It's Not That Simple: An Unnecessary Elimination of Strict Liability and Presumed Damage in Libel Law

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REVIEW ESSAY

IT'S NOT THAT SIMPLE: AN UNNECESSARY ELIMINATION OF STRICT LIABILITY AND PRESUMED DAMAGES IN LIBEL LAW


Reviewed by Alfred C. Yen*

Libel actions of one sort or another have wandered in and out of vogue as methods for correcting perceived shortcomings of the press.¹ During the middle of the twentieth century, libel actions were unpopular in the United States. In 1947, Zechariah Chafee, Jr. wrote that "a libelled American prefers to vindicate his reputation by steadily pushing forward his career and not by hiring a lawyer to talk in a courtroom."² Despite the recognition by courts that libel actions could be used to curtail press activity, libelous speech initially was devoid of first amendment protection.³ This apparent tranquility was shattered over the next forty years.

In 1964 the Supreme Court decided the famous case of New York Times Co. v. Sullivan.⁴ The Court held that traditional libel actions by public officials violated the first amendment protec-

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² Z. Chafee, Jr., Goverment and Mass Communications 106–07 (1947).
tion of free speech. Henceforth, public officials had to prove that a defendant published the allegedly defamatory statements with "actual malice in order to meet constitutional standards." 

However, while the constitutionalization of libel law increased the plaintiff's burden of proof in certain actions, it did not discourage plaintiffs from suing. Indeed, the number of libel suits exploded during the next twenty years. Rather than "steadily pushing forward" their careers, Americans began calling their lawyers. With its newfound popularity and constitutional status, libel law moved to the forefront of public and scholarly debate. This Review examines a recent chapter in the debate, Judge Lois Forer's book *A Chilling Effect.*

Although *New York Times* was widely praised as a significant advance in first amendment jurisprudence, the constitutional standards established in subsequent cases have proven less than completely satisfactory. As a result, later cases have attracted substantial criticism.

Perhaps more importantly, lower courts have encountered difficulty in applying the standards of "public figure" and "actual malice." One judge noted that "[d]efining a public figure is much like trying to nail a jellyfish to a wall." The concept of actual malice proved similarly troublesome. Although the standard was meant to decrease the chilling effect of libel suits, experience showed that the subjective nature of the actual malice test has

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5 Id. at 279–80.


7 Although Forer's book deals with many aspects of the relationship between individuals and the press, this review focuses primarily on Forer's treatment of actions for defamation falsehoods (generic libel). Space constraints preclude consideration here of her more sweeping discussions of privacy, publicity and emotional distress.

8 See, e.g., Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191, 194 (1964). Effusively praising the Court's decision, Kalven declared that *New York Times* was "an opinion that may prove to be the best and most important it has ever produced in the realm of freedom of speech."


led to costly and prolonged court battles—made all the worse by the Supreme Court's refusal to curtail plaintiffs’ discovery rights. In fact, the very process of litigation has become as threatening as the risk of damage awards.

These difficulties have caused some commentators to suggest that the legislatures, not the courts, should assume responsibility for reforming modern libel doctrine. Forer's book follows this trend by advocating the adoption of a federal libel statute.

By Judge Forer's own admission, A Chilling Effect is "not a legal text." She makes no attempt to survey relevant doctrine or legal commentaries. Instead, her book is intended to educate Americans and their elected representatives about both the problems in existing libel law and the urgent need for a libel statute. As a trial judge, Forer believes that her view of libel law differs from that of the Supreme Court and other commentators.

The result is a good effort to identify and explore problems posed by the explosion of suits against the media. Forer recognizes that actions other than ordinary defamation can seriously chill speech. As a result, her book broadly explores the legal relationship between media organizations and their human subjects. By identifying and describing problems in such areas as invasion of privacy, rights of publicity and infliction of emotional distress, Forer makes an effort that has not been made by too many scholars, legislators and judges.

