franklin, *supra* note 1, at 23 n.105 (citing commentators who suggest this approach and discussing the ACLU's decision to support absolute privilege for some speech on matters of public concern).

52. M. FRANKLIN, CASES AND MATERIALS ON MASS MEDIA LAW 14-20 (2d ed. 1982). For recent criticism of the marketplace view, see Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 16-49 (arguing that current first amendment doctrine conceptualizing a marketplace of ideas masks its bias toward preserving the status quo).

53. Justice Brennan has suggested the possibility of permitting a court to order a press

supporters of absolute privilege would probably also reject, some opportunity for adjudication is necessary.

Since judicial determinations are necessary in some cases, it is desirable to offer a remedy that lowers the stakes of those determinations. Although these determinations are not always correct, the risk of judicial error is worth taking if the decision does not result in a monetary award or other serious penalty. Those who think that judicial adjudications of truth and falsity are too fragile to support the large monetary sanctions that often follow are aiming at the wrong target. They should not be concerned with the adjudication, which the parties may dispute afterward,<sup>54</sup> but with the remedies. A declaratory judgment of falsity that carries with it no monetary award presents a very different risk from those involved under the current libel regime.

### C. Concern for Private Plaintiffs

My proposal bars negligence as a basis for damage liability. This surely makes it more difficult for "private" plaintiffs to use state law under *Gertz* to recover actual damages.<sup>55</sup> I have concluded earlier, however, that *Gertz* unsoundly draws a line between public and private plaintiffs. In addition, its negligence standard brings strict liability back into the libel area through the back door because it is simply too easy for plaintiffs to prove.<sup>56</sup> It is a small jump from finding an error to concluding that someone in the operation behaved unreasonably—either by failing to check with still another source or by failing to wait another day until the plaintiff could be reached.<sup>57</sup> Furthermore, the availability of

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defendant to publish a determination that the defendant has been found to have defamed a plaintiff. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (concurring opinion); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 47 (1971) (plurality opinion). I have previously elaborated on the constitutional and other more fundamental reasons for not requiring media to report that a government agency has found that their defamatory statements were false. Franklin, *supra* note 1, at 34; see also Barrett, *supra* note 12, at 870 n.138 (discussing reasons for not requiring publication of judgment).

54. Recent examples might include such murky situations as the disputes over the counting of enemy troop strength, at the core of *Westmoreland v. CBS Inc.*, 596 F. Supp. 1166 (S.D.N.Y. 1984), and the events occurring before the attack on the refugee camps, at issue in *Sharon v. Time, Inc.*, 599 F. Supp. 538 (S.D.N.Y. 1984).

55. Professor Barrett suggests that on the merits the elimination of liability based on negligence may be sound. Barrett, *supra* note 12, at 879-880.

56. Franklin, *What Does "Negligence" Mean in Defamation Cases?*, 6 COMM/ENT L.J. 259, 264-81 (1984).

57. See Remarks of Charles Nutt, Jr., Executive Editor of the *Bridgewater Courier News*, at the Joint ABA-ANPA Task Force National Symposium on Libel, tape 5, at 17 (Mar. 21, 1986) (on file with the author) [*hereinafter* Remarks of Charles Nutt, Jr.] (arguing that juries have interpreted negligence standards in "a predictable way": "If something in the article was wrong, then clearly the newspaper must have been negligent. 20/20 hindsight says that there must have been some other step somewhere that the newspaper could have taken.").

Professor Barrett objects that this provision will make my proposal politically unattractive.

negligence liability disproportionately hurts small media.<sup>58</sup>

Professor Bloom,<sup>59</sup> who believes that the negligence system is functioning effectively, concludes that a media defendant's "[v]erification" of the disputed facts is the "key issue in most negligence litigation."<sup>60</sup> Since fewer than fifty cases have discussed the sufficiency of negligence,<sup>61</sup> he concludes that there is no reason why "reasonably clear standards will not eventually develop" in this area.<sup>62</sup> However, "reasonably clear standards" of negligence have not emerged in decades of personal-injury or property-damage tort actions—unless the standard is that plaintiffs win. If no other standards developed in negligence libel cases, a judge would probably accept a jury's findings on negligence liability. The jury could always find that the media defendant should have sought "verification" from still another source. This would lead to denials of summary judgment, trials at which juries find negligence, and appeals in which courts refuse to upset verdicts solely on the sufficiency point.<sup>63</sup>

The trade-off of smaller verdicts for negligence that was envisioned in *Gertz* is not likely to be of much solace to defendants because of the ruling that actual injuries included emotional distress.<sup>64</sup> The actual-injury category also includes special damages. Since business plaintiffs may have special damages,<sup>65</sup> media defendants face the possibility of very large damage judgments even under negligence. Even if *Gertz* is sound constitutional law,<sup>66</sup> a state could properly protect speech that is not reckless from damage liability, particularly if the plaintiff was offered an

Barrett, *supra* note 12, at 879-80. The question of political attractiveness is addressed *infra* text accompanying notes 128-32.

58. Nutt, whose paper has a circulation of 54,000, has observed that courts have tended to find the sorts of persons his paper writes about—local bankers and important persons in town—to be private persons, because a person who may be important in one part of the area served may be relatively unknown in another community served. Remarks of Charles Nutt, Jr., *supra* note 57, tape 5, at 12, 16. He also observed that his paper was larger than most, with 85 percent of all dailies having circulations under 50,000, and half being under 25,000. *Id.* This tendency of the courts to designate local people as "private" exposes the local, small-community newspaper to greater liability than might be incurred by media that cover the national or state scene.

59. Bloom, *Proof of Fault in Media Defamation Litigation*, 38 VAND. L. REV. 247 (1985).

60. *Id.* at 389.

61. *See id.* at 386 nn.511 & 512, 387 n.513 (listing cases). Several of these cases were decided on multiple grounds. Plaintiffs who lose at the trial level are much less likely to appeal than are losing media defendants because plaintiffs have their best chance at the trial level. Also, media defendants are often repeat players who wish to undo losses and thus will appeal adverse verdicts.

62. *Id.* at 390.

63. *Cf.* LIBEL DEFENSE RESOURCE CENTER, BULLETIN NO. 6, at 35, 42 (Mar. 15, 1983) (reporting finding that no negligence cases were reversed on appeal exclusively because of an inadequate showing of negligence).

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

65. *See infra* note 67.

66. For writers who have expressed doubts on this, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW 631-51 (1978); Christie, *Underlying Contradictions in the Supreme Court's Classification of Defamation*, 1981 DUKE L.J. 811; Franklin, *supra* note 56, at 280-81.

opportunity to obtain a no-fault decision on truth and falsity.<sup>67</sup>

Accordingly, it is not at all clear that the passage of time will make the situation more tolerable: negligence simply flows too readily from error in libel cases. The elimination of a damage action for negligence is a valuable reform.

