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In Defense of Truth? Some Shortcomings of Civil Libel Law

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UNIVERSITY HONORS PROGRAM

SENIOR PROJECT - APPROVAL

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PROJECT TITLE: ~~A Need for Change? What's Wrong
and Right with the Law of Civil Libel.~~

Some

In Defence of Truth? - ~~The~~ shortcomings in civil
Libel Law

I have reviewed this completed senior honors thesis with this student and certify that it is a project commensurate with honors level undergraduate research in this field.

Signed: Dwight T. Teeter Faculty Mentor

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Comments (Optional):

Ms. Maxwell presented me with a thought-provoking essay on libel. She's a good student who has the ability to work well with ideas, and I have exchanged comments with her on this submission.

NLD, Jr.

Sarah Maxwell

Senior Honors Thesis

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In Defense of Truth?

Some Shortcomings of Civil Libel Law

Abstract

This project attempts to discern the discrepancies in American civil libel law and suggest alternatives or methods of reform. Civil libel law, as it stands, is ineffective and benefits neither the defendant nor the plaintiff. It does not hit where it aims; thereby limiting speech while still reaping damage to reputation.

The research methods involved perusing several law journals and relevant literature for articles that would be understandable to individuals without a history in law, such as myself. The articles were then read critically and sorted based on relevance and cohesion.

The findings were as conclusive as could be expected when dealing with an issue as delicate and complex as the First Amendment. In other words, the reform suggestions are simply that, as no legal steps have been taken in that direction. But that does not mean the *need* is not there!

Freedom of speech is non-issue in the civilian United States. It is taken for granted as an inalienable right, an expectation whose violent history is resigned to dusty books and constitutional law classes. Still, the importance of this privilege to the early American people is obvious; they felt so strongly about it that it became the very headstone of the Bill of Rights. The American forefathers so valued free speech that they attempted to guarantee it through the First Amendment: “Congress shall make no law...abridging the freedom of speech, or of the press...”¹ The men drafting the Constitution—rather, amending it that it might be ratified—held this freedom dear because they were closely familiar with its bloody history in English common law.² They could recall the publishers who were fined, hung in stocks, or even drawn and quartered for daring to print monarchical criticisms or dissenting opinions about religion.³

Today, the ability to criticize is rarely even an afterthought—no one second-guesses the legality of pasting an “IMPEACH BUSH” sticker on his bumper, or the presence of a gay rights decal in a storefront window. The expectance of these rights is as unconscious as breathing; they are woven tightly into the fabric of the American citizen, into society in general. But in the case of freedom, history is not irrelevant; indeed, “taking freedoms for granted can be the world’s most dangerous complacency.”⁴ Therefore, it must be understood that “the worth of freedom to the individual and to society [does not] go unchallenged. Freedom is always at risk, and in any society, some

¹ U.S. Constitution, Amendment 1.

² Nelson, Harold L., Dwight L. Teeter, Jr. and Don R. Le Duc, *Law of Mass Communications: Freedom and Control of Print and Broadcast Media*, 6th ed. (Westbury, NY: The Foundation Press, Inc., 1989), 10.

“Ancient Enemies of Freedom: From England to the United States,” Dwight L. Teeter, Jr. Class lecture notes, JEM 467, Fall 2004.

⁴ Nelson, p. 4.

hate and fear the expression of ideas contrary to their own.”⁵ In other words, the availability of free speech does not imply that what is said will be agreeable to everyone. This is where the Miltonian principle and modern libel law come into the picture. In 1644, English poet John Milton argued against pre-publication censorship with what is now called the ‘diversity principle:’⁶

And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt Her strength. Let her and falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?

Whereas Milton proposed that truth could only flourish when it was challenged by other ideas in an open marketplace, he did not address the need to check injurious speech that harms reputation—a second irrefutable human right⁷:

A free society by its nature is going to allow communication which harms many reputations. Freedom, after all, is a risk. Although society has a strong interest in the free flow of information, there is also a societal stake in allowing protection of one’s reputation.

Libel law seeks to balance this clash between individual reputation and the value of free expression, for “a civilized society cannot refuse to protect reputation.”⁸

And so, with the advent of libel law and the First Amendment’s absolute protection of free speech, both reputation and truth are safe from contamination? Unfortunately, the opposite seems to be true: libel law is ineffectual and the point of the First Amendment is shrouded in legal verbosity and complicated statutes. In effect, libel

⁵ Ibid, 7.

