
THE FINANCIAL IMPACT OF LIBEL REFORM ON REPEAT PLAYERS

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In the libel area, increased attention has recently been given to questions of legislative action ranging from those that simply shift fees to those so broad as to look like proposals for libel “reform.”¹ As these complex proposals are unveiled, it is sometimes difficult to see how the proposed changes will actually operate. The goal of this paper is to provide a systematic way in which the repeat players—newspapers and broadcasters in particular—can think about how they will fare under each proposal. Although I analyze matters from the perspective of the media, it will be relatively easy to see how each plan will affect plaintiffs. The overall impact of these proposals on the public is beyond the scope of this paper and is addressed elsewhere.² Although noneconomic issues are critical to any discussion of libel reform, and perceptions of fairness, “chilling,” and political reality may carry the day, it is important that the repeat players, who will undoubtedly have much to say about any proposed reform, understand the financial impact of proposed changes.³

This paper identifies the costs defendants incur under the current libel system, and then assesses the direction and magnitude of changes in these costs produced by three related but distinct reform proposals.

The discussion supplies no numbers—for three reasons. First, at this early stage it is more important to develop an approach than to achieve a result. Second, we can expect that a set of numbers obtained in confidence from a few unidentified media operations will have little relevance for most of the others. Numbers supplied by a large newspaper may have little relevance to a small newspaper, or at least will be perceived that way. Broadcasters may find even less affinity. Third, and perhaps most important, each newspaper is likely to have the relevant figures for its own operation or to be able to obtain them. The primary purpose of this paper, then, is to provide a formula for calculating the costs of proposed reforms, one that each repeat libel play may adjust for its own situation.

I. THE CURRENT SYSTEM

As a first approximation, we may say that the economic costs ($E\$$) of defending a libel action today consist of a broad category called legal expenses ($L\$$) plus those amounts that defendants pay out on claims ($P\$$). In an effort to make this analysis as concrete as possible, we exclude more speculative costs, such as any long-run rise or fall in public confidence in the press that might accompany any change in the legal rules. In each case it is important to subdivide these two items so that we can trace their rise and fall under various proposed reforms. At this first stage, however, we can say that $E\$ = L\$ + P\$$.

A. Legal Expenses

Legal expenses break down into five categories. One involves the amounts now spent on such items as hiring specialists to advise the staff on libel or having some or all articles reviewed prior to publication. These expenses are not attributable to any specific claims, but rather to general libel overhead. These will be called legal overhead (Lo).

Although this expense is likely to vary widely, according to the size and focus of the publication, we will assume, unless otherwise stated, that the libel overhead for any particular newspaper will not be altered substantially by any of the proposals. Standard practice will certainly not change until it is clear how any new proposal will operate. And even if absolute privilege were to become law, most publishers would still endeavor to be accurate. Some might suggest that the elimination of a damage sanction would cause even the most conscientious publishers to spend less on accuracy than they do now. Others would respond that this economic approach fails to recognize the value most publishers put on their reputations for accuracy.

The other four subdivisions of legal expenses are tied to specific libel claims. These consist of (1) expenses allocated to investigating and litigating questions related to the alleged error of the statement;⁴ (2) those allocated to the fault question, including the determination whether the plaintiff is public or private;⁵ (3) those allocated to all other legal issues and defenses involved in the claim, such as state rules of special damages and the statute of limitations; and (4) those allocated to negotiations arising from the dispute. These will be called Le , Lf , Lm , and Ln respectively, for "error," "fault,"⁶ "miscellaneous," and "negotiation."

In any single case the relative proportions of the four types of legal expenses will vary greatly. If the error becomes clear shortly after publication, little need be spent in litigating the falsity of the charges.

But that same case may involve substantial costs related to litigation over whether the error resulted from actual malice.⁷ In some cases, however, the error issue assumes center stage, though not to the exclusion of the fault question. The course of discovery may dictate that questions of error and fault be explored together, rather than concentrating on one of them.⁸

Since most states follow the negligence rule for private plaintiffs,⁹ the fault inquiry in these cases should cost less on average than cases brought by public plaintiffs—unless the private plaintiff attempts to show actual malice in an effort to recover general and punitive damages. Thus, in cases brought by public plaintiffs the legal expenses devoted to actual malice are likely to be larger on average and to be a larger percentage of total legal expenses than in cases brought by private plaintiffs.¹⁰

Over a long period, most newspapers will find that the types of legal expense fall into predictable proportions. Although some larger media may find themselves in very expensive disputes over falsity, such as the Sharon and Westmoreland cases, smaller media are unlikely to be in the same position. For them, at least, it seems likely that the costs of litigating fault will far exceed those incurred in litigating falsity.

Although miscellaneous legal expenses may dominate most of the simpler libel claims, they are not likely to loom large in absolute dollar terms because the issues often can be raised on motions to dismiss. Although an issue involving special damages or the statute of limitations may produce only “miscellaneous” expenses, if the defense is successful, the case is likely to be a very small one. Moreover, miscellaneous expenses tend to be eclipsed in any gigantic case, in which either error or fault questions, or both, will dominate.

Finally, negotiations of some sort are likely to occur in every case under the current system. Persons upset with an article will attempt to have it corrected, which may lead to further discussion over whether an error occurred and, if the newspaper is persuaded that it erred, how to correct the error. Despite their frequency, negotiation expenses are unlikely to loom large in any single case. To sum up so far, we can say that $L\$ = Lo + Le + Lf + Lm + Ln$.¹¹

B. Payouts

We know that the media are successful in some 90 percent of the cases that are litigated to conclusion.¹² In the few that are lost, defendants make some payment that must be included in our calculations. Payouts that result from judgments (P_j) may include both compensatory and punitive damages.

Although some claims lead to settlements in which no money changes hands,¹³ newspapers do sometimes make payments (P_s) as parts of settlements.¹⁴ The amount of money changing hands in any single libel case will be attributable either to judgment or settlement. Over a period of time the total payouts may include both and can be symbolized as $P\$ = P_j + P_s$.

One would expect payments to be made more often in negligence cases than in actual malice cases because it is easier to recover under negligence law.¹⁵ The amount of actual injury damages in such cases¹⁶ would appear to be independent of whether the libel occurred through negligence or actual malice.¹⁷ If so, compensatory damages should be substantially higher on average in the fewer successful public plaintiff cases, which will include general damages, than in the private plaintiff cases in which the plaintiff does not show actual malice. The damage disparity should be greater in those states in which punitive damages are available.¹⁸

When we look at current small legislative changes in personal injury law, we can see that proposals to limit general damages or to cap or eliminate punitive damages¹⁹ will have much less effect on libel defendants than on other defendants because so few libel defendants pay damages. Still, such legislation may affect the bargaining range in settlement discussions and might dissuade some plaintiffs—or their attorneys if the contingency fee is used²⁰—from suing at all.²¹ Overall, then, the total costs of libel under the current system over any period of time can be seen to be:

$$E\$ = L\$ [L_o + L_e + L_f + L_m + L_n] + P\$ [P_j + P_s].^{22}$$

C. Recovery of Expenses

From this total of the costs of the current system, we must subtract outlays that are recouped or avoided. These are likely to be achieved in either of two ways.

1. Countersuits

If the defendant has prevailed in a case that was brought to harass or without any chance of success, the defendant may attempt to recoup its expenses—either by seeking legal fees as part of the judgment in the original case, or by bringing a separate action for malicious civil prosecution.²³ Success under either of these routes would reduce net legal expenses by the defendant. Because this recoupment has been success-

ful in only a few cases,²⁴ we can omit it here in the interest of simplicity without much loss of accuracy.²⁵

2. Insurance

It is not possible, however, to neglect the other major way in which newspapers may avoid the full economic brunt of the current libel system, including its potential annual fluctuations—libel insurance. Those who carry libel insurance are likely to view the costs of libel in terms of premiums and deductibles. In fact, the basic approach developed here addresses the problems of both insured and uninsured defendants because, for most publications, insurance premiums, over time, will approximate a balanced flow of the expenses actually incurred.²⁶

II. THE IMPACT ON COSTS OF THREE REFORM PROPOSALS

A. Introduction

We turn now to a consideration of three proposals for reform—the Lockyer bill,²⁷ the Schumer bill,²⁸ and the Plaintiff's Option Libel Reform Act.²⁹ All provide a declaratory judgment option whose exercise bars a damage action.³⁰ Although the proposals vary greatly, they all create two-track systems with several basic features in common that might be addressed at the outset. All offer the plaintiff the chance to obtain a declaratory judgment by proving with convincing clarity that the defendant's defamatory statement was false. In that proceeding no damages are available, fault plays no part, and the winning plaintiff generally recovers legal expenses.³¹ All the proposals offer a statute of limitations of one year,³² but most plaintiffs attracted to a declaratory approach will move quickly to obtain one of the great benefits of the action—an early resolution.

