Rethinking Media Liability for Defamation of Public Figures

John L. Diamond
RETHINKING MEDIA LIABILITY FOR DEFAMATION OF PUBLIC FIGURES

John L. Diamond†

I. INTRODUCTION

Increasingly, television, radio, and the print media have tilted toward exploitative sensationalism in the quest for higher ratings or circulation. The 1990's version of truth or consequences confronts studio guests with unknown same-sex admirers;¹ network anchors inquire from elderly mothers of public figures the details of privately uttered remarks after promising confidentiality;² syndicated current affairs programs highlight lurid details of public figures. Should the law respond differently than it currently does? This essay argues a cautious yes. It also proposes a reform and contrasts it with alternative proposals, including the Annenberg Reform Proposal,³ proposals by Professor Marc Franklin⁴ and Professor David A. Barrett,⁵ and the Uniform Correction or Clarification of Defamations Act.⁶

A. THE BREAK WITH THE PAST — NEW YORK TIMES CO. v. SULLIVAN

Media regulation has evolved dramatically in the last thirty years.⁷ Prior to 1964, common law torts codified in state legislation imposed

† Professor of Law, University of California, Hastings College of the Law. B.A., Yale College; Dipl. Crim., Cambridge University; J.D., Columbia Law School. The author would like to express his gratitude for the outstanding research assistance of Anthony P. Canini, David B. Gorodess and Martin L. Pitha.


⁶ UNIFORM CORRECTION OR CLARIFICATION OF DEFAMATION ACT (1993).

⁷ This evolution has consisted in a shift in standards towards the imposition of less liability, from common law strict liability to a less rigorous subjective "actual malice" standard. See Paul C. Weiler, Defamation, Enterprise Liability, and Freedom of Speech, 17 U. TORONTO
substantial media accountability through defamation, privacy, and, potentially, intentional infliction of emotional distress. Defamation imposes liability for publication of factual assertions that are false and seriously damage the victim's reputation. Traditionally, truth is a defense under the common law, but failure to establish truth would result in liability for both general, special, and, potentially, punitive damages. The common law requires that the "publication" or communication to a third party be intentional or negligent, but does not require that the falsity of the defamation be the result of intent, recklessness, or negligence. As a result, defamation exists under the common law as a strict liability tort.

Common law privileges provided some immunity for special communications but did not generally protect the media. If the media


9 See RESTATEMENT (THIRD) OF TORTS § 559 (stating "[a] communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."). See also Donald Gillmer & Jerome Barron, Mass. Communication Law 197-201 (4th Ed. 1984).

10 See RESTATEMENT (SECOND) OF TORTS § 581A (stating "[o]ne who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true.")

11 See E. Hulton & Co. v. Jones, [1910] A.C. 20, stating, "[a] person charged with libel cannot defend himself by shewing [sic] that he intended in his own breast not to defame, or that he intended not to defame the plaintiff, if in fact he did both."

12 Stanley Ingber, Defamation: A Conflict Between Reason and Decency, 65 U. VA. L. REV. 785, 797 (1979) ("Three characteristics marked common law defamation: strict liability, presumption of damages, and limited availability of defenses.").

13 Privileged communications include the reports issued by credit agencies to their clients and the discussions between individuals who are engaged in a group or common enterprise, most notably employers and their employees. See Jeremiah Smith, Conditional Privilege for Mercantile Agencies, 14 COLUM. L. REV. 187 (1914). See also RESTATEMENT (SECOND) OF TORTS §§ 585-587 (Judges and parties to suits also enjoy an absolute privilege).

The existence of a privilege is determined by the interests of the speaker, the interests of the audience, or a common interest between the two. See Toogood v. Spyring, 149 Eng. Rep. 1044 (Ex. 1834). See also RESTATEMENT (SECOND) OF TORTS §§ 594-596.

The most difficult of situations arises when a defendant volunteers information when no inquiry has been made of him. See RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 1151-1153 (6th ed. 1995).

14 Statutory intervention has codified some of these common law principles. See CAL. CIV. CODE § 47(3) (West 1995) (which provides a privilege for "a communication, without malice, to a person interested therein . . . (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information"). This statute, however, has not generally been extended to the media. See Brown v. Kelly Broadcasting Co., 771 P.2d 406 (Cal. 1989).

See also Farmers Educ. & Coop. Union of Am. v. WDAY, Inc., 360 U.S. 525 (1959) (which created an absolute immunity provided for the media in the context of an equal time provision for candidate access to the media). See Equal Opportunities Act § 315 (1934).
made an error, liability could ensue even if the media had exercised due care.\textsuperscript{15} Furthermore, general damages encompassed mental distress which could be presumed without proof by a jury.\textsuperscript{16}

Beginning with \textit{New York Times Co. v. Sullivan}\textsuperscript{17} in 1964, a series of constitutional cases imposed dramatic restrictions on public plaintiffs' rights to recovery. In the \textit{New York Times} case, an Alabama public official filed a defamation suit over an advertisement placed in the \textit{New York Times}. The insertion of the political advertisement was arguably negligent because it made allegations that were inconsistent in fact with the newspaper's previously published reporting relating to a local civil rights demonstration.

The Alabama courts imposed massive damages based upon the limited circulation of the \textit{New York Times} within the state.\textsuperscript{18} The state's perceived hostility to the involvement of the \textit{New York Times} in the civil rights movement appeared to make the massive liability punitive under the common law strict liability defamation standard of Alabama state law, which was unfettered by any constitutional or other federal restraint.\textsuperscript{19} The Alabama common law did provide for privileges which in some instances could protect defendants, but these were limited and generally did not address defamation in the context of public controversy.

In \textit{New York Times}, the Supreme Court required public officials to prove "with convincing clarity" "actual malice" in order to award damages against media defendants.\textsuperscript{20} Constitutional actual malice is defined

\textsuperscript{15} Another privilege available to the media is the 'Fair Report' privilege based upon fair and accurate reports of government activities or meetings. The essence of this privilege lies in the simple communication of an occurrence, even if a statement made by a public figure reported upon was within the context of a lie. To establish liability information must be misquoted or inaccurate. \textit{Cf.} Holy Spirit Ass'n for the Unification of World Christianity v. New York Times Co., 399 N.E.2d 1185 (N.Y. 1979) (finding no liability because a newspaper article was not inaccurate just imprudent due to the unverifiable nature of the report).

\textsuperscript{16} \textit{See also} \textit{RESTATEMENT (SECOND) OF TORTS} § 611 (defining this privilege as limited to "a meeting open to the public... dealing with a matter of public concern").

\textsuperscript{17} \textit{376 U.S. 254} (1964).

\textsuperscript{18} Such a basis for liability is often justified under the "single publication rule". At common law each individual copy of a publication could be considered a separate cause of action. The law currently treats an entire edition of a publication as a 'single publication' which creates but one cause of action for damages. \textit{See also} \textit{UNIFORM SINGLE PUBLICATION ACT}, 14 U.L.A. 377 (1952).

\textsuperscript{19} \textit{See also} \textit{E. Hulton & Co. v. Jones}, [1910] A.C. 20, and \textit{Inger} \textit{supra} note 12.