⁶ John Milton, *Areopagitica* (Chicago 1953).

⁷ Nelson, p. 100.

⁸ Anderson, David A. “Is Libel Law Worth Reforming?” *University of Pennsylvania Law Review* 487 (1992): 490.

law—which is intended to protect reputation while maintaining a free press⁹—is completely self-defeating. It encourages self-censorship, the ultimate enemy of the First Amendment and anti-federalism, and does little to repair public reputations. What is to be done when the most beloved, truly innate freedom of a nation is no longer protected—“Libel law continues to exact a price from speech... Whatever is added to the field of libel is taken from the field of free debate.”¹⁰ What happens when the very law enacted to protect becomes the instigator of the threat? Reform is necessary, indeed, it is overdue, and if reform cannot prove effectual, then “honesty and efficiency demand that we abolish the law of libel.”¹¹

In order to reform libel, it is necessary that its history and structure be well understood. By definition, libel is an unprivileged publication of a false and defamatory statement about a plaintiff that harms said plaintiff. For libel to be actionable in court, the statement must either injure the subject’s reputation or excite adverse, derogatory, or unpleasant feelings or opinions against the subject.¹² It is essential that every element of libel—publication, injury, fault, identification, and defamation—be present to have basis for a case. Libel is judged under tort law “on the basis of which person’s whose reputations have been harmed by published statements about them can recover money damages,”¹³ which implies that money is an acceptable pacifier. Modern libel law is defined primarily by two Supreme Court cases that are both more than thirty years old. Before *New York Times v. Sullivan* in 1964, libel suits were frequently filed by public

⁹ Dwight L. Teeter, Jr. in a conversation with Sarah Maxwell, October 2004.

¹⁰ Anderson, pp. 488, 490.

¹¹ Ibid, 489.

¹² Leiter, Kelly and Dwight L. Teeter, Jr. Class lecture notes, JEM 400, Spring 2003.

¹³ Bezanson, p. 1.

figures to harass and often force newspapers out of business. The Sullivan decision changed the impetus for filing libel suits by placing the burden of proof on the plaintiff and setting forth the actual malice standard. The standard “prohibits a public official from recovering damages from a defamatory falsehood relating to his official conduct unless he proves that the statement was made...with knowledge that it was false or with reckless disregard of whether it was false or not.”¹⁴ Furthermore, the plaintiff proving actual malice is forced to do so with “convincing clarity,”¹⁵ rather than the accepted preponderance of evidence rule. The second Supreme Court case, *Gertz v. Welch*, 1974, further tilted libel law litigation in favor of the defendant by extending the actual malice rule to include public figures. This broad definition could include anyone from an internationally famous movie star to the winningest basketball coach in the county. These landmark cases outlined the precedents that govern libel law today. Namely, that public officials and figures catapult themselves into media spotlight and thereby are not only accountable for the criticism they will likely receive, but also have more access to the resources necessary to respond to that criticism. For this reason, they are responsible for proving actual malice by clear and convincing evidence. Conversely, private figures must only prove negligence—that the defamation was “published without the ‘due care’ that would be used by an ‘average person of ordinary sensibilities’”¹⁶— to demonstrate fault.¹⁷ Finally, in order to recover damages, a private plaintiff must prove actual injury,

¹⁴ 376 U.S. 254 (1964), at 279-80.

¹⁵ *Ibid.*, at 285-86.

¹⁶ Nelson, p. 110

¹⁷ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

or “impairment of reputation and standing in the community, personal humiliation, or mental anguish and suffering.”¹⁸

There are three types of recoverable damages available to a successful plaintiff in a libel suit: general or compensatory, special or actual, and punitive. In order to receive general damages, the plaintiff must prove injury to reputation or humiliation. Punitive damages are intended to punish the defendant for a particularly “malicious or extremely careless libel,” because they “ought to be punished for the harm they cause.”¹⁹ Finally, to recover special or actual damages, the plaintiff must prove a monetary loss as a result of the libel. Juries determine the amount of damages to be awarded, generally siding with the plaintiff against the media: “If the evidence is believed, any prejudice against the media that the jury members already have can be given full expression through a massive award of damages.”²⁰ However, the rate of appeals in libel cases is very high, and “many verdicts are overturned completely...the highest award to survive appeal is \$3 million; the average ‘take-home’ figure has been estimated as low as \$20,000.”²¹

While the Sullivan and Gertz decisions set forth precedents intended to clarify and ease libel law litigation, their major success has been tipping the scales of justice in favor of the defendant—“...libel litigation...produces victory for the press at least 90 percent

¹⁸ Anderson, p. 502.