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14 Hustler Magazine v. Falwell, 108 S. Ct. 876, 56 U.S.L.W. 4180 (1988), illustrates the implication of first amendment values in non-defamation actions. Defendant Hustler magazine published a "parody," modeled after a nationally known advertisement, suggesting that plaintiff television evangelist Falwell had engaged in a drunken incestuous rendezvous with his mother in an outhouse. Falwell sued, alleging invasion of privacy, libel and intentional infliction of emotional distress. After a directed verdict for the defendant on the invasion of privacy claim, the jury found no libel, but awarded the plaintiff $100,000 in compensatory damages and $100,000 in punitive damages. On appeal, the Fourth Circuit upheld the jury award. 797 F.2d 1270 (1986), petition for
Despite Forer's efforts, the book falls short of its stated goal of educating lawmakers. Although Forer successfully identifies troublesome issues, she does not sufficiently clarify the fundamental concepts that form the basis of those problems. In particular, much of the book is devoted to making a case for the adoption of a universal negligence standard in libel and the elimination of presumed damages. Forer justifies her position primarily by appealing to common sense; she contends that most of the problems in libel doctrine can be cured by reconciling it with principles of ordinary negligence law. This, however, is based on the unarticulated assumption that ordinary negligence law makes good sense. (pp. 71–72).

Unfortunately, things are not that simple. By uncritically accepting ordinary negligence law as a model of good law, Forer misses the opportunity to educate her reader about more basic and fundamental choices which must be made by anyone rewriting the law of libel. If Forer had examined the theories behind the protection of reputation and speech, she would undoubtedly have discovered justifications for a strict liability libel cause of action and the limited imposition of presumed damages. Forer could also have arrived at the same justifications by considering the results of recent empirical research. By failing to consider adequately either of these possibilities, Forer keeps her reader from making a fully considered reevaluation of libel law.

I. Describing the Problem

Forer fails to provide an orderly overview of modern libel doctrine.15 Such a summary, however, is necessary before one can meaningfully evaluate her suggested reforms.

reh'g with suggestion for reh'g en banc denied, 804 F.2d 484 (1986). The Supreme Court reversed, holding that Falwell, a public figure, could not recover for intentional infliction of emotional distress absent a valid finding of defamation. 56 U.S.L.W. at 4182. Although the decision may have broad implications for non-defamation suits against the press, future decisions may limit its application to public figure plaintiffs, thereby leaving private figures free to pursue similar claims. In addressing non-defamation actions, Forer advocates the statutory creation of a right of "persona," which would encompass rights of privacy, publicity and truthful depiction. (p. 42).

15 Because she believes that libel law is fatally indeterminate, Forer describes libel doctrine only when the description appears necessary to make her point that libel law makes no sense. This major shortcoming makes it difficult to evaluate her proposals.
Under the common law, libel was defined as a false statement that held the plaintiff up to hatred, ridicule or contempt.\textsuperscript{16} Traditionally, a false accusation of criminal activity, unchastity, fraud or the like sufficed to create a defamation claim. If the statement was defamatory, a defendant was held strictly liable at common law for actual harm proven at trial by the plaintiff.\textsuperscript{17} The plaintiff also could receive a judgment for presumed damages, even if she had offered no evidence of actual harm. To assess damages, the jury merely appraised the harshness of the defamatory statement.\textsuperscript{18} In addition, a jury could award punitive damages if the defendant published the defamatory statement with common law malice.\textsuperscript{19}

In constitutionalizing libel law, the Supreme Court modified the traditional doctrine. First, the Court reduced the liability of defendants in certain cases. It held that a "public figure" plaintiff could not recover without proof, by clear and convincing evidence, that the defendant had published the defamatory falsehood with "actual malice."\textsuperscript{20} "Actual malice" has been defined in this context as "knowing or reckless disregard for falsity."\textsuperscript{21} A "private figure" plaintiff did not have to prove actual malice, but instead could recover by demonstrating a defendant's fault.\textsuperscript{22} Second, the Court changed the common law damage rules, prohibiting the award of presumed or punitive damages unless the plaintiff (whether public figure or private figure) proved actual malice.\textsuperscript{23} Because of these modifications, strict liability has been eliminated, at least for the time being.\textsuperscript{24}