\textsuperscript{20} \textit{New York Times Co.}, 376 U.S. at 280. \textit{See also} \textit{Gertz v. Robert Welch Inc.}, 418 U.S. 323(1974) (limiting recovery to actual damages for falsity in cases by private plaintiffs, allowing punitive damages only when actual malice can be proven).
as making a statement "with knowledge that it was false or with reckless disregard of whether it was false or not." With the new actual malice standard, the common law strict liability tort of defamation became a tort requiring subjective and conscious wrongdoing.

The Supreme Court, when imposing this constitutional requirement, noted the importance of encouraging robust political debate unintimidated by liability for unintended errors. Subsequently, the Supreme Court required public figures as well as public officials to prove actual malice. The Court noted that public officers and public figures have often, though not always, assumed the risk of defamation and other public disclosures by thrusting themselves into politics and other professions associated with public notoriety.

The new actual malice standard resulted in substantially less media regulation by the courts. In effect, the media now enjoys an extreme "limited duty" protection for reporting regarding public figure victims. This trend in defamation law has also developed in torts protecting privacy. Courts have allowed the public disclosure of private facts when the source of the facts is in the public record or is of legitimate public interest. Intentional infliction of mental distress has also been restricted so public figures cannot bring an action for media publications unless, in essence, defamation under new constitutional standards can be proved.

---

21 New York Times, 376 U.S. at 280. In Saint Amant v. Thompson, 390 U.S. 727, 731 (1968) the Supreme Court defined recklessness toward the truth to require that the defendant "in fact entertained serious doubts as to the truth of his publication." See also Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 692 (1989) including within N.Y. Times actual malice a "deliberate decision not to acquire knowledge." Constitutional actual malice in the New York Times case should be distinguished from the common law malice which is defined as constituting ill will, hatred, or reckless disregard of the plaintiff's rights.

22 Id. at 270.

23 See Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1967), where the Court noted, "'public figures,' like 'public officials,' often play an influential role in ordering society. And surely as a class these 'public figures' have ready access as 'public officials' to mass media of communication, both to influence policy and to counter criticism of their views and activities."

24 See sources cited supra note 7.


26 See RESTATEMENT (SECOND) OF TORTS § 652D, cmt. d. See also The Florida Star v. B.J.F., 491 U.S. 524 (1989), where a reporter-trainee copied a rape victim's police report, which was placed within a police press room, and then wrote a one paragraph story based upon the report which was printed in the Florida Star. The Court held that "where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order, and that no such interest is satisfactorily served by imposing liability . . . under the facts of this case." Id. at 541.

The result of this constitutionalization of traditional media torts has been a new equilibrium in government media regulation. In essence, the *New York Times* case and its progeny have established a minimalist government intervention model by which only very extreme intentional media wrongdoing is sanctioned in the context of coverage of public officials and figures. This is in contrast with a government control model, personified in traditional broadcast regulation, and a laissez faire model relying totally on market forces.

It is the position of this essay that the new dominant minimalist intervention model needs to be adjusted to encompass more elements from the government control model. At present, media regulation for public affairs has shifted too close to deregulation under the laissez faire model.

**B. THE LAISSEZ FAIRE MODEL**

A very strong and well established position, espoused by the media and many others, argues a laissez faire approach based on respect for the First Amendment and market forces. The First Amendment protects free speech in general and the free press in particular. Judicial scrutiny, it is argued, is dangerous government intrusion because the marketplace of ideas requires a forum for debate uninhibited by liability concerns. Furthermore, the quality of media presentations should be dictated by what the marketplace demands rather than imposed by government bureaucrats or political ideologues.

---

28 See Paul A. LaBel, *Reforming the Tort of Defamation, An Accommodation of the Competing Interests Within the Current Constitutional Framework*, 66 Neb. L. Rev. 249 (1987), outlining the restrictions upon defamation liability, set out by *New York Times Co. v. Sullivan*, which include the requirements of proof of actual malice, the burden of proving actual malice with convincing clarity, and independent appellate review.

29 See sources cited supra note 7.


31 U.S. Const. amend. I.

32 "When ideas compete in the market place for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. . . . Full and free discussion has indeed been the first article of our faith." Dennis v. United States, 341 U.S. 494, 584 (1951) (Douglas, J. dissenting).

33 See Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966), where the court reversed the FCC’s decision that the plaintiffs were merely members of the public, not entitled to an evidentiary hearing regarding the alleged segregationist views of a local television broadcast licensee.

See also Comment, *Recent Cases: Office of Communication of United Church of Christ v. FCC*, 80 Harv. L. Rev. 670, 673-74 (1967), stating that "by expressly rejecting the assumption that the 'Commission can always effectively represent the listener interest in [license] renewal proceedings' . . . the present court’s refusal to respect the FCC’s view . . . would seem to be another manifestation of its distrust of the commission." *Id.* at 673-74.
C. **GOVERNMENTAL CONTROL MODEL**

An alternative to the laissez faire model is the government control model. Under this model, the government plays a much more proactive role within (at least arguably) constitutional constraints. A variety of doctrines reflect this approach, particularly in the regulation of broadcast media. The fairness doctrine, upheld constitutionally for television and radio, requires a balanced presentation in the broadcasting of controversial issues.

The fairness doctrine, which had been imposed on television and radio stations, had a two-pronged requirement that a station must broadcast controversial issues of public importance and ensure that significant contrasting views are presented. Unlike the equal time provision for opposing candidates, the balance did not have to be exact nor was any proponent of an opposing view entitled to claim time. It was the station’s responsibility to strike this balance. However, the Federal Communications Commission (F.C.C.) has declined to enforce the fairness doctrine, and Congress by one vote failed to override President Reagan’s veto of a statute imposing the doctrine on the F.C.C. An earlier court decision had ruled that § 315 of the Communications Act, while acknowledging the fairness doctrine, had not codified it.

In contrast to the fairness doctrine, the equal time provision requires that opposing candidates receive equal opportunity to purchase or receive free air time subject to exceptions like appearances on bona fide news and interview programs. Failure to conform to this provision could result in sanctions against the licensee, including a possible license revocation by the F.C.C. Additionally, the news distortion rule imposes sanc-

---


37 See Communications Act of 1935 § 315, stating: "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station . . . ."

For an example of an exception, see Columbia Broadcast System (Suez Crisis) 14 R.R. 720 (F.C.C. 1956), where President Eisenhower’s Democratic opponent requested time equal to that which was used by the President to discuss the explosion of war in the Middle East. The networks refused and the commission upheld their stance.
tions on broadcast stations for misleading news presentations. All licensing of broadcast stations is required to be in the public interest. Consequently, stations are required to affirmatively identify and address issues of public importance. This aggressive government control has been justified in light of the scarcity of airwaves which are exclusively licensed by the government to the broadcaster.

