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John C. Martin
John.Martin@chicagounbound.edu

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The Role of Retraction in Defamation Suits

John C. Martint

In its *Proposal for the Reform of Libel Law*, the Libel Reform Project of the Annenberg Washington Program notes:

[I]n recent years we've heard an unremitting chorus of criticism about the present law of libel. The attacks have come from all quarters—from judges, academics, journalists, victims of libel, defendants in libel suits and attorneys for both defendants and plaintiffs. The current system does not work well for anyone.¹

The Project’s Libel Reform Act proposes a number of remedial measures, including a provision requiring plaintiffs to seek either the retraction of a defamatory statement or an opportunity to reply to charges before initiating suit. If the plaintiff fails to make a request, or if the defendant publishes a retraction, suit is barred.² The Libel Reform Project emphasizes that “the simplest, most efficient remedy for defamation is a prompt and reasonable retraction or reply.”³

In affording significance to the publication of a retraction in a subsequent defamation suit, the Annenberg Proposal merely builds upon existing law. Although a retraction does not completely exonerate the defamer unless published so soon after the defamation as to negative the utterance,⁴ retraction has traditionally been admissible both to demonstrate that the defendant’s defamatory publication was not malicious and to mitigate awards of compensatory damages.⁵

In suggesting that the publication of a retraction be an absolute bar to a suit for damages, the Annenberg Proposal does, however, significantly increase the stakes attached to retraction. In this

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¹ B.A. 1991, Yale University; J.D. Candidate 1994, University of Chicago.
³ Id at 15 (§ 3 of Libel Reform Act).
⁴ Id at 20 (Section-by-Section Analysis, § 3).
⁶ Id at 846.
respect, the Libel Reform Act reflects a modern trend. Although retraction has always been somewhat probative of malice, courts have increasingly come to regard retraction as dispositive disproof of malice. Similarly, while retraction has traditionally mitigated damages, state retraction statutes increasingly prevent plaintiffs from recovering whole categories of damages after publication of a retraction.

This Comment argues that the present trends in the law of retraction require reexamination. Part I of this Comment examines the significance attached to retraction, both at common law and in state retraction statutes, and notes the increased importance attached to retraction by recent legislation and case law. Part II considers the relationship between retraction, malice, and defamation damages, noting that the increased importance attached to retraction often overstates its actual value as probative evidence of malice or as a remedy for reputational harm. Part III seeks justification for this shift outside of the traditional concerns of defamation law by considering whether the modern emphasis on retraction might be justified as a means of controlling the high costs of libel litigation. The Comment concludes that an increased emphasis on retraction serves little purpose and suggests that the best way of addressing both traditional and modern concerns is to leave retraction in its customary role.

I. CURRENT LAW GOVERNING RETRACTIONS

A. Retraction and Malice

Traditionally, retraction has served as evidence of an absence of malice as revealed in both case law and state statutes. Similarly, a refusal to retract has sometimes been used to buttress allegations that a defendant published a defamatory article maliciously.

The evidentiary role of retraction became even more important after the Supreme Court's decision in New York Times Co. v

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* See Part I(A).
7 See Part I(B).
9 See, for example, Fessinger v El Paso Times Co., 154 SW 1171 (Tex Civ App 1913); O'Connor v Field, 266 App Div 121, 41 NYS2d 492 (1943).
10 Many of these state laws permitted retraction to rebut a statutory presumption of malice. See, for example, SD Cod Law § 20-11-8 (1979).
11 See, for example, Crane v Bennett, 177 NY 106, 69 NE 274 (1904); Reid v Nichols, 166 Ky 423, 179 SW 440 (Ky App 1915).
In New York Times, the Supreme Court determined that the First Amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." In Curtis Publishing Co. v Butts, the Court extended this requirement to suits brought by any public figure. Although the "actual malice" required by New York Times, a knowledge of falsity or a reckless indifference to truth, differs significantly from common law malice, which was akin to spite or ill will, courts have continued to consider retraction or its absence as evidence of malice.

In New York Times, the plaintiff, in accord with an Alabama statute, requested a retraction of an allegedly defamatory statement before filing suit. Although the Times did not print a retraction, the Court found the Times's refusal inadequate evidence of malice, noting that the newspaper had responded to the plaintiff's request by indicating its belief that the allegedly defamatory item could not be read as referring to the plaintiff. Significantly, however, the Court declined to rule on "whether or not a failure to retract may ever constitute [evidence of malice]."

