

1986

## Defamation and Alternative Dispute Resolution: Healing the Sting

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# DEFAMATION AND ALTERNATIVE DISPUTE RESOLUTION: HEALING THE STING

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## I. INTRODUCTION

On January 23, 1982, CBS Television broadcast a 90-minute documentary entitled "The Uncounted Enemy: A Vietnam Deception." The major theme of the documentary was the contention that General William C. Westmoreland had deliberately distorted data regarding enemy troop strength in order to mislead President Johnson, Congress, and the American public about the Vietnam War. In response to the documentary, General Westmoreland filed what was to become a well-publicized defamation suit against

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CBS and three individuals involved in the broadcast.<sup>1</sup> Three years later, after extensive discovery, eighteen weeks of trial, and several million dollars in attorneys' fees,<sup>2</sup> the suit was settled without any money changing hands. The parties issued a joint statement agreeing that "the court of public opinion," rather than a court of law, would be the appropriate forum for deciding who was right in the case.<sup>3</sup>

On October 5, 1981, the Washington Post ran an item in its "Ear" gossip column reporting a "rumor" that former President Jimmy Carter had bugging equipment placed in Blair House while President-elect and Mrs. Ronald Reagan were living there.<sup>4</sup> The former president demanded a retraction and apology from the Post. After an investigation and some repositioning,<sup>5</sup> the Post published a complete retraction and apology on October 23, 1981, just eighteen days after the original story had appeared.<sup>6</sup> As a consequence, former President Carter dropped his plans to sue the Post for libel.<sup>7</sup>

These two cases, both involving well-known public figures and major news organizations, represent opposite extremes in the handling and resolution of defamation problems.<sup>8</sup> Between the Carter and Westmoreland cases lie a wide variety of defamation disputes. Most of these cases achieve far less notoriety and involve plaintiffs and defendants enjoying far less popular recognition than the principals in these two cases. The wide variety of defamation cases suggest an almost equally wide variety of mechanisms which might be used to resolve these disputes.

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1. *Westmoreland v. CBS, Inc.*, 601 F. Supp. 66 (S.D.N.Y. 1985). The case was repeatedly referred to in the press as a "\$120 million suit," based on General Westmoreland's ad damnum figure. Of course, calling it a "\$120 million suit" does not make it a \$120 million suit.

2. Attorneys' fees and other costs associated with the case are estimated to have run from seven to nine million dollars. *N.Y. Times*, Feb. 18, 1985, at A1, col. 6.

3. *Id.*

4. *Washington Post*, Oct. 5, 1981, at D1, col. 1.

5. The Post first maintained that there was a distinction between reporting the existence of a rumor and reporting fact, stating that the rumor was "utterly impossible to believe." *F.Y.I.*, *Washington Post*, Oct. 14, 1981, at A24, col. 1. Mr. Carter is said to have found this statement both baffling and unacceptable. *N.Y. Times*, Oct. 15, 1981, at B16, col. 1.

6. *Washington Post*, Oct. 23, 1981, at A1, col. 5.

7. *N.Y. Times*, Oct. 25, 1981, § 1, at 26, col. 1.

8. Throughout this article the generic term, defamation, will be used to describe both libel and slander.

Because the Westmoreland case was settled prior to verdict, it lacked one expensive and time-consuming element present in many defamation cases—the appeal. Empirical studies have demonstrated an unusually high rate of appeals in defamation cases, with media defendants appealing virtually all adverse verdicts. Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F.L. Rev. 1, 4 (1983).

This article will explore several mechanisms for the resolution of defamation cases. It will first review problems of substantive law which present obstacles to the fair and efficient resolution of these disputes. It will then explore some substantive law reform proposals which may expedite the fair and rational resolution of these disputes. Finally, the article will suggest some private dispute resolution processes which may advance the parties' goals, with or without substantive law reform. While a large number of defamation disputes involve non-media defendants,<sup>9</sup> the article will focus upon disputes involving news organizations. The article will also examine empirical data suggesting that much of the financial and psychological expense of defamation litigation is unwarranted in light of the goals of the parties.

The article will develop a three-fold thesis, which may be summarized as follows:

- (1) Defamation is a field in which legal rules and gamesmanship have frequently obscured the interests of the parties.
- (2) Both substantive law reform and the use of alternative dispute resolution techniques might result in major strides to correct this problem.
- (3) There will remain some cases in which resort to the jury trial may be the most appropriate means of resolving defamation disputes.

## II. PROBLEMS WITH SUBSTANTIVE LAW

Problems with the substantive law of defamation have been the subject of a great deal of prior discussion and writing.<sup>10</sup> Without reinventing the wheel, I will summarize what I feel to be the most prominent problems.

### A. *The Federal/State Law Hybrid: A Patchwork Quilt*

A major set of problems in defamation law arises out of a phenomenon almost unique to this body of law. Because of the first amendment consid-

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9. Professor Marc A. Franklin's study of 534 reported defamation cases from 1976 to 1979 revealed that 69% involved nonmedia defendants. Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 ABF RES. J. 455, 465. A more recent study, however, reports that "about seven of every ten libel cases involve members of the news media." Bezanson, Cranberg and Soloski, *Libel Law and the Press: Setting the Record Straight*, 71 IOWA L. REV. 215, 218 (1985). A comprehensive report of the Iowa study's findings is to be published in a forthcoming book. Findings cited herein are from a preliminary report.

10. See, e.g., Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422 (1975); Ashdown, *Gertz and Firestone: A Study in Constitutional Policy-Making*, 61 MINN. L. REV. 645 (1977); del Russo, *Freedom of the Press and Defamation: Attacking the Bastion of New York Times v. Sullivan*, 25 ST. LOUIS U.L.J. 501 (1981); Franklin, *supra* note 8; Hulme, *Vindicating Reputation: An Alternative to Damages as a Remedy for Defamation*, 30 AM. U.L. REV. 375 (1981); Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to the Central Meaning of the*

erations described in *New York Times Co. v. Sullivan*<sup>11</sup> and its progeny,<sup>12</sup> the federal courts have intervened to juxtapose federal constitutional considerations on a body of law which (like most of tort law) had previously been viewed as a matter of state concern. State defamation law (which remains the substantive base upon which the constitutional considerations have been superimposed) is frequently archaic, even quaint. For example, the libel/slander distinction, which developed at a time when ecclesiastical courts wielded wide jurisdiction and the printing press furnished the only means of mass communication, is ill-suited to today's forms of expression.<sup>13</sup> The language of defamation law has a baroque ring to it, with rococo terms such as colloquium, inducement, and innuendo. Of course, the most confusing of terms continues to be "malice," a term that, due to constitutional considerations, has taken on special meaning.<sup>14</sup>

As archaic and confusing as the state common-law doctrine (supplemented by state statutory enactments) has been, it is the past twenty-two years of federal constitutional developments which have generated the greatest confusion in the law of defamation. Subsequent to the seminal *Times* case, the U.S. Supreme Court moved through a period of shifting standards, exemplified by plurality opinions in *Curtis Publishing Co. v. Butts*<sup>15</sup> and *Rosenbloom v. Metromedia, Inc.*<sup>16</sup> Then, in its 1974 decision in *Gertz v.*

*First Amendment*, 83 COLUM. L. REV. 603 (1983); Comment, *Reply and Retraction in Actions Against the Press for Defamation: The Effect of Tornillo and Gertz*, 43 FORDHAM L. REV. 223 (1974).

11. 376 U.S. 254 (1964). In this landmark decision, the Supreme Court held that first amendment principles require that a public official bringing a defamation action must prove that a defamatory statement was made with "actual malice"—i.e., known falsity or reckless disregard for truth or falsity—in order to recover. *Id.* at 279-80.

12. See, e.g., *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Gertz v. Robert Welch*, 418 U.S. 323 (1974); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Herbert v. Lando*, 441 U.S. 153 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984); *Dun & Bradstreet v. Greenmoss Builders*, 105 S. Ct. 2939 (1985).

13. Courts have struggled to apply the libel/slander distinction to media such as radio, television, and motion pictures. See, e.g., *Gray v. WALA-TV*, 384 So. 2d 1062 (Ala. 1980). *Shor v. Billingsley*, 4 Misc. 2d 857, 158 N.Y.S.2d 476 (Sup. Ct. 1956), *aff'd*, 4 A.D.2d 1017, 169 N.Y.S.2d 416 (1957), *appeal denied*, 5 A.D.2d 768, 170 N.Y.S.2d 976 (1958); *White v. Valenta*, 234 Cal. App. 2d 243, 44 Cal. Rptr. 241 (1965). In some instances, state legislatures have intervened by enacting statutes addressing this issue. E.g., CAL. CIV. CODE § 46 (West 1982); N.D. CENT. CODE §§ 14-02-03 to-02-04 (1981).

14. Because of an unfortunate choice of language by the United States Supreme Court, judges, juries, lawyers, and law students have for twenty-two years struggled with the distinction between "common law" (or "garden variety") malice and "actual malice" as defined in the *Times* case. In retrospect, the term "scienter" (used in fraud and securities cases) might have been a better choice, because the *Times* standard is concerned with the defendant's knowledge, rather than her motive.