#### D. Will Eligible Plaintiffs Make the Election?

A critical question in any reform is how it will work in practice. This proposal seeks to encourage those who cannot obtain quick retractions from the publisher to choose the declaratory judgment route rather than the damage route. The proposal makes the damage remedy less attractive because it eliminates punitive damages, introduces a fee-shifting provision, and increases the burden of proof for private plaintiffs. The proposal also enhances the attractiveness of the declaratory judgment action by using fee-shifting provisions.<sup>68</sup> Will these reforms deter enough prospective plaintiffs from bringing damage actions to help relieve the chill on free speech under current libel law? This proposal may achieve that goal since legal expenses, even if not diminishing, may

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67. Cendali asserts that although I designed my proposal "in part to provide a remedy for those plaintiffs who cannot afford to bring a full-fledged action, . . . a plaintiff who has suffered actual damages will not be made whole by a purely nonmonetary remedy." Cendali, *supra* note 4, at 478. It is true that those who feel that they must have damages have little choice. Under her proposal, private plaintiffs would have a negligence action only for special damages (out-of-pocket losses) unless the defendant has failed to retract after a sufficient request. *Id.* at 490. These plaintiffs might be better off with this negligence damage action than with the choice under my proposal of a declaratory judgment or actual-malice damage action. On the other hand, all plaintiffs who had suffered nonspecial damages at the hands of a defendant who later retracts would be worse off under her proposal than under mine.

Moreover, very few plaintiffs can establish special damages. Statement of Charles Morgan, attorney for libel plaintiffs, at the *Conference on Protection of Reputation in a Democratic Society: The News Makers vs. the News Media, University of California, Berkeley* 201 (Nov. 1, 2, 1985) (on file with the author). The only significant plaintiffs likely to have such damages are business owners and managers, whom the Iowa study found to be a "distinct minority" of plaintiffs. Soloski, *supra* note 8, at 219.

Some states have rejected the *Gertz* approach even in the absence of an alternative remedy. *See, e.g., Gaeta v. New York News, Inc.*, 62 N.Y.2d 340, 465 N.E.2d 802, 477 N.Y.S.2d 82 (1984) (requiring a slowing of gross irresponsibility rather than simple negligence to establish liability in areas of legitimate public concern warranting public exposition).

68. Professor Barrett argues that I have done little to make my declaratory judgment action politically attractive. Barrett, *supra* note 12, at 877-80. For private plaintiffs, the attractiveness of the proposal depends on the impact of my rejection of the damage action based on negligence, and for all plaintiffs, on the impact of the fee-shifting provisions and the elimination of punitive damages. Whatever the impact of these changes, my proposal offers an opportunity to remove some cases from the damage route and reduce the current pressure toward costly damage actions. It displaces relatively little of the tort action but may encourage enough lower-stake actions to produce substantial social gains.

Professor Barrett also argues that I have done things to make the declaratory judgment action distinctly unattractive. *Id.* at 877-80. Some of these points are discussed *infra* text accompanying notes 78 & 83.

become more predictable in total and more uniform in each case. If insurance continues to use the deductible or retention clauses in declaratory judgment cases,<sup>69</sup> enough fee reimbursements may be granted to successful defendants to reduce the chill on editors and publishers.

Some organizations and individuals who are mainly interested in harassing defendants may hesitate to bring damage actions lest they become liable for the legal expenses of both sides under this proposal. The many public officials and others who now sue under a contingency fee arrangement<sup>70</sup> would incur a new financial risk because of fee shifting. Nonetheless, other organizations that file nuisance suits are unlikely to use attorneys on a contingency-fee basis.<sup>71</sup> These organizations are already prepared to pay their own attorneys to maintain cases that by definition they cannot realistically win.<sup>72</sup> The fee-shifting provision would render such plaintiffs liable for defense fees that may run double or triple their own legal costs.<sup>73</sup> Nevertheless, groups that are powerful enough to harass effectively are probably sufficiently solvent to comply with any fee shift. Therefore, whether these groups would change their strategy is not clear. I suspect that many would not because one of their purposes is to cost the media defendant its deductible and perhaps lead to an increase in insurance premiums. Under the fee-shifting provision, the defendant would come out of a successful defense in the same position as it went in—except for the interruption of daily operations.<sup>74</sup>

Might harassing plaintiffs use declaratory judgments as opposed to damage actions? This also seems unlikely. First, in a declaratory judg-

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69. Libel insurance is written so that exposure to the initial cost of any claim is retained by the insured. This is analogous to a deductible. Then the insurer enters and covers legal expenses and any liability up to the limits of the policy. See Franklin, *supra* note 1, at 18-22. More recently, a major insurer has added a co-insurance provision under which the insured must share 20% of all legal fees and expenses whatever the outcome of the case. Massing, *Libel Insurance: Scrambling for Coverage*, COLUM. JOURNALISM REV., Jan./Feb. 1986, at 35, 36.

70. Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226 (1985).

71. Plaintiffs' lawyers are more likely to make a more realistic assessment of their prospects and may be discouraged from accepting libel cases on a contingency-fee basis—especially in light of *Sharon v. Time, Inc.*, 599 F. Supp. 538 (S.D.N.Y. 1984) and *Westmoreland v. CBS Inc.*, 596 F. Supp. 1166 (S.D.N.Y. 1984).

72. Thus, the elimination of punitive damages probably would not significantly change their current practices.

73. The plaintiff's financial liability under fee shifting will depend on the actual and reasonable defense costs. In some cases, these may well exceed twice the plaintiff's expenses, given (1) the frequent disparity in wealth between libel plaintiffs and large media defendants, (2) the fact that many of these cases proceed on a contingency-fee basis, and (3) the fact that defendants are often motivated by a remote, but real, risk of being held liable for vast damages.

74. This assumes that the judge finds that the defense costs were reasonable. Because groups bringing nuisance suits probably would sue for large amounts and conduct extensive pretrial discovery, a rigorous defense would be justified, and full reimbursement is likely. Moreover, these are precisely the groups that are wealthy enough to feel the sting of fee shifting.

ment action, the falsity question lends itself to quicker resolution with accompanying embarrassment if the suit is not well-grounded. Second, the simpler nature of the action means that the goal of costing defendants time and money would not be achieved nearly as effectively as with a damage action which would last longer and cost more.

Even if harassing plaintiffs may not change their habits, other plaintiffs will find the declaratory judgment action attractive. The available evidence indicates that many plaintiffs, particularly public officials, state that their primary goal is to correct the record and that they need not obtain damages if they can get a quick nonmonetary remedy.<sup>75</sup> Although one must examine carefully such self-serving statements, that position makes sense given the few cases in which plaintiffs can demonstrate clearly that they have sustained financial harm. Furthermore, those who cannot prove "actual malice" but who wish to restore their names will have the incentive to use the declaratory judgment action. They will be able to restore their reputations without putting the defendants at risk for large sums.