Although such decisions as \textit{New York Times}, \textit{Gertz} and their progeny were meant to protect the media from unwar-

\textsuperscript{17} R. Smolla, Law of Defamation § 1.05[1] (1986).
\textsuperscript{18} Id. at § 9.05[1].
\textsuperscript{19} Id. at § 9.08[3][b][ii].
\textsuperscript{21} \textit{New York Times}, 376 U.S. at 280.
\textsuperscript{22} See \textit{Gertz}, 418 U.S. at 347; L. Tribe, supra note 12, at 874.
\textsuperscript{23} \textit{Gertz}, 418 U.S. at 349. However, under the plurality opinion of \textit{Dun & Bradstreet}, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985), private plaintiffs can now recover presumed and punitive damages without showing malice, if the defamatory speech is not "of public concern." \textit{Dun & Bradstreet}, 472 U.S. at 758.
\textsuperscript{24} Although \textit{Gertz} purported to abolish strict liability, the case of \textit{Dun & Bradstreet} suggests that the Court may retreat from its stance in \textit{Gertz}. See infra note 56.
ranted libel suits, Forer contends that in fact they have caused the chilling effect that the Supreme Court had sought to prevent. (pp. 17, 28–29).

She cites several cases to support her claim. In one, a wealthy and prominent divorcee recovered $100,000 for a minor inaccuracy in a news report of her divorce. In another, a candidate for a United States Attorney appointment successfully sued an individual who had written the President of the United States to criticize the aspirant’s performance. By contrast, in a third case, an incumbent mayor was denied recovery for a newspaper’s erroneous report that he had been indicted for perjury.

Forer concludes that such inconsistent results render libel law unintelligible. Plaintiffs with seemingly meritless cases recover, while apparently defenseless publishers escape liability. Such confusion, she asserts, creates incentives for plaintiffs to sue, while offering little guidance to lawyers who must advise their media clients whether to settle. Every plaintiff is tempted to “stay in the race” on the chance of striking it rich. (pp. 21, 41). Even if a plaintiff’s claim ultimately is found meritless, free expression is chilled by the huge attorneys’ fees and other costs generated by the libel suit. (pp. 30–31).

What is worse, Forer argues, courts are helpless to remedy the situation. (pp. 89–111, 111 n.16). Part of the problem is constitutional: it is difficult, if not impossible, to determine accurately who qualifies as a public figure. The complexity of libel doctrine has compounded the quandary. It takes a judge two to three hours simply to read instructions to the jury, which, Forer says, are too complex for jurors to understand. (pp. 97–98). Even if the judge manages to give intelligible instructions, the abstract constitutional determinations — Who is a “public figure”? What is “actual malice”? — distract juries from the two fundamental questions: Is the allegedly defamatory statement true? Was the plaintiff harmed? (pp. 77–79, 111). Because of

25 Time, Inc. v. Firestone, 424 U.S. 448 (1976) (erroneous report that divorce had been granted on grounds of extreme cruelty and adultery when grounds were extreme cruelty and lack of domestication).
these complexities and distractions, jury verdicts risk being arbitrary.

Forer says these problems arise because libel doctrine is counterintuitive, as opposed to ordinary negligence law, which she apparently considers "intuitive." (p. 82). Under a negligence regime, for example, a defendant's liability is not intended to be punitive. Rather, damages are designed to "replace the losses of the injured person, not to give a windfall or a bonus..." (p. 80). In libel cases, however, presumed or punitive damages allow juries to punish defendants and award windfall damages to plaintiffs. Such verdicts lead plaintiffs to anticipate winning large awards from deep-pocket media defendants regardless of actual harm. As a result, says Forer, defendants are forced to pay large sums in settlement even when they honestly think that they have harmed no one. Citing several cases in which apparently undeserving plaintiffs recovered substantial amounts despite an inability to prove harm, (passim) Forer concludes that the awarding of presumed damages in libel actions undermines the proper goals of tort law. (pp. 81–82, 94–95).