15. 388 U.S. 130 (1967).

16. 403 U.S. 29 (1971).

*Robert Welch*,<sup>17</sup> the Court appeared to offer a definitive statement of constitutional doctrine in this area. *Gertz* indicated, *inter alia*, that the "actual malice" standard of *Times* would apply not only to public officials, but to "public figures" as well.<sup>18</sup> Subsequently, however, it was discovered that the very definition of "public figure" would be the subject of much litigation, again requiring definition and redefinition by the United States Supreme Court.<sup>19</sup>

Recent years have seen a series of Supreme Court cases indicating discomfort on the part of certain members of the Court with the "actual malice" standard. The decisions in *Time, Inc. v. Firestone*<sup>20</sup> and *Hutchinson v. Proxmire*<sup>21</sup> suggested a narrowing of the definition of public figure; in *Herbert v. Lando*<sup>22</sup> the Court broadened plaintiffs' access to the newsroom in light of the evidentiary burden under the "actual malice" standard. Occasional victories for media defendants<sup>23</sup> suggest that the Supreme Court has yet to arrive at a clear consensus on the constitutional implications of defamation cases. At this stage, however, it is fair to question whether a majority of the Court would have concurred in the "actual malice" standard were the *Times* case before the Court today.<sup>24</sup>

The latest source of confusion is the case of *Dun & Bradstreet v. Greenmoss Builders*,<sup>25</sup> decided in June, 1985. There, jury instructions allowed a business to obtain compensatory and punitive damages against a credit reporting agency without a finding of "actual malice."<sup>26</sup> The *Gertz* decision

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17. 418 U.S. 323 (1974).

18. *Id.* at 342, 343.

19. See *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976). Lower federal courts have also grappled with the category of "limited purpose public figure." See *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1136 (1983); *Fitzgerald v. Penthouse Int'l*, 639 F.2d 1076 (4th Cir. 1981); *Waldbaum v. Fairchild Publications*, 627 F.2d 1287 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 598 (1980); *Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); *Ratner v. Young*, 465 F. Supp. 386 (D.V.I. 1979); *Buchanan v. Associated Press*, 398 F. Supp. 1196 (D.D.C. 1975).

20. 424 U.S. 448 (1976).

21. 443 U.S. 111 (1979).

22. 441 U.S. 153 (1979); see *infra* text accompanying note 94.

23. *E.g.*, *Philadelphia Newspapers v. Hepps*, 106 S. Ct. 1558 (1986); *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984).

24. The Burger Court's treatment of the "actual malice" standard of *N.Y. Times v. Sullivan* parallels the same Court's treatment of the exclusionary rule of *Miranda v. Arizona*, 384 U.S. 436 (1966). See, *e.g.*, *Fletcher v. Weir*, 455 U.S. 603 (1982); *California v. Prysock*, 453 U.S. 355 (1981); *Rhode Island v. Innis*, 446 U.S. 291 (1980); *Michigan v. Mosley*, 423 U.S. 96 (1975); *Kirby v. Illinois*, 406 U.S. 682 (1972); *Harris v. New York*, 401 U.S. 222 (1971). In both instances, a Court which felt uncomfortable with a Warren-era rule narrowed the application of that rule while stopping short of overturning the rule entirely.

25. 105 S. Ct. 2939 (1985).

26. *Id.* at 2942.

prohibited the award of presumed or punitive damages in the absence of "actual malice."<sup>27</sup> In *Dun & Bradstreet*, however, the Court upheld the award below, stating that punitive damages may be recovered in the absence of "actual malice" when the defamatory statement does not involve a "matter of public concern."<sup>28</sup> The *Dun & Bradstreet* case indicates a further trimming back on *Times* and *Gertz* principles, and it also adds a new layer of potential confusion. Now, courts, juries and litigants must wrestle with the public/private figure distinction of *Gertz*, as well as the determination of whether the subject of the defamatory statement is a matter of public concern.<sup>29</sup> Regrettably, the decision involves the courts in yet another inquiry, this one to determine whether the content of a defamatory statement is worthy of constitutional protection.<sup>30</sup>

The sensitivity to first amendment concerns expressed in *Times* and *Gertz* are welcome developments. However, the uncertainty and confusion created

27. *Gertz*, 418 U.S. at 349.

28. *Dun & Bradstreet*, 105 S. Ct. at 2946. Because the *Gertz* case "involved expression on a matter of undoubted public concern," Justice Powell's plurality opinion in *Dun & Bradstreet* asserted, "We have never considered whether the *Gertz* balance obtains when the defamatory statements involve no issue of public concern." *Id.* at 2944. Justice Brennan, however, felt that the issue of presumed and punitive damages had been fully disposed of in the *Gertz* opinion. *Id.* at 2957 (Brennan, J., dissenting).

29. Nowhere does Justice Powell's plurality opinion define "matter of public concern," a point made in Justice Brennan's dissent. *Id.* at 2929 (Brennan, J., dissenting).

30. Justice White's concurring opinion not only expresses dissatisfaction with *Gertz* (a thought echoed in Chief Justice Burger's concurrence), but states, "Although Justice Powell speaks only of the inapplicability of the *Gertz* rule with respect to presumed and punitive damages, it must be that the *Gertz* requirement of some kind of fault on the part of the defendant is also inapplicable in cases such as this." *Id.* at 2953 (White, J., concurring). This statement suggests yet another area of uncertainty for future cases.

Fortunately, the Court declined to base its decision on a distinction between media and non-media defendants, as had been suggested by the Vermont Supreme Court. See *Greenmoss Builders v. Dun & Bradstreet*, 143 Vt. 66, 461 A.2d 414 (1983), *aff'd*, 105 S. Ct. 2939 (1985). Such a distinction would have created an intolerable caste system with respect to first amendment rights. See Note, *Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Nonmedia Defendants*, 95 HARV. L. REV. 1876 (1982). This is small solace in light of the distinction regarding the subject matter of the defamatory statement created by the Court's decision.

The Court's more recent *Hepps* decision, which placed the burden of proof of falsity on defamation plaintiffs, should generally be viewed as a positive step in terms of both recognition of first amendment rights and logical application of legal principles. See *infra* text accompanying notes 52-58. The *Hepps* holding, however, was explicitly limited to actions against media defendants for speech of public concern. *Philadelphia Newspapers v. Hepps*, 106 S. Ct. 1558, 1564 (1986). Thus the public/private concern distinction of *Dun & Bradstreet* and the potential for a media/non-media distinction remain real.

by over twenty years of constitutional litigation in defamation cases are less welcome.<sup>31</sup> The result of these cases is a constantly changing patchwork quilt of state and federal statutory and decisional law with little consistent underlying theory.

### B. *Dealing with Uncertainty*

Uncertainty in any area of the law renders outcomes of disputes less predictable. In the view of some commentators, the unsettled state of defamation law hampers the development of alternatives to litigation.<sup>32</sup> This is an accurate, if incomplete, appraisal. The uncertainty of legal results is likely to serve as an obstacle to settlement only if the parties and their counsel are willing to allow the parameters of settlement to be dictated by a prediction of legal results. However, replication of the predicted legal outcome need not be the sole agenda of the parties and their counsel. While the parties to defamation disputes obviously operate in the shadow of the law, they are still free to invent other more satisfying solutions by focusing on the parties' interests and needs, rather than focusing exclusively on a legal solution.<sup>33</sup>

An empirical study recently conducted at the University of Iowa (hereinafter the "Iowa study") indicates that "libel plaintiffs do not sue for the sole purpose of obtaining a judicial remedy for reputational harm. They mainly sue to restore their reputation by setting the factual record straight, and this objective is accomplished in significant degree independent of the judicial result in the case."<sup>34</sup> To the extent that this is true,<sup>35</sup> enormous potential exists for the mutually satisfactory and efficient settlement of disputes at relatively little expense.

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31. One commentator has noted, "[T]he Court, inadvertently, has structured a bewildering labyrinth where even the mighty Theseus would yield to despair." del Russo, *supra* note 10, at 501.

32. Remarks by N.Y.U. Journalism Professor Dick Cunningham and attorney Bruce Sanford at ABA Seminar, reported in 54 U.S.L.W. 2057 (July 23, 1985).

33. Professor Carrie Menkel-Meadow has written:

In counseling clients lawyers may tell them what remedies are legally possible . . . and thus preclude inquiry into alternatives which the client might prefer or which might be easier to obtain from the other party. . . . [S]ome disputants prefer an acknowledgement that wrong has been done to them to receiving money. Once lawyers are engaged and the legal system, even if only informally, has been mobilized, the adversarial structure of problem-solving forces polarization and routinization of demands and stifles a host of possible solutions.

Menkel-Meadow, *The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us*, 1985 Mo. J. DISPUTE RESOLUTION 25, 33.