D. THE GOVERNMENT MINIMALIST INTERVENTION MODEL

A third approach to media regulation allows for government sanctions only in extreme cases. Current defamation law reflects this approach. For the last three decades (but notably not before) defamation law has been severely constrained by Supreme Court decisions. Beginning with New York Times, wrongful injury to the reputations of public officials and public figures transformed a system based on strict liability into a system requiring proof of subjective intentional wrongdoing.

Under the constitutional requirements imposed by New York Times, the public officials or figures must prove "actual malice," a knowing falsehood or conscious disregard as to its truth or falsity. Private figures defamed in the context of a public controversy must merely prove that the media acted with fault, but are limited to "actual damages" unless they can prove "actual malice." Actual damages is a relatively broad concept that includes proving emotional and pecuniary losses attributable to the defamation. This constitutional protection provides a breathing

---

39 See National Broadcasting Co. v. United States, 319 U.S. 190, 216, 224 (1943), where the Court held that the Communications Act of 1934 "authorized the Commission to promulgate regulations designed to correct . . . abuses" and that the public interest to be served under the Act is "the interest of the listening public." See also The Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C.2d 650 (1971).
40 See Rep. Patsy Mink, 59 F.C.C.2d 987 (1976), where the Commission held that a radio station seeking to renew its license, which had refused to air an anti-strip mining tape on the grounds that it had not aired the original pro-strip mining tape, showed an "unreasonable exercise" of discretion in so doing. The station, by virtue of its location and the importance of the issue of strip mining there, was found to have an affirmative obligation to air programs or news stories relating to the issue.
41 See id.
42 See cases cited supra note 20.
43 This standard was upheld for public figures in Curtis Publishing Co. v. Butts, 388 U.S. 323 (1974).
44 See sources cited supra note 10.
45 Constitutional actual malice in the New York Times case should be distinguished from the common law concept defined as constituting ill will, hatred, or reckless disregard of the plaintiff's rights. Constitutional actual malice is defined as statements made "with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).
space for robust reporting and debate.\textsuperscript{47} With regard to defamed public officials and figures, negligent reporting is immunized.\textsuperscript{48} For defamed private figures, however, a recovery based upon negligent reporting is possible.\textsuperscript{49}

E. **Appraising the Three Models**

There are both merits and drawbacks to each of the approaches derived from the three models of media control. First, the laissez faire model protects against governmental intrusion. On the other hand, it relies entirely on market forces to ensure a fair and quality presentation, even when those market forces have limited effective competition. Second, the governmental control model, which, at least in theory, is prevalent in the more intensely regulated broadcast media, utilizes a government commission to stimulate and arbitrate fairness and accuracy in the media. It clearly poses, however, the dangers associated with government intrusion.\textsuperscript{50} A commission, appointed by politicians, arbitrates vague concepts such as fairness and objectivity.\textsuperscript{51}

The third model, limited government intrusion, has become the dominant system for regulating the media. In recent years, the broadcast media have enjoyed (with the potential exception of indecency regulation) increasing deregulation.\textsuperscript{52} Furthermore, the fairness doctrine\textsuperscript{53} and equal time provisions\textsuperscript{54} have never been applied to the print media where

\textsuperscript{47} See New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964), where the court noted the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”

\textsuperscript{48} Negligence constitutes unreasonable conduct below the professional standard and is an objective standard, needing proof of conscious risks taking.

*New York Times* actual malice requires proof that the defendant subjectively knew of falsity of a statement or was consciously aware of her absence of knowledge. This results in a protection, and consequential absence of liability, for negligent reporting and reflects the concern over possible chilling effects liability for negligence could have upon free speech.

\textsuperscript{49} See Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974), noting that “so long as they do not impose liability without fault, the states may define for themselves the appropriate standard of liability . . . .”

\textsuperscript{50} Government intrusion can be characterized by increased government costs and altered market incentives. While such altered incentives may seem favorable, the government’s inability to respond effectively to market changes may result in a less efficient allocation of goods, services, and resources.

The often cited solution to this problem is to adjust the market mechanism so as to internalize the externalities in order to correctly valuate an activity. Such a policy provides correct marketplace incentives.

\textsuperscript{51} If this model were adopted, it is likely that the burden of regulating such affairs would be placed upon the Federal Communications Commission.

\textsuperscript{52} See sources cited supra note 7.

\textsuperscript{53} See sources cited supra note 34.

its application could raise constitutional questions. While the limited
government intrusion model avoids, by definition, many of the pitfalls
associated with governmental action, it falls short of providing adequate
protection from media negligence.

F. THE INADEQUACY OF THE LIMITED GOVERNMENTAL INTRUSION
MODEL

Constitutional defamation law does not create an incentive for jour-
nalists to be careful when reporting information concerning public
figures. By requiring subjective wrongdoing in the form of actual malice
there is no legal penalty or remedy for professional negligence. A jour-
nalist, contrary to the intent of defamation law, has a clear incentive to
make a "scoop" and reveal sensational information without an effort to
corroborate its truth. Carelessness, so long as it does not constitute a
conscious disregard for the truth, goes unsanctioned by law.

In other professions, the utilitarian role of the law is deemed an
important adjunct to apprehension over diminished reputation. Medical
personnel have reputations and ethical responsibilities, as do the legal
professionals, but both are also subject to a professional negligence
standard.

As in other professions, the market could arguably provide a sanc-
tion for mistakes and false reporting. In fact, the media is arguably sub-
ject to more public and consumer scrutiny than the typical physician or
lawyer (the O.J. Simpson trial excepted). The individual journalist and
the media organization that disseminates her work risk embarrassment
and loss of credibility for dissemination of erroneous information.

Such scrutiny ostensibly discourages negligent conduct.

55 If the intent of defamation law is to prevent the spread of defamatory statements, this
is clearly contravened by a policy which does not hold a careless defendant liable. When the
market signals that carelessness does not result in liability a clear incentive exists to be care-
less in order to maintain a questionable but profitable story. This market signaling contravenes
the law's basic purpose of prevention of defamatory statements resulting in inefficiency, un-
certainty as to liability, and increased information costs. Arguably, such effects are not neces-
sary to avoid the chilling of free speech.

56 Some argue that this is a necessary breathing space for the effective protection of the
Cmr. L. Rev. 782, 802-813 (1986), arguing that a media defendant may not know its own self-
interest and that reducing such breathing space and allowing the imposition of strict liability
may actually save more in economic terms.

57 See JOHN L. DIAMOND, LAWRENCE C. LEVINE AND M. STUART MADDEN, UNDER-

58 The basic premise of this argument is that negative public reaction will cause a decline
in sales, subscribers, and profits. Query whether such an incentive exists if only its reputation
for truth were affected and not its sales or profits.
The media, however, arguably benefits from such conduct, while the legal, medical, and other professions do not. While negligence in other professions can also bring benefits in terms of savings and perhaps some initial consumer satisfaction, documented negligence in other professions is ordinarily accompanied, when perceived, by negative market reactions. In contrast, a reputation for sensationalism and unsupported speculation can, in some cases, increase media circulation or ratings. Shows like “A Current Affair” and publications like “The National Enquirer” profit more through their entertainment value than through their reputations as rarefied and thoughtful sources of news. Accuracy and legitimate scoops are a plus, but disseminating exciting rumors, whether true or not, generates profitability in the media.