In the discussion that follows, we are concerned with the impact that each of these new proposals will have on existing law and on defense costs. We are especially eager to determine whether those who today have only a choice between suing for damages and filing no suit will behave differently when they have the added option of suing for a declaratory judgment. The second goal is to determine the cost impact of these shifts. Schematically, this may be set out as in table 7.1 (with the operational questions set in each box).

It is important to recognize that “no suit” does not mean that the aggrieved person does nothing at all after the article in question appears. This category now includes at least three separate groups: (1) those who in fact do nothing; (2) those who complain and negotiate but, getting

no relief, give up; and (3) those who negotiate successfully for either a retraction, a reply, money, or some combination thereof. The first course of action produces virtually no defense costs; the second produces minor negotiation costs and perhaps some costs involved in exploring the claim. The third, however, involves negotiation expenses and perhaps some payouts in settlement. This may also include the costs of using space in the newspaper or buying space elsewhere for retractions or replies, and the “costs” of embarrassment in admitting some kinds of errors.

Each newspaper will best be able to subdivide the current “no suit” category that it confronts. To the extent that initial negotiations do not produce a settlement before suit is filed, these expenses are included as part of the damage action. Where a complaint is filed and allowed to lapse without much further action, the damage claim may involve fewer defense costs than a situation classified as “no suit.”

A brief overview of the table 7.1 at this point suggests that the critical question in terms of flow and costs will be how many current seekers of damages will switch to the declaratory action. The more who do so, the lower the total legal expenses incurred in case 1 cases; but the higher the expenses in case 2, which today is zero. The extent of the switch may be controlled by changes that an individual proposal makes in the damage action. Case 3 will come into existence if the shifting of fees deters current suits or if the declaratory alternative induces more settlements without suit. Case 4 will exist only if fee shifting provisions make feasible damage suits that are not now feasible—a highly unlikely situa-

TABLE 7.1: The Impact of the Proposals on the Current System (Generic)

PROPOSED SYSTEM	CURRENT SYSTEM	
	<i>Suit for Damages</i>	<i>No Suit Filed</i>
Suit for Damages	1. How many will continue to seek damages?	4. How many who do not now sue will?
Suit for Declaratory Judgment	2. How many who now seek damages will switch to dj?	5. How many who do not now sue will seek dj?
No Suit	3. How many who now seek damages will not sue?	6. How many will still not sue?

tion. Case 5 will be crucial if many who do not sue today are induced to bring actions for declaratory judgments. This would substantially raise the costs here from its current figure of zero. Finally those who did not sue under the old system and do not sue under the new system (case 6) may decrease in number because of the new alternative of case 5; but the costs associated with case 6 may increase since some claimants will fare better in pre-suit negotiations than they do today.

We turn now to more specific analysis of the likely directions and magnitudes of the possible movements. Before turning to specific proposals we consider some general questions that are raised by all three.

B. Common Questions Under All Three Proposals

1. Total Claims

The first question is to try to determine how many, under the current system, are suing for damages and how many are in one of the "no suit" groups.

It seems unlikely that all who see themselves as victims are suing today. Most try to get corrections.³³ Some who fail, angry at the media for the story on their subsequent treatment or both, go to a lawyer to initiate a suit.³⁴ If the lawyer will take the case on a contingency fee,³⁵ the case will be brought. If not, what will the complainant do? This is likely to depend on the severity of the perceived harm or injustice, the financial status of the complainant, and the lawyer's advice about the chances for ultimate success.³⁶ The complainant who is discouraged by an accurate explanation of the obstacles may decide to forget the whole matter. To the extent that plaintiffs today consult lawyers who systematically overestimate the chances for success,³⁷ the current system is producing more weak cases than might be expected.

There is also the situation in which, even after the adverse odds are explained, the complainant concludes that the act of bringing suit itself may be helpful in rehabilitating a hurt reputation.³⁸ Finally, some may sue simply because there is no other way to clear their names. If they can at least get to trial and get a special verdict, they may be able to clear their names even if the jury does not find the requisite fault.³⁹

Those now suing. The number of eligible⁴⁰ persons now seeking damages who will be induced to shift to the declaratory action will depend in large part on the motives for suit, the strength of the case, the attractiveness of the declaratory action, and on what changes, if any, make the current damage action less attractive. The Lockyer bill, for example,

does not affect the damage action,⁴¹ but other approaches make the damage action less attractive to some or all prospective plaintiffs.⁴²

Those not now suing. How many of the current “no suits” are likely to become declaratory judgments under a new system? Different media are likely to have different rates here. Publications that enrage those who think themselves defamed might find virtually no rise in total suits against them under any two-track system if today’s suits are based on anger and frustration. But publications generally perceived to be “responsible” might face more litigation. Complainants who perceive error but are not upset by the newspaper’s style or content or its dispute resolution tactics and who do not want to press weak legal claims would now have a way to test their claims of error.

The patterns might vary from the status quo (no suers switch to declaratory actions and all current non-suers behave exactly as they have been) to one extreme (all current suers continue to seek damages and all current non-suers bring or threaten declaratory actions) or another (all current plaintiffs switch to declaratory actions and all current non-suers take no action whatever). It is much more likely, of course, that some plaintiffs will switch from damage actions and that some who do to sue today will decide to bring the declaratory action. We must then compare any savings from fewer damage defenses with the new costs incurred in defending the declaratory actions, adding the role of fee shifting⁴³ In fact, however, many cases that start on the declaratory track will not run the full course.⁴⁴

2. Changes in costs

The crux of the matter, though, is not how many persons switch from one regime to another, but whether the total costs incurred under the new system are lower than those incurred under the current one. The first question here is whether a case litigated under the declaratory judgment system will cost less than one litigated under the current system. The exclusion of fault may reduce that legal expense to zero. But what will happen to the costs of litigating falsity? The central empirical question here is whether falsity litigation in case 2 will cost less than it would in case 1. Two features suggest lower cost: a plaintiff who cannot get damages may not push the matter as hard as where damages are available; and a defendant who is not at risk for damages may not put the same resources into defending the accuracy of a story. The opposite argument is that a media organization’s reputation for accuracy will require as rigorous and expensive a defense of a story as that now made in a damage action.

The large responsible media, remembering the Sharon and West-

moreland cases, assert that they will not save costs in a declaratory judgment system because the gigantic cases tend to center on falsity and will cost the same as they do now. Does this perception accurately reflect the situation of most big media or are a handful of massive cases distorting the perceptions? Even if the large media do not save much in the falsity phase of the case, might they still save enough by the elimination of fault questions to more than cover the costs of the new cases brought in case 5 by the current non-suers?

Although it seems likely that there will be some savings from the elimination of the fault question and the low likelihood that the falsity litigation will cost more when damages are not at stake than when they are, still it might be that in some cases it would be cheaper for the defendant to obtain summary judgment on the fault question in a damage action than to litigate solely the falsity question in a declaratory framework. But overall this seems an unusual case.

It seems highly unlikely that the small media will find themselves embroiled in the massive falsity disputes. Their cases tend to involve local matters that, no matter how hard to sort out with confidence, are unlikely to produce long trials over falsity. It is important to recognize that just as large and small media may have different concerns under the current system, they may gain different types and levels of benefits from proposed changes in that system.

Finally, the timing of the election is such that the plaintiff who is interested primarily in litigating falsity may make the election without knowing how the alleged error occurred. Without a choice, the plaintiff will begin the action to see what discovery will produce. Under a two-track system, the plaintiff who finds declaratory action more congenial will forgo what might have been a successful damage action in order to obtain the quicker and surer declaratory judgment. This timing may cast doubt on defendants' concern that plaintiffs with strong damage actions will continue to bring them and that only those with weak damage actions will switch to declaratory actions.

3. Settlements

Experience suggests that few libel defendants emerge unscathed from high-publicity cases. Either the story is shown to be false,⁴⁵ or certain practices of the defendants are shown to be less than admirable,⁴⁶ or the plaintiff actually obtains an award that is upheld on appeal.⁴⁷ Even if no wounds are inflicted, the financial and psychic costs of discovery may be so great that most newspapers will prefer to shift as many cases as possible from the damage track. For each case settled, the risk of payout

(*P*\$) drops to zero or to a known settlement figure, and legal expenses are conserved.

What keeps newspapers from settling more cases? In cases in which the error is recognized shortly after publication—called here clear error (*Ec*)—why does the case proceed? Is it because the plaintiff is dissatisfied with the timing or placement of any retraction? Does the plaintiff assert that the correction has not undone enough of the initial harm? Are the parties unable to agree on the role of fault or on a financial settlement? Is it that the plaintiff's goal was to harass or seek a big recovery, so that any retraction offered or made was virtually irrelevant to the decision to sue? Or did the defendant choose to defend a damage action on the assumptions that the requisite fault could not be shown and that it was better to incur the legal expenses and the very low risk of payout than to admit the error publicly? The answers will vary with the plaintiff, the publication, and the specific situation.