Forer criticizes the actual malice standard in a similar manner. Under ordinary negligence law, a plaintiff recovers if she can demonstrate that the defendant has acted without due care. By contrast, the actual malice standard permits recovery for actual harm only when the defendant acted with reckless disregard for the truth. Thus, Forer argues, the actual malice standard unacceptably operates to deny recovery to deserving plaintiffs. (pp. 79, 111).

II. Forer's Case for the Elimination of Presumed Damages and the Adoption of a Universal Negligence Standard

Having presented the disarray in the house of libel, Forer sets out to put that house in order. Not surprisingly, she believes that a new regime, reconciling libel law with ordinary negligence law, would create certainty, adequately protect reputation and remove the chilling effect. (pp. 71–72, 95). These effects in turn would hasten the process of libel litigation and simplify the judge's task. (p. 95).

An essential element of her attempt to conform libel law to ordinary negligence law is the adoption of a universal negligence
standard. Under Forer's model statute, a public figure libel plaintiff no longer would have to prove that the defendant acted with actual malice; a showing of negligence would suffice. (pp. 76–79, 340). Forer advances two justifications for this proposal. First, because negligence is a familiar concept, plaintiffs and defendants would understand their rights and obligations. Courts also would find the test easier to apply. (p. 94). This would promote certainty, expedite litigation and increase the likelihood of a reasoned settlement.

Second, the adoption of a universal negligence standard would eliminate the problematic constitutional public figure and actual malice tests. (pp. 340–41). Under present doctrine, the public figure test determines whether the actual malice standard of liability applies. Forer proposes instead that negligence be the standard of liability for all cases. By adding the uniform damages standards described below, the need for the public figure test would be eliminated. The results of this overhaul would again be heightened certainty, smoother judicial administration and increased opportunities for settlement.

A second essential element of Forer's proposal is the elimination of presumed damages. Under her suggested statute, compensatory money damages would be available only for harm actually proven to have been caused by the defendant's negligence. Punitive damages would be awarded only upon a showing of "personal spite or ill will." (p. 331). Once again, she cites ease of judicial application as her goal. First, eliminating presumed damages would reduce a plaintiff's incentives to sue, increase her incentives to settle and thereby hasten the processing of litigation. (pp. 99, 111). Furthermore, "[j]uries would have the usual criteria by which to measure damages. Trial judges would also be able to exercise their usual function of remitting damages in excess of what was proved. Trial and appellate judges would have a sound basis by which to measure the fairness of the verdict." (p. 354).

Taken together, Forer's proposals seem to constitute a seemingly convincing case for the adoption of a universal negligence standard and the elimination of presumed damages. However, things are not as simple as Forer imagines them. A closer examination of the reasons for protecting reputation and speech reveals a strong case for the adoption of a strict liability
cause of action for libel that would allow limited presumed damages. By failing to embark on this inquiry, Forer misses the opportunity to educate her reader about the fundamental choice inherent in her proposal.²⁸

The next section of this Review describes this neglected line of inquiry. It begins by considering recent empirical and theoretical scholarship. This leads to an examination of libel remedies other than money damages and the standards of liability which are appropriate for those remedies. A case for strict liability in libel and the limited imposition of presumed damages follows.

III. A Case for a Strict Liability Cause of Action in Libel

"The law [historically] treats reputation as a property right that is balanced against the First Amendment claims of the author," says Forer. Because of this, "[t]he remedy for damage to reputation, like the remedy for damage to any other property interest, [is] an award of money." (p. 113). For Forer, this proposition is not enough. She finds it "unnecessary to discuss the juridical theories and precedents for granting recovery to subjects who sue for defamation."²⁹ (p. 114) This assumption underlies her claim that presuming damages as a normal consequence of harm to reputation does not make sense.³⁰ (p. 114).

