A First Amendment Analysis of the Annenberg Libel Reform Proposal

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The Supreme Court's landmark decision *New York Times Co. v Sullivan* recently celebrated a troubled 25th anniversary. The case that meshed the common law of defamation with the free speech needs of American society celebrated its silver anniversary amid complaints it had transformed libel law into a legal morass.

A primary complaint is that the Court, through *New York Times* and its progeny, has unwittingly turned libel law into a giant lottery system. Libel plaintiffs rarely win, but the successful ones often hit a jackpot of huge damages. For libel defendants, the protections afforded by *New York Times* lead to multi-million dollar legal bills. Indeed, the only libel participants who consistently wear smiles are the lawyers who guide the parties though this high-stakes game.

Additionally, the Court's libel law decisions may have made defamation suits complex beyond the grasp of the typical jury. Two-thirds of jury verdicts in favor of plaintiffs are revised on appeal. On this evidence it is even debatable whether the current law makes libel disputes suitable for jury trials. This is in some sense bewildering. Defamation suits seem especially suited for jury trial; who, other than a group of lay persons, is better suited to evaluate damage to a person's or company's reputation? Indeed,
the idea that juries should have a fundamental role in libel trials is the product of the first major defamation case on American soil, the 1735 trial of John Peter Zenger for seditious libel.  

Such problems have spawned numerous, mostly academic, proposals for reforming libel law. The most significant practical proposal to overhaul the law is the Libel Reform Project of Northwestern University's Annenberg Washington Program ("Annenberg Proposal"). The heart of the proposal is the creation of a no-fault, no-damages declaratory judgment proceeding for libel disputes.

A thorough critique of the entire proposal would address a number of complex constitutional questions. For example, under the Annenberg Proposal, it is unlikely that libel plaintiffs would ever recover money damages, whether or not they wanted them. Does this unconstitutionally deny a libel victim's right to remedy?

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* See, generally, Zechariah Chafee, Jr., Freedom of Speech and Press 40 (Carrie Chapman Catt Memorial Fund, 1955) ("The colonists had . . . learned from the sedition trials that this essential power of the people to talk about political issues can be easily destroyed by their rulers unless the question of punishing talk is decided by plain citizens on a jury.").


* The Supreme Court has implied that Congress or the states must provide an adequate substitute when they replace a common law recovery scheme. The roots of this doctrine are in New York Central Railroad Co v White, 243 US 188 (1917). The Court concluded there that New York's worker compensation system did not deny due process to injured workers, because it was a "reasonably just substitute" for the common law cause of action an injured worker would otherwise have against his employer. Id at 201.

The Court most recently applied this "quid pro quo" analysis in Duke Power Co v Carolina Environmental Study Group, 438 US 59, 88 (1978), upholding a federal damage cap of $560 million in nuclear power accidents. The plaintiffs claimed that the law unconstitutionally limited tort victims' right to full recovery for their injuries. The Court said a "reasonably just substitute" may not be constitutionally necessary, but nonetheless analyzed the case on that basis. Id at 89-92.

The Court has since declined the opportunity to determine specifically whether the Constitution's due process clauses require such a substitute. See Fein v Permanente Medical Group, 38 Cal 3d 197, 695 P2d 665, cert denied, 474 US 892 (1985) (White dissenting).

Applying the quid pro quo analysis, the Annenberg Proposal is constitutionally suspect in that it provides no "reasonably just substitute" to a large number of libel plaintiffs who want money damages. However compelling this argument, it seems highly likely that the Court, faced with a challenge to a statute based upon the Annenberg Proposal, would reject this "quid pro quo" argument by initially concluding that there was a "rational basis" for the law. Duke Power, 438 US at 82-83 (citing Usery v Turner Elkhorn Mining Co., 428 US 1, 15 (1976)).

For an interesting study of this quid pro quo analysis in relation to medical malpractice reform, see Note, Restrictive Medical Malpractice Compensation Schemes: A Constitutional "Quid Pro Quo" Analysis to Safeguard Individual Liberties, 18 Harv J Leg 143, 151-55 (1981).
LIBEL REFORM

Does the plan impermissibly interfere with the right to jury trial? Detailed analysis of these and other questions is necessary, but beyond the scope of a single comment. Instead, this Comment will focus on the question of whether the no-fault, no-damages declaratory judgment action created by the Proposal is consistent with the First Amendment. This Comment will argue that while such action poses difficult constitutional issues, the Annenberg Proposal does not impermissibly limit the free speech guarantees of the First Amendment. There are reasons other than constitutional ones, however, to suggest that the Annenberg Proposal would not achieve its goal of libel reform.

Part I of this Comment discusses problems in current libel law and their history. Part II discusses the components of the Annenberg Proposal. Part III discusses First Amendment problems with no-fault declaratory judgment actions. Part IV suggests drawbacks to the no-fault declaratory judgment action that do not reach the level of constitutionality.

I. FLAWS IN CURRENT LIBEL LAW

A. Development of the Fault Standard

The general principles of the common law of libel are relatively simple. Defendants were strictly liable for publication of false and defamatory material, unless acting under privilege. That is, the plaintiff's reputation was the focus of the law.

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* The Annenberg Proposal does not specify whether the declaratory judgment actions could be heard before juries, although at least some panel members believe that a judge would hear the cases. "In [the declaratory judgment action], the only question would be whether the statement to which the plaintiff objects is true or false. After a trial, the judge would rule on this question and state his decision." Rodney Smolla, New Ideas in Libel; No Cash, Just Truth, Newsday 81 (Mar 3, 1989) (emphasis added).

In state actions, however, juries are generally available for declaratory judgment proceedings so long as they were available for the action replaced. See 22A Am Jur 2d Declaratory Judgments § 228 (1988 & Supp 1990).