34. Bezanson, Cranberg & Soloski, *supra* note 9, at 227.

35. Some of the statements made by interviewees of the Iowa study could have been self-serving. Libel plaintiffs may have preferred portraying themselves as



## C. Non-Fulfillment of Legal Goals

In addition to the uncertainty regarding the law of defamation, there are other aspects of legal rules that stand as impediments to efficient settlement of defamation disputes. The Iowa study confirms earlier studies indicating that the *Times* and *Gertz* standards present almost unsurmountable barriers to plaintiffs pursuing defamation claims.<sup>36</sup> One such study indicates that approximately ninety-five percent of plaintiffs who bring actions against media defendants ultimately lose.<sup>37</sup> Many plaintiffs who in fact have been falsely defamed are nevertheless unable to clear their names because they are unable to prove that the defendant acted with the "actual malice" required in cases brought by public officials and public figures under *Times* and *Gertz*.<sup>38</sup>

Notwithstanding their high success rate, even those defendants who ultimately prevail in defamation cases incur enormous legal fees. Professor Marc Franklin has observed that the *Times* "actual malice" standard and the *Gertz* fault requirement rarely result in summary judgment. As a consequence, a large proportion of defamation cases proceed to discovery and jury trial.<sup>39</sup>

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merely desirous of setting the record straight and not being driven by a selfish desire for a large jury award. For example, General Westmoreland reportedly rejected, nine months prior to trial, a joint statement somewhat more favorable to him than that which he ultimately accepted after four months of trial, by which time much evidence unfavorable to the General had been introduced. N.Y. Times, Feb. 24, 1985, § 1 at 1, col. 3. Still, the Iowa data is intriguing. Most defamatory statements (even those made by media) reach narrower audiences and involve less controversial matters than those made in the *Westmoreland* case, and many defamation plaintiffs might prefer a quick retraction or clarification to prolonged litigation.

36. See generally Franklin, *supra* note 9; Franklin, *Suing Media for Libel: A Litigation Study*, 1981 A.B.F. Res. J. 795.

37. Franklin, *supra* note 9, at 498. Professor Franklin also reported that 88% of plaintiffs in non-media cases ultimately lose. *Id.* The Iowa study reports that the media win 90% of their cases. Bezanson, Cranberg & Soloski, *supra* note 9, at 218.

38. See Franklin, *supra* note 8, at 29.

39. *Id.* at 30. Chief Justice Burger has observed that because "proof of 'actual malice' calls a defendant's state of mind into question, . . . [it] does not readily lend itself to summary disposition." *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1970). However, in a case decided this past term, the Supreme Court held that the *Times* clear-and-convincing standard of proof of "actual malice" should be taken into account with regard to the granting of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986). It remains to be seen whether this ruling will result in a significant increase in summary dispositions on behalf of defamation defendants.

Professor Franklin has also noted that most jury verdicts in defamation cases tend to be pro-plaintiff, only to be reversed on appeal by the appellate courts. Franklin, *supra* note 8, at 7. It is only sensible for a defamation defendant to appeal an adverse jury verdict. Appeals, too, cost money and thus, many defamation defendants are left with a Pyrrhic victory, having spent considerable sums to vindicate their first amendment rights.

Because the *Times* and *Gertz* requirements fail to protect defendants from the cost of litigation, it has been suggested that the first amendment requires complete immunity from liability in cases involving public officials, public figures, or matters of public concern.<sup>40</sup> However, while fear of the chilling effect of litigation may be well founded, the prospect of citizens (whether or not they hold public office) being deprived of any remedy to protect their good names is no less grim. The ideal remedy would preserve the right to clear one's name, without chilling the media's ability and desire to pursue and print a story due to either the threat of no-fault liability or crippling litigation costs.

While much of the above has been said before,<sup>41</sup> the Iowa study suggests yet another reason why the *Times* and *Gertz* rules have failed to produce the desired results. As indicated earlier, most defamation plaintiffs ultimately lose because the courts find that they have failed to sustain their burden of proving fault as required by *Times* or *Gertz*. As a consequence, "the truth or falsity of the challenged statement is no longer pertinent to the libel action. Liability, when found, is as often rested on a finding of abuse of privilege,"<sup>42</sup> i.e., a finding that the defendant acted with "actual malice," or (in the case of private figure plaintiffs) negligence. Thus, "[w]hile most plaintiffs lose, they do so on a technicality of privilege. This affords some plaintiffs the virtual certainty of a face-saving explanation: what the press said was false, but they got off on a technicality because they weren't negligent or reckless."<sup>43</sup> Plaintiffs can rationalize their failure to win without risking exposure, while undergoing the perverse pleasure of putting a defendant who has wronged them through the painful ordeal of a lawsuit.<sup>44</sup> The fact that most plaintiffs

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40. This position, advocated by Justices Black and Douglas in the *Times* case, was adopted by the American Civil Liberties Union in October, 1982. See Cranberg, *ACLU: Second Thoughts on Libel*, COLUM. JOURNALISM REV., at 42 (Jan.-Feb. 1983); see also, del Russo, *supra* note 10; Lewis, *supra* note 10.

41. See, e.g., Franklin, *supra* note 8; Hulme, *supra* note 10.

42. Bezanson, Cranberg & Soloski, *supra* note 9, at 230.

43. *Id.* Of course, this is not the first time a constitutional right has been labeled a mere "technicality."

The Iowa study goes on to say that libel plaintiffs are not deterred from suing by "the prospect that the alleged falsity of the challenged statement cannot be established—that the truth of what was published will be promptly confirmed. This deterrent does not exist today, largely because of the constitutional privileges." *Id.* at 231-32.

44. The Iowa study notes:

Little wonder . . . that plaintiffs whose chief motive may be to legitimate an unwarranted claim of falsity see litigation as an effective way to do so, and need not fear that their claim will ever be compromised by a finding that what was said about them was true. Little wonder that public plaintiffs whose interest is largely nonfinancial see a libel suit as an effective remedy, while the private plaintiffs who tend to suffer economic harm find the present system extremely frustrating.  
*Id.* at 231.

hire their attorneys on a contingent fee basis (whereas defendants pay by the hour) is consistent with this thesis.<sup>45</sup>

The view that the unpredictability of defamation law results in fewer out-of-court settlements is at least partially supported by the above findings. A risk-averse plaintiff motivated primarily by the prospect of recovering damages might rationally agree to a settlement in light of the uncertainty of the outcome. However, a plaintiff desirous of clearing her name and/or punishing a defendant may be willing to risk an uncertain result at trial, particularly when an adverse result does not serve to reinforce the original defamatory statement.<sup>46</sup>

In short, the laudable first amendment goals of the *Times* and *Gertz* decisions are subverted because, rather than protecting media defendants, the *Times* and *Gertz* standards simply produce ambiguous results at great expense. Meanwhile, plaintiffs about whom false statements have been made are all too frequently unable to clear their names. We should therefore seek remedies which provide falsely defamed plaintiffs the opportunity to clear their names, without producing a chilling effect on the first amendment rights of media and other potential defamation defendants. Some of these remedies can be the product of law reform by courts and legislatures. Other remedies might be fashioned as alternatives to conventional litigation by the parties and their counsel. The next section of this article suggests reforms that might be undertaken by courts and legislators. The last section suggests what lawyers and their clients might do to promote an atmosphere more conducive to the rational and efficient disposition of defamation claims.

### III. CHANGES IN SUBSTANTIVE LAW

#### A. Streamlining the Fact-Finding Process Through Use of the Special Verdict

The principal reform I would suggest is that the fact-finding process in defamation cases be streamlined through the use of a special verdict requiring the jury to answer three questions: (1) Did the defendant defame the plaintiff? (2) Was the defendant's statement false? (3) Did the defendant act with "actual malice"? The plaintiff should have the burden of proof with respect to all three of these issues.

The above proposal resembles the special verdict used by Judge Abraham Sofaer in the recent defamation action brought by former Israeli Defense Minister Ariel Sharon against *Time* magazine.<sup>47</sup> In that case, a jury deter-

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45. Plaintiffs' risks are low because, as the Iowa study notes, "it is cheap for libel plaintiffs to sue." *Id.* at 228.

46. See *id.* at 232.

47. *Sharon v. Time, Inc.*, No. 83 Civ. 4660 (S.D.N.Y. 1985).

mined that *Time* had indeed defamed Mr. Sharon when it reported that Mr. Sharon had discussed revenge with Phalangist leaders shortly before the massacres of Palestinians at two refugee camps. The jury further found that *Time's* statement was false. However, the jury declined to find that *Time* had acted with knowing falsity or with reckless disregard for truth or falsity.<sup>48</sup> Both sides emerged from the courtroom proclaiming victory.<sup>49</sup> General Sharon did in fact succeed in clearing his name (an important political goal from his perspective), while *Time* (by virtue of the absence of a finding of "actual malice") was not required to pay any damages.

Where there has been a false and defamatory statement but no "actual malice," a special verdict like that used by Judge Sofaer allows the plaintiff to clear her name while still avoiding the crippling damages that may have an adverse effect on a defendant's first amendment rights. In the past, commentators such as Professors James Hulme and Marc Franklin have suggested that defamation plaintiffs be allowed to pursue a remedy in which they could clear their names without the benefit of damages, where "actual malice" or negligence could not be shown.<sup>50</sup> While Professors Hulme and Franklin would have required a plaintiff to elect such a remedy, the special verdict procedure allows the same result without requiring the plaintiff to forego pursuit of a damage remedy.<sup>51</sup>

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48. It was undisputed that Mr. Sharon was a public figure, and that the "actual malice" standard was therefore appropriate. The jury added a postscript to its verdict in which it indicated that *Time* was careless in its reporting. This would strongly suggest that the jury would have found *Time* negligent in the absence of the "actual malice" standard. N.Y. Times, Jan. 25, 1985, at B4, col. 1.