When the allegation of error is disputed (*Ed*), the newspaper cannot retract.⁴⁸ A reputable publisher involved in such a dispute can avoid a suit today only by a settlement that gives the plaintiff a chance to state his or her side or by an article that reports the differing views and how difficult it is to establish the truth. If these do not satisfy the plaintiff, and the plaintiff is ready to pursue the case, the defendant must hope to win quickly on lack of fault or on a miscellaneous defense because the error question seems to present a matter for trial.

Two-track settlements. Under a two-track system, the analysis of settlements becomes more complex. In the systems in which the plaintiff's option controls,⁴⁹ the plaintiff must weigh the attractiveness of the damage action against the value of the opportunity to prove falsity. A plaintiff who could be sure of the opportunity to litigate falsity would have more leverage in negotiations than he has today. But just as information about falsity may lie more with one party than the other,⁵⁰ so too with information on the fault question. In most cases, the plaintiff will have no independent knowledge about how an error occurred—even an error that is now clear.

The preliminary negotiations may be critical in directing the plaintiff. If the error is clear and the defendant is prepared to make an acceptable retraction, the plaintiff will get as much as he might have were he to use the declaratory track. Indeed, he will get more, since an admission of error will come sooner and be more convincing than a judicial declaration of error after litigation. Whether the newspaper will admit the error and hope to end the matter or try to trade the retraction for a total settlement may depend on the rules that control the damage action—a subject on which the proposals differ.

If the error is disputed, the plaintiff must realize that the declaratory action may fail. The damage action presents the same risk plus several other hurdles. The newspaper, on the other hand, will recognize that retraction is not available as a remedy, and that if plaintiff pursues either of the two remedies the case may be extended. A plaintiff who is intent on clearing his name is likely to pursue the declaratory road. This will keep legal costs low⁵¹ and be likelier to achieve the goal sought. A plaintiff who realizes that the path is going to be difficult, that the result is uncertain, and that the need for clearing his name is not as important as reaching the same audience with his side of the dispute, might be receptive to the opportunity to state his views in a column or letter soon after the statement that caused the dispute.

4. Defaults

The three proposals all envision a contested declaratory proceeding that culminates, if there is no settlement, in a judgment that falsity was or was not established. Under each proposal, however, there is the possibility that the defendant, no longer liable for damages after the plaintiff's election,⁵² may simply default in the declaratory action. This would allow the plaintiff to obtain a default judgment of falsity, which would render the defendant liable for the plaintiff's reasonable legal fees.⁵³ These fees are likely to be low in the default situation.

What has the plaintiff obtained in such a situation? Will the public that learns about the outcome treat the default as an admission of error? Might there be other explanations, such as the inability of a small newspaper to afford to defend a case of disputed error? The proposals do not address the issue. Would the defendant's default undermine the plaintiff's efforts to clear his name? Some bargaining on the default question may be possible where the plaintiff's election controls. Where, as in the Schumer bill,⁵⁴ the defendant can convert a damage action into a declaratory action and then default, the plaintiff can do nothing to avoid that outcome. The analysis of settlement and default dynamics will be specific to each proposal.

5. Insurance Practices

Another set of common questions is whether the introduction of a two-track system would change either the way in which media libel insurance is written or the size of the premiums. This might depend on how readily new costs or savings can be predicted. That in turn will depend on how the declaratory action operates and what changes are made in the damage action. These will be discussed shortly. In any event, there may be much slippage between what new legislation says, and how it works.

If the legislation appears to have the potential to increase costs, insurers might raise premiums. If it seems clear that one goal of the legislation is to reduce overall defense costs, insurers may adopt a wait-and-see attitude or may be reassured about the jurisdiction's libel climate and reduce premiums quickly. I will assume that the introduction of any of the three proposals will not, by itself, produce any substantial shift in insurance underwriting practices or premiums until some experience has been obtained.⁵⁵

C. The Lockyer Bill

The bill introduced by California⁵⁶ State Senator Bill Lockyer permits any public official or public figure who claims to be the subject of a media defamation to bring an action for a declaratory judgment that the statement was defamatory and false.⁵⁷ Fault and common law malice are irrelevant, damages are not recoverable, and seeking this relief precludes seeking damages.⁵⁸ In the declaratory judgment action, the prevailing party is to recover reasonable attorney's fees except when the judge finds an "overriding reason" not to follow the prevailing party rule;⁵⁹ the defendant proves that it "exercised reasonable efforts to determine that the publication or broadcast was not false and defamatory";⁶⁰ the defendant published a correction no later than 10 days after the action as filed;⁶¹ or when a losing plaintiff is found to have brought and maintained the action with a "reasonable chance of success."⁶² The existing damage action is unchanged.

In comparing costs, we start with the current system's regime under which all costs and risks are incurred in defending damage actions or in negotiations conducted under threat of a suit for damages. Under the Lockyer bill, case 1 in table 7.1 would remain the same for all plaintiffs who continued to sue under the proposal, but the total would decrease as plaintiffs instead chose to seek declaratory relief or not to sue. (There is no reason why any former suers should move to total inaction under the Lockyer bill because no losing plaintiff in a damage action would owe legal fees to the defendant. But some current damage seekers will now be in a position to bargain effectively for retractions and other relief, under case 3, without suit.) The major question then is how many will switch from case 1 to case 2.

Since no change in the rules or fee structure of damage actions has occurred, the inducement to shift from damage actions to declaratory relief will have to be found in the attractions of the new action. The clearest attraction is the far greater ability to obtain a judgment on falsity. Since no damages are recoverable in such an action, the fee-

shifting provisions will be important to those who would find it burdensome to have to bear even these reduced costs.

Are the fee-shifting provisions strong enough to encourage marginal plaintiffs to switch to the declaratory action? Although the general rule awards reasonable fees to the prevailing party in the declaratory action, exceptions cloud this picture for successful plaintiffs and will cause extra litigation and negotiation.⁶³ If the defendant exercised reasonable efforts to avoid falsity before the publication (something the plaintiff may not readily know) or if the defendant retracted no later than 10 days after the action was filed, each side will bear its own fees if the plaintiff wins the action. It seems probable that the more the error is disputed, the more likely it is that reasonable care will be found to have been taken. Even if these two specific defenses do not apply, the court may bar the successful plaintiff from recovering fees if it finds an "overriding reason" to do so.⁶⁴ Thus, the fee provisions are unlikely to be a strong inducement to the plaintiff to switch from the damage action. To the extent the defendant must reimburse the plaintiff, we may call these amounts "*Fp*."

The other side of the coin is, of course, that if the plaintiff brings a declaratory action (but not a damage action) and loses, the bill's general rule would require the plaintiff to reimburse the defendant's reasonable legal expenses (*Fd*). Will this deter plaintiffs from choosing the declaratory action? This is unlikely. The most significant fee provision is the fourth,⁶⁵ which permits a shift against a plaintiff who has proceeded without a reasonable chance of success. If the statement is defamatory, the plaintiff might be held to have had a reasonable chance for success so long as a colorable, even if unsuccessful, case of falsity could be made out. In any event, a losing plaintiff may be able to avoid reimbursing the defendant under the "overriding reason" provision, especially if the defendant is prosperous and the plaintiff is an ordinary citizen.⁶⁶ All in all, the extent of fee shifting is hard to predict, but it would seem to add little incentive to plaintiffs to choose the declaratory route if they are not already so inclined.

Table 7.2 suggests the likely impact on defense costs of plaintiffs who do switch from damage actions to the declaratory alternative under the Lockyer bill. (Recall that negotiations may occur before the decision to switch is made.)

The settlement payments are not zero because a switch does not mean that no money will be spent in settlements. One can imagine a case in which the plaintiff may think that the requisite fault can be established but in which the error may be hard to prove. The plaintiff might be willing to go the declaratory route if the defendant, to avoid the expense of defending and possibly losing a conventional damage action,

were willing to agree to a payment (perhaps of special damages?) if plaintiff proved falsity.

In the second column, those who do not sue today are not likely to seek damages under the Lockyer proposal (case 4) because it does nothing to make the damage action any more attractive—either substantively or by fee shifting. On the other hand, some who do not sue today may find the declaratory relief attractive (case 5). Depending on the pre-suit negotiations, some of these current non-suers may wind up in case 6 rather than case 5. Those who can show clear error may not have to sue at all because the defendant, knowing that a declaratory action will reveal the error, may choose to settle the case before suit is filed. Or the defendant may wait to see if the plaintiff is persistent enough to file that action. Either way, these new plaintiffs will impose new costs on defendants. If the error is disputed, the dispute is more likely to fall under case 5 than 6, unless the parties can agree to a reply or nonretraction device. The immediate question is the impact of these new plaintiffs. A summary of their role under the Lockyer bill can be seen in table 7.3.

The situation under the Lockyer proposal may be summarized as follows in table 7.4.