A great many subtle factors will control which plaintiffs will elect the declaratory judgment. Reform should be gradual to uproot as little tort law as possible in order to monitor how proposed reforms work. If states experiment with different versions, we can begin to identify the most important variables. The libel crisis warrants moving ahead with reforms, but the uncertainties indicate the wisdom of moving ahead slowly and acting at the state level.

#### *E. Is Failure to Require Publication of an Adverse Judgment a Fatal Flaw?*

My proposal has been criticized because of the absence of a mechanism to require retractions.<sup>76</sup> It is undesirable and unnecessary to mandate retractions under the declaratory judgment alternative. A timely retraction is crucial so that those who learned of the first statement will receive word of the correction. In the declaratory judgment situation, however, the judgment comes at a minimum several months after the initial statement. In addition, the declaratory judgment performs a different function than retraction. It resolves cases in which the statements do not lend themselves to retraction because the facts are uncertain. A case involving unclear facts is the least compelling one for mandatory publication of the judgment because it allows government coercion of speech in a doubtful situation. If a clear error emerges in the course of

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75. Soloski, *supra* note 8, at 219-20.

76. See, e.g., Cendali, *supra* note 4, at 478-79.

litigation, the fee-shifting arrangements probably would induce a voluntary retraction along the way.

Even absent a mandatory retraction provision, my proposal improves the plaintiffs' ability to restore their reputations. Since the act of initiating a damage suit itself may help restore the plaintiff's reputation,<sup>77</sup> initiating a declaratory judgment action should have the same effect. The declaratory judgment action also is more likely to reach the falsity question than is the damage action and to reach it sooner. At worst, a plaintiff emerges from the process with a judgment of falsity that can be used effectively with employers, creditors, acquaintances, and others who, in the the plaintiff's estimation, may have been distant since the original statements. Beyond that, some judgments will surely be reported by the other local, regional, or national media as news, even if the defendant chooses not to publish them. The defendant may also find it newsworthy that a court has found its statements defamatory and false under the clear-and-convincing standard.

On balance, the overall danger of governmental coercion of the press involved in mandating retraction outweighs the marginal benefits lost by not requiring publication of the result of a declaratory judgment action.<sup>78</sup> Thus, I remain opposed to mandatory retraction proposals.

#### *F. Should the Declaratory Judgment Action Include Discovery?*

My decision to prohibit the use of discovery in the declaratory judgment action has also drawn fire. The objections stem from concern that the plaintiff will not have access to everything needed to prove falsity and, therefore, will be dissuaded from using the remedy.<sup>79</sup> Providing for discovery in the declaratory judgment action is unwarranted. First, most discovery by libel plaintiffs relates to actual malice; they usually do not use it to get information on falsity.<sup>80</sup> Second, in cases of defendant's clear error, discovery is unnecessary to clarify facts. Therefore, the lack of discovery will speed restoration of plaintiff's reputation rather than hinder the process in these cases. Even if the falsity issue is arguable, the plaintiff presumably already knows enough to render discovery unnecessary. The plaintiff may be curious about how the defendant made its mistake, but that is irrelevant if the plaintiff is confident of the facts. Of

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77. Bezanson, *supra* note 70, at 228 ("[P]laintiffs see the act of initiating suit, independent of its result, as an effective and public form of reply or response. By invoking the formal judicial system, the plaintiffs legitimize their claim of falsity. Reputational repair follows without the assistance of—indeed in spite of—the judicial system.")

78. Franklin, *supra* note 1, at 33-34, 42-43 (rejecting mandatory publication of adverse judgment).

79. See Barrett, *supra* note 12, at 877-78.

80. Conversation with Chad Milton, Assistant Vice President of Media/Professional Insurance, Inc. (Mar. 19, 1986).

course, each party can do further investigation without the aid of discovery.

The foregoing argument is complicated, however, by my provision that a winning plaintiff cannot obtain fees if she has not disclosed her essential evidence of falsity to the defendant before seeking the declaratory judgment.<sup>81</sup> It is possible that a plaintiff who wants to recover fees will be disadvantaged by the defendant's prior knowledge of the plaintiff's case where the plaintiff has no advance knowledge of the defendant's case. This does not present a serious problem. The plaintiff may not know what the defense will be, but since the plaintiff usually starts with ample proof of falsity, this disparity is not serious.<sup>82</sup> Moreover, although the proposal may not require the defendant to submit its evidence to the plaintiff, the defendant may find it desirable to do so. If the defendant has powerful evidence of truth, disclosure will allow it to claim that, should it win, its legal fees incurred after that point should be reimbursable.<sup>83</sup> Full discovery is not essential to assure that a court's subsequent adjudication of the issues is accorded legitimacy<sup>84</sup> because plaintiffs know much about the facts necessary to litigate falsity.

Although I still reject discovery, my proposal should not fail on this point alone because allowing discovery will probably not cause fatal difficulties. Even defendants who care deeply about their credibility are managed by practical people who recognize that moderation may be

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81. *POLRA*, *supra* note 15 and accompanying text, § 4(b)(2); *see infra* note 82.

82. Although the provision suggests that a plaintiff who finds new and important evidence of falsity just before the trial cannot recover fees even if he prevails, this could be changed to provide that fees after that point cannot be recovered unless that new information is shown to the defendant reasonably soon after it is acquired. This situation is likely to be rare since most plaintiffs will not begin without good evidence of falsity. The plaintiff might present evidence to the publisher, but be told that the newspaper would like to see more. The plaintiff has up to a year to collect evidence of falsity, and make subsequent presentations. It is not likely that the plaintiff will acquire a critical piece of evidence after that.

83. *POLRA* allows the plaintiff to recover attorneys' fees if the plaintiff did not have a reasonable chance of prevailing in the action. *POLRA*, *supra* note 15 and accompanying text, § 4(a)-(b)(2). One way to show that the plaintiff did not have a reasonable chance of success would be for the defendant to present its powerful evidence of the truth to the plaintiff prior to the litigation. This may answer Professor Barrett's concern that under my proposal a defendant might sit back and then trounce the unsuspecting plaintiff with a devastating showing of truth. Barrett, *supra* note 12, at 878. One could also meet this concern by requiring the parties to exchange witness lists or summaries of evidence to be offered before trial. In addition, defendants might find summary judgment appropriate in cases in which the "defamatory" element is missing, such as the case of a libel-proof plaintiff. *See Note, The Libel-Proof Plaintiff Doctrine*, 98 HARV. L. REV. 1909, 1916 (1985). However, depending on the costs of moving for summary judgment, the likelihood of appeals from the granting or denial of the motion, and the fee-shifting provisions, the defendant may find it cheaper and simpler to wait for the hearing.