In light of Forer’s concern over judicial and academic butchering of libel law, her uncritical acceptance of reputation as property is strange. Even stranger is the length to which she goes to endow reputation with property-like traits. In several places, Forer states that it is probably unconstitutional to eliminate certain recoveries for harm to reputation. Such changes in the law purportedly violate due process prohibitions against the taking of property without just compensation. (p. 201). While reputation does have property-like traits, it deserves protection for reasons beyond its economic value.

²⁸ This choice is to treat reputations as a property right. See infra text accompanying note 30.
²⁹ Forer attacks the assumption only by arguing that harm to reputation does not necessarily lead to loss of property.
³⁰ For further development of the theory behind Forer’s position, see infra note 39.
Support for this proposition comes from both empirical and theoretical scholarship. In Phase I of the Iowa Libel Research Project, Professors Bezanson, Cranberg and Soloski interviewed more than 150 libel plaintiffs and defendants in an attempt to determine why they sue.\textsuperscript{31} Contrary to Forer's apparent belief that most plaintiffs sue out of a desire to strike it rich, the study found that plaintiffs' three primary motivations are non-financial: restoring reputation, correcting falsity and achieving vengeance. Only 20\% of the plaintiffs brought suit to recover damages for economic harm.\textsuperscript{32} Indeed, plaintiffs apparently viewed the very act of bringing suit as vindicating their reputations.\textsuperscript{33} Interviews with media defendants confirmed the study's findings with regard to the motivations of plaintiffs. Defendants perceived that the majority of plaintiffs seek vindication and punishment, not compensation.\textsuperscript{34}

Professor Bezanson found support for the primacy of non-financial motives to sue in the fact that plaintiffs face extremely poor prospects for victory or significant recovery.\textsuperscript{35} Of the plaintiffs interviewed, 86.5\% stated that they would sue again. Surprisingly, even of the plaintiffs who lost and said the suit accomplished nothing, 80\% claimed they would sue again.\textsuperscript{36} From these responses, it is evident that plaintiffs do not view money as the remedy for harm to their reputations. Indeed, the willingness to sue again despite initial failure indicates that plaintiffs feel their reputation is worth protecting even if no money can be recovered.


\textsuperscript{32} Bezanson, Libel Law and the Realities of Litigation: Setting the Record Straight, supra note 31, at 228.


\textsuperscript{34} See Cranberg, Fanning the Fire: The Media's Role in Libel Litigation, 71 Iowa L. Rev. 221 (1985).


\textsuperscript{36} Id. at 797.
A similar conclusion can be drawn from a theoretical perspective. Robert C. Post has examined three distinct concepts of reputation worthy of protection: as property, as honor and as dignity. Post explains each of these concepts and shows how each has influenced libel doctrine.

The first of these notions corresponds to Forer's accepted premise:

[R]eputation can be understood as a form of intangible property akin to goodwill. It is this concept of reputation that underlies our image of the merchant who works hard to become known as creditworthy or of the carpenter who strives to achieve a name for quality workmanship. Such a reputation is capable of being earned, in the sense that it can be acquired as a result of an individual's efforts and labor.

According to Post, the concept of reputation as property presumes the existence of a marketplace that values reputation. Defamation law thus ensures that individuals are not wrongfully deprived of reputational value earned in the marketplace.

The second notion, reputation as honor, is based on the individual's social role. Under this theory, the individual's reputation does not depend either on her efforts or on market forces. Instead, reputation comes to the individual by reason of her station. Thus, for example, royalty enjoys a "good" reputation merely by being noble, not by reason of hard work or good deeds.

If reputation is seen as honor, then libel law

must define and enforce the ascribed status of social roles. . . . [This] function was epitomized in the law of seditious libel, which punished as a crime any speech

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38 Id. at 693.
39 Id. at 695.
40 Id. at 699-700.
41 Id. at 700.
"that may tend to lessen [the King] in the esteem of his subjects, may weaken his government, or may raise jealousies between him and his people."42

The third notion, reputation as dignity, is based on the "essential dignity and worth of every human being."43 This dignity is "the respect (and self-respect) that arises from full membership in society."44 In other words, an individual's sense of self is determined in large part by how others perceive and treat her. Under this theory, libelous statements tend to ostracize people from society. Defamation law seeks to protect individual dignity, to prevent wrongful dislocation from society and to enforce a code of civility.45

Each of these conceptions of reputation implies a different form of libel law. A theory of reputation as property leads to a conception of libel not unlike Forer's. If reputation is an intangible asset valued by the marketplace, awarding money damages for reputational harm makes sense. Because the form of harm can be proved by reference to the marketplace, presumed damages are nonsensical under a reputation as property theory.46 (p.80-82).