¹⁹ Nelson, pp. 139-40.

²⁰ Chesterman, Michael. “The Money or the Truth: Defamation Reform in Australia and the USA”
University of New South Wales Law Journal 301 (1995): 306-07.

²¹ *Ibid.*

of the time.”²² This imbalance cannot be fair, and is the direct opposite of the harmony libel law intends to create.

The first major problem with the law of civil libel lies in the actual malice standard, which is also referred to as the Sullivan rule. By definition, the actual malice issue requires the Court to use inferences about the defendant’s state of mind at the time of publication, which is a very subjective venture.²³

Under that [actual malice] rule, constitutional protection turns not on what is published, or on the objective truth or falsity of what is published, but on the defendant’s knowledge or doubts with respect to falsity. Courts are required to determine what defendant’s thought, and because only defendants know the answer to that, it would hardly do to accept their self-serving testimony as conclusive. So defendant’s thoughts are usually inferred from what they did or said.

In other words, the Sullivan rule declares truth subjective, while at the same time blatantly favoring the media! These inferences are dangerous not only because they disregard truth and ignore the victim of the defamation, but also because they threaten the journalistic process. Because these inferences require much attention be paid to the defendant’s actions at the time of publication, the editorial process becomes open to public speculation and debate. The Court demands access to the journalist’s notes, recordings, and private interviews; they want to question the credibility of his sources despite confidentiality rules and chat with his editor.²⁴ Other typically private practices up for Court perusal include the defendant’s attitude toward both the plaintiff and toward journalism as a whole—“Evidence that the defendant espoused a particular journalistic philosophy or objective may be admissible to permit an adverse inference to be drawn

²² Bezanson, p. 5.

²³ Anderson, p. 516.

²⁴ Ibid.

from the defendant's failure to adequately investigate"²⁵—as well as the journalistic pressures existing at the time of publication. In other words, every aspect of the journalistic process is up for legal review. Personal attitudes, previous mistakes, sources that wish to remain anonymous—all of these things become public knowledge in the event of a libel suit. Isn't the threat of such intrusion enough to cause some journalists to self-censor even if their criticisms are true? Who other than the public suffers from this breach from free expression—"the actual malice rule also exacts a price from the society at large. It imposes costs on public life...not only politics, but also cultural, religious, educational, and business life."²⁶

A second downside to the actual malice rule is its adverse effects on litigation. Because such detailed scrutiny of the defendant's state of mind is necessary to prove actual malice, a lengthy discovery period usually follows; indeed, "the issue does not readily lend itself to disposition at all. Cases that turn on actual malice sometimes continue for ten or fifteen years."²⁷ Furthermore, even after years of compiling evidence, lawyer's fees and preliminary court costs, there still may not be enough evidence of actual malice for a case! For example, in *Herbert v. Lando*, the deposition, discovery process, and associated litigation lasted for thirteen years, after which "the case was dismissed on the ground that there was not sufficient evidence of actual malice to require trial."²⁸

²⁵ *Ibid*, 518.

²⁶ *Ibid*, 531 and Bezanson, p. 3.

²⁷ *Ibid*, 510.

²⁸ *Ibid*, 511 and see *Herbert v. Lando*, 476 U.S. 1182 (1986).