In the absence of an answer to this question, courts have since proved willing to find the failure to retract probative of malice. Although some courts have held that a failure to retract does not establish actual malice, most authorities suggest that a failure to retract, in conjunction with other circumstances, may be used to establish the requisite level of malice.

A published retraction may also play an evidentiary role. Indeed, a defendant's publication of a correction may be of even

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13 Id at 279-80.
14 388 US 130 (1967).
15 Id at 155.
16 Robert D. Sack, Libel, Slander, and Related Problems V.5.1.1 at 211 (Practicing Law Institute, 1980).
18 Id at 286.
19 Id.
20 See, for example, Connelly v Northwest Publications, Inc., 448 NW2d 901, 905 (Minn App 1989).
21 Tavoulareas v Piro, 759 F2d 90, 132 (DC Cir 1985); Golden Bear Distributing Systems of Texas, Inc. v Chase Revel, Inc., 708 F2d 944, 950 (5th Cir 1983); Restatement (Second) of Torts § 580A and comment d (1977) ("Under certain circumstances evidence [of refusal] might be relevant in showing recklessness at the time the statement was published.").
greater significance than it was before New York Times. Although some courts follow the common law view that retraction may rebut a presumption of malice only in the totality of the circumstances, and thus require a finding of fact on questions of malice,\(^2\) other courts regard retraction as sufficiently probative of an absence of malice to warrant summary judgment in suits involving public figures.

For example, in *Hoffman v Washington Post Co.*,\(^3\) a former weightlifting coach brought suit against the *Washington Post* for publishing an article that implied that the coach had greatly enriched himself by selling worthless protein supplements. While accepting that the article itself was defamatory, the court granted the newspaper’s motion for summary judgment. The court found that “since the issue of actual malice focuses on the defendant’s state of mind . . . it is significant and tends to negate any inference of actual malice on the part of the Post Company that it published a retraction of the indisputably inaccurate portions of the . . . article in the next day’s edition.”\(^4\)

B. Retraction and Limitation of Damages: State Retraction Statutes

Traditionally, the retraction of a defamatory statement has served to mitigate damages.\(^5\) This general principle, although sometimes manifested in case law,\(^6\) is more frequently found in “retraction statutes” that expressly provide that the retraction of an alleged libel will limit the damages available to plaintiffs.\(^7\) These statutes, however, have varied significantly with time, with modern statutes providing more stringent caps on damages than older laws.

\(^2\) See *Kerwick v Orange County Publication Division of Ottaway Newspapers, Inc.*, 52 NY2d 625, 626, 420 NE2d 970 (1981) (finding that while retraction might be considered evidence of a lack of malice in certain instances, it “would not be sufficient as a matter of law for that purpose”). See also *Di Lorenzo v New York News, Inc.*, 81 AD2d 844, 848 (1981).

\(^3\) 433 F Supp 600 (D DC 1977), aff’d without opinion, 578 F2d 447 (DC Cir 1978).

\(^4\) Id at 605. Similarly, in *Zerangue v TSP Newspapers, Inc.*, 814 F2d 1066 (5th Cir 1987), the court noted that a retraction would have been sufficient to justify summary judgment on behalf of a libel defendant. Id at 1071. Retraction was ultimately insufficient in that case, however, because the defamatory article was republished by the defendant after the retraction was issued. Id at 1072.

\(^5\) *Sack, Libel, Slander* VIII.1 at 371 (cited in note 16).

\(^6\) See, for example, *O’Connor*, 266 App Div at 121.

\(^7\) *Sack, Libel, Slander* VIII.2 at 372 (cited in note 16).
1. Retraction and actual damages: the traditional approach.

The oldest and most common retraction statutes are of two types. The first type simply codifies the common law presumption in its most general terms. A 1927 Texas statute, for example, provides simply:

In any action for libel, in determining the extent and source of actual damage and in mitigation of exemplary or punitive damage, the defendant may give in evidence, if specially pleaded, all material facts and circumstances surrounding such claim of damage . . . and any public apology, correction or retraction made and published by him of the libel complained of . . . .

The second type of statute requires a plaintiff to notify the defendant of the alleged defamatory publication before suit and limits recovery to "actual damages" if a retraction is published. For example, the Connecticut retraction statute provides:

In any action for a libel . . . unless the plaintiff proves either malice in fact or that the defendant, after having been requested by him in writing to retract the libelous charge, in as public a manner as that in which it was made, failed to do so within a reasonable time, he shall recover nothing but such actual damages as he may have specially alleged and proved.