On the other hand, when reputation is seen as something other than an income-producing asset, money damages seem less appropriate.47 How can any sum of money be equated with the loss of a person's place in the larger community? Awarding money damages in such situations constitutes pure speculation.48

The foregoing discussion demonstrates the need for a libel remedy other than pure money damages. As discussed above, empirical studies have shown that plaintiffs primarily are concerned about vindication. This theory leads to the same conclu-

42 Id. at 702 (quoting 3 W. Blackstone, Commentaries on the Laws of England 123).
43 Id. at 707 (quoting Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).
44 Id. at 711.
45 Id. at 709-11.
46 Id. at 695-99.
47 As noted above, reputation as honor is manifested most clearly in seditious libel doctrine. However, because New York Times found this version of defamation unconstitutional, this Review focuses instead on the concept of reputation as dignity.
48 Post, supra note 37, at 703, 713.
sion: reputation is worth protecting because it protects the individual’s place in society. Both analyses suggest the need for a libel remedy focusing not on compensation but on the restoration of the individual. Two such remedies come to mind: declaratory judgment and retraction.

A declaratory judgment would give the successful plaintiff a judicial declaration of the falsity of the defamatory publication. A retraction, by contrast, would require the defendant to correct the errors made. For example, a libelous front page, banner headline accusation of theft would demand a front page, banner headline retraction. If the defamation were committed privately, corrections would be sent to all who read or heard the defamatory statement. No compensation for pecuniary loss or emotional harm would be awarded in either case.

The proposed retraction remedy cannot completely replace money damages. Libel can cause very real pecuniary loss. A lawyer falsely accused of fraud, for example, may lose a substantial portion of her practice. The additional imposition of money damages remains a powerful tool to discourage undesirable forms of activity (such as willful dissemination of falsehood). For this reason, restorative remedies should coexist with money damages.

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49 See Franklin, A Declaratory Judgment Alternative to Current Libel Law, 74 Calif. L. Rev. 809 (1986); Hulme, supra note 13; Franklin, Good Names and Bad Law: A Critique of Libel Law and a Proposal, supra note 13.

50 Others have hinted at this remedy. See Post, supra note 37 at 730 n.206; Lebel, Defamation and the First Amendment: The End of the Affair, 25 Wm. & Mary L. Rev. 779, 788 (1984). To the extent that a defendant is required to act affirmatively, a retraction is more drastic. Note, however, that the broad dissemination of the correction ensures that many more people will be informed of the defendant’s error.

Concerns that Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), renders such proposals unconstitutional are unwarranted. Tornillo tested a statute that created a compulsory right of reply when no defamation had occurred. The case does not stand for the proposition that a defendant cannot be forced to retract a defamatory statement after a verdict has been reached. See J. Nowak, R. Rotunda & J. Young, Constitutional Law 932 (1983).

51 For our purposes, the choice of restorative remedies is not important. What is important is the shift in emphasis from compensation (money damages) to restoration, which greatly reduces the chilling effect of libel actions. Declaratory judgments and retraction are outlined here to give the reader concrete examples of the types of restorative remedies which are available.

52 As discussed below, presumed damages would be recoverable, but not upon the theory of compensating pecuniary loss or emotional suffering.

53 Election of remedies has been suggested by several commentators. Some advocate election by the plaintiff. For example, plaintiffs might be encouraged to choose a
With two conceptually distinct libel remedies created, the next step is to decide what standard of liability is to be required for the imposition of each remedy. This inquiry can be answered by a detailed analysis of the reasons for limiting libel suits. As discussed below, retraction remedies may be appropriately applied on a strict liability basis, whereas money damages should be awarded only on a showing of greater fault.