84. *But see* Barrett, *supra* note 12, at 879 (a court judgment on truth should be "reached with the benefit of the full panoply of procedural devices developed by the courts to ascertain the truth."). On the other hand, although discovery is little used in the criminal justice system, that system's legitimacy is not questioned on that basis.

appropriate when the stake no longer includes potentially enormous damage awards. Of course, some cases may become fierce battlegrounds over falsity. Even there, the cost of discovery would probably be far lower than the cost incurred in the same case today because fewer issues would be in contention.

### G. *Will My Proposal Delay Settlements?*

In order to preserve the opportunity to recover fees under this proposal, the plaintiff will probably present or try to present evidence of falsity to the defendant before electing which route, if any, to follow.<sup>85</sup> In such situations, one commentator suggested that the defendant may delay settling until the plaintiff chooses a route and thus establishes the litigation's stakes.<sup>86</sup> This delay is unlikely, however, for several reasons. First, defendants probably realize that many plaintiffs are eager for quick corrections,<sup>87</sup> and, where the case warrants it, will try to prevent litigation by admitting error or by granting the plaintiff the opportunity to reply.<sup>88</sup> Moreover, the plaintiff probably will complain very soon after the statement appears,<sup>89</sup> providing the defendant with the opportunity to avoid suits.

Second, under my proposal, the plaintiff could obtain a judgment of falsity more cheaply, rapidly, and effectively than is possible in a traditional damage suit. Accordingly, media defendants in particular would have to consider the likely increase in plaintiffs' willingness to sue and in the concomitant negative publicity for media. Such circumstances would encourage the defendant to settle, unless it was confident of its version of the facts.

Finally, the fee-shifting provision, which encourages the parties to meet, may result in early settlement. Currently, many plaintiffs state that newspaper defendants antagonize them when they complain and that this propels them to sue.<sup>90</sup> This antagonism sometimes occurs at the hands of the embarrassed or angry reporter.<sup>91</sup> A more formal meeting with the potential defendant's top management or lawyer might focus discussion on hard evidence of falsity rather than on emotion. The organization

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85. The irrevocability of the plaintiff's election between damages and declaratory judgment makes this timing likely. See *POLRA*, *supra* note 15 § 1(d).

86. Cendali, *supra* note 4, at 479. Although Cendali's comments are addressed to the plan described in the original critique, which included the mandatory preaction meeting, see *supra* text accompanying notes 17-22, her concerns would still be valid under the new approach.

87. See Soloski, *supra* note 8, at 219-20.

88. *But see id.* at 220 (reporting that the media reject most requests for corrections).

89. Most complain within two days. See *supra* note 20.

90. Cranberg, *Fanning the Fire: The Media's Role in Libel Litigation*, 71 *IOWA L. REV.* 221, 221 (1985) ("An overwhelming number of plaintiffs told us that their postpublication experiences with the press influenced their decisions to bring suit.").

91. *Id.* at 223-24.

may be happy to have the chance to correct without suit—a chance they might not have without the meeting.<sup>92</sup> Therefore, providing the plaintiff the option to pursue a nondamage action would reduce the likelihood of litigation.

#### IV THE SCHUMER BILL

Although legislation affecting libel is being introduced in state legislatures,<sup>93</sup> primary attention has focused on H.R. 2846, introduced in 1985 by Representative Charles Schumer.<sup>94</sup> The House has already held hearings.<sup>95</sup> I have included the text of that bill to facilitate easy comparison with my proposal.

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92. The newspaper business, which accounts for almost two-thirds of all suits against media defendants, Franklin, *Suing Media for Libel*, 1981 AM. B. FOUND. RES. J. 795, 810, by nature focuses on the future. See Cranberg, *supra* note 90, at 222 (arguing that newspapers are geared to the next day, not yesterday's "fallout"). It is thus unlikely that the top management of most newspapers will learn of their errors prior to a lawsuit without such a meeting.

93. *E.g.*, S. 1979, 1985-86 Cal. Leg., Reg. Sess. (1986) (introduced by Sen. Bill Lockyer).

94. See *supra* note 2.

95. Hearings on libel law and possible reforms were held on July 18, 1985 and on February 26, 1986.

99TH CONGRESS  
1ST SESSION

# H. R. 2846

To protect the constitutional right to freedom of speech by establishing a new cause of action for defamation, and for other purposes.

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## IN THE HOUSE OF REPRESENTATIVES

JUNE 24, 1985

Mr. SCHUMER introduced the following bill; which was referred to the Committee on the Judiciary

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## A BILL

To protect the constitutional right to freedom of speech by establishing a new cause of action for defamation, and for other purposes.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3       SECTION 1. ACTION FOR DECLARATORY JUDGMENT THAT  
4               STATEMENT IS FALSE AND DEFAMATORY.

5       (a) CAUSE OF ACTION.—

6               (1) A public official or public figure who is the  
7       subject of a publication or broadcast which is published  
8       or broadcast in the print or electronic media may bring  
9       an action in any court of competent jurisdiction for a

## 2

1 declaratory judgment that such publication or broadcast  
2 was false and defamatory.

3 (2) Paragraph (1) shall not be construed to require  
4 proof of the state of mind of the defendant.

5 (3) No damages shall be awarded in such an  
6 action.

7 (b) BURDEN OF PROOF.—The plaintiff seeking a declar-  
8 atory judgment under subsection (a) shall bear the burden of  
9 proving by clear and convincing evidence each element of the  
10 cause of action described in subsection (a).

11 (c) BAR TO CERTAIN CLAIMS.—A plaintiff who brings  
12 an action for a declaratory judgment under subsection (a)  
13 shall be forever barred from asserting any other claim or  
14 cause of action arising out of a publication or broadcast which  
15 is the subject of such action.

16 (d) ELECTION BY DEFENDANT.—

17 (1) A defendant in an action brought by a public  
18 official or public figure arising out of a publication or  
19 broadcast in the print or electronic media which is al-  
20 leged to be false and defamatory shall have the right,  
21 at the time of filing its answer or within 90 days from  
22 the commencement of the action, whichever comes  
23 first, to designate the action as an action for a declara-  
24 tory judgment pursuant to subsection (a).

## §

1           (2) Any action designated as an action for a de-  
2       claratory judgment pursuant to paragraph (1) shall be  
3       treated for all purposes as if it had been filed originally  
4       as an action for a declaratory judgment under subsec-  
5       tion (a), and the plaintiff shall be forever barred from  
6       asserting or recovering for any other claim or cause of  
7       action arising out of a publication or broadcast which is  
8       the subject of such action.

9       **SEC. 2. LIMITATION ON ACTION.**

10       Any action arising out of a publication or broadcast  
11       which is alleged to be false and defamatory must be com-  
12       menced not later than one year after the first date of such  
13       publication or broadcast.

14       **SEC. 3. PUNITIVE DAMAGES PROHIBITED.**

15       Punitive damages may not be awarded in any action  
16       arising out of a publication or broadcast which is alleged to  
17       be false and defamatory.