My sense is that apart from the bare incentive it offers in the opportunity to seek a declaration of falsity, the Lockyer bill does little to induce plaintiffs to switch from the damage action to the declaratory action. To the extent plaintiffs do switch to case 2 there will be overall savings in litigation costs—in most cases—that may not be offset by the total of costs imposed by new plaintiffs (case 5) or by the added negotiating costs incurred generally, primarily in cases 3 and 6.

TABLE 7.2: Lockyer Bill

<i>Impact of Plaintiffs Who Switch to Case 2 of Table 7.1 on Current Expenses</i>	
EXPENSE	COMMENTS
$L_o =$	At most little change.
L_e probably =	Still in every case—possible large-small media difference.
L_f far lower	Zero except for pre-suit work.
$L_m ?$	Saves some defense research but adds disputes over fees.
L_n higher	Increased negotiation.
P_j to zero	All risk is gone.
P_s lower	Lower range for bargaining—but not zero.
F_p higher	A new item that might matter in clear cases.
F_d slightly higher	New <i>offset</i> —unlikely to be significant.

In terms of the formula, the question for defendants under the Lockyer bill is whether:

$$\text{Savings } [L_f + P_s + F_d] > \text{New Costs } [L_e + L_n + F_p].$$

As we have seen,⁶⁷ the nature of the error may determine the course of the bargaining. The earlier explanation of why cases of clear error are unlikely to go to judgment becomes even stronger when we add the possible obligation to reimburse the successful plaintiff, unless the defendant can establish that its behavior before publication protects it.⁶⁸ Each

TABLE 7.3: Lockyer Bill

Impact of New Plaintiffs on Current Expenses (Cases 5 and 6 of Table 7.1)

EXPENSE	COMMENTS
$L_o =$	At most little change
L_e far higher	Major new expense
$L_f =$	Low before and now
$L_m ?$	Low before—now includes litigation over fees
L_n higher	Increased negotiation
P_j to zero	Very low before and zero now
P_s slightly higher	More settlements—but low \$
F_p higher	A new item that might matter in clear cases
F_d slightly higher	New <i>offset</i> —unlikely to be significant

TABLE 7.4: The Impact of the Lockyer Proposal on the Current System

LOCKYEAR PROPOSAL	CURRENT SYSTEM	
	<i>Suit for Damages</i>	<i>No Suit Filed</i>
Suit for Damages	1. Same costs per suit	4. No suit now if none before
Suit for Declaratory Judgment	2. Each dj case cheaper than former damage suit	5. New costs incurred
No suit	3. A few bargainers will settle without suit	6. A few bargainers will get more than before

newspaper can best judge for itself how its clear errors occur and how it will fare under this part of the Lockyer fee rules. If the alleged error is disputed, as noted earlier,⁶⁹ negotiations may take a different course under the Lockyer bill but will still occur. The existence of the dispute makes it likely that the defendants will be able to prove reasonable care before publication and avoid having to reimburse a successful plaintiff.

D. The Schumer Bill

Representative Charles Schumer's (D., New York) study bill⁷⁰ begins, as does the Lockyer bill, with the option permitting both public officials and public figures to obtain declaratory judgments of falsity on clear and convincing evidence, without regard to fault, and bars a plaintiff who seeks declaratory relief from seeking damages.⁷¹ The critical difference is that if the plaintiff elects the conventional damage action the defendant may override that election by unilaterally converting the plaintiff's damage claim into one for declaratory relief.⁷² The case would then proceed as if the plaintiff had made that election originally.⁷³

The Schumer bill (tables 7.5 and 7.6) provides that in both the declaratory action and the damage action the prevailing party shall recover reasonable attorney's fees except (1) that the court may reduce or disallow the award if "it determines that there is an overriding reason to do so"⁷⁴ and (2) no fees may be awarded against a defendant that proves that it exercised due care to avoid making the false and defamatory

TABLE 7.5: Schumer Bill

<i>Impact of Plaintiffs who Switch to Case 2 on Current Expenses</i>	
EXPENSE	COMMENT
<i>Lo</i> =	Very little change.
<i>Le</i> probably =	Still in every case—possible difference between large and small media.
<i>Lf</i> far lower	Possibly zero for public plaintiffs.
<i>Lm</i> ?	Lower on law; higher on fees.
<i>Ln</i> slightly higher	A few more options for claimant.
<i>Pj</i> to zero	All risk is gone.
<i>Ps</i> far lower	Very little room for money claims.
<i>Fp</i> higher	New item—more wins for <i>P</i> since <i>D</i> can elect <i>DJ</i> for public <i>P</i> .
<i>Fd</i> slightly higher	New <i>offset</i> —unlikely to be significant.

statement or shows that it retracted not later than 10 days after an action was filed.⁷⁵ Finally, the Schumer bill makes the damage action less attractive by barring the award of punitive damages.⁷⁶ Since only one libel plaintiff in ten has been prevailing in reported damage actions,⁷⁷ the chance to recover fees is unlikely to make the damage action more attractive to prospective plaintiffs, especially when combined with the new declaratory option.

But are damage actions likely to survive under the Schumer bill? It seems that the public⁷⁸ plaintiffs likeliest to bring damage actions are those most confident about showing the requisite fault. But defendants will know more about how the error occurred and will be most likely to convert to declaratory actions the plaintiffs' self-selected strongest damage cases.

Plaintiffs are unlikely to bring weak damage actions, because of both the fee provisions and the creation of the alternative action. But if a plaintiff were to miscalculate and bring a weak damage action, how might the defendant respond? Would it convert the action anyway to save itself from the risk of an unjustifiable loss, or from concern that perhaps *it* is miscalculating, or to avoid the disruptions that discovery might bring to the newspaper? Or would it accept the damage action and hope to win and to recoup litigation expenses? My sense is that media organizations (and their insurers) are risk averse in the extreme under current libel law and would take any chance to avoid exposure to damages, even where punitive damages are barred.⁷⁹

If I am right that the Schumer approach will lead to the virtual⁸⁰ demise of damage actions, it becomes fairly easy to predict its impact on

TABLE 7.6: Schumer Bill

<i>Impact of New Plaintiffs on Current Expenses (Cases 5 and 6)</i>	
EXPENSE	COMMENTS
<i>L_o</i> =	At most little change.
<i>L_e</i> far higher	Major new expense.
<i>L_f</i> =	Low before and now.
<i>L_m</i> ?	Low before — now includes fee litigation.
<i>L_n</i> higher	Increased negotiation.
<i>P_j</i> to zero	Very low before and zero now.
<i>P_s</i> slightly higher	More settlements — but low \$.
<i>F_p</i> higher	A new item that might matter in clear cases.
<i>F_d</i> slightly higher	New <i>offset</i> — unlikely to be significant

defense costs. If all cases went the full declaratory route, a defendant would eliminate damage exposure and legal expenses related to fault. The new costs in defending declaratory actions would include added expenses for negotiation and for determining falsity in cases brought by current non-suers.

Although it is hard to predict how fee shifting will operate when it includes an exception for "overriding reason,"⁸¹ it seems likely that here, as with the Lockyer bill, the defendant will have to reimburse fees when the plaintiff establishes falsity—unless the defendant can come within the other escape hatches such as due care before publication or a quick retraction after suit is filed.⁸² On the other hand, it is unlikely that many losing plaintiffs will have to reimburse.⁸³ The incentive effects of the fact that the damage action has been made unattractive (by eliminating punitive damages and by imposing the risk that unsuccessful damage plaintiffs may have to reimburse defendants) are unimportant because of the Schumer defendant's unilateral ability to avoid damage exposure.

It appears, then, that the effect of the Schumer bill will be to switch virtually all public plaintiffs into case 2. (Any plaintiffs left in case 1 who prove actual malice will recover less on average than they do now because of the elimination of punitive damages.) Some plaintiffs who sue today on a contingency fee basis might decide not to sue (case 3) because of the danger of having to reimburse a successful defendant. Others in case 3 may now be able to bargain more effectively for retraction or reply because of the new declaratory option. But since the defendant can now unilaterally avoid all damage liability, it is hard to see how the defendant need pay much in settlements.

Plaintiffs who do not sue under current law have no reason to bring a damage action under the Schumer bill (case 4) because it is no more attractive substantively. The only possible new basis for suit would be the possibility of recovering fees. But the fact that so few plaintiffs now win these cases, the lack of punitive damages, the risk of having to reimburse if unsuccessful, and the current availability of contingency arrangements suggest that no new damage cases will appear.

But certainly some plaintiffs who now do not sue are likely to take advantage of the declaratory option (case 5) if they cannot reach agreements under case 6. Because of the similarity of the fee provisions, the analysis here should be the same as that earlier for cases 5 and 6 of the Lockyer bill.⁸⁴ (The defendant's ability to avoid a damage action under the Schumer bill is irrelevant here because we are dealing with plaintiffs who do not seek damages today and who have no reason to change that now, as discussed in connection with case 4.)