The most disturbing thing about actual malice proceedings is that they are unconcerned with the issue of falsity despite the fact that filing a libel suit is the legal equivalent of saying “you’re lying!”²⁹ The focus on the defendant’s mental state at the time of publication steers focus away from the heart of the matter, the reason for the suit—the truth—and it follows that “...truth and falsity have very little to do with libel litigation...It is now the defendant’s conduct, rather than the plaintiff’s reputation, that is on trial.”³⁰ This reversal of focus favors the defendant, because 75 percent of all actual malice-based proceedings receive motions for summary judgment. The plaintiff “very frequently loses” summary judgment cases because they never go before a jury, who is more likely to “want to punish the media.”³¹ Furthermore, the defendant fighting on the grounds of actual malice “gets the best of both worlds. [He] can formally deny the plaintiff’s charge of falsity and maintain a ‘we-stand-by-our-story’ posture without actually standing by the story.”³² While such a stance is beneficial during judicial proceedings, in the end, it serves only to increase public dissatisfaction with the media. In fact, the actualization of the Sullivan rule produces the opposite of its intention:³³

The purpose of the actual malice standard was to protect robust public discussion by reducing the extent to which the press censors itself due to threat of litigation. The rule’s actual effect on litigation, however, gives the press more cause for anxiety than comfort...its very purpose is to protect the dissemination of falsehoods...To the extent that the actual malice rule protects falsehood, it also undermines the credibility of the press. The rule devalues the currency of public information, and the strength of that currency is ultimately more important to the press than to anyone else.

²⁹ Ibid, 521.

³⁰ Chesterman, p. 308.

³¹ Ibid.

³² Anderson, p. 522.

³³ Ibid, 523, 534-35.

It is clear that the Sullivan rule does little for either party in a libel suit, but its negative effects reach outside the courtroom. Ultimately, when free speech is compromised, everyone suffers—not just a few individuals in a stuffy courtroom. No, the absence of truth in these proceedings directly affects the public at large, for they “place a high value on the dissemination of accurate information and on having the record corrected when it is inaccurate.”³⁴ Yet the arena of public discourse does not suffer alone; the inadequacy and ambiguities of libel law discourage participation in society for fear of damage to reputation. While case law determines that the actual malice standard applies only to public officials and figures, “any observant person can see that those who participate in public matters seem to receive little protection from the law of defamation.”³⁵ Where does one draw the line? What exactly constitutes ‘public matters’—are Little League baseball coaches to be held accountable in the same way as a Supreme Court justice? Is the president of a local Right to Life group subject to criticism along the lines of that brooked by Noam Chomsky? To the extent that libel law refuses to protect reputation, citizens will turn away from the public sphere—who wants to be criticized when there is no safeguarding reputation? Therein lies the crucial factor: if the average citizen is dissuaded from participation in the public sphere, then what type of person will be attracted to political involvement?—“If we tell people there’s to be absolutely nothing private left to them, then we will attract to public office only those most brazen, least sensitive personalities.”³⁶

Although the actual malice rule constitutes a number of the discrepancies within libel law, it is unfortunately not the only area in need of reform. Namely, the nature of

³⁴ Bezanson, p. 5.

³⁵ Anderson, p. 532.

³⁶ Ibid.

libel law as a tort turns the issue under legal discussion from truth to money. As noted earlier, a tort is a civil wrong, for which damages are rewarded to compensate any injury. This causes several problems. Firstly, it assumes that plaintiffs want monetary compensation for damage to reputation, but the Iowa Libel Research Project found that 95 percent of defamation victims “sought correction of alleged falsity... with a retraction, correction, or apology...rather than money damages.”³⁷ Evidence from the study goes on to cite that, had some sort of retraction been printed promptly, a libel suit would not be necessary:³⁸

What plaintiffs most want is public vindication of their reputation. It is when their requests are rudely fobbed off, or when lawyers whom they have consulted hold out the hope of large verdict, that money starts to become more than the truth—and even then, the wish to correct the record remains prominent.

But the truth is not only of interest to the victim of defamation. Indeed, the public also has a stake in whether disreputable claims about a public official or figure are true: “That adjudication...of the truth or falsity of a defamatory allegation...will have profound implications for the operation of public institutions.”³⁹ It is clear once again that libel proceedings reach beyond those directly involved and affect countless numbers of people. The truth—the entity libel law sought to protect—is shrouded in legal jargon and politics, but it remains what the public wants, needs. Why then do libel proceedings insist on turning the focus away from truth?

Libel law also begs for improvement because of technological advances. The advent of the Internet has introduced a new millennium of complications because “anyone in the world with access to a personal computer and an Internet connection can

³⁷ Bezanson, p. 25, 172.