49. N.Y. Times, Jan. 25, 1985, at B4, col. 5; N.Y. Times, Jan. 25, 1985, at A3, col. 1.

50. See Hulme, *supra* note 10; Franklin, *supra* note 8. Justice White also suggested such a remedy in his concurring opinion in *Dun & Bradstreet*, 105 S.Ct. 2952 (1985) (White, J., concurring). Long before the *Times* case, Professor Robert A. Leflar suggested a retraction or right of reply remedy patterned after Arkansas' old "lie bill." Leflar, *Legal Remedies for Defamation*, 6 ARK. L. REV. 423 (1952). While some of Professor Leflar's observations might appear quaint by modern-day standards (e.g., his description of judgments of \$5,000 or \$25,000 as "excess," *id.* at 424), and some of his remedies might be outmoded in light of modern constitutional developments, Prof. Leflar probably should be regarded as the intellectual godfather of alternative remedies for defamation.

51. Because the special verdict can be required in the context of the traditional cause of action for libel or slander, very little in the way of fundamental change is necessary for it to be implemented. Judge Sofaer was empowered to call for a special verdict under Rule 49 of the Federal Rules of Civil Procedure. State trial judges could take similar action on their own motion under state rule counterparts to Rule 49.

Elsewhere, state legislatures might act to require a special verdict. While such a state requirement, if viewed as procedural, could cause *Erie* problems in cases litigated in the federal courts, the federal courts would be likely to defer to the state rule in the absence of a "direct collision" between the federal rule and state law. See *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750-53 (1980).

The above proposal is likely to draw criticism from both sides of the defamation controversy. Plaintiffs would no doubt object to the requirement that they bear the burden of proof of falsity. Prior to *Times*, truth had been regarded as an affirmative defense with respect to which the defendant had the burden of proof.<sup>52</sup> While the *Times* case placed the burden of proof of "actual malice" on the plaintiff, it is silent as to the burden of proof regarding falsity. Theoretically, a plaintiff could succeed in proving that a defendant acted in reckless disregard for truth or falsity in publishing a statement which turned out to be true.<sup>53</sup> The mental gymnastics necessary to arrive at such a result, however, suggest the adoption of a streamlined fact-finding process under which proof of falsity should be a burden borne by the plaintiff.<sup>54</sup>

The U.S. Supreme Court has adopted this position on first amendment grounds (at least with respect to cases against media defendants involving matters of public concern) in *Philadelphia Newspapers v. Hepps*,<sup>55</sup> decided

52. This was not always so. The adage "the greater the truth, the greater the libel" was legally accurate until the John Peter Zenger case in 1735. In that case, a jury disregarded a trial court's instructions by heeding defense counsel Andrew Hamilton's plea to exonerate his client, Mr. Zenger, on grounds of truth. In light of Zenger's reprieve by jury, it is ironic that the modern libel case often involves a media defendant who ultimately obtains a judicial reprieve from an unfavorable jury verdict.

53. Theoretically, a camel can pass through the eye of a needle. Nevertheless, the continued existence of truth as an affirmative defense, notwithstanding the "actual malice" requirement of *Times* or the fault requirement of *Gertz*, is suggested by Justice Rehnquist's majority opinion in *Time, Inc. v. Firestone*, 424 U.S. 448, 459 (1976).

54. Judge Sofaer instructed the jury that the plaintiff had the burden of proving falsity with the same "convincing clarity" required under *Times* with respect to proof of "actual malice." The Judge later indicated that he was uncertain of the proper standard of proof on this issue, and that in the event the jury had returned with a "no" answer to the falsity question, he would have asked the jury to re-determine the issue based on a preponderance standard. Kaplan, *The Judge's Post-mortem of the Sharon Libel Trial*, Nat'l L.J., March 18, 1985, at 28. Lacking any strong feelings as to the "proper" standard of proof on this issue, I would suggest that a jury might better cope with a uniform standard as to all issues, and therefore express a slight preference for a convincing clarity standard.

55. 106 S. Ct. 1558 (1986). *Hepps* was an appeal from a Pennsylvania Supreme Court decision holding that truth remained an affirmative defense for which the defendant had the burden of proof. *Hepps v. Philadelphia Newspapers*, 506 Pa. 304, 485 A.2d 374 (1984), *rev'd*, 106 S. Ct. 1558 (1986). Several other jurisdictions had already rejected the presumption of falsity, placing the burden of proof on the plaintiff. *E.g.*, *Goldwater v. Ginzburg*, 414 F.2d 324, 338 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970), *reh'g denied*, 397 U.S. 978 (1970); *Tiernan v. East Shore Newspapers*, 1 Ill. App. 2d 150, 116 N.E.2d 896, 899 (1953); *Jacron Sales Co., v. Sindorf*, 276 Md. 580, 350 A.2d 688, 698 (1976); *Madison v. Yunker*, 180 Mont. 54, 67, 589 P.2d 126, 133 (1978), *rev'd on other grounds*, *Williams v. Pasma*, 202 Mont. 66, 656 P.2d 212 (1982). The first of these decisions probably served as the basis for Judge Sofaer's charge that General Sharon had the burden of proof with respect to falsity.

this term. Aside from the Court's view that placing the burden of proof on the plaintiff is constitutionally mandated, common sense dictates such an allocation of the burden.<sup>56</sup> While the Pennsylvania Supreme Court suggested in *Hepps* that a requirement that a plaintiff prove falsity is tantamount to requiring the proving of a negative,<sup>57</sup> this is not ordinarily true. After all, who but the plaintiff is in a better position to establish whether a statement about her is true or false? Who knew better what General Westmoreland told President Johnson, or what General Sharon told the Phalangist leaders, than Westmoreland and Sharon themselves? Furthermore, while it remains theoretically possible to be reckless with respect to the truth and still (largely through luck) be correct, it strains logic to place the burden of proof of "actual malice" on the plaintiff and leave the burden of proof regarding truth or falsity on the defendant.<sup>58</sup>

Plaintiffs are also likely to object to the proposal's adoption of Professor

56. *Hepps'* limitation to actions against media defendants for statements of public concern does not preclude the Court, in a future case, from placing the burden of proof on the plaintiff in all defamation cases. Nor does the decision preclude the courts or legislature of a particular state from imposing this burden in all such cases as a matter of state substantive law. Federal courts exercising diversity jurisdiction in those states would be required to abide by the state substantive law rule under *Erie* principles. See *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

It would not be inappropriate for a state to adopt such a rule, given the states' historic role in the development of tort law, as well as the Brandeisian view of the states as laboratories for legislative experimentation. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

57. *Hepps*, 506 Pa. at 318, 485 A.2d at 386, *rev'd.*, 106 S. Ct. 1558 (1986).

58. Justice O'Connor's plurality opinion in *Hepps* noted that "evidence offered by plaintiffs on the publisher's fault in adequately investigating the truth of the published statements will generally encompass evidence of the falsity of the matters asserted." *Philadelphia Newspapers v. Hepps*, 106 S. Ct. 1558, 1565 (1986).

The state court opinion in *Hepps* suggested that in light of the protection given the newsroom under Pennsylvania's shield law, 42 Pa.C.S. § 5942(a), it was only fair to maintain the burden of proof as to truth or falsity on the defendant. The Supreme Court declined to address the permissible reach of such shield laws, stating simply that it was "unconvinced that the State's shield law requires a different constitutional standard than would prevail in the absence of such a law." *Hepps*, 106 S. Ct. at 1565. In an earlier case, however, the Court indicated that media defendants could not have it both ways, insisting that plaintiffs prove "actual malice" while asserting a constitutional claim of privilege against newsroom discovery. See *Herbert v. Lando*, 441 U.S. 153, 170 (1979). A reasonable balance might be struck by shifting the burden of proof as to truth or falsity to the defendant only when the defendant insists on a privilege protecting it from discovery. The abusive discovery feared by the dissenters in *Herbert* might thereby be avoided without serious damage to the interests of either party. See *id.* at 202 (Stewart, J., dissenting) and 204-05 (Marshall, J., dissenting).

Defense counsel in *Hepps* argued that the Pennsylvania rule (placing the burden of proof on the defendant) "constitutes a conscious determination by the state to err on the side of punishing speech that may be true rather than allowing speech that may be false to go unpunished." Such a decision, he added, "turns First Amendment law upside down." Natl. L.J., Dec. 16, 1985, at 44. The Supreme Court apparently agreed. *Hepps*, 106 S. Ct. at 1558.