Surely the savings related to actual malice and to payouts must exceed

the new costs related to negotiation and falsity in cases 5 and 6. Bargaining is quite restrained here because the defendant can unilaterally avoid damage actions. Still, there may be some room for bargaining for retractions or for opportunities to reply, to avoid a potentially extended and uncertain declaratory action. In addition to losing leverage in terms of the damage action, the plaintiff also cannot negotiate to avoid the defendant's default in the declaratory action. It seems clear that:

$$\text{Savings } [L_f + P\$] > \text{New Costs } [L_n + L_e].$$

The effect on each of the six cases appears in table 7.7.

The crucial difference between the Schumer bill and the Lockyer bill will be in the number in cases 1 and 2. Under the Schumer bill the vast majority will switch to case 2. To the extent that it costs less to litigate in case 2 than in case 1 (the savings will be somewhat less under Schumer because of the bar on punitive damages), the Schumer bill will yield greater total savings to defendants. The costs incurred in cases 5 and 6 should be about the same under both—but less likely to wipe out the savings otherwise produced by the Schumer bill. In addition, negotiated settlements will surely involve fewer and smaller payouts under the Schumer bill than under the Lockyer bill.

E. The Plaintiff's Option Libel Reform Act (POLRA)

This proposal⁸⁵ gives the plaintiff the controlling choice, as does the Lockyer bill, but extends it to all plaintiffs and makes it available against

TABLE 7.7: The Impact of the Schumer Proposal on the Current System

SCHUMER PROPOSAL	CURRENT SYSTEM	
	<i>Suit for Damages</i>	<i>No Suit Filed</i>
Suit for Damages	1. Very few public <i>Ps.</i> Lower average payouts	4. No reason to sue now if not before
Suit for Declaratory Judgment	2. Very large category—each case costs less than case 1	5. New costs incurred
No Suit	3. A few bargainers will settle without suit	6. Slightly more bargaining

all defendants. Discovery on falsity is barred.⁸⁶ The proposal goes beyond the two bills in making the damage action less attractive by requiring all plaintiffs to show falsity and actual malice with convincing clarity and by eliminating punitive damages.⁸⁷

The proposal provides, as does the Schumer bill, that losers in both the declaratory action and the damage action generally owe the winners reasonable legal fees, subject to four exceptions.⁸⁸ In damage actions, an unsuccessful plaintiff who has suffered special damages and who had a reasonable chance of success need not reimburse.⁸⁹ The other three exceptions involve the declaratory action: (1) the losing plaintiff need not reimburse unless he proceeded without a reasonable chance for success or failed to present his evidence to the defendant before suit;⁹⁰ (2) a plaintiff who has succeeded on the basis of evidence not presented to the defendant beforehand cannot recoup legal fees from the defendant;⁹¹ and (3) if the defendant has made an appropriate retraction after the declaratory action was filed, the defendant is the prevailing party thereafter.⁹² Since fee shifting is not subject to an "overriding reason" exception or to one based on prepublication conduct, it should play a more predictable role here than under either the Lockyer or Schumer bills—and cost less to determine.

A newspaper may find it more difficult to calculate the consequence of this proposal than of the other two. Since the Lockyer bill simply cleared a new path, the first question was how many would choose the new path instead of the damage route. Under POLRA, in addition to measuring that effect, we must also determine how many more will switch to the declaratory route because of the changes made in the damage action. Since the two declaratory actions are essentially the same (except for fee provisions),⁹³ it seems clear that however many persons would choose the Lockyer declaratory path over the damage action, more would do so under POLRA (see tables 7.8 and 7.9).

The differences in fee shifting strengthen that contrast. Plaintiffs who succeed in the declaratory action are more likely to get their legal expenses reimbursed under POLRA than under the Lockyer bill because POLRA contains no exceptions for "overriding reason" or prepublication care. Moreover, it protects most losing plaintiffs who have offered their evidence of falsity to the defendant early in an attempt to get a quick resolution.⁹⁴ (A further provision to encourage early showing of evidence of falsity bars from reimbursement even a successful plaintiff who has not shown the evidence of falsity to the defendant.⁹⁵)

By making the tort action less attractive and the recovery of fees more likely in the declaratory action in case of success and avoidable in case of failure, POLRA should encourage plaintiffs to switch to the

declaratory path (case 2). Moreover, that course is more widely available than under the other two bills because it is not limited to public plaintiffs or to media defendants.

The plaintiffs who would continue to sue for damages (case 1) would presumably be those who may think they have a good case on actual malice (and who want to pursue it), as well as those bent on harassing or intimidating the media. This may mean that the average costs of defending the remaining damage actions will be higher than they are

TABLE 7.8: POLRA Proposal

Impact of Plaintiffs Who Switch to Case 2 on Current Expenses

EXPENSE	COMMENTS
<i>Lo</i> =	Very little change.
<i>Le</i> probably =	Still in every case—possible large-small media difference.
<i>Lf</i> far lower	Zero except for pre-suit work.
<i>Lm</i> ?	Less legal defense—but more fee litigation.
<i>Ln</i> slightly higher	More options for plaintiff.
<i>Pj</i> to zero	All risk is gone.
<i>Ps</i> lower	Lower range for bargaining—but not zero.
<i>Fp</i> higher	New item—extent depends on how many use DJ and the outcomes.
<i>Fd</i> slightly higher	New <i>offset</i> —potentially significant but uncertain.

TABLE 7.9: POLRA Proposal

Impact of New Plaintiffs on Current Expenses (Cases 5 and 6)

EXPENSE	COMMENTS
<i>Lo</i> =	At most little change.
<i>Le</i> far higher	Major new expense.
<i>Lf</i> =	Low before and now.
<i>Lm</i> ?	Low before—now includes fee litigation.
<i>Ln</i> higher	Increased negotiation.
<i>Pj</i> to zero	Very low before and zero now.
<i>Ps</i> slightly higher	More settlements now.
<i>Fp</i> higher	A new item that might matter in clear cases.
<i>Fd</i> slightly higher	New <i>offset</i> —unlikely to be significant.

today when plaintiffs have no choice. But the costs will often be recoverable, especially from solvent individuals or groups whose suits fail.

Will the plaintiff success rate increase over the current 10 percent? Although the self-selection that will result from creating a two-track system suggests a higher rate, several factors cut the other way. The first is the greater difficulty of winning the action because of the requirement of actual malice. Second, as noted earlier,⁹⁶ solid information about actual malice is rarely available to the plaintiff when the election must be made. As a result, some plaintiffs who might succeed today will forgo the damage route under POLRA. Thus, as with the Lockyer bill, it is not clear why the current success figure should change.

So far as case 3 is concerned, the effect under POLRA should be essentially the same as that under the Schumer bill. Some plaintiffs who sue today on a contingency fee might decide not to sue because of the danger of having to reimburse a successful defendant. Others in case 3 may now be able to bargain more effectively for retraction or reply because of the new declaratory option. Under POLRA, the plaintiff's bargaining leverage will resemble that under the Lockyer bill more than that under the Schumer bill because the plaintiff controls the election.

Plaintiffs who do not sue under current law have no reason to bring a damage action under POLRA (case 4) because it is substantively less attractive than the current damage action. Only the possibility of recovering fees might tip the balance in favor of suit. But, as with the Schumer bill, the fact that so few plaintiffs now win these cases, the lack of punitive damages, the risk of having to reimburse if unsuccessful, and the likely availability today of contingency arrangements for strong cases suggest that no new damage cases will appear.

How many current non-suers are likely to take advantage of the declaratory option (case 5)? This will depend to some extent upon the impact of the fee-shifting provisions, which is more predictable than under either of the other proposals. A plaintiff who is confident about falsity and who is willing to show his evidence to the defendant can be assured of winning and recovering fees—or of obtaining an appropriate retraction. Complainants will also be aware of the risk of having to reimburse, if unsuccessful, for failure to reveal evidence—or for having brought or maintained the case without a reasonable chance of success. Of course, the defendant is aware of the same points and may settle some of these cases before suit (case 6). The impact of new plaintiffs is suggested in table 7.9

The usual question is whether the major costs saved by not having to defend so many damage actions, together with the reduced risks in those damage actions that are still brought (offset by the new burden of

reimbursing successful plaintiffs), outweigh the new costs attributable to the declaratory action and the added negotiation and settlement costs that come from providing plaintiffs with the new alternative. To the extent that failing suits are brought to harass, defendant may obtain substantial reimbursements of fees; to the extent plaintiffs switch to declaratory relief, the saving will come in lower expenses related to fault. In terms of the formula, the question is whether

$$\text{Savings } [Lf + P\$ + Fd] > \text{New Costs } [Le + Ln + Fp].$$

The overall analysis is presented in table 7.10.