³⁸ Chesterman, 309-10.

³⁹ Ibid.

be the town crier in our 21st century global village.”⁴⁰ Libel law’s origins in English common law are centuries old, and its attempts at modernization proceeded the age of ISPs. So what now? How can archaic laws be applied to innovative technology? How can one prosecute a libeler whose identity is impossible to discover due to screen names and scrambling? The fact is, with the Internet giving anyone and everyone publishing ability, libelous statements have the perfect opportunity to abound:⁴¹

In the past, most libel involved media defendants because only they had the platforms needed to publicize the message. But the media also were usually sensitive to libel issues and acted responsibly about what they published...with articles vetted by editors for accuracy and factual support, and by lawyers to limit liability exposure.

There are no editors on the Internet. But now that libel is free from the constraints of an overbearing newsroom, how will it be regulated? Things will have to change. First of all, if the reasoning behind the actual malice standard for public officials and public figures is that they have more access to the news media and could therefore reinstate their reputations by refuting libelous claims, then how can such a standard be applied when even John Doe has a laptop?⁴² The Internet essentially nullifies the Sullivan rule by making everyone a public figure. So who is stuck with the burden of proof if “the ubiquity of the Internet...levels the playing field”?⁴³ More importantly, who should be held responsible for the law suit? In traditional print libel, publishers and news corporations are held as responsible as the writer of the libel.⁴⁴ This legal responsibility rests on many factors, namely that the individual is less likely to have the money

⁴⁰ McCormick, J. Burke and D. Alan Rubin, “Zapped in Cyberspace” *Trial*, 38/3 (1991): 32.

⁴¹ *Ibid.*

⁴² Anderson,

⁴³ McCormick, 34.

⁴⁴ Godwin, Mike, “The Law of the Net: Problems and Prospects” *Internet World*, Sept./Oct. 1993, accessed at http://www2.cddc.vt.edu/www.eff.org/pub/Misc/Publications/Mike_Godwin.

necessary either to pay for a legal team or cover awarded damages.⁴⁵ Before 1996, Internet plaintiffs attempted to recover damages from ISPs, referring to them as a publisher of sorts. But 1996 was the year of *Stratton Oakmont, Inc. v. Prodigy Services Co.* and the ensuing Communications Decency Act (CDA). In the *Stratton* suit, Prodigy was found “liable for defamatory Internet statements, mainly because it retained editorial control over the content of the site.”⁴⁶ This decision helped Congress decide how to deal with the ISP responsibility issue, and the CDA states that “no ISP shall be treated as the publisher or speaker of any information provided by another information content provider.”⁴⁷ This leaves the author of the statement as the only source of recovery for the plaintiff; “fortunately, many homeowners’ insurance policies, including umbrella policies, cover defamation claims.”⁴⁸ But, determining who one should sue does not guarantee how: “since anonymity is the rule rather than the exception online, a plaintiff must first identify that defendant.”⁴⁹ The process of uncovering the defendant generally requires a subpoena, which requires a filed law suit.⁵⁰ This process is time-consuming and costly, and depends upon the ISPs cooperation. Time is a key issue in defamation suits, however, because of “relatively short”⁵¹ statutes of limitation.

The final area of libel law reform rests on the fact that the news media of today are nothing like their 1960s counterparts. Local daily newspapers are few and far between, and most have corresponding websites and broadcast stations, and independent newspapers are even less common! In fact, “by 2004, five men controlled all the media

⁴⁵ Ibid.

⁴⁶ McCormick, 36.

⁴⁷ Ibid.

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ Id.

⁵¹ Id.

once run by 50 corporations as of 20 years earlier,”⁵² suggesting that media is promoting less of a marketplace of ideas and more of a marketplace? If the U.S. media is no longer concerned with the diversity principle and the dissemination of truth, but is instead focused on ratings, how then, should the First Amendment be applied?⁵³

The ‘marketplace’ nowadays is simply too heavily dominated by monopoly players to produce the conflict of perceptions and the variety of investigative activity that might reliably generate ‘the truth’...Being diverse, scattered, and composed of small enterprises, it...clearly needed protection through individual, legally-recognized rights...yet these arguments are no longer clearly compelling. Media monopoly has also brought media power—the power of the media as against government is...much greater than it used to be...Media power calls for media responsibility...and the Sullivan rule...and the ‘marketplace of ideas’ concept...need fundamental reconsideration.