* It is, of course, an overstatement to say that the common law tort of defamation is simple; it is one of the most complex and difficult to understand. See Richard A. Epstein, Charles O. Gregory and Harry Kalven, Jr., Cases and Materials on Torts 1085 (Little, Brown & Co., 4th ed 1985). "Relatively simple" here means that the elements of a libel case were easier to establish when there was a no-fault standard.

* Under common law, libel defendants have an absolute privilege for reporting judicial, legislative and executive proceedings, and thus are not liable for false statements produced therein. Defendants also are protected by a conditional privilege when reporting certain
Although common law libel existed at the time the Bill of Rights was adopted, it was not adjudged constitutionally problematic until 1964, when the Supreme Court decided in *New York Times* that, in suits involving public officials, strict liability for libel was inconsistent with freedom of the press. The *New York Times* was largely driven by its attendant historical circumstances, the civil rights turmoil of the early 1960s. The *Times* had printed an advertisement, highly critical of Alabama public officials, that contained some relatively minor inaccuracies. Sullivan, the Montgomery police commissioner, sued and won a $500,000 verdict. The Court overturned the verdict—and centuries of defamation tort law. It held that a public official could not recover libel damages unless he or she proved the defendant had acted with "actual malice," that is, with knowledge of the falsity of the statement or with reckless disregard for whether or not it was true.

In several cases during the following decade, the Court considered what categories of plaintiffs would have to meet this new burden of proof. In 1974, in *Gertz v Robert Welch, Inc.*, the Court completed its break with the strict liability scheme of common law defamation. It held that the First Amendment prohibited all strict liability libel law, regardless of whether the plaintiff was a public figure or a private citizen. From then on, all libel plaintiffs would have to prove negligence, or worse, in addition to falsity. This Comment will focus on *New York Times* and *Gertz* as the most significant cases; these decisions shifted the focus of libel trials from the truth of the statement to the defendant's state of mind. The Annenberg Proposal is designed to return the focus of libel law to its original place, the veracity of the statement.

The Court's decisions in *New York Times* and *Gertz* were motivated by a concern that large damage awards would cause self-matters, for example, matters printed in defense of their own interests. Plaintiffs can overcome these conditional privileges by proving fault on the part of defendants. W. Page Keeton, *Prosser and Keeton on Torts* §§ 114, 115 at 815-38 (West, 5th ed 1984).


*See Curtis Publishing Co. v Butts and Associated Press v Walker*, 388 US 130, 134-35 (1967) (applying the *New York Times* standard to those "persons who are not public officials but who are 'public figures' and involved in issues in which the public has a justified and important interest"); and *Rosenbloom v Metromedia, Inc.*, 403 US 29, 43 (1971) (plurality argued that the subject matter of the alleged libel, and not the status of the plaintiff, should be the key to whether *New York Times* applies; this argument was rejected three years later in *Gertz v Robert Welch, Inc.*, 418 US 323, 323-43 (1974)).
censorship within the media. Fearful of deterring the rigorous news reporting it considered essential to a free society, the Court opted against punishing publishers or broadcasters who made good-faith efforts at veracity. In *New York Times*, for example, the *Times* lost a half-million dollar judgment to a public official not even named in the advertisement. Similarly “defamed” public officials had sued on the same ad, and the paper was facing another $2 million in additional verdicts. These awards would likely have put the *Times* out of business, while threatening the same to other papers reporting the civil rights struggle. The Court was no doubt determined to prevent this from happening.

The freedoms the press won in *New York Times* were arguably attributable more to the Court’s wish to see the South on the losing end of the civil rights movement than to a consensus that the common law of strict liability libel was fundamentally and generally flawed. Yet however “results-oriented” *New York Times* was, its underlying rationale endured. In *Gertz*, the Court corrected the “flaws” of strict liability libel with respect to private plaintiffs as well, despite a much less sympathetic defendant than the *Times*. There, the defendant, publisher of a John Birch Society newsletter, labeled the plaintiff, a civil rights lawyer, a “Leninist” and a “Communist-fronter.”

B. Problems Created by the Fault Standard

*New York Times* was heralded as opening a new era of press freedoms. Twenty-five years later critics began to claim that, far from a judicial masterpiece, the Court created a monster. The Annenberg Panel is not the first group to call current libel law a failure, but is merely the latest in a long chorus. The problem,
most critics agree, is that libel suits now center, not on the veracity
of the statement, but on the defendants' state of mind when it was
made.23 The prosecution and defense of libel suits under this re-
gime is much more expensive than where the truth of the state-
ment is the sole issue. There remains a strong incentive, however,
to sue despite these high costs and the high burden imposed by the
fault standard. Although plaintiffs rarely win,24 those who do win
big. According to one study of cases ending in 1984, the average
jury award to victorious plaintiffs is roughly $80,000.25 A sizeable
damage award could shut down all but the wealthiest media out-
lets.26 Additionally, these big payoffs no doubt encourage others
who feel defamed to hire an attorney on contingent fee27 to file a
big-money lawsuit.28

Thus the current system is one, critics say, in which neither
plaintiffs nor defendants can call themselves winners. An oft-cited
example of this is Sharon v Time, Inc.29 In 1984, Time magazine
reported that Sharon, who was at the time Israel's defense minis-
ter, had approved the 1982 massacre of Palestinians in a Beirut
refugee camp. Sharon sued for $50 million. In an unusual move,
the trial judge instructed the jury to return a special verdict. The
jury determined that Time's report was false and defamatory, but
that Sharon had failed to prove actual malice. For all his time and
money, not to mention his proof that Time badly defamed him,
Sharon came up empty-handed—but claimed vindication nonethe-
less. Time came up with an equally weak claim to victory, spending