18       **SEC. 4. ATTORNEY'S FEES.**

19       In any action arising out of a publication or broadcast  
20       which is alleged to be false and defamatory, the court shall  
21       award the prevailing party reasonable attorney's fees, except  
22       that—

23           (1) the court may reduce or disallow the award of  
24       attorney's fees if it determines that there is an overrid-  
25       ing reason to do so; and

4

1           (2) the court shall not award attorney's fees  
2           against a defendant which proves that it exercised rea-  
3           sonable efforts to ascertain that the publication or  
4           broadcast was not false and defamatory or that it pub-  
5           lished or broadcast a retraction not later than 10 days  
6           after the action was filed.

7 **SEC. 5. EFFECTIVE DATE.**

8           This Act shall apply to any cause of action which arises  
9           on or after the date of the enactment of this Act.

10

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The Schumer bill and my proposal agree on several features, including the initial plaintiff's option to elect a declaratory judgment action,<sup>96</sup> the burden of proof in that action,<sup>97</sup> the abolition of punitive damages in libel actions,<sup>98</sup> the effect of the election on the damage action,<sup>99</sup> and a one-year statute of limitations.<sup>100</sup> Both also recognize the need for some fee shifting.<sup>101</sup> On the other hand, several major differences exist as well, two of which have already been addressed.<sup>102</sup> I now turn to others.

### A. *The Defendant's Election*

My central disagreement with the Schumer bill is that it gives the defendant rather than the plaintiff control over election of remedies. Although the plaintiff has the first chance to elect, the defendant may override the plaintiff's choice of damages and convert the action into one for declaratory judgment.<sup>103</sup> The result is that any eligible defendant<sup>104</sup> may unilaterally avoid exposure to damage liability without regard to its prepublication behavior and without regard to ensuing harm. (Moreover, a defendant can even avoid liability for any attorneys' fees simply by retracting within ten days of the plaintiff's filing.<sup>105</sup>) This provision of the Schumer bill is objectionable because it (1) is unfair to all plaintiffs, especially those with special damages; (2) shows premature willingness to concede society's inability to handle intentional defamatory falsehoods; (3) destroys a longstanding tort remedy without a showing that less drastic alternatives are not available; and (4) is politically unattractive.

96. Compare *POLRA*, *supra* note 15 and accompanying text, § 1(a) with Schumer bill, *supra* note 2, § 1(a).

97. Compare *POLRA*, *supra* note 15 and accompanying text, § 1(b) with Schumer bill, *supra* note 2, § 1(b).

98. Compare *POLRA*, *supra* note 15 and accompanying text, § 3(b) with Schumer bill, *supra* note 2, § 3.

99. Compare *POLRA*, *supra* note 15 and accompanying text, § 1(d) with Schumer bill, *supra* note 2, § 1(c).

100. Compare *POLRA*, *supra* note 15 and accompanying text, § 2(a) with Schumer bill, *supra* note 2, § 2.

101. Compare *POLRA*, *supra* note 15 and accompanying text, § 4 with Schumer bill, *supra* note 2, § 4. Nonetheless, the philosophy and details of each proposal differ.

102. See *supra* text accompanying notes 79-84 (discovery), and *supra* text accompanying notes 29-32 (role of retraction). For criticism of the Schumer bill's approach to retractions, see *infra* text accompanying notes 139-40.

103. Schumer bill, *supra* note 2, § 1(d).

104. Sections 1(a) and 1(d) of the Schumer bill, *supra* note 2, speak in terms of defamation claims that arise out of mass-media situations, but do not explicitly state that the cases must involve media defendants. It is possible to read the bill to cover claims made by plaintiffs against nonmedia individuals who have uttered the alleged defamations through mass media. On the other hand, the retraction provision in § 4(2) suggests that the drafters focused on suits against mass-media defendants.

I have made my proposal applicable to all defamation defendants. See *POLRA*, *supra* note 15 and accompanying text, § 1 (a)(1); see also text accompanying notes 23-28.

105. Schumer bill, *supra* note 2, § 4(2).

First, the defendant's election is unfair to plaintiffs since plaintiffs who have suffered harm will be effectively barred from suing for damages by the likelihood that these damage cases will be converted into declaratory judgment actions by the defendant. I suspect also that damage cases involving public plaintiffs<sup>106</sup> will virtually disappear. Public plaintiffs who think they can show falsity but not actual malice will elect the declaratory judgment route. Those who think they can prove actual malice and who feel the need for damages will bring the tort action, yet those "strong" cases are the ones that the media defendants will convert to declaratory judgment actions. The only plausible situation in which media defendants might willingly expose themselves to damage liability and extensive defense costs is when the defendant perceives only a minimal risk of liability and would rather accept that chance than either admit error or have falsity adjudged in the declaratory action. Yet, even in that situation and even if the defendant can recoup its legal costs if it prevails, the time and interruption cannot be recouped and the damage action will remain costly. In short, the damage action will rarely be used.<sup>107</sup>

The self-serving assertion of many plaintiffs that they sue for non-monetary relief<sup>108</sup> does not support a conclusion that no plaintiff should be permitted a nontrumpable election to seek damages. Even the press itself appears concerned about the fairness of this approach.<sup>109</sup> Unless

106. See Schumer bill, *supra* note 2, § 1(a)(1) (limiting declaratory judgment action to public officials and public figures). This means that actions by private plaintiffs are unaffected by § 1 of the bill. The other provisions of the bill are not so limited.

107. Professor Barrett suggests that defendants are more likely to defend damage actions brought by public plaintiffs than I believe they are. He states that "prominent and profitable national media organizations, may well conclude in some cases that the potential reputational injury of losing a libel suit justifies risking the slight chance of a damage award in return for the actual malice defense." Barrett, *supra* note 12, at 870. If a media organization truly prizes its reputation for accuracy, it might be expected to defend the accuracy of the particular story in the declaratory judgment action rather than to assert an actual-malice defense, which only obscures the accuracy point.

In fact, one of the major purposes of Professor Barrett's Comment is to identify problems with the damage action and to give reasons why its virtual, if not total, demise is something to applaud. See, e.g., *id.* at 856 (juries are likely to misunderstand their function); *id.* at 856-57 (jury verdicts are unpredictable); *id.* at 871-73 (lengthy discussion on the significance of damages). He further suggests that the public-plaintiff damage action seriously threatens "responsible" journalism. See *id.* at 1514. Most of his criticisms, however, also apply to actions brought by private plaintiffs.

Professor Barrett argues that the "most important justification" for the defendant's election is that "eliminating the actual-malice defense is . . . an enormous concession to [public figure] plaintiffs." *Id.* at 871. The enormity of that concession depends in part on how quick and inexpensive the declaratory judgment track turns out to be.