This second type of statute often places conditions on its damage limitation. For example, some statutes, while following the formula of the Connecticut statute, provide specific definitions of "reasonable time" or "as public a manner." Additionally, these retraction statutes often apply only to limited categories of defen-

28 Tex Rev Civ Stat Ann § 5431 (Vernon 1991). See also La Civ Code Ann § 2315.1 (West 1990) ("any retraction or correction made by defendant must be considered in mitigation of any damages to be awarded"); Va Code § 8.01-48 (1992) ("the defendant . . . may introduce in evidence in mitigation of general and punitive damages, or either, but not of actual pecuniary damages . . . that apology or retraction . . . was made with reasonable promptness and fairness"); W Va Code § 57-2-4 (1992) ("the defendant . . . may give in evidence in mitigation of damages that he made or offered an apology to the plaintiff for such defamation").


30 See, for example, Idaho Code § 6-712 (1990) (retraction within three weeks of notice); NC Gen Stat § 99-2 (1991) (retraction within ten days of notice).

31 See, for example, Okla Stat Ann § 1446a (West 1989) (retraction must appear under heading "RETRACTION" in eighteen point or larger type on same page and same type as original article); Utah Code Ann § 45-2-1 (1988) (retraction must appear in same type and in same position on same page).
Moreover, many statutes require that the defamatory statement involve neither knowing falsity nor malice.\footnote{32} All of the statutes in this second category, however, uniformly require that the awards be limited to "actual damage." \textit{Neafie v Hoboken Printing and Publishing Co.}\footnote{34} was among the earliest cases defining this term. While accepting that "actual damages" at common law often excluded "all allowance of compensation for the general injury to plaintiff's reputation," the \textit{Neafie} court found that adopting such a construction violated the New Jersey Constitution.\footnote{35} The court reasoned that "the right of a person to be secure in his reputation against unwarranted attacks such as slanders and libels" is a part of the right of pursuing and enjoying safety and happiness guaranteed by the state constitution.\footnote{36} For over fifty years, every court construing "actual damage" limitations used similar reasoning, ensuring that after a retraction had been published, "actual damages" would exclude only exemplary or punitive damages.\footnote{37}

2. More serious limitation of awards: California's section 48a and \textit{Werner v Southern California Associated Newspapers.}

In 1945, California enacted section 48a of its civil code. This section provides that "[i]n any action for damages for the publica-

\footnote{32\footnote{33} Some statutes apply to all defamers. See, for example, Neb Rev Stat § 25-840.01 (1988); Mich Comp Laws Ann § 600.2911 (West 1992). Others protect only certain classes of media defendants. See Minn Stat Ann § 548.06 (West 1988) (newspapers only); NJ Stat Ann § 2A:43-2 (West 1991) (newspapers, magazines, serials or other publications). See also \textit{Williamson v Lucas}, 171 Ga App 695, 320 SE2d 800, 802 (1984) (declining to extend Georgia retraction statute to radio and television broadcasts).

\footnote{33\footnote{34} See, for example, Iowa Code Ann § 659.2 (West 1988); Ga Code Ann § 105-720 (Michie 1991). Other statutes have no such requirement for knowing falsity or malice. See, for example, Idaho Code § 6-712 (1990); Wis Stat Ann § 895.05 (West 1990). Yet other statutes require that the original statement be published with a reasonable belief as to its truthfulness. SD Cod Law § 20-11-7 (1989). Because the Supreme Court has held that the First Amendment prohibits the imposition of defamation liability without fault, however, this requirement is largely superfluous. See \textit{Gertz v Robert Welch, Inc.}, 418 US 323, 347 (1974); Sack, \textit{Libel, Slander VIII.2.1} at 373 (cited in note 16).

\footnote{34\footnote{35} 75 NJ L 564, 68 A 146 (1907).

\footnote{35\footnote{36} 75 NJ L at 567.

\footnote{36} Id.