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23 According to one study, nearly 90 percent of libel suits turn on the issue of negli-
gence or malice. John Soloski, The Study and the Libel Plaintiff: Who Sues for Libel?, 71
Iowa L Rev 217, 218 (1985). Soloski and two other researchers later published the results of
this study in a book. See Randall P. Bezanson, Gilbert Cranberg and John Soloski, Libel
24 In the Iowa Study survey group, media defendants were ultimately successful in 83
percent of all libel suits finally resolved. Iowa Study at 127.
25 Id at 153.
26 See Green v Alton Telegraph Printing Co., 107 Ill App 3d 755, 438 NE2d 203 (1982),
in which a small paper filed for bankruptcy when faced with a $9.2 million libel verdict.
Amazingly, the libel occurred in an internal memorandum and not on the pages of the
newspaper.
27 Approximately 80 percent of libel plaintiffs have attorneys working on a contingency
fee basis. Randall P. Bezanson, Libel Law and the Realities of Litigation: Setting the Rec-
28 Lois G. Forer, A Chilling Effect: The Mounting Threat of Libel and Invasion of
Privacy Actions to the First Amendment 37 (Norton, 1987). Judge Forer was an Annenberg
panelist.
29 Various motions made during this jury trial are reported at 575 F Supp 1162 (SDNY
1983); 599 F Supp 538 (SDNY 1984); and 609 F Supp 1291 (SDNY 1984).
millions on its defense and suffering the embarrassing exposure of its shoddy reporting and editing procedures.\textsuperscript{30} Citing cases such as \textit{Sharon}, critics of current libel law, including the Annenberg panel, argued that libel cases should be less about money—multi-million-dollar legal bills and damage verdicts—and more about injured reputations. Specifically, they argue that libel plaintiffs are far more interested in a judicial determination that they were defamed than in winning money damages. This presumption is the thesis of the Iowa Libel Research Project, an extensive study of libel and privacy suits filed between 1974 and 1984.\textsuperscript{31}

The Iowa Study was based on interviews with libel plaintiffs and media defendants as well as surveys of newspapers. Only 21.9 percent of the libel plaintiffs interviewed said they were interested in winning money damages; the others said they only wanted their reputations restored (30 percent), to deter publication of similar stories in the future (18.7 percent), or punish or take revenge on the defendant (29.4 percent).\textsuperscript{32} Needless to say, some commentators are skeptical of the study's conclusion that libel plaintiffs are generally disinterested in money damages.\textsuperscript{33} The Annenberg panel, however, was convinced that libel plaintiffs as a group would prefer the brevity, economy and easier burden of proof of a no-fault, no-damages declaratory judgment action.

\section*{II. The Components of the Annenberg Proposal}

The Annenberg Proposal is the result of the Libel Reform Project at Northwestern University. The eleven-member panel\textsuperscript{34}
released a libel reform study and accompanying model statute in October 1988. Its guiding hypothesis was that modern libel law does not work: "Libel suits tend to drag on interminably, are enormously costly for both sides and very seldom clearly resolve what ought to be the heart of the matter: the truth or falsity of what was published." Although largely an amalgamation of libel reforms proposed throughout the 1980s, the Annenberg Proposal has received the most public attention. The report has already had some impact: its model statute was introduced as a bill in the Connecticut legislature in early 1989. And the California Supreme Court cited the proposal in a recent case as indicative of public sentiment for libel reform.

The proposal has three stages. The first requires the alleged libel victim to request within 30 days of publication a retraction or an opportunity to reply. This request is a prerequisite to any suit. The defendant can bar any legal action by complying with the request, an option currently unavailable in any state. Retractions

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38 Id at 7.


40 Annenberg Proposal at 15-16 (cited in note 6).

41 Thirty-three states have some sort of retraction statute on their books, generally providing for mitigation of damages if there is a retraction or reply. No state has a statute that permits a retraction or reply to bar a plaintiff's suit. Bruce W. Sanford, Libel and Privacy: The Prevention and Defense of Litigation §§ 12.3.1 to 12.3.4 (Prentice Hall, 1985 & Supp 1987).
and replies must be reasonably calculated to reach the same audience as did the alleged libel.\textsuperscript{42}

The proposal's second stage accounts for the most substantive reform. Should the retraction/reply stage fail and a suit be filed, either the plaintiff or defendant can unilaterally force the suit into a no-fault, no-damages declaratory judgment proceeding, where the only issue is whether the statement was true or false.\textsuperscript{43} The loser of this action pays only the winner's attorney fees.\textsuperscript{44} Also, a losing defendant is under no obligation to print the result.

The third stage allows a traditional suit for damages in the unlikely event that a defendant agrees to that kind of liability exposure. Here, too, the proposal works significant reforms. Punitive damages would be eliminated, and the plaintiff would be awarded only actual damages.\textsuperscript{45} Finally, the proposal broadens the types of privileged material which can be printed or broadcast without fear of being sued.\textsuperscript{46}

III. \textbf{THE ANNENBERG PROPOSAL IS CONSISTENT WITH THE FIRST AMENDMENT}

A. The No-Fault Declaratory Judgment Action Reduces the Chilling Effect of Libel Damage Awards

On its face, the no-fault declaratory judgment action appears unconstitutional. \textit{New York Times} and \textit{Gertz} established the rule that, under the First Amendment, no plaintiff may win a libel case against the media without showing that the defendant acted negligently or worse. The Annenberg Proposal, by creating no-fault declaratory judgment actions, appears not to follow this rule. A more detailed analysis, however, shows that the initial observation of unconstitutionality is misplaced.