108. See Soloski, *supra* note 8, at 219-20.

109. The press has doubts about bills that take no account of prepublication behavior or of harm actually suffered. See, e.g., Denniston, *A Bill That's On the Money*, WASH. JOURNALISM REV., Jan. 1986, at 50 (suggesting that the defendant's election is the "shakiest part" of the Schumer bill and that "whatever else Congress may be able to do about libel, there is the deepest doubt that it

one denies the existence of harm in libel cases, something that most journalists are unwilling to do,<sup>110</sup> it is hard to justify the de facto elimination of damage awards in virtually all cases.

Second, the defendant's election represents an unwise capitulation to irresponsible publishers who intentionally defame others. My approach and that underlying the Schumer bill differ about how effective the availability of a libel damage action is as a deterrent to defamation. The five-percent chance of suffering an unpredictable damage judgment<sup>111</sup> and the higher chance of incurring unrecoupable costs in damage actions clearly do chill the aggressiveness of responsible journalists.<sup>112</sup> Professor Barrett argues that giving defendants the option to avoid damages in exchange for a declaratory judgment action that is harder to defend will reduce the chill, thus producing benefits that exceed the cost of increasing the propensity of irresponsible publishers to lie.<sup>113</sup> This conclusion reflects an incorrect assessment of the costs and benefits. I have already shown that my proposal can reduce some chilling of responsible publishers without functionally eliminating the damage action.<sup>114</sup>

The defendant's election is also premised on a misunderstanding of the ability of damage actions to deter irresponsible publishers. The traditional results of a five-percent success rate<sup>115</sup> probably do not apply to an irresponsible publisher who is determined to build audiences with defamatory lies. This figure was derived mainly from cases involving traditional publishers and broadcasters.<sup>116</sup> Now that Carol Burnett, for

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could get away with doing that"); *Public Affairs, the Media, and the Democratic Process*, CENTER MAG., May/June 1985, at 10, 35 (reporting dialogue of a meeting at which William Thomas, Editor, L.A. Times said: "A law that says, if you retract as prominently as you injured, there shall be no damages, would be quite a law. I don't know whether that would be fair to the plaintiff at all.").

The specifics of the Schumer bill aside, much of the press has general doubts about absolute privilege. See Franklin, *supra* note 1, at 26-28.

110. See, e.g., Remarks of Robert Maynard, publisher, Oakland Tribune, at the *Conference on Protection of Reputation in a Democratic Society: The News Makers vs. the News Media*, University of California, Berkeley, 190 (Nov. 1, 2, 1985) (on file with author).

111. For support of the five percent success rate, see Franklin, *supra* note 92, at 803; see also Bezanson, *supra* note 70, at 228 ("less than ten percent of media libel cases are won in court. . .").

112. See *supra* note 12 and accompanying text.

113. See Barrett, *supra* note 12, at 871-73.

114. See *supra* text accompanying notes 23-28 & 55-74.

115. See *supra* note 111.

116. Franklin, *supra* note 92, at 810. The published studies deal with libel cases litigated to conclusion. It is clear, however, that settlements do occur with some frequency and may occur more often now that insureds must bear a percentage of defense costs. See *supra* note 69. For a discussion of an unpublished study of settled libel cases, see Franklin, *supra* note 92, at 800 n.12. The Iowa study expects to publish data on settlements. See Remarks of Randall Bezanson at the Joint ABA-APNA Task Force National Symposium on Libel, tape 2, at 22, 24 (Mar. 21, 1986) (on file with author) [*hereinafter* Remarks of Randall Bezanson]. A defendant's option will eliminate virtually all of these settlements.

example, has broken the ice,<sup>117</sup> we are seeing an increasing amount of litigation against organizations like the *National Enquirer* and *Globe International*.<sup>118</sup> It is unlikely that deliberate defamers will be held liable at a rate as low as five percent in the coming years. Under my proposal, plaintiffs in such cases would be able to control the remedy. In contrast, under the Schumer bill, the defendant may convert the damage action into a declaratory judgment and defend, risking exposure to nothing more than fee shifting. The defendant's election removes any deterrent effect of libel law by allowing irresponsible publishers to choose either to retract and escape liability for attorneys' fees or to default and face only minimal fee shifting.<sup>119</sup>

Moreover, the scandal press is not the only group that can be called "irresponsible" and who would no longer be subject to the deterrent force of libel damage actions under the Schumer bill. Another candidate for that category is the narrow-spectrum publisher or broadcaster whose message is pitched to a faithful political or religious following and who may be tempted to play fast and loose with the truth.<sup>120</sup> Also, the small publisher or broadcaster who has great local power but lacks ethical standards may be tempted by the defendant's election to defame intentionally. The Schumer bill would free these groups from restraint. I do not argue that the actual-malice rule is generally necessary to provide

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

118. For example, television producer Arthur Fellows has sued the *National Enquirer*. *Fellows v. National Enquirer, Inc.*, 42 Cal. 3d 234, 721 P.2d 97, 228 Cal. Rptr. 215 (1986). The father of actor Tom Selleck has sued the *Globe* for libel, alleging that he neither granted an interview to the *Globe* nor made the statements attributed to him. *Selleck v. Globe Int'l, Inc.*, 166 Cal. App. 3d 1123, 212 Cal. Rptr. 838 (1985) (reversing dismissal of libel action); see Eisler, *Tabloid Will Seek Supreme Court Review of Ruling Allowing Suit by Actor's Father*, L.A. Daily J., Apr. 19, 1985, Pt. II, at 1, col. 1. The California Supreme Court, on a vote of 4-3, denied a hearing on August 1, 1985. As a third example, Tom Selleck has settled a claim against the *National Enquirer*, which printed a retraction. *The Enquirer Settles with Tom Selleck*, San Francisco Chron., Oct. 7, 1985, at 59, col. 3. Fourth, Dionne Warwick settled a libel suit against the *Globe* in which she originally sought \$30 million in damages. *Singer Withdraws Tabloid Suit*, San Jose Mercury News, May 8, 1986, at 4A.

119. This type of publisher probably will not be embarrassed by regular defaults. For example, assuming the allegations by Tom Selleck's father are true, a publisher willing to print a fabricated, defamatory "interview," see *supra* note 118, despite likely liability for damages, probably would view the option to default with monetary impunity as a windfall. The defendant's option could only encourage such conduct.

It is not clear whether the same consideration applies to the narrow-spectrum magazine, see *infra* text accompanying note 120, which may be more sensitive to this problem because regular defaults may hurt its credibility with its adherents. One wonders, though, how the defendant in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the publisher of a John Birch Society magazine, would have responded if it could have elected between a damage action and a declaratory action.

On the other hand, there can be little doubt that in most media organizations, a default would hurt the morale of the staff at least as badly as a settlement does under current law.