\footnote{37\footnote{38} See, for example, \textit{Ellis v Brockton Publishing Co.}, 198 Mass 538, 84 NE 1018, 1020 (1908); \textit{McGee v Baumgartner}, 121 Mich 287, 80 NW 21, 22 (1899); \textit{Comer v Age-Herald Publishing Co.}, 151 Ala 613, 44 So 673 (1907); \textit{Meyerle v Pioneer Publishing Co.}, 45 ND 568, 178 NW 792 (1920); \textit{Osborn v Leach}, 135 NC 628, 47 SE 811 (1904); \textit{Ross v Gore}, 48 S2d 412, 414 (Fla 1951). While some cases allowed retraction to mitigate the actual damages awarded, this limitation still guaranteed that intangible injuries to reputation or feelings would be considered by the jury. See, for example, \textit{White v Sun Publishing Co.}, 164 Ind 426, 73 NE 890 (1905).}
tion of a libel in a newspaper, or of a slander by radio broadcast, plaintiff shall recover no more than special damages unless a correc-
tion be demanded and be not published or broadcast. The statute defines special damages as "all damages which plaintiff al-
leges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts
of money as the plaintiff alleges and proves he has expended as a result of the alleged libel." The statute distinguishes such dam-
ages from "general damages," which it defines as "damages for loss of reputation, shame, mortification, and hurt feelings."

Section 48a's provision for special damages marked a significant departure from prior retraction law. Because awards of special
damages limit recovery to out-of-pocket expenses and do not in-
clude injuries to a plaintiff's feelings or reputation, special dam-
ages are considerably less likely to involve large sums of money. Moreover, special damages are harder to prove than "actual dam-
ages" largely because of the difficulty of proving that a defama-
tory publication is solely responsible for a particular loss. Finally,
although other state retraction statutes had earlier attempted to limit recovery to special damages, state courts interpreting those statutes had, in practice, avoided that limitation.

Section 48a's innovative damage cap was unsuccessfully challenged. In Werner v Southern California Associated Newspa-
"pers, the plaintiff brought suit after the defendant newspaper falsely reported that he had been convicted of a felony and sen-
tenced to prison. The complaint alleged that the newspaper knew or should have known of this error and that the defendant pub-
lished the report with the intent of defaming the plaintiff. The lower court sustained a demurrer, noting that the plaintiff had not

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39 Id at § 48a(4)(b).
40 Id at § 48a(4)(a).
41 Bruce W. Sanford, Libel and Privacy § 12.3.2 at 593 (Prentice Hall Law & Business, 2d ed 1991); Sack, Libel, Slander VIII.2.9 at 383 (cited in note 16).
42 Sanford, Libel and Privacy § 12.3.2 at 593 (cited in note 41); Sack, Libel, Slander VIII.2.9 at 383 (cited in note 16).
44 Such statutes had required, as a prerequisite to limited damages, that the defamer have acted in "good faith," a term which courts construed as requiring an absence of any fault, including negligence. Because the California provision contained no similar "good faith" requirement, it severely restricted a plaintiff's ability to collect huge defamation judgments. See also Thorson v Albert Lee Publishing, 251 NW 177 (Minn 1933); Moore v Stevens, 27 Conn 13 (1858).
45 35 Cal 2d 121, 216 P2d 825 (1950).
requested a retraction under section 48a and had not contended that he suffered any special damages as a result of publication. The plaintiff challenged the statute, arguing that the California Constitution’s provision that “[e]very citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right,” required the press to be responsible for damages caused by libels. The plaintiff also argued that the statute’s damage cap violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment by denying defamation plaintiffs the right to recover reputational damages and by protecting only a limited class of media defendants.

The California Supreme Court upheld the statute. The court held that reading California’s free speech clause to prohibit any change in liability “would result in freezing the law of defamation as it was when the constitutional provision was originally adopted in 1849.” This would be inconsistent with prior legislative enactments that had expanded the scope of libel privileges. The court further found that the retraction provisions of section 48 “provide[d] a reasonable substitute for general damages” in light of the danger of excessive damage recoveries and the public interest in the free dissemination of news, and thus did not violate the Due Process Clause. Finally, the court upheld the statute against the plaintiff’s equal protection challenge, finding that the state legislature could reasonably have concluded either that suits against newspapers and radio stations presented the greatest danger to free expression or that newspaper and radio retractions were more likely to provide redress to damaged reputations than would retractions by private parties.