The Annenberg panelists and others who support similar declaratory judgment schemes argue primarily that the elimination of

\textsuperscript{42} \textit{Annenberg Proposal} at 16.
\textsuperscript{43} \textit{Id} at 11.
\textsuperscript{44} \textit{Id} at 18.
\textsuperscript{45} \textit{Id} at 17.
\textsuperscript{46} See note 10 for a discussion of common law reporting privileges. The Annenberg Proposal maintains the absolute privilege for reporting official matters and includes as well a broad "neutral reportage" privilege that prevents any action when the statement involves "matters of public interest or concern made by persons or entities other than the defendant if the persons or entities who made the statements are identified and the statements are accurately reported." \textit{Annenberg Proposal} at 17.

The Annenberg Proposal also eliminates the common law conditional privileges in declaratory judgment actions, because they would require a showing of fault. \textit{Id}. 
libel damages would eliminate the "chilling effect" that inspired
the creation of the fault standard. That is, if plaintiffs give up
any claim for damages and ask only for a judicial determination of
truth, defendants no longer need the protection *New York Times*
and *Gertz* provide from crushing damage verdicts. This, the propo-
nents argue, is what libel plaintiffs want in the first place.

A possible objection to this argument is that the Annenberg
Proposal underestimates the "chilling effect" of libel defendants' legal bills. Under the current system, legal fees account for 80 per-
cent of defendants' libel costs; damage awards and incidental ex-
penses comprise the remaining 20 percent. Moreover, libel de-
fense costs have skyrocketed. By one account, the cost of the
average suit has risen from about $20,000 in the 1970s to as high as
$250,000 in the mid-1980s. Legal costs in individual suits may
have gone as high as $10 million, a chilling sum even if the defend-
ant ultimately prevails.

Whether a [libel] suit is settled, won, or lost, the legal
fees alone can be chilling. From the media's perspective, the "big chill" in libel litigation comes more from legal fees than from jury verdicts—for most jury verdicts are
overturned on appeal, while the legal bills come
anyway.

Indeed, the chilling effect of legal fees alone was part of the
Court's rationale in *New York Times* for eliminating strict liability
for the defamation of public officials. It is inaccurate, then, to
isolate damage verdicts as the sole component of the "chilling ef-
fect" of libel suits.

It is not clear, however, what effect the Annenberg Proposal
would have on libel defense bills. Certainly, the cost per case would

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47 *Annenberg Proposal* at 9-10; Franklin, 74 Cal L Rev at 820 (cited in note 36); Leval,
101 Harv L Rev at 1289-90 (cited in note 18).
48 See text accompanying note 31.
49 Smolla, *Suing the Press* at 75 (cited in note 3).
51 Smolla, *Suing the Press* at 75 (referring to CBS's bills in its suit against William
Westmoreland, the American general who directed the Vietnam War. Westmoreland
claimed he had been defamed in a "60 Minutes" story. The case settled before trial when
Westmoreland's legal team ran out of money.).
52 Id at 74.
53 "Under such a rule [of strict liability for libel with only the defense of truth], would-
be critics of official conduct may be deterred from voicing their criticism, even though it is
believed to be true and even though it is in fact true, because of doubt whether it can be
proved in court or fear of the expense of having to do so." *New York Times*, 376 US at 279
(emphasis added).
decline. The declaratory judgment action would be less complex than the standard libel trial, because proving fault is the most significant and burdensome requirement of current libel law. Ex-

actly how much cheaper the Annenberg Proposal would make libel actions would vary from case to case. In some cases, the truth or falsity of the alleged libel would be a simple question. Similarly, some publishers may decline a vigorous defense absent the threat of a large damage verdict. In other cases, however, truth may be an extremely elusive, and thus costly, determination.

By lowering the cost of bringing a case and making it easier for plaintiffs to win, the declaratory judgment libel scheme might encourage more plaintiffs to sue. Therefore, any libel savings resulting from simpler trials might be partially offset, on aggregate, by the cost of defending a greater number of cases. The absence of any empirical evidence renders it unclear whether the aggregate libel defense bill will be lower, higher or the same. Certainly any libel reforms that impose costs on libel defendants exceeding those under the current system could make the press even more gun-shy, and would thus be constitutionally suspect.

Despite the changes that would undoubtedly occur in the allo-
cration of expenses for libel suits, it seems likely that the no-fault declaratory judgment action would reduce the overall chilling effect about which the New York Times court was concerned. The argument here is that the chilling effect of libel law correlates with the cost per case of libel suits and not with aggregate libel costs. That is, the chilling effect of libel law is not measured by how much libel defendants spend each year defending suits and, in some cases, paying judgments; instead, the chilling effect is measured by the way the law affects individual editorial decisions. Libel lawyer Floyd Abrams gave a similar analysis to a Congressional committee in 1985. When asked to describe how current libel law chills the media, Abrams responded "]f]or the truth, I would say, is that far too often stories are killed because they aren't 'really good enough'—when those words really mean 'not really good enough in light of the legal risks.' That is the problem caused by libel law today."

According to the Iowa Study, 87.5 percent of libel suits focus on fault; only in the remaining 12.5 percent is the primary focus on truth and defamation. Iowa Study at 125 (cited in note 23). The authors of the study estimated that the fault standard required under New York Times and Gertz has reduced libel plaintiffs' success rates by as much as 50 percent. Id at 122-23.

Libel Law Hearings at 21 (cited in note 33).
Under either current law or the Annenberg Proposal, editorial decisions must consider, among other things, what it would cost were the story at issue to cause a libel suit. Currently, these defense costs are legal fees plus a possible verdict. Today, both are extraordinarily high. Under a system of no-fault, no-damages declaratory judgments, the cost per case would be greatly reduced. There would be no danger of a large verdict, and the cost of defending each case would, except in a small number of cases, be less because fault would not be an issue. Thus, under the Annenberg Proposal, the potential cost of each decision is greatly reduced; in simple terms, each editorial slip-up will cost less than it would under the current system. This, presumably, would make editors and publishers less fearful of publishing stories—exactly the principle of “uninhibited, robust, and wide-open” public discourse espoused in *New York Times.* Therefore, this argument goes, even if the aggregate libel defense bill remained the same or increased under the Annenberg Proposal, there would be an offsetting increase in press freedom resulting from the decreased monetary risk that would accompany each decision.