The flaws have been outlined. The actual malice standard is ineffectual; the public figure/official definition is incompetent. The Internet and the huge media of the new millennium are opening up new issues every day. Juries are awarding damages when plaintiffs want retractions; journalists are censoring themselves when free speech is a constitutional right. Libel law seems pointless; the Iowa Libel Research project found “a legal system whose underlying assumptions about libel—that money is necessary to undo the harm to libel victims, that the constitutional privileges protect the press—bear little relationship to the real world of plaintiffs and media defendants.”⁵⁴ Libel law, as it stands, is clearly not working. But, “without libel law, credibility of the press would be at the mercy of the least scrupulous among it, and public discourse would have no necessary anchor in truth.”⁵⁵ So what can be done?

⁵² Teeter, Dwight L., “Late 2004 Media Ownership” Class lecture notes, JEM 467, Fall 2004.

⁵³ Chesterman, p. 315.

⁵⁴ Bezanson, p. 3.

⁵⁵ Anderson, p. 490.

There is obviously a need for reform, but is there any support for one? Acknowledging that there is a problem is always the first step to fixing it, but no one is stepping up in the name of libel. The media takes comfort in insurance plans that cover libel claims, and “its existence diminishes media zeal for libel law reform.”⁵⁶ Plaintiffs cannot voice an opinion about reform, firstly because they are likely not very knowledgeable about it, and secondly because they are too dispersed to have a constituency.⁵⁷ Lawyers seem less concerned with the problems with libel law and more interested in the monetary benefits as “average libel verdicts [are] three times as high as average verdicts in medical malpractice and product liability litigation.”⁵⁸ Furthermore, state courts are reluctant to address the issue of libel law, despite their expertise in changing tort law, because of the Supreme Court’s frequent interference in the subject.⁵⁹ In short, “without some help from the Supreme Court, the reform movement is doomed... There is no political constituency for reform.”⁶⁰

If the impetus for reform must come from the Court, then it is logical to assume that they should be the first to consider *how* it should be approached. Since the majority of the problems—the outdated diversity principle, the Sullivan rule, the public figure/official determination—are rooted in Court decisions and constitutional privileges, it seems only right that the Court is responsible for fixing what is broken.⁶¹

The Court might simply give up some of the territory it has occupied—by abandoning the actual malice rule, for example. Just as the Court’s intervention has driven other players out of the process of revising libel law, so might its

⁵⁶ Ibid, 548.

⁵⁷ Ibid, 549.

⁵⁸ Ibid, 515.

⁵⁹ Ibid, 549.

⁶⁰ Ibid.

⁶¹ Ibid, 552.

retrenchment draw them back. A drastic retrenchment would no doubt make the media more receptive to legislative reforms.

The Court might also “announce its willingness to consider alternative accommodations between speech and reputational interests. Such an invitation would free the proponents of legislative reform from the constitutional straitjacket in which they now operate.”⁶² Finally, the Court could attempt to reform the law itself, from within.⁶³

Another idea for reform would be the abolishment of the actual malice rule in instances when the plaintiff only desires a declaration of falsity.⁶⁴ Why should damages and the state-of-mind test come to trial if truth is the issue? A third theory discusses the role of damages in libel suits. For example, the Court could declare that punitive damages—which are rewarded mainly for vengeful purposes—should be abolished, or “ceilings should be imposed on compensatory damages; or even no damages at all should be awarded in cases of inadvertent or careless falsehood where the defendant had taken prompt action to restore the plaintiff’s reputation by publishing a retraction.”⁶⁵

Obviously, with the wealth of problems arising from the actual malice standard alone, it stands in need of review. While it “was originally the centerpiece of constitutional libel law, there are now many other sources of protection.”⁶⁶ Because the Court is unlikely to abolish the rule completely, it is important that they revise their definition of public figures, especially in instances of nonexistent connection to public officials.⁶⁷

⁶² Ibid.

⁶³ Ibid, 553.

⁶⁴ Ibid.

⁶⁵ Chesterman, p. 312.

⁶⁶ Anderson, p. 538.