Franklin's across-the-board requirement of proof of "actual malice" in order to recover damages. Professor Franklin advocated this standard prior to the *Dun & Bradstreet* decision;<sup>59</sup> I would suggest that notwithstanding *Dun & Bradstreet*, state courts and legislatures should adopt this standard in all cases. There are two major reasons for this suggestion. First, a uniform standard of fault avoids the difficult factual issue as to whether the plaintiff is a public or private figure.<sup>60</sup> It also avoids the additional determination required in some cases by *Dun & Bradstreet* as to whether the statement involves a matter of public concern. While *Gertz* and *Dun & Bradstreet* indicate that an "actual malice" standard is not constitutionally required in all cases, the state is not precluded from adopting such a standard in the interest of judicial economy.<sup>61</sup>

Second, imposition of the "actual malice" standard works no great hardship in light of the fact that the special verdict allows the plaintiff to clear her name absent any showing of fault whatsoever. In effect, the plaintiff receives a trade-off: a no-fault remedy enabling her to clear her name in public in exchange for a higher standard of fault (at least as to private plaintiffs) in order to recover damages.

Defamation defendants are likely to object to that aspect of the proposal which allows the plaintiff to clear her name without any showing of fault. Some defendants might claim that the special verdict undermines the *Times* and *Gertz* standards, in that it allows for a finding of wrongdoing on the part of the defendant absent any showing of fault.<sup>62</sup> Furthermore, to place a jury's imprimatur on the plaintiff's claim of falsity might be likened to official censure, a threat likely to arouse the first amendment sensitivities of many. In response, I would contend that the special verdict is consistent with the policy of *Times* and *Gertz*, because it strikes a reasonable accommodation between the plaintiff's interest in clearing her name and the defendant's first amendment rights. I suspect that the greatest damage inflicted by a jury finding of falsity would be to a media defendant's market position, rather than to its first amendment rights.<sup>63</sup> In the marketplace of ideas, the media should be no less accountable than those about whom it reports.

59. Franklin, *supra* note 8, at 36.

60. *See id.* at 37.

61. *Gertz* expressly reserved to the states the option of requiring a standard more strenuous than negligence in private figure defamation cases. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-46 (1974).

Concern for judicial economy goes beyond the trial stage. The issue as to whether the plaintiff is a public or private figure often reaches the appellate courts. *See* cases collected *supra* note 18. The Iowa study indicates that sixty percent of all media libel cases involve some sort of pretrial appeal. Bezanson, Cranberg & Soloski, *supra* note 9, at 230.

62. *See* Comment, *Winning the War Against Self-Censorship: Eliminating Special Verdicts in Defamation Actions*, 90 DICK. L. REV. 683 (1986).

63. It has been suggested that a jury is an awkward mechanism to determine the truth, particularly in politically charged cases. *See* Lewis, *supra* note 10, at 620-

The special verdict may also produce dividends in terms of jury control. A requirement that juries break down their findings into three discrete, "linear" determinations<sup>64</sup> is likely to reduce the incidence of runaway juries applying their own rules in derogation of the requirements of law.<sup>65</sup> The potential for juries exacting vigilante justice against unpopular media defendants is thereby curtailed.

The special verdict might also serve as a deterrent to plaintiffs who have been truthfully defamed, but who hope to "win by suing."<sup>66</sup> A jury's refusal to find falsity strips away these plaintiffs' ability to claim that they were falsely defamed, but lost on the "technicality" of constitutional privilege. In fact, such plaintiffs run the risk that a jury's refusal to find falsity will serve to reinforce the initial defamatory statement. Indeed, General Westmoreland's settlement with CBS shortly after the *Sharon* special verdict was rendered in the same courthouse may have been prompted by the General's fear that his jury, asked to render a special verdict, would find that CBS's statements were true.<sup>67</sup>

### B. Elimination of Punitive Damages

As the number of defamation suits has grown over the past several years, so has the size of damage awards.<sup>68</sup> Punitive damages have played a major

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621. While there may be some truth to this argument, it is something we ask juries to do all the time. Imposition of the burden of proof of falsity on the plaintiff (perhaps by a "convincing clarity" standard) provides additional protection for the defendant.

64. Professor James A. Henderson has, in another context, described as "linear" those issues which have defined limits upon inquiry and argument. Professor Henderson has argued that such issues are more easily adjudicated than "polycentric" issues, which lack such limits. Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467, 475 (1976).

Time's attorneys were disturbed about the manner in which the special verdict was delivered in the *Sharon* case, with several days passing between announcements of the jury's findings as to defamatory content, then falsity, and finally, absence of "actual malice." Time was apparently concerned about the public perception of these announcements as reported piecemeal by the media. Conversation with Robert Marshall, counsel for Time, Inc., in Columbia, Missouri (Nov. 15, 1985). In effect, Time was concerned about being defamed in the media. This is at least one concern that it can share with General Sharon.

65. Columnist Anthony Lewis has previously suggested the role special verdicts might play in holding juries to the test of *New York Times v. Sullivan*. Lewis, *supra* note 10, at 617.

66. See Bezanson, Cranberg & Soloski, *supra* note 9, at 228; see also *supra* notes 42 through 45 and accompanying text.

67. The Judge in the *Westmoreland* case had indicated his intention to utilize a special verdict similar to that used in the *Sharon* case. N.Y. Times, Feb. 24, 1985, at 39, col. 1.

68. See Note, *Punitive Damages and Libel Law*, 98 HARV. L. REV. 847 (1985); Franklin, *supra* note 36.



role in the growth of these awards.<sup>69</sup> First amendment considerations should have long ago led to the elimination of punitive damages in all defamation cases. The threat of such damages can result and has in fact resulted in self-censorship, particularly on the part of small publications and broadcasting companies.<sup>70</sup> One commentator has recently noted, "Because such media are a principal source of minority viewpoints, the overly generous assessment of punitive damages may disproportionately dampen the expression of unpopular views."<sup>71</sup>

Punitive damages represent an intrusion of criminal law goals (e.g., retribution) into the tort law. Punitive damages are particularly inappropriate where the defendant's activity has social utility.<sup>72</sup> As Prof. David A. Anderson has stated, "[P]unitive damages simply have no place in a speech context, no matter what the requisite quantum of fault or the classification of the potential plaintiff may be."<sup>73</sup> In stark contrast to the strong social utility associated with the conduct of news organizations (evidenced by first amendment protection) is the absence of any countervailing interest in punitive damages on the part of defamation plaintiffs. As compensatory damages serve to fully compensate the plaintiff for any injury sustained,<sup>74</sup> punitive damages serve little purpose but to gild the plaintiff's lily. While punitive

69. See Anderson, *supra* note 10, at 477; Note, *supra* note 68; Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 2 (1982).

70. See, e.g., Curley, *How Libel Suits Sapped the Crusading Spirit of a Small Newspaper*, Wall Street J., Sept. 29, 1983 at 1, col. 1.

71. Note, *supra* note 68, at 858. While setting forth the many dangers of excessive punitive damages awards, the Note nevertheless takes the position that punitive damages should be allowed in libel cases, but only where both "actual malice" and common-law malice are shown. *Id.* For reasons articulated in the text, I feel that such a rule provides inadequate first amendment protection. See also Anderson, *supra* note 10, at 473-79; Lewis, *supra* note 10, at 617.

72. For this reason, punitive damages are probably inappropriate in medical malpractice cases as well. See Ackerman, *Medical Malpractice: A Time for More Talk and Less Rhetoric*, 37 MERCER L. REV. 725, 745 (1986).

Arguably, little social utility is derived from publications such as the NATIONAL ENQUIRER and HUSTLER. However, I would be most hesitant to impose a rule regarding punitive damages based on anybody's perceived value of the content of any publication.

The Harvard note suggests the need for punitive damages to redress "the possibility of systematic undervaluation—the prospect that [the defendant] will not be held accountable for all his wrongful acts and that, when he is sued, he will not be made to pay the full value of the harm inflicted." Note, *supra* note 68, at 852. I would suggest that such a basis for punitive damages raises serious due process questions, to say the least.

73. Anderson, *supra* note 10, at 477. In a similar vein is columnist Anthony Lewis' comment, "Punitive damages have no place in the defamation law of a country with a first amendment." Lewis, *supra* note 10, at 617.

74. This is particularly true in light of the Supreme Court's broad definition of compensable injuries in defamation cases. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *Time v. Firestone*, 424 U.S. 448, 459 (1976).

damages may be viewed as a means of compensating plaintiffs for their attorneys' fees and other litigation expenses, these expenses are best and most honestly dealt with by labeling them as such and expressly allowing their recovery after reasonable proof.<sup>75</sup> Unguided and speculative awards of punitive damages are ill-suited to this purpose.<sup>76</sup>

### C. *Payment of Attorneys' Fees*

In lieu of punitive damages, attorneys' fees and other costs of litigation should be awarded to the prevailing party under limited circumstances. While some commentators have suggested adoption of the British system of awarding fees to the winner in all cases,<sup>77</sup> such a rule might have a chilling effect on litigation brought in good faith or brought to test the boundaries of the law. Instead, attorneys' fees should be awarded only where the bad faith of a party has been demonstrated. I would suggest employment of the following objective criteria to determine bad faith.