Proponents of declaratory judgments for libel suits also offer default as an option for defendants who, even in the absence of damage verdicts, would remain chilled by their own legal fees plus those of any plaintiff who successfully proves falsity. The typical scenario involves a small-town publisher faced with a factually complex libel action. Although confident of a conceivably defamatory story’s accuracy, the publisher nonetheless cannot afford to defend even a no-damages action. As a result, the publisher defaults by declining to print the story and perhaps explains why he or she did so in an article or editorial.

Default, however, is a troublesome option. Courts and commentators have long understood that complete “truth” in news stories is an impossible dream. A plaintiff with a grudge against a newspaper—stemming, say, from the paper’s editorial policy—could invariably find some inconsequential errors to complain about and file one spurious suit after another. A newspaper too poor to defend itself would be forced to default and inflict damage to its own reputation, no matter how diligently it defended itself in print.

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57 Franklin, 74 Cal L Rev at 821 (cited in note 36); Leval, 101 Harv L Rev at 1296 (cited in note 18).
58 Franklin, 74 Cal L Rev at 821.
A further benefit from the reduced costs of individual decisions to publish would be the reduced importance of lawyers to the editorial process. Under the current system, lawyers have increasingly become involved in newsroom decisions as a way to nip expensive libel suits in the bud.69 This relatively recent phenomenon would make a traditional journalist cringe,60 as lawyers undoubt edly err on the side of caution. Again, if each editorial decision carried less risk, there would be less need to subject stories to legal review prior to publication, and, consequently, less editorial interference by lawyers. Although the Supreme Court has done little to end the proliferation of newsroom lawyers,61 it has nonetheless recognized that outside interference with editorial decisions can be constitutionally troublesome.62

B. The No-Fault Declaratory Judgment Action Does Not Violate the First Amendment by Increasing the Government’s Role in Determining “Truth”

The Annenberg Proposal provokes a separate First Amendment question: would declaratory judgment libel actions put the government in a role inconsistent with traditional or modern free press values? Specifically, when the government provides truth as the remedy of vindication, does the government then have an unconstitutional degree of “truth-making” in the normal discourse of society?

Initially, the Annenberg Proposal raises no constitutional problems in this respect. After all, the trier of fact in declaratory judgment libel actions has a duty identical to that of judges and

69 Forer, A Chilling Effect at 31 (cited in note 28).
60 See, for example, Steve Weinberg, The Anderson File, Columbia Journalism Rev 35, 39 (Nov/Dec 1989) (“The biggest change in [Jack Anderson’s] operation is one that, sadly, puts him in the mainstream. As Anderson explained in a recent interview, every column is now approved by lawyers before dissemination. . . . Drew Pearson, who reveled when a libel suit came along and refused to carry libel insurance, must be spinning in his grave.”).
61 In fact, the Court was responsible for putting lawyers in the newsroom. In Herbert v Lando, 441 US 153 (1979), the Court held that attorneys for libel plaintiffs could conduct discovery of the editorial processes, including notes and memos, and discussions among reporters and editors, that preceded the alleged libel. Id at 175.
62 See Miami Herald Publishing Co. v Tornillo, 418 US 241, 258 (1974), where the Court held unconstitutional a Florida law requiring newspapers that had criticized politicians to offer reply space. The Court ruled that allowing outsiders to write their own stories would unduly interfere with the paper’s editorial processes and thus would deter the media from criticizing politicians in the first place. “Faced with penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the [reply] statute, editors might well conclude that the safe course is to avoid controversy. Therefore . . . political and electoral coverage would be blunted or reduced.” Id at 257.
juries under common law libel—to determine whether the material statement at issue was false and defamatory. But two important distinctions between the proposed system and the common law force an independent constitutional evaluation of the Annenberg Proposal.

First, one can expect a much broader use of the new system than the current one. Although the magnitude of the caseload under a declaratory judgment is speculative, it seems logical that, given both the return to no-fault libel and the extent to which the media now permeates our society, the number of suits will be much higher than in the pre-*New York Times* days. Conceivably, these declaratory judgments could become so popular as to require a sort of small-claims court for defamation cases.

Second, there is a fundamental difference in remedies between the proposed system and the common law of libel. Under the common law, the judge's or jury's determination of truth was a means to a damage verdict. In contrast, the Annenberg Proposal envisions "truth" as the end—that is, the remedy itself. Zechariah Chafee, discussing libel reform more than 40 years ago, noted this distinction: "The law does not enforce accuracy for its own sake. It does sometimes determine the issue of truth in damage suits for libel, but only as an incident to the main purpose of redressing injuries suffered by individuals." Therefore, rather than be viewed simply as a return to the common law system, the declaratory judgment for libel should be analyzed as a new animal. To do so requires a consideration of what the First Amendment contemplates as a permissible role for the government. This is neither an easy task nor one subject to conclusive determination.