⁶⁷ Ibid.

One idea for reform directly answers the need for reputation protection, and requires the author of the defamation provide it:⁶⁸

A more socially conceived freedom of communication, placing significant weight on the 'public right to know,' would be well-served, not jeopardized, if defamation proceeding involving issues of public interest regularly brought forth an adjudication on the truth or falsity of the relevant defamatory allegation of fact and if, to convert an adjudication of falsity into an adequate remedy for the defamed plaintiff, the defendant were required to publicize this adjudication.

This requirement would bring truth to the forefront, which seems fair considering the entire purpose of the First Amendment is to promote truth via the allowance of free speech!

Another thought for reform is to alleviate the pressure from the high cost of litigation. The number one goal of libel law is to reduce the 'chill' on speech, but the "chill comes primarily from the cost of litigating...Controlling these costs must be a target of any reform."⁶⁹ Although money should not be related to truth, it invariably is, as plaintiffs must seek damages to pay their attorneys, and the media must respond. If damages do not exist, then the impetus to file the suit is nullified. While this reform may reduce the number of suits filed, it does not solve the problem of disseminating the truth. What happens when a proposed suit is legitimate, but the plaintiff has no hope of affording it?

Finally, the most effective method of reform might well be the easiest, and most assuredly, the cheapest. The theory behind the reform is simple: if there is no lie, there is

⁶⁸ Chesterman, p. 314.

⁶⁹ Anderson, p. 541-42.

no libel. Richard M. Clurman, an experienced and respected journalist suggests that journalists should abolish the taboo of allowing subjects and sources to pre-read stories.⁷⁰

His logic is as follows:⁷¹

American courts do not grant injunctions in restraint of publishing. So the objecting source cannot stop the story from being printed or shown. But, say the lawyers, the publication will be put on notice that it is about to say something that it has been warned not to in advance. That could create grounds for a libel suit based on actual malice. Not likely, since the story must in fact be wrong to lose a libel suit. If the story is incorrect, it should not have been published in the first place. Libel suits are more easily won in the newsroom than in the courtroom.

Not only would such a practice prevent the majority of libel suits from occurring, but it would promote responsible journalism, giving much-needed credibility to the media!

In conclusion, the routes to libel law reform are many, and the power to get them started lies in the hands of the Supreme Court. The opportunities, too, are abundant—some have long been in need of repair and others have yet to be revealed by the Internet. It is clear that something must be done; moreover, it is obvious that abolition of the law in general is impossible. And so, reform is the only outlet and it is absolutely necessary. Perhaps the Court should be petitioned to get the ball rolling?

I must put forth my own opinion, but must also set forth a disclaimer: I am not a legal theorist. My knowledge of the law is limited to a single communication law class and the research I conducted for this paper. This narrow field of knowledge does not prevent me from having an opinion, however. I agree that libel law is in need of reform. It is obviously not a dire need, as there are no lives at stake and the injuries in question are never physical. Furthermore, for all the complaints about the law and its restrictions

⁷⁰ Clurman, Richard M. *Beyond Malice: The Media's Years of Reckoning* (New Brunswick: Transaction Publishers, 1991):10-11.

⁷¹ Ibid.

on speech, I feel that the United States is pretty lucky in what we are allowed to say—“In the United States, defamation laws are significantly less restrictive of speech than the laws of most other countries.”⁷² As a journalism student, I am passionate about freedom of the press and my right to an opinion, but I am also wary of everything becoming the ‘public’s right to know.’ I do not believe that everything should be available for public dissemination.

Finally, I must agree with Richard Clurman’s ideas about libel reform. I think allowing subjects and sources to pre-read stories only adds to one’s credibility and demonstrates an obvious personal faith in the story. I do not believe that it poses any threat to free speech or encourages censorship. In fact, it promotes responsible and truthful journalism. I have had all of my articles revised by a professor, and in certain projects, they were sent to my sources for review. I found their comments interesting, and the ‘threat’ of having them read it only promoted me to work harder. I think this theory could be the best solution to the libel problem—especially if the Court does not find it necessary to make any changes or support a reform.

⁷² Fried, Eva, “Issues and Challenges Presented by Defamation on the Internet” *Journal of Internet Law* 6/12, 3.