120. For an example of a case involving a narrow-spectrum publisher, see *Gertz v. Robert Welch, Inc.*, 680 F.2d 527 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983); see also *supra* note 119.

responsible publishers with incentives to be careful. Most already have professional and social incentives to be honest and careful.<sup>121</sup> But if the group of potentially irresponsible publishers is broader than the "professional criminal"<sup>122</sup> category, as I believe it is, then to release all media from legal control as the Schumer bill does would not only be morally dubious but would produce new instances of irresponsibility.<sup>123</sup>

Professor Barrett justifies this loss of checks against intentional defamation in part by asserting that it "is a fair and necessary trade-off for the parties in light of societal interests, particularly the first amendment interest in robust debate."<sup>124</sup> The Schumer bill, however, draws no distinction between public officials and public figures, and is not limited to statements that implicate self-governance or any other subject matter. As a result, it deprives low-level public officials<sup>125</sup> and involuntary public figures<sup>126</sup> of their actions in the name of improving the quality of public debate. Does "debate on public issues" include anything that titillates any segment of the public? If the defendant's election were limited to stories concerning self-governance,<sup>127</sup> with all the line drawing that would entail, one might be able to understand and maybe even agree with

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121. See Franklin, *supra* note 1, at 27-28. In addition to concern about the attitudes of the general public, responsible journalists may be influenced by the appraisals of peers in academic publications, such as the *Columbia Journalism Review* or the *Washington Journalism Review*, and professional publications, such as the *Bulletin of the American Society of Newspaper Editors*.

122. See Barrett, *supra* note 12, at 872.

123. Professor Barrett asserts that "expansion in the scope of libel defenses would lead to greater press irresponsibility." *Id.* at 872. It seems odd for Professor Barrett to assert that my proposal may encourage these defendants when he supports the Schumer bill, which allows these defendants the option to avoid damage actions for libel.

One answer is that if "irresponsible" publishers develop a history of defaulting in declaratory judgment actions, it is unlikely that plaintiffs will take that route. Both the higher success rate against these defendants and increasing willingness of individuals to sue them, see *supra* text accompanying notes 111-18, will probably further induce those with claims against these defendants to use the damage route. Thus, those hurt by these defendants probably will be the least likely to be satisfied with a default judgment and will opt for a damage action. To the extent plaintiffs tend to use the declaratory judgment action against responsible publishers and the damage action against irresponsible defendants (or those media members guilty of serious breakdowns), my proposal has a real chance to succeed without eviscerating libel law.

124. Barrett, *supra* note 12, at 882.

125. Professor Barrett does express concern about, but no solution for, the low-level public officials who may be deprived of their damage actions under the Schumer bill. *Id.* at 868 n. 133.

126. For a case involving an involuntary public figure, see *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736 (D.C. Cir. 1985) (holding that a federal air controller was an involuntary public figure in connection with a story about an air crash eight years earlier), *cert. denied*, 106 S. Ct. 2247 (1986).

127. The focus of a defendant's election would then be on the subject matter of the alleged defamation rather than on the status of the plaintiff. Even if the Supreme Court's rejection of that approach for constitutional purposes in *Gertz* was sound, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-46 (1973), that rejection casts no doubt on a legislative approach that seeks to protect certain kinds of speech.

the point. Now, however, the bill sweeps so broadly that it protects everything in print about "public" persons.

Although critics agree that large transaction costs play a role in the current libel law problem, the amount saved by any proposal will depend on the attractiveness and simplicity of its low-stakes alternatives. The Schumer bill appears to conclude that the current situation is so bad that there is no time to try measures that are less protective of the press. Many who deplore the current situation probably empathize with plaintiffs and would find the Schumer bill a giant step in the wrong direction. My proposal is based on a perception of problems on both sides.

Third, the defendant's election is undesirable because enough uncertainties exist over the effects of libel law reform to warrant rejection of the Schumer bill's immediate and uniform imposition of a defendant's option. The results of my proposal are sufficiently unpredictable that it is far too early to conclude that it or some variation of it will not encourage enough plaintiffs to use the declaratory judgment action to reduce transaction costs while preserving existing legal techniques to protect citizens from being defamed at will without effective recourse. The Schumer bill, without any evidence that an approach based on the plaintiff's election will not do the job, would permit any defendant to avoid the compensatory and deterrent functions of tort law.

Fourth, the Schumer bill is politically unattractive. Professor Barrett has suggested that POLRA is unlikely to command public support.<sup>128</sup> Its major political drawback seems to be the increase in proof requirements for private plaintiffs.<sup>129</sup> As I earlier responded,<sup>130</sup> giving all such plaintiffs an election to seek a declaratory judgment warrants the increase in proof requirements.<sup>131</sup> Despite my treatment of private plaintiffs, I believe that my proposal is more likely to have widespread support than is the Schumer bill. I would not relish having to convince a legislature or the electorate to adopt a statute that allows "irresponsible publishers" to escape all liability for whatever harm they may impose by

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128. Barrett, *supra* note 12, at 880.

129. *Id.* at 879-80.

130. See *supra* text accompanying notes 55-67.

131. If protecting public debate is important to the Schumer bill it is odd for it to perpetuate the current law's focus on the plaintiff's status. Schumer bill, *supra* note 2, § 1(d)(1). The result is to handle a case based on the facts of *Gertz* under state law—negligence and a preponderance of the evidence—but to permit a defendant's election in a case based on the facts of *Burnett v. National Enquirer, Inc.*, 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983), *appeal dismissed*, 465 U.S. 1014 (1984), so that the plaintiff must prove falsity by clear and convincing evidence even to get a declaratory judgment.

Denying any election to private plaintiffs forces them to take the damage route. Given the ease with which negligence can be shown to flow from error, see *supra* text accompanying notes 56-57, many media defendants will be subject to too great a risk of monetary liability. Smaller defendants who could benefit greatly from the avowed goals of the Schumer bill may be least able to take advantage of it. See *supra* note 58 and accompanying text.

their use of deliberate falsehoods.<sup>132</sup>

### B. *The Shifting of Fees*

Although both my proposal and the Schumer bill place heavy emphasis on fee shifting in both damage actions and declaratory judgment actions, they approach the matter differently. For a damage action, the Schumer bill allows a court to alter the rule that the prevailing party gets reasonable attorneys' fees when "there is an overriding reason to do so."<sup>133</sup> Under my proposal, the general fee shift will occur in damage actions except when a losing plaintiff has in fact sustained special damages and had a reasonable chance of proving falsity and actual malice with convincing clarity.<sup>134</sup> My fee-shifting provision is preferable because it will encourage a move away from damage actions. The Schumer bill's open-ended, "overriding reason" provision probably would not be used because of judicial reluctance to prejudice further any plaintiff, with or without special damages, who could clearly show falsity, even if the plaintiff's evidence of actual malice was truly weak.