The broadest—and perhaps most unworkable—free speech/press theory is the "marketplace of ideas." Enunciated three centuries ago by John Milton, and most notably restated by Oliver Wendell Holmes, this interpretation presumes that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." Under such a theory, the Annenberg Proposal would surely be problematic, as "truth" would not win

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* See part III.A of this Comment.
* Chafee, *Freedom of Speech and Press* at 32 (cited in note 5) (quoting John Milton's *Areopagitica*, published in 1644: "Let [Truth] and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter.").
* *Abrams v United States*, 250 US 616, 630 (1919) (Holmes dissenting).
out on its own. Instead, after going through certain legally prescribed procedures, the "truth" that triumphed would do so upon the determination by a state organ, the courts. The "marketplace of ideas," however, is not a complete First Amendment theory, for there appears little dispute that society needs some protection from false and distortive speech.67

The question, then, is not whether the government must sit on the sidelines, but rather the degree to which government may interfere with freedom of the press. Centuries of libel law are evidence that the government has a legitimate interest in accuracy or, more specifically, in inaccuracies that harm its citizens.68 The Annenberg Proposal could be a reasonable method of regulating this interest, much like, for example, the Federal Communications Act is a reasonable method of keeping the airwaves uncluttered.69

The danger in such regulations is that they give the government control over the "quality" of speech.70 The Annenberg Proposal is problematic in this respect. Truth does not lend itself to easy determination, particularly when the means of discovering truth is a court case. As Chafee noted, "[l]itigation can settle disputes; it cannot settle truth.... We must always be careful not to assume that the findings of a tribunal on a controversial issue are THE TRUTH."71 A number of observers, including at least two Annenberg panelists, have recognized the difficulty of determining

67 See, for example, C. Edwin Baker, Scope of the First Amendment Freedom of Speech, 25 UCLA L Rev 964, 976 (1978) (The marketplace theory "requires that people be able to use their rational capacities to eliminate distortion caused by the form and frequency of message presentation.... This assumption cannot be accepted. Emotional or 'irrational' appeals have great impact.").


68 See Rosenblatt v Baer, 383 US 75, 86 (1966) ("Society has a pervasive and strong interest in preventing and redressing attacks upon reputation. But... there is tension between this interest and the values nurtured by the First and Fourteenth Amendments.").

69 See 47 USC § 151 (1988), noting the government's interest in "a rapid, efficient, Nation-wide and world-wide communications system."

The unique nature of the broadcast media perhaps lends itself to more of this type of procedural regulation. The Court has allowed more substantive interference with the electronic media than with the traditional press. For a discussion of this issue, see William W. Van Alstyne, Interpretations of the First Amendment 73-77 (Duke University Press, 1984).

70 Chafee, 2 Government and Mass Communications at 678-89 (cited in note 64).

71 Chafee, 1 Government and Mass Communications at 173 (emphasis in original).
the "truth" in some libel suits. Nor has the Court failed to take notice of this problem; it recognized in New York Times that determining whether or not a news story was true was a difficult and uneasy role for courts.

The question of how effectively truth can be determined is less important than who is doing it. This is where the Annenberg Proposal is in the greatest danger of running afoul of the First Amendment. In rewriting the law of libel, the Court in New York Times found strict liability libel suits by public officials inconsistent with "the central meaning of the First Amendment." Thus, whatever its origins, the First Amendment could never again tolerate prohibitions against criticism of public officials and government policy. Even those who offer restrictive views of free speech concede that protection of political speech is the purpose of the First Amendment.

In line with this theory, any system where the government is given the role of determining the official version of the "truth" would be troublesome. A government with its hands on the controls of "truth" has at its disposal the tools to manipulate the flow of important information. In libel cases, the problem is most acute when disputes involve public officials. The danger comes from having the government adjudicate claims of inaccuracy made

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72 Forer has said any test of truth should demand only "substantial accuracy." Forer, A Chilling Effect at 340 (cited in note 28). Panelist Sandra S. Baron, an NBC lawyer, said in commentary included in the report: "Indeed, I remain skeptical that any system of libel laws that depends on judicial determinations of the often-elusive concept of truth is preferable to leaving the resolution of public disputes to public forums." Annenberg Proposal at 27 (cited in note 6).

73 "[C]ourts have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars." New York Times, 376 US at 279.

74 Id at 273.

75 Constitutional historian Leonard Levy has argued that the Framers never intended the First Amendment to proscribe seditious libel, and that the doctrine of press freedoms as protecting criticism of public officials and policy did not develop until after the passage and retraction of the Sedition Act of 1798. "[T]here is not evidence to warrant the belief . . . that the Framers possessed the ultimate wisdom and best insights on the meaning of freedom of expression. What they said is far more important than what they meant." Leonard Levy, Emergence of a Free Press 349 (Oxford University Press, 1985).

76 Kalven, 1964 Sup Ct Rev at 209 (cited in note 12) ("The touchstone of the First Amendment has become the abolition of seditious libel and what that implies about the function of free speech on public issues in American democracy.").


78 Chafee, 1 Government and Mass Communications at 12 (cited in note 64).
by its own members. That is, every time such a case occurred, a government organ—the court, and in many cases a single judge—would decide whether a statement made by a private citizen about a government official was an acceptable version of the truth. Such claims arise surprisingly often. In the Iowa study, 56.3 percent of all libel suits against media defendants between 1974 and 1984 were filed by public officials or public figures.

The problem would be particularly troubling in a political context. An example would be a political candidate who sued for declaration of falsehood during a campaign in one of the few states where judges are appointed. One would certainly worry about the pressure on a judge who was up for reappointment to favor any plaintiff involved, directly or indirectly, with the appointment process. A similar concern would exist in states where judges are elected regarding their incentive to side either with each other or simply against unpopular newspapers or television stations. Both situations indicate ways in which the government could misuse its truth-determination role.