Due to its necessary reliance on conflicting market forces and the lenient control provided by the actual malice standard, the limited governmental intrusion model is clearly inadequate to the task of encouraging responsible media action in the context of public figure reporting.

II. TOWARD INCREASED MEDIA LEGAL RESPONSIBILITY: A PROPOSAL

A. THE ARGUMENT AGAINST NEGLIGENCE

Should negligence liability be a component of media responsibility in the context of public figure reporting? Would negligence liability threaten free discourse?

One may argue that while negligence, in principle, excuses reasonable errors and mistakes, potentially massive liability associated with
vigoroucoverage arguably can deter aggressive coverage. The cost of litigation and the uncertainty of jury verdicts may create a chilling effect on the kinds of coverage and reporting in which some, particularly less wealthy, media might engage. Arguably, this risk, along with the notion that public officials and figures voluntarily assume their status and the risks associated with it, warrants protection of the media against unlimited civil negligence liability. A liability threshold higher than mere negligence is further justified because it is very difficult to define what constitutes a reasonable mistake. Additionally, political and ideological tensions could result in extreme penalties. The facts of the *New York Times* case suggest that ideological debate alone can prompt punitive sanctions against inevitable negligent errors.

Nonetheless, it is wrong to completely immunize negligent error. The public benefits from competent journalistic scrutiny; the public does not benefit from negligent reporting. Such reporting can result in serious harm to individuals from defamation. Since the underlying impetus for the immunity from negligence liability is the intent to avoid discouraging non-negligent journalistic coverage, it is quite plausible that other remedies are possible that would discourage negligent journalism but not discourage vigorous journalism.

The problem poses a two-pronged question. First, what is the ideal approach? Second, what approaches are available which do not require changing constitutional doctrine?

**B. The Ideal Approach**

Protection for the media based on damage liability limitations rather than protection based on heightened culpability standards would appear preferable. The Supreme Court in *Gertz v. Robert Welch Inc.* attempted this approach when private plaintiffs were defamed in the context of a public controversy. Fault, not actual malice, was required but only for recovery of "actual" damages. Unlimited damage recovery, in-

---

61 Public figures may gain their notoriety incidental to their professional or personal pursuits. See, e.g., *Mezropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977); *Carson v. Allied News*, 529 F.2d 206 (7th Cir. 1976).

62 Note that strict liability was all that needed to be established under Alabama state law.

63 The possibility of other remedies relies on a presumption that vigorous journalism and negligence liability aren't mutually exclusive. That these are mutually exclusive is more than debatable, as this proposal suggests. The deterrence effect of money damages on vigorous journalism by publishers will be lowered or lost if damages are kept low and only allowed upon a finding of negligence.

64 Limitations on damages address both plaintiff and defendant concerns. Plaintiffs receive the increased possibility of revealing the truth, and defendants have their vigorous journalistic efforts protected by lower damage awards imposed only upon a finding of negligence.

65 See cases cited *supra* note 20.
cluding punitive damages, would require clear and convincing proof of actual malice.\footnote{See id.}

The concept of “actual” damages is, however, extremely broad. While it excludes “presumed” damages\footnote{Presumed damages allow juries in defamation cases to award damages without proof of loss. “[D]amage is presumed from proof of wrongdoing.” McCormick, supra note 16.} and punitive damages, emotional damages are not excluded.\footnote{See Faulk v. Aware, Inc., 231 N.Y.S.2d 270 (Sup. Ct. 1962) and McCormick, supra note 16.} Unfortunately, such emotional damages are extremely difficult to translate into monetary value. Economic losses or special damages, on the other hand, may be determined with more precision. It can, however, be difficult to ascertain or measure even economic losses when the injured entity is not a conventional business, but is a new business, an unconventional business, or a political reputation.\footnote{See, e.g., Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989) (judicial candidate who lost an election sued and won $5,000 in damages and $95,000 in punitive damages from a newspaper which had harmed his reputation).}

Nevertheless, there is substantial precedent for limiting recoveries in defamation cases to special damages in the context of retraction statutes.\footnote{Retraction statutes often limit recovery to special damages when an appropriate retraction has been made, thus foreclosing the possibility of punitive or mental distress damages. Today, approximately half the states have retraction statutes.} California, for example, limits recovery for newspapers, radio, and television to special damages if there is a timely retraction.\footnote{Cal. Civ. Code § 48a (West 1995).} Other publications, such as “The National Enquirer,” which a California appellate court characterized as a magazine for the purposes of the retraction statute,\footnote{Burnett v. National Enquirer, Inc., 193 Cal. Rptr. 206 (Cal. Ct. App. 1983).} are not protected. The court justified this characterization by noting that magazines are subject to less deadline pressure than newspapers and the broadcast media.\footnote{In order to distinguish the Enquirer from a newspaper, the court characterized newspapers as engaged in the “immediate dissemination of news.” Id. at 213.}

Retraction statutes existed long before the New York Times case. Now, such retraction statutes exist in conjunction with the constitutionally imposed actual malice standard. While such statutes did not exist in Alabama, their co-existence with constitutional protections gives certain media extreme immunity.\footnote{See Werner v. Southern California Associated Newspapers, 216 P.2d 825 (Cal. 1950), dismissed on motion of counsel for the appellant, 340 U.S. 910 (1951) (upholding the California retraction statute which limited damages even when the defamation was intentional).} In California, for example, a public figure plaintiff must prove actual malice and falsity of an objective fact as a prerequisite to recovery. If the newspaper or broadcast outlet responds in a timely manner with a retraction, it is protected even when the degree of
culpability would otherwise justify compensation for emotional injury and punitive damages. The plaintiff can only recover special or pecuniary losses resulting from the defamation.

While not all retraction statutes are identical, the remedy in many ways reflects a legislative response to a problem that a federal constitutional mandate has largely usurped. Constitutional standards have dramatically altered the balance between free debate, including the risk of occasional error, and public discourse. The *New York Times* standard, while proper in motive and concern, has precluded other solutions. Indeed, basing liability solely on conscious culpable wrongdoing has had the unfortunate impact of justifying civil litigation discovery inquiries into a reporter's mind and her confidential sources.

Negligence is the dominant system of legal liability for professional error. It ideally punishes only inefficient behavior which fails to take proper but not excessive precautions. In the context of First Amendment values, requiring only negligence to recover damages but limiting recovery to special damages if a retraction is made after a judicial determination of falsity would more effectively serve the purpose of defamation law than requiring intentional or reckless culpability to obtain unlimited damages. In the absence of negligence, there would be no liability.