If, on average, litigating declaratory actions is cheaper than litigating current damage actions, and if enough plaintiffs switch from the damage action to the declaratory action, this may more than make up for the new costs introduced by those plaintiffs who do not now sue (case 5) and the added negotiation expenses generally. The incentive to settle cases of clear error may be stronger here because the fee-shifting provisions focus on postpublication conduct. The defendant's incentive to settle cases of disputed error may be stronger here because losing defendants are more likely to owe fees than under the two bills.

CONCLUSION

At this point, it might be helpful to take another look at the six boxes from a comparative standpoint to see the points at which the reform

TABLE 7.10: The Impact of the POLRA Proposal on the Current System

POLRA PROPOSAL	CURRENT SYSTEM	
	<i>Suit for Damages</i>	<i>No Suit Filed</i>
Suit For Damages	1. Fewer suits by all <i>Ps</i> . Lower average payouts	4. No reason to sue now if not before
Suit for Declaratory Judgment	2. Each case cheaper than former damage suit	5. New costs incurred
No suit	3. A few bargainers will settle without suit	6. A few bargainers will get more than before

proposals differ from current law and from each other. (In table 7.11 *L* stands for Lockyer, *S* for Schumer, and *P* for POLRA.)

Unless the Lockyer bill manages to divert a substantial number of plaintiffs away from damage actions, it is not clear that it will achieve cost savings for defendants. It seems clear that such savings will be achieved under the Schumer bill and it seems likely that the POLRA proposal will achieve savings though in a lesser amount than under the Schumer bill.

Plaintiffs will certainly be better off under all of these proposals than under current law. Under the Lockyer proposal, plaintiffs as a class make no tradeoffs to obtain their new advantage. Under POLRA, some

TABLE 7.11: The Impact of Each Proposal on the Current System

PROPOSAL	CURRENT SYSTEM	
	<i>Suit for Damages</i>	<i>No Suit Filed</i>
Suit for Damages	1. Number of cases: Most under <i>L</i> Fewest under <i>S</i> <i>P</i> in between Rate of recovery: <i>P</i> lower than <i>L</i> and <i>S</i> Size of recovery: <i>L</i> highest <i>S</i> lowest—private <i>Ps</i> <i>P</i> in between Fee shifts: <i>L</i> none More under <i>P</i> than <i>S</i>	4. No reason to sue now if not before
Suit for Declaratory Judgment	2. Number of cases: Fewest under <i>L</i> Most under <i>S</i> <i>P</i> in between Fee shifts Uncertain under <i>L</i> & <i>S</i> Most under <i>P</i> DJ suits cheaper for small media, possibly not so in giant cases	5. New costs incurred in all plans Most fee shifts in <i>P</i>
No Suit	3. Settlers better off under <i>L</i> and <i>P</i> . Some large payments	6. Weak damage cases—more retractions, not many or large payments

plaintiffs give up substantial damage claims. Under the Schumer bill public plaintiffs may lose their damage claims entirely.⁹⁷ Although the impact on plaintiffs is not a mirror image of the effect on the defendants, it is not hard to predict how different groups of plaintiffs will react to each of the three proposals.

Finally, it is worth reemphasizing that this paper has stressed defense costs to the virtual exclusion of all other criteria. This was done not because these questions are the only ones or even the most important ones but because it seemed useful to try to provide media organizations, which are certain to play a vital role in the political process, a way of assessing this one impact on their operations. Some media organizations may find the impact on their costs conclusive. Others will use it as the starting point for their own much broader analysis of today's libel law, touching such matters as the impact of declaratory approaches on press credibility and on public attitudes toward the press.

It appears from the analysis that declaratory proposals that discourage resort to damage actions and encourage resort to declaratory actions will cost media no more than the current system now costs, and may produce substantially lower costs for all the media or at least for smaller media. If these predictions are accurate, the economic concerns of media should not stand in the way of serious considerations of alternatives to the current libel regime.

APPENDIX A

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds that the current judicial mechanism for redress of defamation of a public official or public figure by a media defendant fails to provide justice for either party.

The current remedy of a suit for money damages produces an unacceptable risk of suppression of free speech and public access to vital information.

Concurrently, the plaintiff in such an action is rarely interested in monetary redress, but rather seeks vindication of his or her reputation.

It is, therefore, the intent of the Legislature to provide a concurrent remedy to a suit for money damages which avoids costly and protracted litigation on the issue of defamation of a public figure or public official, and establishes a remedy which truly protects the defamed individual and at the same time encourages the robust exchange of ideas which is so vital to our democracy.

SEC. 2. Section 48.6 is added to the Civil Code, to read:

48.6. (a) A public official or a public figure who is the subject of a publication or broadcast made in a newspaper, magazine, radio or television broadcast, or any other print or electronic media, may bring an action for a judgment that the publication or broadcast was false and defamatory.

(b) Notwithstanding any other provision of law, it shall be no defense to an action brought under this section that a publication or broadcast was made without malice or ill will or any other improper motive or negligence.

(c) In any action brought under this section, the plaintiff shall be required to prove by clear and convincing evidence that the publication or broadcast was false and defamatory.

(d) No damages may be awarded in any action brought under this section, whether or not those damages are for compensation or for punishment and by way of example. Any person who commences an action for relief under this section shall be barred from asserting or pursuing any other claim or cause of action arising out of the publication or broadcast, and shall be deemed to have waived the right to assert any such claim.

(e) In any action arising under this section, the court shall award reasonable attorney's fees to the prevailing party except as follows:

(1) The court may reduce or disallow attorney's fees if there is an overriding reason to do so.

(2) No attorney's fees shall be awarded against a defendant that proves that it exercised reasonable efforts to determine that the publication or broadcast was not false and defamatory.

(3) No attorney's fees shall be awarded against a defendant that published a correction or retraction no later than 10 days after the action is filed.

(4) No attorney's fees shall be awarded against a plaintiff unless it is proved that the action was brought or maintained without a reasonable chance of success.

(f) An action under this section shall be subject to the period of limitations of Section 340 of the Code of Civil Procedure.

APPENDIX B

A BILL

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

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

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

(a) CAUSE OF ACTION.

(1) A public official or public figure who is the subject of a publication or broadcast which is published or broadcast in the print or electronic media may bring an action in any court of competent jurisdiction for a declaratory judgment that such publication or broadcast was false and defamatory.

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

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

(b) BURDEN OF PROOF. The plaintiff seeking a declaratory judgment under subsection (a) shall bear the burden of proving by clear and convincing evidence each element of the cause of action described in subsection (a).

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

(d) ELECTION BY DEFENDANT.

(1) A defendant in an action brought by a public official or public figure arising out of a publication or broadcast in the print or electronic media which is alleged to be false and defamatory shall have the right, at the time of filing its answer or within 90 days from the commencement of the action, whichever ever comes first, to designate the action as an action for a declaratory judgment pursuant to subsection (a).

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

SEC. 2. LIMITATION ON ACTION.

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

SEC. 3. PUNITIVE DAMAGES PROHIBITED.

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

SEC. 4. ATTORNEY'S FEES.

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

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

(2) the court shall not award attorney's fees against a defendant which proves that it exercised reasonable efforts to ascertain that the publication or broadcast was not false and defamatory or that it published or broadcast a retraction not later than 10 days after the action was filed.

SEC. 5. EFFECTIVE DATE.

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

APPENDIX C: THE PLAINTIFF'S OPTION LIBEL REFORM ACT

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

(a) CAUSE OF ACTION.

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

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

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

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

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

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

SEC. 2. LIMITATION ON ACTION.

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

(b) It shall be a defense to an action brought under SEC. 1 that the

defendant published or broadcast an appropriate retraction before the action was filed.

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

(d) Actions brought under SEC. 1 shall be accorded highest priority in setting dates for trial.

SEC. 3. PROOF AND RECOVERY IN DAMAGE ACTIONS.

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

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

SEC. 4. ATTORNEY'S FEES.

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

(b) EXCEPTIONS.

(1) In an action for damages brought by a plaintiff who sustained special damages, the prevailing defendant shall not be awarded attorney's fees unless the action is found to have been brought or maintained without a reasonable chance for success.

(2) In an action brought under SEC. 1, a prevailing defendant shall not be awarded attorney's fees unless the plaintiff has brought or maintained the action without a reasonable chance for success or has failed to present evidence to the defendant before the action was filed.

(3) In any case brought under SEC. 1, in which the plaintiff has prevailed on the basis of evidence that plaintiff did not present, or formally try to present, to the defendant before the action was filed, the plaintiff shall not recover attorney's fees.

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

SEC. 5. EFFECTIVE DATE.

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

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NOTES

1. E.g., H.R. 2846 (99th Cong. 1st Sess.) (1985), the Schumer study bill, reprinted in Appendix B; Cal. S. B. 1979 (1986), the Lockyer bill, reprinted in Appendix A; Franklin, "A Declaratory Judgment Alternative to Current Libel Law," 74 *Calif. L.Rev.* 809 (1986), containing a proposal that is reprinted in Appendix C.