Overall, however, the problem of “government-as-truthmaker” may be more troubling in theory than in practice. A dangerous system of the government sitting in judgment of damaging statements about its own members is, for several reasons, an overly dramatic characterization of what a declaratory judgment system would produce. First, as noted earlier, the triers of fact in these cases would either be judges or jurors, who have the role of “truth determination” in all disputes. Second, this monolithic depiction of government is inconsistent with our system of separated powers, where

79 Justice Louis Brandeis, in his concurring opinion in Whitney v California, 274 US 357, 375 (1927), said that speech and press freedoms contemplated that the “discovery and spread of political truth” would be the function of individuals, not the government.
80 Iowa Study at 10 (cited in note 23).
81 According to 1989 figures, in seven states all or nearly all judges are appointed by the governor or legislature: California, Maine, New Hampshire, New Jersey, Rhode Island, South Carolina and Virginia. The Lawyer’s Almanac 1989 690-99 (Prentice Hall, 1989).
82 Thirty-two states elect some or all of their judges, in either partisan or non-partisan elections: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin. Id at 690-99.
83 Panel chair Rodney A. Smolla, in a recent article reiterating the arguments in favor of the Annenberg Proposal, responded similarly to the “government-as-truthmaker” argument by noting that, carried to its logical extreme, it would unravel all existing libel law, which at its root requires a determination of truth or falsity. Rodney A. Smolla and Michael J. Gaertner, The Annenberg Libel Reform Proposal: A Case for Enactment, 31 Wm & Mary L Rev 25, 55 (1989).
the different branches seem at least as likely to butt heads as to protect each other. It is not clear, for example, that a judge would be any more inclined to support fellow public officials than the newspaper upon which he or she depends for popularity. Thus, the system would be a far cry from the image of members of congress or presidents deciding their own disputes with the media. Additionally, even if such feared decisions were to occur, their consequences would be greatly mitigated, because there would be no damages to make the defendants feel the pain of varying from the official version of the truth. And finally, these concerns seem to presume a populace that cannot think for itself, that would accept without question the results of these declaratory judgment actions. In short, the type of "governmental truth-making" incident to declaratory judgment libel actions does not appear to be the type central to the First Amendment.

This point is illustrated by the facts of New York Times. Assume that the advertisement was entirely correct instead of just substantially so. Would a declaration by an Alabama judge or jury that the Times was wrong, and Sullivan was right, without the attendant damages, have created any danger? Probably not. It seems likely that few people, particularly the Times’s normal nationwide audience, would have believed the court. That is, Sullivan may have been vindicated in his own eyes and in the eyes of those sympathetic with his cause, but in few eyes beyond that. Thus, the danger of inherent to finding "political truths"—that the outcome will reflect the individual biases of the judge or jury members, and that the only version of the truth will be the official one—would exist more in theory than in practice. The decision itself would certainly not silence the media. Without the large damage verdict that accompanies decisions under current law, there would be little danger of self-censorship.

C. The Fee-Shifting Component of the Annenberg Proposal Does Not Impose a Damage Verdict Without Fault

The fee-shifting provision of the declaratory judgment action raises independent constitutional questions. The preliminary question is the propriety of fee-shifting. Fee-shifting, of course, is the exception rather than the rule in the American legal system.\(^{85}\)

\(^{84}\) Chafee, 1 Government and Mass Communications at 142 (cited in note 64).

\(^{85}\) In support of the American rule [against fee-shifting], it has been argued that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from
Courts are generally inclined to uphold statutory fee-shifting proposals, which exist in a number of areas. Thus, the provision in the Annenberg Proposal would likely be acceptable.

The Annenberg panel and proponents of similar plans contend that fee-shifting is essential to provide libel plaintiffs and defendants the proper incentives to settle cases by retraction or reply, and more importantly, to seek a no-fault, declaratory judgment rather than the traditional action for damages. In particular, they argue that without fee-shifting, less affluent plaintiffs may have no remedy against libel. Under the current system, a plaintiff with a decent case has no trouble finding a contingency-fee lawyer attracted by the potential of a big payoff. These same lawyers would presumably not be interested if no damages were available, although some commentators have argued that the high-profile nature of libel suits alone attracts lawyers. But generally speaking, without reimbursement of attorneys' fees, those plaintiffs unable to finance their own suits would essentially find themselves without any remedy.

The idea that libel plaintiffs who prefer vindication to damages should be entitled to enough money to cover legal fees is not without prominent supporters. The potential problem with fee-
shifting in declaratory judgment libel actions, however, is that it would, in effect, impose a damage award on unsuccessful defendants without a showing of fault. With fee-shifting, successful libel plaintiffs would get no compensation for their reputational injuries, but would recover legal fees "caused" by the suit. Under the current system, legal fees can equal or exceed the damage verdict. For example, William Tavoulareas won punitive damages against the Washington Post that equalled the $1.8 million he spent to bring his case.9

The simple nature of declaratory libel judgments would greatly lessen legal fees in most cases. Conceivably, there could be an extremely complex case, such as the Tavoulareas suit, where there would be no difference between making the defendant pay the plaintiff's legal fees and making the defendant pay a typical damage verdict. The shifting of unusually large legal fees would most likely occur, ironically, in high-profile suits involving public officials and public figures, the cases that inspired the Court's press protections in the first place. Under the Annenberg system, that money would be paid without a showing of fault. The infrequency of such a result, however, suggests that the fee-shifting aspect of the Annenberg Proposal would not likely cause constitutional problems.

IV. THE WISDOM OF THE NO-FAULT DECLARATORY JUDGMENT ACTION

Although the no-fault declaratory judgment action of the Annenberg Proposal is consistent with the First Amendment, the wisdom of such a reform is questionable on other grounds. If the structure of the Annenberg Proposal—in particular the retraction/reply provision and the no-fault, no-damages declaratory judgment action—works such a sensible compromise between plaintiff and defendant interests, if in the end it makes both sides better off, then why have not libel litigants worked out such a system on their own?