First, attorneys' fees should be awarded to the plaintiff where all three elements of the special verdict<sup>78</sup> have been established. Proof not only of defamation and falsity, but also of "actual malice" indicates that the defendant (by publishing known falsehoods or acting in reckless disregard for truth or falsity) has acted in bad faith and has abused its constitutional protection. The plaintiff, in the meantime, has surmounted substantial legal obstacles (including the burden of proof) to obtain favorable verdicts on all three issues. Compensatory damages alone do not render the plaintiff whole in light of the substantial cost of litigation. Under present law, punitive damages are constitutionally permissible where the plaintiff has established "actual malice."<sup>79</sup> Under this proposal, punitive damages would be replaced by damages which are demonstrably related to the plaintiff's actual costs.

Second, attorneys' fees should be awarded to the defendant in cases where the plaintiff has failed to establish that the defendant's statement was

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75. Professor Anderson has noted, "If courts desire to compensate plaintiffs for attorneys' fees and other costs, they should do so directly, not by permitting punitive damages that may be wholly unrelated to those expenses." Anderson, *supra* note 10, at 476.

76. As indicated earlier, the *Dun & Bradstreet* case eliminated the *Gertz* requirement of "actual malice" to recover punitive damages where the defamatory statement did not address a matter of public concern. See *supra* notes 25-30 and accompanying text. While there may be less of a constitutional reason to protect speech from punitive damages in matters that are not of public concern, the *Dun & Bradstreet* rule imposes content-based discrimination between types of speech and creates an unnecessary fact-finding problem which can be eliminated by state legislative or judicial action.

77. See, e.g., Kuenzel, *The Attorney's Fee: Why Not A Cost of Litigation?*, 49 IOWA L. REV. 75 (1963).

78. See *supra* discussion accompanying note 47.

79. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

false (the second issue under the special verdict proposal). This is an appropriate test of bad faith on the part of the plaintiff because, while the plaintiff cannot be charged with knowledge as to whether the defendant proceeded with "actual malice," a plaintiff who prosecutes a defamation action, knowing full well that the challenged statement is true, is clearly acting in bad faith.<sup>80</sup> The award of attorneys' fees under these circumstances should further discourage frivolous suits, the goals of which are often more political than compensatory. In particular, it should prevent plaintiffs from bringing defamation actions in order to "win by suing."<sup>81</sup>

In cases in which the plaintiff has succeeded in proving the first two elements of the special verdict (*i.e.*, a defamatory statement which was false) but has failed to establish "actual malice," the parties would be left to pay their own costs. In such a case, neither party can be charged with bad faith.<sup>82</sup>

#### D. *What Substantive Reform Will Not Do*

It is fair to ask why an article dedicated to alternative dispute resolution in defamation cases should devote so much space to substantive law reform. It is the author's belief that present defamation law, well intentioned as it may be, has resulted in distorted strategies which foster excessive litigation and inefficient resolution of disputes. The suggested substantive reforms are designed to create an atmosphere more conducive to the efficient and fair settlement of disputes. The primary effect of these reforms would be to discourage frivolous litigation brought by plaintiffs about whom true statements have been made, while allowing victims of false statements to clear their names. What the above measures are unlikely to do, however, is to expedite resolution of cases in which the plaintiff has been falsely defamed but where the defendant has acted in good faith (*i.e.*, without "actual malice"). It is with respect to these cases that the need for alternative dispute resolution techniques is the strongest. These cases also present the greatest

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80. One possible objection here is the equating of failure to prove falsity with the conclusion that the defamatory statement was in fact true. One could, in these cases, condition an award of attorneys' fees on an additional jury finding that the statement was in fact true. Whether this additional procedure is warranted by the marginal gains in fairness is open for debate.

81. See *supra* notes 42-46 and accompanying text.

82. I am uncertain as to the proper disposition of attorneys' fees where the plaintiff has failed to satisfy the jury that the statement was defamatory. At first blush, an award of costs to the defendant might appear appropriate. However, a plaintiff might proceed under a good-faith belief that she has been defamed, only to find that a jury does not consider the statement to be defamatory. The issue could be resolved by asking the jury to determine whether the statement was true, but I question whether it is worthwhile to undergo the additional cost of another procedural step simply to resolve who should pay the costs. Furthermore, the jury may have determined that the statement was non-defamatory simply because it was one of opinion, which, according to *Gertz*, can be neither true nor false. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

likelihood for successful employment of alternative dispute resolution (ADR) techniques, because presumably, both parties have been proceeding in good faith. ADR techniques can therefore be used to reconcile differences between parties and to create an expeditious and fair solution.

#### IV. THE ROLE OF ALTERNATIVE DISPUTE RESOLUTION

The potential for alternative dispute resolution in defamation cases is highlighted by the Iowa study's finding that most victims of defamation contact the media before bringing suit in order to set the record straight. As the authors of the Iowa study have stated,

The significance of the contact with the media is hard to overstate. It means the press has an opportunity to resolve the dispute before a lawyer enters the picture and before the complainant may even have given serious thought to litigation . . . a golden opportunity, you might call it.<sup>83</sup>

However, instead of entering into discussions likely to resolve the dispute (through retraction or correction, for example), publishers of defamatory statements all too frequently engage in behavior which is likely to flame the fires of a potential lawsuit. The Iowa study reports that defamation victims are subjected to newsroom runarounds, stonewalling and outright rudeness.<sup>84</sup> "In a significant proportion of the cases, the way people were treated when they contacted the media was a factor in, if it did not fully account for, their anger and the decision to sue."<sup>85</sup>

Why are victims of defamatory statements treated in this manner? The Iowa study notes the constant time constraints under which most news organizations labor. The pressure to turn out tomorrow morning's edition leaves little opportunity to deal with complaints about today's paper.<sup>86</sup> The Iowa study also notes a widespread absence of any systematic means of handling complaints. Defamation victims who call news organizations are often bounced from one telephone extension to another.<sup>87</sup> In some instances, complaints go to the reporter or writer who has a personal stake in the story. Natural defensiveness, on the part of the writer or organization, is often likely to interfere with objective consideration of the complaint. This is particularly true of news organizations, which, understandably, are conditioned to resist pressure. A siege mentality takes hold, and the defamation victim's honest effort to clear her name quickly turns into an adversarial confrontation.<sup>88</sup> In addition, I suspect that many news organizations interpret virtually any complaint as a challenge to their first amendment rights. This

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83. Bezanson, Cranberg & Soloski, *supra* note 9, at 221.

84. *Id.* at 222-224.

85. *Id.* at 221.

86. *Id.* at 222.

87. *Id.*

88. *Id.* at 222-23.

response is unfortunate in those cases where the complaint is motivated by a legitimate desire to set the record straight through private means of dispute resolution without judicial interference. The defensive posture assumed when the first amendment flag goes up, however, can quickly transform the complaint into a lawsuit in which judicial interference is invoked.

The obvious remedy for all of this, as suggested by the Iowa study, is for news organizations to systematize the handling of complaints, placing complaints under the responsibility of a person with good human relations skills and no day-to-day editorial responsibilities.<sup>89</sup> Some news organizations have established such procedures, hiring ombudspersons as members of their staffs. In many cases, fielding complaints in this manner will lead to a retraction or clarification. In cases in which the news organization still does not feel such action is justified, the careful and considerate manner in which the complaint is handled may convince the complaining party that a lawsuit is not the best course of action.

#### A. *Agreeing on How to Disagree*

What about those cases in which the complaining parties and news organizations are unable to agree upon a resolution? I suggest that they might still agree on how to disagree. It is here where alternative dispute resolution processes come into play.<sup>90</sup> While various ADR devices might be appropriate here, I suggest that discussions continue between the complaining party and the news organization through a fact-finding process utilizing a neutral third party. The neutral can be selected from academia, from an organization such as the American Arbitration Association, or from some community group. The most important consideration must be that while the neutral should be sensitive to both the desire for accuracy and first amendment concerns, she must not be viewed as having any ties to either the complaining party or news organizations which would compromise her objectivity and neutrality. The fact-finder's independence and credibility are of critical importance in light of the delicate tasks to which she will be assigned.<sup>91</sup>

##### 1. "Binding fact-finding"

Fact-finding may proceed in accordance with one of two models. The first of these models I will call "binding fact-finding." This process may be

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89. *Id.* at 225.

90. Actually, the process of discussion and negotiation carried on between the complaining party and the ombudsperson may itself be viewed as an ADR process.

91. Judge Harry T. Edwards has expressed concern about engaging neutrals who lack substantive expertise in the area of dispute. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV.L.REV. 668, 683 (1986). This may present a problem in defamation cases, where most people with substantive expertise

viewed as a hybrid of fact-finding and arbitration. Under binding fact-finding, the complaining party and the news organization agree in advance to be bound and act in accordance with facts found by the neutral fact-finder. The fact-finder proceeds with a full investigation in which she receives the full cooperation of the parties. Procedures are informal;<sup>92</sup> information is produced by the parties on the basis of written or oral requests from the fact-finder, the contents of which might be suggested by the parties themselves. While no formal proceedings are contemplated, the fact-finder may wish to sit down with all parties present to review facts and present the opportunity for the parties to again attempt to resolve the dispute on their own terms before rendering a decision.