2. E.g., Barrett, "Declaratory Judgments for Libel: A Better Alternative," 74 *Calif. L. Rev.* 847 (1986); Cendali, "Of Things to Come—The Actual Impact of *Herbert v. Lando* and a Proposed National Correction Statute," 22 *Harv. J. Legis.* 441 (1985); Franklin, *supra* note 1.

4. Although all three proposals require the plaintiff to establish falsity, see text *infra* following note 30, and states must impose this burden in most, if not all, libel cases, *Philadelphia Newspaper Co. v. Hepps*, 475 U.S. 1134 (1986), the term "truth" may still be important. For example, a defendant who seeks summary judgment on this issue may find that demonstrating the statement's truth is the most effective way of showing that the plaintiff will be unable to prove it false.

5. Among the noneconomic costs beyond the scope of this paper are the effects on staff morale of being engaged in extensive pretrial activities.

6. I assume that strict liability will not be imposed on media defendants under an extension of *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

7. E.g., *Burnett v. National Enquirer, Inc.*, 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983), appeal dismissed for want of jurisdiction, 465 U.S. 1014 (1984).

8. E.g., *Westmoreland v. CBS, Inc.*, 596 F.Supp. 1170 (S.D.N.Y. 1984); *Sharon v. Time, Inc.*, 599 F.Supp. 538 (S.D.N.Y. 1984). Despite suggestions for carefully structured discovery from Justice Brennan, dissenting in part, in *Herbert v. Lando*, 441 U.S. 153, 180 (1979), most are not so conducted.

9. *Gazette, Inc. v. Harris*, 229 Va. 1, 325 S.E.2d 713, 726 n.3 (1985). Although some private plaintiffs try to prove actual malice in order to recover a larger amount of damages, e.g., *Gertz v. Robert Welch, Inc.*, 680 F.2d 527 (7th Cir. 1982), cert. denied, 459 U.S. 1226 (1983), many rely on negligence principles. See the cases cited in Bloom, "Proof of Fault in Media Defamation Litigation," 38 *Vand. L. Rev.* 247 (1985) and Franklin, "What Does 'Negligence' Mean in Defamation Cases?" 6 *Comm/Ent L. J.* 259 (1984).

10. If smaller media tend to be sued more frequently by plaintiffs who are called private (and who do not try to prove actual malice), it may mean that the legal expenses devoted to the fault question may be a lower portion of that newspaper's total legal expenses than it would be for larger media. See statement of Charles Nutt, Executive Editor of the Bridgewater (N.J.) *Courier News* at Symposium sponsored by ABA-ANPA Task Force, March 21, 1986 (smaller papers are finding that persons they write about—local bankers and important persons in town—are being called private). See, e.g., *Bank of Oregon v. Independent News, Inc.*, 29B.Or. 434, 693 P.2d 35, rehearing denied, 298 Or. 819, 696 P.2d 1095, cert. denied, 474 U.S. 826 (1985).

11. Another way to look at legal expenses is by stage of disposition. Thus, rather than

breaking the expenses down by issue, one could break them down according to cases that were won on motion to dismiss, on summary judgment, after trial, or after appeal, or were lost, or were settled. Although this will help measure the strength of the plaintiff's case, it will not be helpful in tracing the reasons for spending defense money. Nor will it permit comparisons with alternative systems that emphasize the role of falsity. Finally, this breakdown is harder to categorize because, for example, motions to dismiss may be granted after some substantial discovery has occurred. Although the same discovery might address questions of both falsity and fault, this seems easier to unravel than procedural overlaps.

12. Franklin, "Suing Media for Libel: A Litigation Study," 1981 *Amer. B. Found. Research J.* 795, 803; Bezanson, "Libel Law and the Realities of Litigation: Setting the Record Straight," 71 *Iowa L. Rev.* 226, 228 (1985) ("[l]ess than ten percent of media libel cases are won in court").

13. E.g., Bezanson, *supra* note 12, at 228 ("another fifteen or so percent are settled, usually without money changing hands"). Sometimes the parties agree that one or both will contribute some amount to charity. Thus, the settlement between Charles Rebozo and the *Washington Post* (after ten years of litigation) included a published statement that the newspaper "did not state that Mr. Rebozo committed a criminal act, and it was not intended to convey that implication." Both parties agreed to make contributions to charity. *N. Y. Times*, Nov. 5, 1983, at 13 col. 3. In addition to the legal expenses incurred before that point, there may be some further costs in loss of respect depending on whether the settlement involved an admission of serious error. See *infra* note 22.

14. Franklin, *supra* note 15, at 800 n.12.

15. On the other hand, in the vast majority of reported cases the plaintiff is treated as public. Franklin, *supra* note 12, at 825.

16. The limit is "actual injury damages," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974). See also *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

17. The relationship between the source of the error and the harm done by the error depends on the facts. There seems little to say on this abstractly.

18. Punitive damages are available in most states, Bender, "Public Policy Limitations on Insuring Punitive and Actual Damages," in J. Lankenau (ed.), *Media Insurance and Risk Management* 337 (PLI 1985).

19. Strasser, "Changing Law in Handling of Liability Claims," *Nat'l L. J.*, Apr. 28, 1986, at 1 (reporting on new statutes in ten states).

20. Bezanson, *supra* note 12, at 228 ("Roughly eighty percent [of libel plaintiffs] engage lawyers on a contingency fee arrangement").

21. It does seem unlikely, though, that these limitations would discourage many plaintiffs who were motivated primarily by the possibility of recovering damages. Moreover, damage limitations would not discourage plaintiffs who were suing to clear their names or those who were suing primarily to harass defendants. Although defendants might decide to spend less on legal defense if the outer limits of exposure were more predictable, it seems unlikely that the outer limits will be pulled in so far as to make this kind of calculation central to any decision.

22. This formula excludes several economic costs such as the possible impact on advertising volume or rates from lower circulation caused by editorial decisions motivated by libel law. It also excludes the impact of judicial findings of libel on the value of the newspaper in any future sales negotiations. Cf. Brand, "Denver Post Corrects Story on Continental Airlines," *Editor & Publisher* 80 (April 19, 1986) (lengthy front page editorial statement correcting an earlier front page story). Will this enhance or hurt the paper's credibility in the community? How might this be translated into economic terms?

23. Countersuits in libel cases are much discussed today, but courts and lawyers have so far shown an ambivalent attitude toward the device. Strasser and Lauter, "Tables Turned in Libel Trial," *Nat'l L. J.*, Nov. 19, 1984, at 3.

24. Successful efforts include *Beary v. West Publishing Co.*, 763 F.2d 66 (2d Cir.) cert. denied, 474 U.S. 903 (1985) and *Daily Gazette Co. v. Canady*, 332 S.E.2d 262 (W.Va.1985).

25. Each newspaper will use its unique experience in making calculations—here, that it actively and successfully pursues this course. If it spends money seeking this result but failing, these expenses should be added to miscellaneous expenses.

26. Legal expense ($L\$$) can be seen to be the sum of the insurance premium (Ip) plus the deductible or retention (Id) plus any sum that exceeds the maximum coverage under the policy (Im). This last item can be entirely made up of very large legal expenses or might be made up of both legal expenses and some payout. In addition, now that at least one libel insurer requires insureds to bear 20 percent of the legal expenses after any deductible (Il), these amounts must also be included in legal expenses. This yields a formula for economic costs of insured media in which legal expenses and payouts are no longer separate items. Since some of these costs involve annual expenditures and perhaps limits per year or per case, extended time frames should be used. Thus, the economic costs of libel law for an insured newspaper are $E\$ = Ip + Id + Im + Il$.

27. See Appendix A.

28. See Appendix B.

29. See Appendix C. This proposal was suggested in Franklin, "Good Names and Bad Law: A Critique of Libel Law and a Proposal," 18 *U. S. F. L. Rev.* 1 (1983) and presented in statutory form in Franklin, *supra* note 1.

30. Although there has been some discussion of the role of retraction statutes in libel reform, e.g., Cendali, *supra* note 2, this device, which exists in some form in over 30 states (B. Sanford, *Libel and Privacy* 663 [1985]), has not gained wide support as a reform. These statutes are not perceived to help plaintiffs who are primarily interested in clearing their names in cases in which, after publication, the facts are still in serious dispute. Although this might lead the parties to settle for a reply by the plaintiff in the newspaper, it does not provide the plaintiff with the admission or adjudication being sought. In such a case the plaintiffs' only alternative is to resort to the conventional damage action. As suggested in the text, declaratory proposals may induce retractions and replies.

31. Appendix A § 2(b), (d)-(e); Appendix B §§ 1(a) (2)-(3), 4; Appendix C § 1 (a) (2)-(3), 4.

32. Appendix A § 2 (f); Appendix B § 2; Appendix C § (2)(a).

33. Soloski, "The Study and the Libel Plaintiff: Who Sues for Libel?" 71 *Iowa L. Rev.* 217, 219-20 (1985) (half of the future plaintiffs go to media before seeing an attorney; others go to media after seeing an attorney).