Arguably, such an approach even increases the protection afforded media. It would allow media to defer a retraction until the hearing and still not risk damages in excess of special damages. In any event, injured

---

75 *Id.*
76 Previously, retraction statutes allowed a correction in order to avoid strict liability thereby providing some insulation to the press. Now, under the *New York Times* standard, no liability is established unless the case involves reckless or intentional defamation thereby providing the sought for insulation for vigorous reporting.
77 *See* Herbert v. Lando, 441 U.S. 153 (1979). CBS, producer of "60 Minutes," was required to respond to court inquiries concerning why certain investigations were untaken at deposition. This was considered relevant because journalist thought processes were found pertinent in establishing constitutional malice as a prerequisite to recovery.
79 Professional liability for error raises serious questions. Total liability for reasonable risks of error would discourage innovation and overdeter the development or expansion of information. For this reason, I would not impose special damages for a determination of falsity without fault. *See* Ingber, *supra* note 12, advocating this position in part. However, absence of adequate liability may result in questionable activities which may not be in the patient's or client's best interest. Negligence, as a standard, recognizes the importance of both of these goals and ideally imposes liability when one interest is allowed to unreasonably prevail over the other. It may be argued that the information costs of determining possible liability would be high, but the societal benefits of such a flexible standard would most likely outweigh such costs. *See* *id.*
80 *See* Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. Chi. L. Rev. 782, 802 (1986) (noting that "it is possible that the actual malice rule has made the situation worse for media defendants than it would be under a sensible strict liability rule.").
individuals can recover for true out-of-pocket losses. Equally important, the media will be provided with some incentive to be cautious initially and a strong incentive to retract an error once it is specifically determined as such.\(^8\)

In this sense, the retraction type approach resembles the equal time and fairness doctrines in the government control model.\(^8\) Instead of viewing control simply as a liability issue, there is a corrective effort to influence the media’s presentation. Under the equal time provision and to a large extent under the fairness doctrine, advocates of opposing positions can demand balanced access to the media. Failure to provide such access when required could result in sanctions against the broadcast licensee. In an analogous manner, retraction statutes provide sanctions for the failure to respond to a request, in this instance, for an acknowledgment of error.

Such a system relies more on altering the media’s presentation and less on draconian sanctions, unless the media chooses to assume the risk by declining the retraction.\(^8\) Accidental error leads to limited liability, creating the incentive for caution, but not punitive liability. The *New York Times* actual malice standard protects the media from any liability for accidental error, but all protection is lost if the plaintiff can establish conscious disregard for the truth.\(^8\) The focus is not on correction but on litigating the state of mind of the journalist.\(^8\) In short, the *New York Times* solution of balancing media responsibility with First Amendment protection appears to be strategically questionable.\(^8\)

C. DISPUTE RESOLUTION WITHIN THE CURRENT CONSTITUTIONAL FRAMEWORK

Given the existence of the *New York Times* standard as a constitutional parameter, I argue for a dispute resolution\(^8\) model which lowers

---

\(^8\) Note that defamation is one area in which remedies of retraction or publication of truth may be a more appropriate devices than simple money damages.

\(^8\) See supra notes 33-35.

\(^8\) Arguably, this is an effective device for market functioning because it addresses inaccurate information within the market by providing a correction for inaccuracy and damages for negligence in producing such inaccuracy. This type of corrective effort encourages accurate information, which lowers costs for most transactions, or at least prevents such transaction costs from rising.

\(^8\) See supra note 56.

\(^8\) See Werner v. Southern California Associated Newspapers, 216 P.2d 825 (Cal. 1950).

\(^8\) See Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. Chi. L. Rev. 782, 808-10 (1986) (arguing that litigating the state of mind of the defendant results in a deadweight social loss due to the nature of the current consumption of funds needed to finance the litigation. The costs of litigation include administrative and uncertainty costs).

\(^8\) Dispute resolution avoids civil delays in courts and can provide a more timely and equitable remedy without being constrained by constitutional mandates not beneficial to either party.
the culpability threshold in exchange for lowering the maximum damage liability. The media defendant and public figure complainant agree to arbitrate the accuracy of the alleged defamation. A finding of negligence, in addition to inaccuracy, requires payment of special damages.

In this regard, the media is surrendering the protection of the *New York Times* standard. The plaintiff surrenders, however, the possibility of proving the *New York Times* actual malice standard and recovering more than special damages. Emotional and punitive damages are unavailable, vastly limiting the potential liability of the media. Both parties, however, benefit from a quicker, more efficient system of determining liability.

Such arbitrated dispute resolution arrangements allow the experimentation that the constitutionalization of media liability has, unfortunately, largely precluded. Ultimately, liability for media abuses would be integrated into a system that depends more on corrective resolution and less on economic devastation. Unfortunately, the *New York Times* case and its constitutional progeny have stilted more creative experimentation to preserve First Amendment values but ensure responsibility for malicious errors and injuries of public officials and figures by a prolific and powerful industry.

III. COMPARISON WITH ALTERNATIVE PROPOSALS

A. THE DECLARATORY JUDGMENT PROPOSALS

Professors Marc Franklin and David Barrett have proposed two similar yet significantly different proposals to reform defamation law. Both recognize flaws in the *New York Times* actual malice approach to defamation of public figures and both propose declaratory judgment procedures as a core reform.

Under the declaratory judgment system, a court would determine the truth or falsity of an alleged defamation without requiring any mental culpability as defined by negligence or *New York Times* actual malice.

---

88 The constitutional doctrine of *New York Times* actual malice has foreclosed opportunities for experimentation with policies that provide greater protection or restitution to plaintiffs while continuing to encourage robust debate. This is a premise upon which retraction statutes were originally developed.

89 The concept of corrective resolution recognizes that defamation is a unique area of the law in which retractions and perhaps other alternative remedies may provide an adequate alternative to or supplement for money damages.

90 See Good Names and Bad Law, supra note 4; Declaratory Judgment Alternative, supra note 4; Barrett, supra note 5. Professor Barrett’s position was embodied in H.R. 2846, a federal libel proposal introduced by Congressman Charles Schumer in 1985 to stimulate discussion. See also Professor Robert M. Ackerman’s proposal, arguing for a declaratory judgment scheme as well, but allowing both public and private plaintiffs to recover special damages, attorney fees, and the cost of publishing vindication if *New York Times* malice were established. Robert M. Ackerman, 72 N.C. L. Rev. 293 (1994).
In essence, falsity would be litigated without reference to fault. While this would constitute strict liability, the only remedy provided under the declaratory judgment scheme would be the publicity of the court’s ruling. No monetary damages would be afforded to the plaintiff, although attorney fees could be shifted to the losing party.91

While the two proposals approach fault similarly, they differ regarding a party’s ability to choose a declaratory judgment remedy in lieu of a damage action. Professor Barrett would allow either the plaintiff or the defendant to opt for declaratory judgment litigation exclusively and, consequently, eliminate the possible recovery (aside from the cost of litigation) of any monetary damages suffered by the plaintiff for the alleged defamation.92 Professor Franklin, on the other hand, would allow only the plaintiff to substitute a declaratory judgment in place of a damage action.93

Professor Franklin criticizes Professor Barrett’s proposal for allowing a defendant to elect the declaratory judgment action because such an approach denies the plaintiff monetary recovery and strongly immunizes the media from liability.94 Professor Barrett supports his proposal

---

91 Under Professor Franklin’s proposal fee shifting for litigation costs would not be awarded under certain circumstances. For example, under the declaratory judgment provision a prevailing defendant would not be awarded attorneys’ fees if the plaintiff had “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.” Declaratory Judgment Alternative, supra note 4, at 813. A prevailing plaintiff would not recover if the plaintiff prevailed based on evidence that was not presented or formally attempted to be presented before the action was filed. Professor Franklin also would allow fee shifting under certain circumstances in damages action where New York Times malice is established.