The sole objective of the fact-finder's inquiry should be to determine whether the statement which is the subject of the complaint was true or false. No inquiry would be made as to any fault or "actual malice" on the part of the publisher, nor would there be any inquiry as to the motives of either of the parties. If the fact-finder finds that the statement was truthful, the complaining party is bound, by prior agreement, to drop the claim. If the statement is found to be false in any material respect, the publisher is bound to publish a retraction as phrased by the fact-finder.<sup>93</sup> The fact-finder would also determine the particulars of the publication, such as time and place. Upon publication of the retraction, the complaining party would be required to drop the claim.

Substantial obstacles stand in the way of acceptance of the above process. One obstacle is the possibility that defamation victims will be unwilling to forego litigation in return for the possibility of a retraction. In cases in which the defamatory statement is found to be false, the defamation victim is giving up a substantial legal right. In most states, a timely and conspicuous retraction will serve to eliminate punitive or general damages, but not to entirely extinguish a defamation action.<sup>94</sup> However, present law grants the

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regarding the journalistic process have been associated in some capacity with the media. Insofar as Judge Edwards' concerns can be satisfied by persons with *legal* expertise in the subject area, academia may prove to be a valuable source of knowledgeable neutrals.

92. The procedures will usually depart from those used under traditional formal arbitration.

93. The retraction might be partial or complete, depending on the findings. I am not sure whether the retraction should be presented as the findings of a neutral fact-finder (e.g., "A neutral fact-finder has determined that *The Daily Planet* erred in reporting that Mayor Meier Meyer has embezzled funds from the Metropolis city treasury"), or as an unequivocal statement of the publisher (e.g., "Contrary to earlier reports, Mayor Meier Meyer has *not* embezzled funds from the city treasury; *The Daily Planet* regrets the error).

94. See ALA. CODE §§ 6-5-184 to -5-186 (1975) (punitives recoverable only if defendant fails to publish a retraction); CAL. CIV. CODE § 48a (West 1982) (only special damages recoverable unless retraction demanded and refused); MISS. CODE ANN. § 95-1-5 (1972) (retraction limits plaintiff to recovery of actual damages); TENN.

defamation plaintiff no remedy if a false and defamatory statement has been made without any fault on the part of the publisher.<sup>95</sup> The fact-finding process suggested above would at least give such a person the benefit of a retraction. While the special verdict proposal would give the plaintiff the benefit of a jury declaration of falsity, such declaration would occur only after substantial (and perhaps prolonged, expensive, and emotionally draining) litigation and, where the plaintiff is not particularly prominent, a jury declaration would come with no guarantee that it would be conspicuously reported to the general public. Thus, defamation victims sincerely interested in clearly their names might find this fact-finding process attractive.

Thornier problems may hinder acceptance of the proposal by news organizations. Such organizations might resist the idea of outsiders probing into their news gathering and editorial processes. However, an investigation by a neutral fact-finder selected by the parties may be viewed as less intrusive than that allowed under discovery rules pursuant to *Herbert v. Lando*.<sup>96</sup> Whereas *Herbert* allowed discovery into the journalist's mental processes in order to determine whether defamatory statements were published with "actual malice," the investigation contemplated here would be limited to the truthfulness of the published material, and would not encompass the journalist's subjective thought processes. Furthermore, as an informal, voluntary probe conducted by a private citizen, the fact-finder's investigation would lack the coercive trappings of newsroom discovery under the aegis of judicial process.

The most sensitive area of inquiry from the journalist's point of view would be the fact-finder's investigation into sources for the defamatory statement, some of which might be regarded as confidential. In such an instance, first amendment considerations should be balanced with notions of fairness. Where a defamatory statement is based upon information obtained from an undisclosed, confidential source, the defamation victim is deprived of the opportunity to confront her accuser.<sup>97</sup> It seems only fair that in such instances the news organization be given a choice between revealing the source of the defamatory information or bearing the burden of proof.<sup>98</sup> In the context of

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CODE ANN. § 29-24-103 (1980) (plaintiff restricted to actual damages and no punitives by a retraction if libel was published in good faith); TEX. STAT. ANN. art. 5431 (Vernon 1958) (retraction used to determine extent of actual damages and to mitigate exemplary or punitive damages).

95. See *supra* note 30 (a caveat based on Justice White's concurring opinion in *Dun & Bradstreet*).

96. 441 U.S. 153 (1979). In *Herbert*, the Supreme Court held that the first amendment does not protect a reporter from discovery concerning his thoughts, opinions, and conclusions with respect to the material he gathers, or about his conversations with editorial colleagues. The Court emphasized the heavy evidentiary burden on plaintiffs in defamation cases. *Id.* at 170, 176.

97. Indeed, the discerning reader ought to question both the newsworthiness and the credibility of any statement that comes from an unattributed source.

98. Press advocates might attempt to draw an analogy to the fifth amendment

the informal fact-finding procedure, this shift in burden of proof would mean that all reasonable inferences with respect to which the confidential source could provide information would be made against the news organization until such time as disclosure was made or the inferences were otherwise rebutted. Again, because the process would be voluntary and private, the shift in burden would not be as coercive as placing the burden as to truth or falsity on the defendant in an action brought under judicial process. Furthermore, under this process the news organization would receive a quid pro quo for its candor, in that compliance with the fact-finder's findings would provide a complete defense.<sup>99</sup> The process would emphasize a frank and open search for the truth, rather than the "come-and-get-me" attitude often displayed in the adversary process.<sup>100</sup>

## 2. "Non-binding fact-finding"

An alternative to the binding fact-finding process described above would be a non-binding fact-finding process which might be viewed as more akin to mediation. Under this process, the fact-finder conducts a complete investigation regarding the defamatory statement, utilizing the procedures already suggested with respect to binding fact-finding. While the fact-finder again issues findings with respect to the truth or falsity of the statement, under this procedure the parties are free to work out their own agreement based upon these findings. The fact-finder might act as a mediator to facilitate such an agreement. If the parties cannot work out an agreement, they remain free to proceed to litigation.

One might pause to consider whether the fact-finder's non-binding findings should have any bearing on subsequent litigation. For example, if the fact-finder finds that the defamatory statement is false, and the defendant then fails to issue a retraction, should such failure be probative of "actual malice"?<sup>101</sup> Such a refusal could be interpreted as a cavalier disregard for

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protection which allows a defendant to refuse to testify on the basis of self-incrimination, while maintaining the burden of proof on the prosecution. See *Escobedo v. Illinois*, 378 U.S. 478 (1964). I am not certain that this is apposite, in light of the important distinctions between criminal and civil actions, particularly with respect to discovery of evidence.

99. As indicated earlier, existing retraction statutes merely preclude punitive or general damages. See *supra* note 92.

100. Of course, the assertion of one's constitutional rights should not be dismissed as mere gamesmanship. Participants in the fact-finding process should recognize they may be waiving important rights in the pursuit of other important interests. See *infra* text accompanying notes 103-04.

101. The *Times* case apparently left open the question of whether or not a refusal to retract upon learning of falsity *after* publication may be considered "actual malice." 376 U.S. at 286. See also RESTATEMENT (SECOND) OF TORTS § 580A comment d (1977). But see Franklin, *supra* note 8, at 31 ("Because the only possible liability is based on fault at the time of publication, nothing the paper does thereafter in response to a complainant can be read into its behavior at the time of publication.").



accuracy and at least probative as to the issue of whether there was "actual malice" at the time of publication.<sup>102</sup> Should an offer to retract likewise have some bearing on the "actual malice" issue? For that matter, should a news organizations's refusal to engage in this fact-finding process be itself probative of reckless disregard for truth or falsity (again evidencing a cavalier disregard for the facts)?

While all of this conduct might be probative as to the existence of "actual malice," we may nevertheless not wish to burden the fact-finding process with excess baggage relating to some future trial. It is probably preferable to promote an atmosphere in which the parties are willing to engage in frank discussion of the facts, unburdened by considerations as to how the process might affect their future litigation position. Otherwise, the fact-finding process might be distorted into a pre-litigation post parade in which the parties jockey for position in anticipation of future litigation, rather than a sincere effort to find the truth and resolve differences.

### B. *Focusing on Interests*

In order for either one of the above ADR strategies to be successful, it is necessary to redirect the parties to focus on their respective interests, rather than on their legal rights.<sup>103</sup> The victim of a defamatory statement has a *right* to a jury trial and, upon sufficient proof, to damages. The media and other publishers of defamatory statements have a *right* to first amendment protection. Focusing exclusively on these rights inevitably leads to a clash in the courtroom. If, however, we refocus on the parties' interests, a less expensive, more satisfactory solution may be obtained. The victim has an *interest* in clearing her name. The media have an *interest* in accuracy. Quite frequently, these interests can be reconciled through the dispute resolution procedures suggested above.<sup>104</sup>

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102. There could be some danger in this, much as there is a danger in inferring "actual malice" from a newspaper's muckraking policy, as was done in a vacated decision in *Tavoulareas v. Washington Post*, 759 F.2d 90 (D.C. Cir. 1985), *vacated and petition for rehearing en banc granted*, 763 F.2d 1472 (D.C. Cir. 1985). See Lewis, *Getting Even*, N.Y. Times, Apr. 11, 1985, at A27, col. 5.

103. For some very useful work in this area, see R. FISHER & W. URY, *GETTING TO YES* 41-57 (1981); Menkel-Meadow, *supra* note 33.