The rationale for shielding the media from libel suits stems from the media’s role in the flow of truthful information. Absent protection, the risk of huge judgments and the cost of litigation would deter the media from spreading information and thus would chill speech. Therefore, some tolerance of falsehoods is necessary to preserve the dissemination of truth.\(^5\) In this light, the consequences of restoration and money damages become very different.

When the putative libel defendant considers printing a possibly defamatory statement, she must weigh the possibility of costly litigation and a huge judgment. For a small newspaper, a single multimillion dollar judgment can be fatal. Thus, a publisher must continually decide whether or not to bet her printing press by publishing a particular statement. The danger of being proven wrong alone is not what chills the publisher’s expression. Rather, it is the likely consequence of being proven wrong—the loss of money—that creates the chill. By contrast, if the newspaper’s only risk were public admission of an error, editors and publishers would likely agonize less about printing sensitive stories.

The foregoing analysis implies a sharp dichotomy. Money damages effectively chill the exercise of speech, while restoration (public admission or declaration of error) does not. Because one should be less hesitant to impose restoration remedies than declaratory judgment rather than damages by eliminating punitive damages, introducing fee shifting and augmenting the plaintiff’s burden of proof. See Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, supra note 13, at 812–13. Others have suggested giving defendants the right to elect remedies when the harm is unidentifiable. Defendants would have the option of selecting a remedy of repair in lieu of money damages. See Lebel, *supra* note 50, at 788–90. Some argue that plaintiff’s election should be irrevocable. See, e.g., Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, supra note 13, at 43.

money damages, separate standards of liability for the two remedies should be created.

A restoration remedy should be imposed on a strict liability basis. The plaintiff need only convince the court that the statement is false and defamatory for liability to attach. No showing of negligence or other fault would be required. The proposed strict liability standard is justified for two main reasons. First, restoration is justified even if the defendant is not culpable because restoration focuses on helping the injured victim, not on punishing the defendant.

Second, restoration is not punitive and does not chill speech, even when applied to a faultless defendant. Where money damages are concerned, libel defendants can claim plausibly that strict liability is punitive because damage awards harm those engaged in an honest effort to disseminate truthful information. Where money damages cannot be awarded, however, the argument loses force. No libel defendant who seriously seeks the truth can honestly claim that she has been punished by merely being forced to correct or admit a mistake. Indeed, restoration furthers the very values promoted by the protection of media defendants. By setting the record straight, restoration promotes the dissemination of truth.

By contrast, money damages should attach only upon proof of some fault on the part of the defendant. As the Supreme Court has spoken clearly in this area, for purposes of this Review it makes sense to adopt the two tier system of fault adopted by the Court. Under this system, the degree of fault would depend on the identity of the plaintiff. Public figure plaintiffs would have to show actual malice in order to recover. Private figure plaintiffs would only have to prove "fault."  

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55 This cause of action is not intended to alter the meaning of a defamatory statement. The point is only that defendants will be strictly liable in defamation for retractions.


Gertz, for example, is generally read to prevent states from imposing liability without fault in defamation cases. As such, it prevents states from offering remedies to
The purpose of the twin causes of action is the following. As long as the publisher of a defamatory statement acts reasonably, the primary risk she assumes is that of being forced to admit the error publicly. The only possible loss is one of future printing costs. However, if the publisher does not act reasonably, she assumes the greater risk of liability for all damages caused by the defamatory statement.

IV. The Case for Limited Presumed Damages

If a cause of action for restoration has been accepted, the case for limited imposition of presumed damages would follow naturally. The need for presumed damages flows from a consideration of how restoration operates.

Restoration is a prospective remedy. It makes the plaintiff whole only from the date of the restoration. It does nothing to improve the plaintiff's reputation during the period that the defamatory falsehood goes uncorrected. In addition, the prospect of restoration without the threat of money damages gives the defendant no incentive to correct any errors once a suit has been brought. If the worst that can befall the defendant is a public correction of the false story, there is little reason to print any correction voluntarily. Finally, there is the oft stated problem that the truth "never catches up with a lie." Some who have read or heard the defamatory statement will never learn that it was false.