This argument assumes either that declaratory judgments are an option under the current libel law, or that libel litigants could contract into a dispute resolution system of their choosing. Several
commentators have argued that this is in fact the case. There is nothing in the law of declaratory judgments that prohibits such libel actions; more importantly, declaratory judgments logically advance the "remedial objectives" of libel law. A declaration of falsity is not only a component of the typical suit for damages, but plaintiffs are likely to consider such a declaration a significant part of their verdict. The common law recognized essentially this same action. A plaintiff could sue for nominal damages in an action "brought for the purpose of vindicating [his or her] character by a verdict of a jury that establishes the falsity of the defamatory matter."

The argument in favor of allowing the parties to contract into a no-fault, no-damages action focuses on the defendant's interests. As the beneficiary of libel law's constitutional protections, the defendant should be able to waive his rights at his choosing.

Declaratory judgments for libel, however, have not become a generally accepted alternative to trial. Nor have defendants foregone the protections of New York Times and Gertz when plaintiffs promise to forego any claims for damages. That the opposing parties to libel suits have retained the status quo is perhaps evidence that the assumptions underlying the Annenberg Proposal and the other plans—that plaintiffs would trade damages for vindication and defendants would trade damages for anything—are misguided. Indeed, news stories reporting on the Annenberg Proposal quoted a number of libel "players"—including plaintiff William Westmoreland, Judge Leval, and a number of prominent defense lawyers—as saying they found the proposal's trade-offs unappealing.

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93 Leval, 101 Harv L Rev at 1288 (cited in note 18); Note, Of Things to Come—The Actual Impact of Herbert v Lando and a Proposed National Correction Statute, 22 Harv J Leg 441, 477 (1985); Hulme, 30 Am U L Rev at 389-90 (cited in note 36).
94 The Federal Declaratory Judgment Act provides that federal courts "may declare the rights and other legal relations of any interested party seeking such a declaration, whether or not further relief is or could be sought," 28 USC § 2201 (1988). Similarly, the Uniform Declaratory Judgment Act ("UDJA"), law in 40 states, provides: "Courts of record within their respective jurisdictions shall have the power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed." UDJA § 1, Uniform Laws Annotated 109 (West, 1975).
95 Leval, 101 Harv L Rev at 1292.
96 Restatement (Second) of Torts § 620, comment a (1976).
97 Leval, 101 Harv L Rev at 1298.
98 See, for example, Guy Daust, 'No-fault' Libel Trials Recommended, Associated Press (Oct 17, 1989) (quoting libel lawyer Richard N. Winfield: "If I were a publisher, I wouldn't willingly trade constitutional protection for the illusion of some kind of expedited, low-cost dispute resolution process."); James Warren, Westmoreland, CBS Oppose Libel Plan, Chicago Tribune C5 (Feb 14, 1989) (reporting a Northwestern University forum discussion on
Furthermore, the no-fault declaratory judgment action, by lowering the cost per editorial decision, reduces the deterrent effect the current system has on the more irresponsible publishers. More simply, the Annenberg Proposal eliminates the deterrent value that tort damages have on harmful speech. The classic example is the supermarket tabloid that, unlike more traditional news organizations, is completely unconcerned with building a reputation for accuracy. Such a publication would be undeterred from printing intentionally (or at least recklessly) harmful speech.\footnote{For this reason Marc Franklin, one of the leading proponents of declaratory judgment libel actions, supports them only at the plaintiff's election: Letting defendants elect declaratory judgments “puts the power to publish intentionally false and defamatory statements with practical impunity into the hands of all media.” Franklin, 74 Cal L Rev at 845 (cited in note 36).}

The Annenberg Proposal also seems to prohibit a plaintiff in such an instance from bringing a non-libel intentional tort action. The proposal would disallow frequently used alternative causes of action, such as infliction of emotional distress and invasion of privacy, when “the real, underlying claim is that the plaintiff has been defamed by a false statement of fact.”\footnote{Annenberg Proposal at 12 (cited in note 6).} Although libel plaintiffs may prefer simple vindication to money damages,\footnote{See text accompanying notes 31-32.} they would no doubt prefer that the libel was never published in the first place. That is exactly what tort damages are designed to do.\footnote{Chafee, 1 Government and Mass Communications at 173, 174 (cited in note 64).}

Finally, one must question whether a change in the law of libel is currently necessary. Most of the libel reforms referred to earlier were written in the early and middle 1980s, the most recent peak of high-profile libel suits includes Westmoreland, Sharon and Tavoulareas, all of which occurred prior to 1985. Since then, the number of libel suits filed has declined significantly, prompting speculation that there is now a “chilling effect on potential plaintiffs.”\footnote{See sources cited in note 36.} In a recent article reiterating the rationale behind the Annenberg Proposal, the panel chair suggested that “the time for reform is never in the heat of the crisis, but after it, in the quiet before the storm.”\footnote{Albert Scardino, Libel Suits Wane, Press Study Finds, New York Times 52 (Dec 3, 1988) (reporting a 17 percent decline in libel suits against major newspapers.).} This argument notwithstanding, the absence

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\footnote{Smolla & Gaertner, 31 Wm & Mary L Rev at 48 (cited in note 83).}
of any obvious, pressing need for reform is probably responsible for the early conclusions that the Annenberg Proposal would not get enough political support to become law in the foreseeable future.

**Conclusion**

The Annenberg Proposal raises interesting First Amendment problems but none that would constitutionally derail it. The plan seems to achieve a return to common-law, no-fault libel, and correspondingly shifts the focus of defamation back to injured reputations, without raising the problems of self-censorship that motivated the Court in *New York Times* and *Gertz*. And although it gives the government the role of dispensing "truth" as a remedy, the Proposal does not appear to exceed the bounds of government involvement in freedom of the press.

Whether the reform is a wise one is a different matter. It ignores the beneficial aspects of libel damages, and rests on potentially faulty assumptions about what libel defendants and plaintiffs may want.