104. Professor Menkel-Meadow has suggested that lawyers play a major role in the transformation of disputes into legal language, thereby ignoring important non-legal interests. See *supra* note 33. Elsewhere, Professor Leonard Riskin has described "the lawyer's standard philosophical map," in which disputants are categorized as adversaries, one of whom must win, and other of whom must lose, and in which disputes are resolved through application of some general rule of law. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43-48 (1982). In defamation disputes, sophisticated media defendants do not need lawyers to remind them that first amendment rights are at stake. Quite on their own, they may be inclined to translate every complaint into a first amendment controversy, ignoring other interests such as accuracy and good human relations.

The fact-finding procedures described above should not be regarded as a panacea, providing a sure-fire remedy for each and every defamation dispute. Given the wide variety of defamation claims, no single device will act as a Lydia Pinkham pill, good for whatever ails the disputants. Different parties and circumstances will call for different solutions as varied as the imagination of the parties and their counsel. The viability of the fact-finding processes described above, for example, is largely dependent upon the effectiveness of retraction as a remedy. Certainly retraction worked as a complete remedy for Jimmy Carter.<sup>105</sup> In the former President's case, more people probably read the retraction than the original Washington Post article. But does retraction fulfill the same function for someone less prominent than a former President of the United States? For a less prominent person, even a conspicuously placed retraction may not fully erase the stigma of the initial defamatory story. Still, the imperfection of the retraction remedy may be the price we have to pay for constitutional protection. We are, by now, well beyond the point where a prior restraint would be invoked so as to entirely avoid the sting of the initial defamatory statement.<sup>106</sup>

#### V. TAKING RESPONSIBILITY FOR CHOICES

The dispute resolution procedures suggested above have obvious shortcomings for both sides of the controversy. I would suggest that in these shortcomings can be found not just the weaknesses, but also the strengths of these proposals. Parties to dispute resolution processes must recognize that resolutions or procedures agreed upon by the parties are likely to involve compromises not present when a resolution is imposed through adjudication. What will appeal to some decisionmakers and dismay others is that when a resolution or, for that matter, a process for resolving disputes is voluntarily accepted, the parties themselves (and their respective decisionmakers) are held accountable for these compromises. Those less willing to accept this responsibility will allow the current to carry them over the brink to trial, rather than plotting a safer (though hardly risk-free) course through calmer waters. The added autonomy of ADR processes brings responsibility; one cannot rationalize a bad result by blaming it on a legal technicality or a biased jury. What decisionmakers should realize is that when they allow the dispute to be decided through the traditional adjudication process, they are also making a decision.<sup>107</sup> That decision, of course, means engaging in a process laden with pitfalls which, in many cases, are far worse than those which accompany alternative dispute resolution processes.

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105. See *supra* text accompanying notes 4-7.

106. See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931) (invalidating statute imposing prior restraint on defamatory publication).

107. The philosopher Martin Buber probably said it best: "Not to decide is to decide."

A. *The Trial Option*

There will, however, remain some cases that will and should go to jury trial.<sup>108</sup> Where factual issues remain in dispute, a trial may be inevitable. A jury may be the most appropriate mechanism for resolving many of the issues presented in defamation cases.<sup>109</sup> Who but a group of citizens drawn from the community is better suited to determine whether a statement is to be considered defamatory? Who but a jury of one's peers is better suited to definitively clear a name that has been clouded by a defamatory statement?

Certainly a jury trial can be costly. But it may also be cathartic. The *Westmoreland* trial, expensive as it may have been, might be seen as a passion play in miniature, a final chapter of America's most divisive war in over a century.<sup>110</sup> The courtroom may be viewed as an uniquely American forum for such a controversy,<sup>111</sup> far superior to the blood feud, combat, or ordeal

108. Judge Harry T. Edwards (who, as a law professor, made significant contributions in the field of dispute resolution long before ADR became trendy), has recently written:

[M]utual understanding and good feeling among disputants obviously facilitates intelligent dispute resolution—but there are some disputes that cannot be resolved simply by mutual agreement and good faith. It is a fact of political life that many disputes reflect sharply contrasting views about fundamental public values that can never be eliminated by techniques that encourage disputants to “understand” each other.

Edwards, *supra* note 91, at 678. Judge Edwards was concerned primarily about the resolution of public disputes outside the courtroom. However, while defamation suits are private in form, many such suits take on public importance. A public arena such as a courtroom is not an inappropriate battleground for such disputes. The *Westmoreland* case, because of its entanglement with the Vietnam controversy, is a prominent example of such a dispute.

109. Professor and columnist Anthony Lewis, among others, has suggested that a jury is a poor vehicle for making the types of factual determinations made in defamation cases. Lewis, *supra* note 10, at 620-21. This brings to mind Winston Churchill's comment that “democracy is the worst form of government except all those other forms that have been tried from time to time.” Speech, House of Commons, Nov. 1947. I am inclined to attribute similar shortcomings to the American jury, at least insofar as purely factual determinations are concerned.

110. The *Westmoreland* case may also be seen as a metaphor for the Vietnam War. General Westmoreland pursued a matter with questionable prospects, consuming a great amount of time, energy, expense, and manpower. He nevertheless remained in the conflict, becoming immersed knee-deep in the “Big Muddy” of litigation. In the end, with defeat all but assured, he pulled out, declaring victory.

111. Professor Owen M. Fiss has recently written,

To conceive of the civil lawsuit in public terms as America does might be unique. I am willing to assume that no other country . . . has a case like *Brown v. Board of Education* in which the judicial power is used to eradicate the caste structure. I am willing to assume that no other country conceives of law and uses law in quite the way we do. But this should be a source of pride rather than shame.

Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1089 (1984).

which it replaced.<sup>112</sup> In the *Westmoreland* case, a jury trial produced a public exposition of the facts and an eventual settlement. In our enthusiasm for alternative dispute resolution, we should recognize the continuing legitimacy of the trial process and the vital role it continues to play in the resolution of disputes.

### B. *Reestablishing Control Over Litigation*

As Professor Menkel-Meadow has noted,<sup>113</sup> litigation frequently tends to take on a life of its own. Complaints build into disputes, disputes turn into cases, and the parties and their counsel get swept along on a mad journey to the courthouse, losing sight of their original objectives. This phenomenon is more likely to occur in the "big case," in which an institutional client is represented by a large law firm. With the decision-making process diffused, there is less likelihood that any one individual (be it an attorney or client) will assume responsibility, and litigation tends to snowball, becoming an end in itself.

Many defamation cases present the above scenario. Defendants are frequently large news-gathering organizations represented by major law firms. In recent years, there has even been a trend on the part of plaintiffs to engage large corporate law firms where they will be represented by teams of attorneys.<sup>114</sup> In addition, defamation cases often involve important legal principles which often eclipse personal interests.<sup>115</sup> The lawsuit becomes a battlefield for vindication of first amendment rights or a campaign against a seemingly irresponsible press rather than a truth-seeking process.

If, however, the case is periodically reassessed in light of client objectives, matters are less likely to get out of control. Assuming that the overriding objective of news-gathering organizations is the accurate reporting of facts and that the overriding objective of defamation victims is the clearing of their names, evaluation of defamation cases in light of client objectives should frequently produce a mutually satisfactory resolution short of trial.<sup>116</sup> In those cases in which pre-trial resolution does not occur, the parties can at least proceed to trial recognizing that a more satisfactory solution was unattainable.

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112. We should not forget that the jury trial had its origin as an alternative dispute resolution mechanism. See REMBAR, *THE LAW OF THE LAND* 91-140 (1980).

113. See *supra* note 33.

114. See Franklin, *supra* note 8, at 12, n.58.

115. The involvement of well-financed public interest organizations and foundations such as the Libel Defense Resource Center and ACLU (on behalf of defendants) and Capital Legal Foundation and American Legal Foundation (on behalf of plaintiffs) underscores this commitment to broad legal principles. See *id.* at 12, n.59.

116. In light of modern-day principles of informed consent, I would suggest that the lawyer owes the client nothing short of a periodic reassessment of the case in terms of client objectives. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7, 7-8, 7-9 (1981); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1983).

## VI. CONCLUSION

We have seen how substantive defamation law, due to the development of well-intentioned but confusing and ineffectual rules, has created significant obstacles to the rational and efficient resolution of disputes. Changes in substantive and procedural rules may be conducive to the efficient settlement of disputes, while protecting socially desirable legal rights. In addition, the parties themselves can take steps to resolve defamation disputes before they evolve into major litigation. This is best accomplished when the parties focus on their mutual interests, rather than on their legal rights alone.

Some defamation disputes, because they involve irreconcilable differences between parties or because they involve issues of a public nature, should be resolved through litigation. However, the choice to litigate should be a conscious one, made by informed parties who have decided that it is the best means of pursuing legitimate objectives. In this respect, lawyers can play important roles in (1) shaping substantive and procedural law in such a way that it fulfills legitimate, and only legitimate, objectives, and (2) recognizing that many parties to defamation disputes are best served by engaging in a healing process, rather than through legal combat. To pursue a client's legal rights requires learning and competence; but to recognize and take full advantage of an opportunity to heal is probably the truest test of a lawyer's compassion and skill.