34. *Id.* at 220.

35. Eighty percent do so. Bezanson, *supra* note 15, at 228.

36. Greed cannot explain lawyers' overstatements about the chances for success in libel cases against media. Since most are using the contingent fee, they may have been unaware of the statistics in this area and been analogizing to other tort areas. The cases studied took place before the well publicized results in the Westmoreland and Sharon cases. See *supra* note 8.

37. One explanation may be that lawyers enjoy libel cases and are willing to subsidize them. This might be due to the intrinsic legal interest in the cases or to the recognition that libel cases tend to get wide publicity and will put the lawyer's name before the community—perhaps as a champion of ordinary citizens against unpopular media. See *infra* note 40 for an additional comment.

38. Bezanson, *supra* note 12, at 228 ("The second reason plaintiffs sue is that they win, although they do so by *their* standards, not the judicial system's").

39. E.g., Lubasch, "Time Cleared of Libeling Sharon But Jurors Criticize its Reporting, *N.Y. Times*," Jan. 25, 1985, at 1 (jury found falsity but did not find actual malice); Trumbull, "Nauru President Loses Libel Suit Against Gannett Paper on Guam," *N.Y. Times*, Nov. 1, 1985, at 1 (jury found falsity in suit by Hammer DeRoburt but did not find actual malice).

Some surveys suggest that, at least from the defendant's and insurance perspectives, a high percentage of cases are nuisance cases. Weber, "Editors Surveyed Describe Half of All Libel Suits as 'Nuisance' Cases," *ASNE Bulletin* 38 (Jan. 1986), and Franklin, *supra* note 29 at 6 n.27 (quoting Larry Worrall). This is accurate if it means that the story is true, or is clearly nondefamatory, and the case is being brought to harass. But if it means also that victims of defamatory falsehoods have almost no chance of proving the required fault, many would not call these nuisance cases.

40. The Lockyer and Schumer bills offer this option only to public plaintiffs. Appendix A § 2 (a); Appendix B § 1(a) (1). This might mean extra litigation expense to determine eligibility if an arguably private plaintiff wanted to invoke the declaratory remedy—with the oddity that the plaintiff would be claiming to be public. It seems unlikely that a defendant would want to expose itself to damage litigation under a negligence standard when the plaintiff is willing to forgo damages entirely. But if the plaintiff's eligibility is jurisdictional, the parties cannot effectively waive the point.

Under the Schumer bill litigation might also arise if the plaintiff chose to seek damages. When the defendant sought to convert the action into one for declaratory relief, the plaintiff would assert that the case was not covered by the statute because the plaintiff was private.

41. See Appendix A.

42. See Appendix C.

43. The magnitude of any shift of costs will largely depend upon the identity of the defendant and whether it is the sort plaintiffs may wish to sue for damages for other reasons.

44. See text *infra* following note 49.

45. See *supra* note 39.

46. See The CBS Benjamin Report (1984), an examination by a CBS official of the procedures followed in producing the program that led to General Westmoreland's defamation action against CBS. Cf. *Galloway v. FCC*, 778 F.2d 16 (D.C. Cir. 1985) (detailing, in the context of a distortion claim, procedures followed in a CBS program that led as well to a defamation claim).

47. *Burnett v. National Enquirer, Inc.*, 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983), appeal dismissed for want of jurisdiction, 465 U.S. 1014 (1984). Rather than retry the punitive damage aspect of the case, the parties settled for an undisclosed sum.

48. The costs in staff morale and in the loss of public confidence in the editorial process would render this course unacceptable despite some short-run economic gains in the specific case.

49. These are the Lockyer bill and the POLRA proposal.

50. In most cases the plaintiff who objects to the published version of a story knows information to the contrary.

51. As discussed, the legal costs will be lower case by case under the declaratory judgment approach unless it would have been a case in which a damage action would have been dismissed at an early stage. The cost of the defense in the damage action must include any appeal needed to preserve or obtain that dismissal.

52. Under all three approaches, plaintiff's election of the declaratory route prevents a later damage action. See Appendix A § 2(d); Appendix B § 1(c); Appendix C § 1(d).

53. Although all the proposals have a general rule that would make the loser liable for the winner's attorney's fees in the declaratory action, the loser in a default situation might escape such responsibility under the Lockyer and Schumer bills. See Appendix A § 2(c); Appendix B § 4(1)-(2).

54. See Appendix B § 1(d).

55. Questions will inevitably arise over the role insurers are to play in the question of how much to put into the defense of a declaratory action. If, under the Schumer bill, the insurer had the controlling power to exercise the election, it could be sure of avoiding exposure to damages. This would affect only the insurers's risk of paying judgments or of making payments to settle cases—events that occur in only a small percentage of all claims. Any payments would be small so long as the defense controls the election. Would this be offset by increased litigation costs in the declaratory actions? As my conclusion suggests, insurers should be most reassured by the Schumer bill.

56. It must be recognized that how proposals to change state law will operate depends on the special features of that state's law, especially the role already played by retraction.

57. Although the text of the Lockyer bill appears to cover both media and nonmedia defendants, the preamble suggests that only media defendants are covered. Compare Appendix A § 1 with the preamble. This presents no difficulty in this paper because of our focus on media cases.

58. Appendix A § 2(b), (d)-(e).

59. *Id.* at § 2(e)(1).

60. *Id.* at § 2(e)(2).

61. *Id.* at § 2(e)(3).

62. *Id.* at § 2(e)(4).

63. Legal expenses incurred in resolving disputes over whether fees are recoverable are considered to be miscellaneous expenses (*Lm*).

64. Appendix A § 2(e)(1).

65. *Id.* at § 2(e)(4).

66. See *infra* note 81.

67. See text *supra* following note 44.

68. Appendix A § 2(e)(2).

69. See text *supra* following note 50.

70. H.R. 2846 (99th Cong. 1st Sess.) (1985), reprinted in Appendix B.

71. Appendix B §§ 1(a)(2)-(3), 4.

72. *Id.* at § 1(d)(1).

73. *Id.* at § 1(d)(2).

74. *Id.* at § 4(1).

75. *Id.* at § 4(2).

76. *Id.* at § 3 (barring punitive damages).

77. See *supra* note 12.

78. See *supra* note 40.

79. Two scenarios might conceivably produce a damage action. The first case would be brought by a powerful plaintiff, eager enough to harass the defendant to be willing to pay both fees, if necessary, against a defendant who decides to stand up to the perceived harassment and "teach the plaintiff a lesson." This scenario will not occur frequently.

The second is one in which the public plaintiff has sustained large special damages as the result of a false statement and needs to try to recover them, even though evidence of fault is weak. The defendant might accept the damage action if it believes that some essential

element is missing or that the evidence of fault is indeed weak, and that a successful motion to dismiss or a quick summary judgment might cost less than a declaratory action. In addition, of course, the paper might avoid having to admit error or having a court find error in the original story. This combination of a powerful incentive to seek damages and the hypothesized weakness, but not hopelessness, of the damage action, and the assumption about how surely, cheaply, and quickly the defendant can win the damage action seems rare.

80. The demise will probably not be complete because of the exclusion of private plaintiffs.

81. See Barrett, *supra* note 2 a, suggesting that this provision in the Schumer bill is meant to cover at least the case of the poor plaintiff with special damages who loses the damage action and the wealthy plaintiff who prevails against the poor media defendant in the declaratory action.

82. Appendix B § 4(2).

83. One might expect the invocation of "overriding reason" when a poor plaintiff reasonably tries, but fails, to prove falsity in a declaratory action against a large newspaper.

84. See text *supra* following table 7.1. The fact that the defendant's election controls under the Schumer bill is not important here since that power is no threat to a plaintiff whose case was so weak under current law that no suit is filed.

85. The genesis of this proposal is set out in Franklin, *supra* note 29. The text of the proposal is in Appendix C.

86. Appendix C § 2(c)-(d). The lack of discovery may make some resolutions swifter. On the other hand, it is likely to prevent the use of summary judgment in cases that, in retrospect, surely did not warrant using courtroom time. But cutting against this is the elimination of appeals from grants and denials of summary judgment. I think there will be a net saving here, but that is open to argument.

87. *Id.* § at 3(a).

88. *Id.* at § 4(a)-(b).

89. *Id.* at § 4(b)(1).

90. *Id.* at § 4(b)(4).

91. *Id.* at § 4(b)(3).

92. *Id.* at § 4(b)(4).

93. Compare Appendix A § 2(e) with Appendix C § 4.

94. Appendix C § 4(b)(2).

95. *Id.* at § 4(b)(3).

96. See text *supra* at note 50.

97. For an introduction to the discussion of these other aspects, see Barrett, *supra* note 2 and Franklin, *supra* note 1.