_57_ Litigation costs remain, but can be alleviated by awarding attorneys' fees.
_58_ By contrast, the huge award available in a conventional money damages action provides a powerful incentive to settle.
Presumed damages offer a solution to these problems. Awarding presumed damages provides reasonable compensation for the intangible harm done to the plaintiff pending restoration and for the necessary incompleteness of the restoration remedy. Furthermore, presumed damages give the defendant some incentive to behave responsibly in deciding whether to retract voluntarily, and therefore enhance the likelihood of settlement.

Of course, the unlimited imposition of presumed damages would be a dangerous development. As Forer and others have pointed out, presumed damages give juries the opportunity to impose large unwarranted verdicts. To remedy this, legislatures should pass statutes to limit awards of presumed damages. Such an approach would prevent runaway juries while giving plaintiffs a more complete remedy than restoration alone.

V. Conclusions

The above analysis has sought to demonstrate the major shortcoming of *A Chilling Effect*. Although Forer correctly identifies many problems in libel law, she fails to give her reader the background necessary to guide an intelligent restructuring of the law. It is not sufficient to identify the undesirable consequences of modern libel law, accept negligence law as the manifestation of common sense and then revise libel doctrine to conform with negligence doctrine.

As sections III and IV have shown, legislators cannot be confident in their adoption of any libel statute unless the most basic assumptions surrounding the protection of reputation and

60 See *Gertz*, 388 U.S. at 349.
61 A reasonable limit might be $200 a day, with a maximum total award of $20,000. There is support for the constitutionality of such a proposal. See *Dun & Bradstreet*, 472 U.S. at 771 (White, J., concurring).
62 The reader may have suggestions for improving or criticizing the proposed retraction cause of action. Among the possibilities are the award of attorneys' fees and election of remedies by the plaintiff or defendant. Since the purpose of this Review is to indicate the shortcomings of Forer's approach to educating our legislatures, the elaboration of these ideas is left to others. See, e.g., Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, supra note 13; Barrett, *Declaratory Judgments for Libel: A Better Alternative*, supra note 13; Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, supra note 13.
speech are examined. If legislators simply followed Forer’s notion of remodeling along negligence lines, they would fail to debate the merits of alternative conceptions of reputation or the implications of empirical research. In addition, the case for a strict liability restoration cause of action and the limited imposition of presumed damages would be ignored. Such an uninformed choice would not represent legislative decisionmaking at its best.

Such criticism does not necessarily lead to the conclusion that Forer’s proposal should not be adopted. Rather, the purpose of this Review has been to demonstrate that the adoption of Forer’s proposal—without considering or rebutting models such as the one presented here—would be ill informed. Such legislative action runs the risk of being no more than the “blundering process of trial and error” that Forer rightfully criticizes. (p. 43). Such lawmaking risks creating rules that are even more confusing than current libel doctrine.

This Review began by noting the increasing prominence of modern libel litigation. Using A Chilling Effect as a starting point, the Review then explored how theoretical and empirical research can contribute to solving the doctrinal problems that exist. This exploration, however, is only a starting point.

Even if ordinary defamation law is improved, the tension between individuals and the press will continue. Cases such as Hustler Magazine v. Falwell63 illustrate that the battlefield may already be shifting from libel to other tort causes of action. Thus, simply repairing libel doctrine may not be enough to prepare the legal system for future disputes.

If Forer and others are right in asserting that legislatures, and not the courts, are the proper institutions for resolving the conflict between individuals and the press, then the legislatures should be urged to consider all legal doctrines that can be used to chill free speech. In doing so, the legislatures must make use of the type of inquiry undertaken here. Unless they consider empirical evidence and basic theoretical concepts of reputation, legislatures will be unable to carry on the informed debate necessary to create effective change in the libel law.