Professor Barrett would shift attorney’s fees to the losing party in defamation actions except where the court finds “an overriding reason” to disallow or reduce the award or if a defendant defeated in the action proves it exercised reasonable efforts to ascertain the publication was not false and defamatory or published a retraction within 10 days after an action was filed. Id. at 834-835.

92 See Barrett, supra note 5 at 864-65 (arguing that “[b]y giving defendants, as well as plaintiffs, the option to choose a declaratory judgment, the bill creates a remedy that forcefully implements the goal.” This goal is encompassed by elimination of high costs, increased efficiency of adjudication, and lowering overall social costs.

93 Id. at 853 (stating that “the root of the present libel crisis lies in the fact that reputation can be injured by words, but the common law offers redress only in the form of money damages.”)

But see Rosenblatt v. Baere, 383 U.S. 75, 93 (1966) (Stewart, J., concurring). Stewart stated “imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored.”

94 See Declaratory Judgment Alternative, supra note 4, at 836 (stating that the defendant’s ability to elect 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.”)

95 See generally Declaratory Judgment Alternative, supra note 4, at 841, outlining the two possible alternatives: (A) if plaintiffs think they have a strong case of actual malice, de-
by arguing that the negative publicity from an adverse ruling would deter the media from making defamatory statements. In addition, Professor Barrett notes that if the media loses, it would be forced to pay attorney fees.  

In commenting on the Franklin-Barrett dispute, Professor Jerome Skolnick observes that “Barrett’s proposal values ‘truth’ as the major goal of libel law in light of free speech and dignitarian concerns. Franklin . . . sympathizes with the victim who has suffered economic as well as dignitary harm because of falsity.”  

Franklin argues that some significant number of plaintiffs will elect a declaratory judgment without damages because they are unlikely to win a defamation suit where the New York Times actual malice is required. Furthermore, a defendant would be motivated to issue a retraction rather than litigate a declaratory judgment claim because such a retraction would avoid litigation costs and the award of attorney fees sustained by a successful plaintiff.  

Professor Barrett argues that allowing defendants to immunize themselves from any monetary liability (except their own and a successful plaintiff’s litigation costs) by opting for declaratory judgment litigation “is a fair and necessary trade-off for the parties in light of social interests, particularly the first amendment interest in robust debate.”

---

96 In the present day media environment, where values of entertaining and sensational information predominately increase ratings, it is unlikely that deterrence would be achieved through the shifting of attorneys fees. Even if it could be achieved through this approach, a principal function of tort law is to repair the injury to the plaintiff.  


99 Professor Barrett’s proposal is restricted to public plaintiffs and media defendants. Professor Franklin’s proposal applies to private and public plaintiffs and non-media as well as media defendants. Professor Franklin unlike Professor Barrett would require private as well as public plaintiffs to prove New York Times malice to recover any damages. This is a higher culpability than required by Gertz (see supra note 20 and accompanying text), which allows private plaintiffs to recover “actual damages” if only “fault” is established. Professor Franklin argues falsity is too close to negligence: “It is a small jump from finding an error to concluding that someone in the operation behaved unreasonably — either by failure to check with still another source or by failing to wait another day until the plaintiff could be reached.” See Declaratory Judgment Alternative, supra note 4, at 824. He further argues that mere negligence liability for private plaintiffs hurts small media because relatively prominent community figures, such as bankers, often would still be characterized as private plaintiffs.  

100 Barrett, supra note 5, at 882.
In effect, even intentional defamation is immunized under Professor Barrett's proposal. Professor Barrett argues that:

[denying plaintiffs the right to damages is a fair price to exact in return for the creation of a far more efficient method of vindication. In contrast to their currently dismal five to ten percent success rate, plaintiffs may well win most declaratory judgment actions. With such a swift and sure remedy, plaintiffs who sue are likely to be quite confident of their claims and suits by “guilty plaintiffs” should decline. From the defendants’ perspective, the threat of bankrupting damage judgments will be reduced under the Franklin proposal and eliminated by the Schumer bill [embodying the Barrett position]. With millions of dollars in potential liability no longer at stake, litigation costs will plummet, hastened by the attorneys’ fee-shifting provisions included in both proposals. The chilling effect of potential liability on the press should therefore diminish considerably.

Finally, declaratory judgments will serve the public interest by allowing courts to make prompt determinations of accuracy. Transaction costs will be reduced, and the false statement — whether made by the defendant’s challenged report or by the plaintiff’s complaint of falsity — will quickly stand exposed. Accurate information will strengthen the quality of public debate and will discourage unfounded suits by guilty plaintiffs.

The notion that some plaintiffs must forego monetary compensation for reputational injury in the interest of implementing broader social goals is not new. The common law of libel has always recognized privilege defenses as a means of implementing other social goals.101

The Annenberg proposal utilizes a declaratory judgment scheme that divides the resolutions of disputes into a multi-stage process.102 First, the plaintiff must make a request for a retraction or an opportunity to reply prior to the initiation of a declaratory judgment proceeding.103 If a retraction is made or the plaintiff fails to request one within thirty days,
the plaintiff is precluded from further action. If no retraction is made to the plaintiff's timely request, however, the plaintiff may then institute further proceedings. Upon institution of further proceedings, either the plaintiff or defendant may opt for a non-damage declaratory judgment resolution.

When either party chooses the path of declaratory judgment the court makes a determination of the truth or falsity of the statement. In such a situation, the plaintiff gives up the possibility of recovering damages and the defendant loses the protection of the actual malice standard. The losing party, however, is responsible for the prevailing party's attorney's fees. Finally, if neither of the parties opt for a declaratory judgment proceeding, then a defamation suit for damages proceeds under the present day framework of *New York Times*.  

Under the Annenberg proposal, as in the proposals by Professors Franklin and Barrett, truth or falsity would be determined without reference to fault and no monetary damages would be available, with the exception of the shifting of attorney's fees or the alternative of a traditional damages suit based upon actual malice under current constitutional law governing public plaintiffs. In addition, the proposal also eliminates the distinction between media and non-media defendants.

The Annenberg proposal, like Professor Barrett's proposal, allows either the plaintiff or the defendant to opt for a declaratory judgment proceeding. In developing this proposal, concerns about the overprotection and immunization of the media were seen as secondary to the stated purpose of the Act, which was designed "to provide an efficient and speedy remedy for defamation, emphasizing the compelling public interest in the dissemination of truth in the market-place."  

Such a policy, however, would eliminate damages even when the most egregious and intentional violations occur. Enactment of the Annenberg proposal would allow intentionally defamatory remarks to be

---

*First, the Act limits the reply to the plaintiff's own statement; the plaintiff is unable to append supporting statements of knowledgeable third parties. Second, . . . the restriction on the length of the reply [was] unreasonable. Third, the Act limits the plaintiff's reply to "rebuttal of the defamatory statements," with the result, for example, that the plaintiff would be unable to demonstrate the publisher's malicious intent.*  

*Id.* at 37-38.