In the declaratory judgment situation, also, we agree that fees play a central role, but disagree over that role. The Schumer bill's general rule that the winner gets reasonable fees is again subject to the "overriding reason" exception.<sup>135</sup> In the Schumer bill, the plaintiff need not be able to predict the outcome in order to elect remedies because the defendant can, and is likely to, override the plaintiff's election of a damage action. Since in my proposal the plaintiff's election controls, the plaintiff must be given some reasonable expectation about when he can recover fees. It is important that the fee rules be fairly predictable because there will be no other money changing hands in a declaratory judgment action.

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132. See *supra* note 109 (media questioning the fairness of the defendant's election). If any jurisdiction should nonetheless be attracted to the Schumer approach, it should at least include a provision preserving the right to sue for damages of those who have suffered special damages.

133. Schumer bill, *supra* note 2, § 4(1). Professor Barrett defends this provision because it permits judges to take into account "such factors as extreme disparity in the wealth of the parties" or the existence of noncompensable special damages. Barrett, *supra* note 12, at 875 n.160. Considerations of overriding reason in general or comparative wealth in particular may make prediction of fee shifting uncertain. A plaintiff sure of falsity but uncertain about fees and actual malice may elect the damage action—though the defendant can override that and then win on fees no matter what the outcome. Predictability of fee shifting is crucial in an approach based on a plaintiff's election.

Professor Barrett's example of a situation in which a person who suffered special damages and then lost the damage action, see *id.* at 874 n.158, is precisely the situation covered in § 4(b)(1) of my proposal without creating the uncertain set of fee rules that the Schumer bill would.

134. *POLRA*, *supra* note 15 and accompanying text, § 4(b)(1). Note that the test is objective and not based on what an attorney might advise. According to the Iowa study, plaintiffs report that their attorneys were far more encouraging than the law or the facts warranted. Remarks of Randall Bezanson, *supra* note 116, tape 2, at 24-25. Professor Barrett misreads this test when he asserts that the attorney's advice is relevant. Barrett, *supra* note 12, at 874 n.157.

135. Schumer bill, *supra* note 2, § 4(1).

In addition to the “overriding reason” exception, the Schumer bill would deny a successful plaintiff fees in two other situations. First, the successful plaintiff in either a damage or a declaratory judgment action would be denied fees if the defendant could prove that it made reasonable efforts to avoid the publication of the false and defamatory statement.<sup>136</sup> This would greatly discourage the use of the declaratory judgment action—if the election were with the plaintiff. If fees were crucial, the plaintiff would have to become concerned with the defendant’s prepublication behavior. Rather than focus only on falsity, the plaintiff would have to consider how difficult it would be to show falsity and then guess about what the defense would be able to show on the question of its due care in order to determine the size of the fees in the case. This uncertainty may well deter plaintiffs who otherwise would be inclined to seek a declaratory judgment from doing so.<sup>137</sup>

The second situation in which the Schumer bill would deny the successful plaintiff fees occurs when the defendant has retracted within ten days after suit was filed, whether it is a suit for damages or declaratory relief.<sup>138</sup> In damage actions, I would leave the role of retractions to state law.<sup>139</sup> I see no reason why a plaintiff who shows actual malice and recovers compensatory damages should be unable to recover attorneys’ fees simply because a retraction was published as much as a year after the original defamation.<sup>140</sup>

In contrast to these two provisions of the Schumer bill, my fee-shifting provisions are designed to lead the plaintiff to elect the declaratory judgment action, in part by emphasizing postpublication conduct. The proposal provides that a losing plaintiff will not owe fees unless the plaintiff brought or maintained the action without reasonable chance for success or failed to present her evidence to the defendant in advance of the action.<sup>141</sup> The plaintiff who puts her cards on the table early either will get a quick correction or reply or will have falsity adjudicated. In addition, if she prevails, she will recover fees. If she loses the action, she will

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136. Schumer bill, *supra* note 2, § 4(2).

137. Of course, this does not matter under the Schumer bill since the defendant can convert the suit to a declaratory judgment action anyway.

138. Schumer bill, *supra* note 2, § 4(2).

139. A majority of states have such statutes. B. SANFORD, *supra* note 34, at 663-700 (collecting and quoting 33 statutes).

140. If the plaintiff takes close to a year to investigate before deciding to sue for damages, the defendant would still have ten days in which to retract and escape all fees, whether or not the defendant decided to convert the action into one for declaratory judgment.

The Schumer bill’s retraction provision is much more acceptable in the declaratory judgment context because the plaintiff has already signaled willingness to forgo damages by filing that action. Since the defendant’s admission of error will be at least as valuable a remedy as the court’s later adjudication of that error, an appropriate retraction should obviate the need for adjudication. This should be true at least if the plaintiff has not already expended substantial legal fees.

141. POLRA, *supra* note 15 and accompanying text, § 4(b)(2).

not owe fees unless she is found to have acted unreasonably in bringing or maintaining the action. I consider that a reasonable package to encourage resort to the action.

My proposal thus tries to encourage quick resolution of cases. The goal is to encourage a plaintiff to try to get a correction or an opportunity to reply, without resort to the legal process. A plaintiff who is not seeking damages or trying to burden the defendant should not hesitate to present that evidence.<sup>142</sup>

In order to encourage settlements, the proposal states that an appropriate retraction made before the action is filed is a complete defense to an action for declaratory judgment.<sup>143</sup> If an appropriate retraction is made after the declaratory action is filed, the question instead becomes one of fees, rather than one of absolute defense as under the Schumer bill. Until the retraction, the defendant has forced the plaintiff to incur legal costs and the defendant should become the prevailing party only after that point. The result is that the proposal treats the plaintiff as the prevailing party on the publication of an appropriate retraction, but exposes the plaintiff to liability for the defendant's fees after that point if the plaintiff does not accept the retraction and dismiss the action.

#### CONCLUSION

In this Article, I have provided a statutory version of a proposal that I had previously only described. I have sought to defend the declaratory judgment approach in general and the specifics of my proposal from a variety of claims. Finally, I have responded to assertions that the Schumer bill is preferable to my proposal.

On this last point, we would do well to recall the Supreme Court's admonition about the dangers of absolute privilege for falsehood:

[T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ." [citation omitted] Hence the knowingly false statement and the false statement made with reckless disregard of

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142. For discussion and rejection of concerns that this provision will place the plaintiff at a serious disadvantage, see *supra* notes 81-83 and accompanying text.

143. *POLRA*, *supra* note 15 and accompanying text, § 2(b). This section assumes that the defendant will have a reasonable time in which to consider the evidence and decide whether to retract. This should not cause a problem because, as noted in the text, a retraction made shortly after suit will diminish the defendant's liability for attorneys' fees.

the truth, do not enjoy constitutional protection.<sup>144</sup>

The Schumer bill, with the defendant's election, puts the power to publish intentionally false and defamatory statements with practical impunity into the hands of all media. Furthermore, this power would likely be used by the most irresponsible publishers. The state of libel law today has not reached the point of needing such a dramatic and traumatic overhaul. We would do better by moving toward state experimentation with an intermediate solution such as my proposal.

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144. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