104 The Annenberg proposal under § 7 established proof of negligence by clear and convincing evidence as the minimum level of fault for defamation actions leading to damage awards, recognizing that the judiciary currently imposes a higher culpability standard for public figures.

105 Smolla, *supra* note 3, at 53.
made at the simple cost of a later retraction.\textsuperscript{106} This would contravene an important purpose of defamation policy.

B. PROPOSED UNIFORM CORRECTION OF DEFAMATION STATUTE

The Uniform Correction or Clarification of Defamation Act was adopted in 1993 by the Conference of Commissioners on Uniform State Laws to serve as a model for enactment by state legislatures.\textsuperscript{107} In order for a plaintiff to maintain an action for defamation, the Correction Act requires that either the plaintiff make a request from the defendant for correction or clarification within 90 days after learning of the publication or alternatively that the defendant voluntarily make a correction or clarification.\textsuperscript{108} Plaintiffs requesting a correction after the 90-day period will be limited to recovering only provable economic loss. Section 1(3) of the Act defines economic loss as "special, pecuniary loss caused by the publication." Thus, a plaintiff who does not make a timely request for correction will be unable to recover general damages for pain, suffering, embarrassment, humiliation or loss of reputation. If a timely and sufficient correction is made by the defendant, the plaintiff will once again only be allowed to recover provable economic loss. If a timely correction is no longer possible, the defendant may offer to make a correction, but the offer must also include the payment of the plaintiff's attorney's fees incurred before publication of the correction. A plaintiff in this instance will be able to recover only for provable economic loss and attorney's fees incurred before the offer.

The Uniform Act provides limited additional protection to both the media defendant and the plaintiff. Recovery is limited to special damages only when the media acquiesces once a timely retraction is sought by the plaintiff.\textsuperscript{109} In this manner it is similar to some current retraction statutes such as exist in California. Any judicially fought dispute over the accuracy of the alleged defamation requires the high stakes litigation that currently exists. The public plaintiff may recover massive general

\textsuperscript{106} The nature of a retraction and the limitation of this remedy would allow the cost of wrongful conduct to be estimated and consequently weighed. When the cost of an intentionally defamatory remark can be readily determined, a potential defamer could determine that the probable profits or income they will receive will be in excess of these costs and hence opt for intentionally defamatory yet profitable stories. This would clearly do injustice and some remedy in such cases should therefore be provided.

\textsuperscript{107} See supra note 6. The Act is derived from a more comprehensive proposal by the drafting committee to revise defamation law that was withdrawn from consideration after opposition. See Robert M. Ackerman, \textit{Bringing Coherence to Defamation Law Through Uniform Legislation: The Search for an Elegant Solution}, 72 N.C. L. Rev. 293 (1994).

\textsuperscript{108} The Uniform Code allows specific allegations of defamation in a complaint to constitute a request for correction or clarification. § 3(c).

\textsuperscript{109} Indeed, an untimely retraction still limits recovery to special damages and litigation costs.
damages for emotional distress and potentially punitive damages as well, but would obtain no compensation without first proving *New York Times* malice. High culpability is a prerequisite to obtaining damages.

To a significant extent, the proposal would decrease the plaintiff’s protection, where a similar retraction statute is not already in existence.\(^{110}\) The media can act with intentional or reckless disregard toward the truth, constituting *New York Times* actual malice culpability, and immunize itself from all but economic damages with a subsequent timely retraction.

What the plaintiff gains by the proposal is similar to what the declaratory judgment proposals afforded — a form of public correction. In this case, the correction is made by the media without judicial intervention in order to avoid the danger of greater liability. The plaintiff arguably benefits by receiving a retraction when no remedy whatsoever could be obtained without establishing the requisite *New York Times* actual malice for public plaintiffs. The public plaintiff remains, however, without any economic compensation without proving *New York Times* actual malice and is limited to special damages even with actual malice when the media defendant has published a timely retraction.

C. A CRITIQUE OF THE PROPOSALS

My proposal, as described, differs very substantially from the declaratory judgment procedure advanced by both Professors Franklin and Barrett, as well as the Annenberg Proposal. First, it is limited to public plaintiffs as current constitutional jurisprudence would define it, although I acknowledge that there is a good argument for expanding my proposal to private plaintiffs involved in a matter of public controversy or concern. The public controversy standard has already been developed for litigation under *Gertz* and privacy liability scenarios. My proposal would not apply, in any event, to purely private defamation under the Franklin model.\(^{111}\)

Secondly, for reasons I will discuss below, it does not include a non-damage declaratory judgment option for either party as do the Barrett and Annenberg models or for the plaintiff as does the Franklin model. The Annenberg, Franklin, and Barrett models dispense with culpability as an issue unless the applicable parties fail to elect the non-damage declaratory judgment. If the parties fail to elect a declaratory


\(^{111}\) See supra notes 91 and 99.
judgment, then public plaintiffs, and private ones under the Franklin model, must prove *New York Times* actual malice.\textsuperscript{112}

My proposal requires that public figures prove negligence but limits recovery to special damages if the media promptly retracts the error upon a finding of falsity. The media, by retracting the error earlier, may mitigate the victim’s economic losses, thereby reducing potential liability. *New York Times* actual malice would be limited to the unusual occasion where the media on principle declines to retract despite a finding of negligence and falsity. At that juncture, the current high-stakes battle under present constitutional defamation law reappears. The media is liable for special damages under the finding of negligence\textsuperscript{113} but will have to pay general and perhaps punitive damages if a subsequent hearing finds actual malice.\textsuperscript{114}

Under a dispute resolution procedure, the parties could, as I indicated above, agree to a negligence and falsity hearing.\textsuperscript{115} The plaintiff in that instance surrenders the potential for recovery of more than special damages while the media surrenders the protection of *New York Times* actual malice.

The Franklin, Barrett, and Annenberg models use declaratory judgments as a public relations remedy to clarify the truth and vindicate the defamed party or the wrongly accused publisher. As Professor Barrett argues, “declaratory judgments will serve the public interest by allowing courts to make prompt determinations of accuracy.”\textsuperscript{116}

The purpose of declaratory judgments, however, is to advise a litigant of legal responsibility and potential future liability if a particular course of conduct is followed. It clarifies the law so that the litigant can avoid a violation of that law. A litigant that does not conform to the judgment risks liability for damages and, potentially, even criminal liability in some factual contexts.

The declaratory judgment proposals are a fundamental misuse of the judicial system. First and foremost, courts do not determine historical

\textsuperscript{112} The Annenberg proposal, while requiring a minimum culpability level of negligence, recognizes that courts currently impose a higher culpability standard for public figures. See *supra* note 104.

\textsuperscript{113} This provides an incentive to avoid negligent conduct but only results in the payment of special damages if such negligence occurs. Thus, the harmed plaintiff is compensated and sufficient latitude is left for robust debate.

\textsuperscript{114} This is justified because this situation ultimately embodies the circumstances in which punitive damages are peculiarly appropriate — namely, when a defendant consciously or recklessly causes damages to another.

\textsuperscript{115} Mutual gains for voluntary exchange are self apparent and are preferable to a non-mutual option in which each party can force a settlement situation by opting for a declaratory judgment. Here, the arena for the exchange is simply being created rather than forced upon the individual actors.

\textsuperscript{116} Barrett, *supra* note 5, at 863.
truths. Their fact finding process is abbreviated (not withstanding the O. J. Simpson trial) and is not a substitute for historical research and contemporary debate. Courts must determine facts as an expediency to the political and legal necessity of determining civil or criminal liability. As a fact finding process, the judicial adversary system has many limitations. Indeed, in the civil context, trials only determine what is more likely than not a fact. The pendulum need only tip slightly.

This is not to say that trials do not serve a purpose. Legal liabilities must be determined and remedies provided. The state must act on the facts that it ascertains. Yet, I submit that it is wrong to tell the *New York Times* or *Washington Post* and the public that the government has determined the truth and thereby vindicated the defamed, the publisher, the media, or a private individual. In short, trials create working adjudicative facts because of the demands of tort law. The courts and other governmental agencies should not be independent purveyors of the official truth. Should and could the truth about Watergate, Vietnam and General Westmoreland, or the Iran-Contra affair depend on one trial and one jury?

The declaratory judgment proposals also overestimate the remedial impact of a quasi-retraction or repudiation of a defamatory charge. Reputations can be damaged with economic consequences. Despite his acquittal, it is unlikely that O. J. Simpson will resume his endorsements for Hertz. Indeed, the Franklin model includes private plaintiffs where the results of declaratory judgments may not even be publicized at all or with the same intensity as a tantalizing charge.

It also appears to be a misuse of overtaxed judicial resources to use courts for non-remedial truth finding. Indeed, in some jurisdictions civil trials are already delayed for years because of the priority given to criminal cases and the existing civil case backlog.

Professor Barrett’s proposal and the Annenberg model also pose a very serious problem by allowing the defendant, in addition to the plaintiff, to elect a strict liability declaratory judgment without damage remedies in lieu of a *New York Times* actual malice damage action. In essence, there is an immunity option from damages even for the most egregious intentional defamation. Professor Barrett justifies this result under his model by citing empirical studies indicating that plaintiffs are rarely successful in overcoming the *New York Times* actual malice standard. His proposal provides a remedy in the form of judicial vindication.

---

117 *Declaratory Judgment Alternative, supra* note 4, at 823-825. Professor Franklin would not, however, compel any plaintiffs to relinquish the right to seek damages, but would require all plaintiffs to prove *New York Times* actual malice to recover damages.

Professor Barrett's observation is correct. The *New York Times* actual malice standard results in a very limited media accountability. Consequently, my proposal reduces the culpability requirement to negligence. Both Professors Franklin and Barrett reject negligence as being too easy a finding for the jury once a factual defamatory error is determined.

The Uniform Correction Act does not, at least, preclude the plaintiff from recovering special damages even when the defendant has issued a retraction. As such, the Uniform Correction Act improves upon the declaratory judgment proposals. The Uniform Correction Act does nothing, however, to reduce the public plaintiff's burden of proving *New York Times* actual malice to recover any compensatory damages. Indeed, the public plaintiff who can establish that the defendant acted with *New York Times* actual malice is precluded by a timely retraction from recovering more than special damages.

The media can act with negligence, indeed even with reckless or intentional culpability, and still limit recovery to economic losses that many public figures may find difficult to prove. The "upside" for the public plaintiff — the incentive to retract after a sensational article has been recklessly or negligently published — appears neither a large disincentive to the media to be irresponsible nor true compensation for the wronged victim. My proposal imposes special damages when the media retracts after a finding of only negligence.

IV. CONCLUSION

Admittedly, negligence — what is unreasonable under the circumstances — is a vague concept and even the most conscientious juries may occasionally mistake reasonable error for negligence. As discussed above, however, I believe that the margin of protection should be limits on the penalties — namely special damages for proven economic loss caused by negligence resulting in false defamatory statements. Negligence provides an incentive for caution, but the limit to special damages controls the potential liability.

My proposal recognizes the legitimate injuries defamation can cause and the abuses that the media, often an entertainment enterprise, can inflict. The penalties are measured but real. If the defendant publisher fails to retract once negligence and falsity are established, the plaintiff can attempt to prove *New York Times* actual malice and receive all damages in addition to the special damages that would have been awarded. In this way, the media has a strong incentive to retract. On the other hand, the media can stand by their story by refusing to pay the special damages and refusing to retract. In essence, the media is allowed, on principle, to dispute the court's decision. Full general and, potentially,
punitive damages can be awarded if the plaintiff can prove the media intentionally or with conscious recklessness published falsehoods. Consequently, the media is very unlikely to decline the retraction, but can decline knowing that \textit{New York Times} actual malice is very difficult to prove.

This procedure recognizes that juries and courts can be wrong. Only a finding of \textit{New York Times} actual malice allows a truly massive damage recovery and only a finding of falsity buffeted by a finding of negligence brings a judicial determination. Only if a reasonable person could not support the other factual position does the court make a determination on truth. There is, I believe, a real danger to putting too much stock in a judicial determination of truth, especially when the court is \textit{not} required to find at least negligent culpability. It is one thing for a court to have found no reasonable person could have thought the statement accurate and quite another for the court to simply choose between two competing versions of the truth.

While Professors Franklin and Barrett, as well as the Annenberg proposal, are concerned with the jury wrongly finding negligence, I am more concerned with the jury wrongly finding falsity, especially where no culpability must also be proven. Perhaps the supporters of the declaratory judgment approach can feel comfortable because no damages are at stake.\textsuperscript{119} Unfortunately, the judgment itself, which doesn't even require a retraction under their models, is not worthy of being characterized a remedy, much less one motivating litigation without a contingent fee. Ultimately, torts such as defamation are significant because they provide a remedy. As for what is really "true," nothing beats the marketplace of ideas, not even the courts.

The existence of real remedies stimulates deterrence and provides compensation. Admittedly, proposals with less remedies may more effectively discourage litigation. If defamation injury is taken seriously as a real loss, the potential of tort remedies to both deter negligent journalism and provide real compensation when necessary is worth the cost.

Finally, it should be observed that society benefits from the injured being compensated and wrongdoers being deterred. The wanton destruction of a family's livelihood through defamation is a real injury to the plaintiff and to the community that relies on principles of fairness. Perceptions of justice and decency require compensation.\textsuperscript{120}

\textsuperscript{119} See also Leval, supra note 3, arguing that a "no-money, no-fault" judgment improves the system by reducing costs and increasing efficiency, thereby providing advantages to both plaintiffs and defendants. Plaintiffs gain through a determination of falsity, and defendants gain through an absence of liability for damages.

Amendment values need not preclude professional accountability. The balance in media regulation needs some cautious adjustment to ensure such accountability.