The Werner decision encouraged the promulgation of retraction statutes that severely restrict damages. Indeed, five states subsequently enacted statutes that, like section 48a, limit libel

46 216 P2d at 826-27.
47 Cal Const, Art I, § 9.
48 Werner, 216 P2d at 827.
49 Id at 828.
50 Id at 831.
51 Id at 827.
52 216 P2d at 828.
53 Id.
54 Id at 832.
55 Id at 833.
plaintiffs' post-retraction recovery to special damages. More commonly, however, states enacted statutes that, while limiting recovery, condition the limitation on an absence of actual malice. Courts interpreting such statutes have relied heavily on Werner's finding that retraction can function as a reasonable remedy for the harms of defamation, and have, with one exception, upheld these statutes against constitutional challenges. Moreover, although contemporary commentators sharply criticized Werner, section 48a has served as a model for at least two recently proposed national correction statutes.

II. REEXAMINING THE REASONS FOR RETRACTION LAW

As Part I demonstrates, current defamation law assigns importance to retraction in two contexts. First, courts view retraction as evidence of "good faith" or malice. Second, state retraction laws contain recovery by limiting recoverable damages. Modern developments in the law have increased the legal significance of retraction in these contexts by assigning it greater weight as evidence of malice and enlarging the categories of damages disallowed after a retraction has been published. Close scrutiny of retraction's potential utility reveals, however, that this trend of attaching increased weight to retraction often defeats the limited traditional goals of retraction.

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56 See Ariz Rev Stat Ann § 12-653.02 (West 1979); Neb Rev Stat § 25-840.01 (1988); ND Cent Code § 14-02-08 (1990); Or Rev Stat §§ 30.160-30.175 (1991). See also Holden v Pioneer Broadcasting Co., 228 Or 405, 365 P2d 845, 848 n 3 (1961) (relying upon Werner to uphold similar Oregon statute, court noted that "the California Statute in question in the Werner case was interpreted as allowing retraction to limit recovery to special damages even where the defamation was malicious or reckless. It is not necessary for us to decide whether we would uphold a statute of this type.").

57 See, for example, Holden, 365 P2d at 851. The Arizona statute was the exception. See Boswell v Phoenix Newspapers, Inc., 152 Ariz 1, 730 P2d 178 (1985) (finding that Arizona retraction statute violated Article 18, section 6 of the Arizona Constitution, which provides that the right of action to recover damages shall never be abrogated).


59 See Note, An Alternative to the General Damage Award for Defamation, 20 Stan L Rev 504 (1968); Note, Of Things to Come—The Actual Impact of Herbert v Lando and a Proposed National Correction Statute, 22 Harv J Leg 442 (1985). Both suggest that correction statutes similar to section 48a should be enacted by Congress in order to avoid state constitutional challenges.
A. Retraction and Malice

The assumption that retraction can be equated with an absence of malice has two significant shortcomings. First, and most important, retraction law has failed to consider the implications of the redefinition of "malice" in *New York Times Co. v Sullivan*, in which the Supreme Court recharacterized malice in terms of awareness of the truth, rather than subjective motivation. Thus, although retraction might have indeed indicated an absence of "ill will" under the old regime, the possibility of honest disagreement about the truth of the allegedly defamatory utterance makes retraction a less reliable indicator of "knowing falsity" or of "reckless disregard" for the truth under the present regime.

Defendants often refuse to retract because of a sincere belief that the original story was accurate. Both traditional and modern libel law make allowance for this possibility by requiring that a failure to retract serve as evidence of malice only in light of surrounding circumstances. Unfortunately, libel law today places an additional burden on the truthful or honestly mistaken publisher by attaching dispositive significance to the presence of a retraction. Because the presence of a retraction may serve to conclusively dispel any suspicion of malice, defendants who publish retractions reap the benefits of early dismissal of suit, while those who do not publish retractions face costly trials and a possible adverse judgment.

This failure to account for the possibility of honest mistake or disagreement makes it safer to insincerely declare oneself false rather than to adhere to one's genuine belief in the truth. This result is particularly ironic in light of the Supreme Court's goal in redefining "actual malice"—to strengthen the "profound national commitment to the principle that debate on public issues should be uninhibited and wide open." Instead of encouraging a defen-
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dant who has a reasonable belief in a story’s veracity to introduce it into public debate, attaching dispositive significance to retraction compels the withdrawal of challenged items.

Even if one accepts the pre-New York Times definition of “malice” as “ill-will,” however, a second problem remains. The notion that retraction indicates an absence of malice appears to rest on a simple cost-benefit analysis. Retraction represents a withdrawal of a charge by its accuser and an admission of error. Because such a withdrawal costs a media organization some credibility and embarrassment, a media defendant’s willingness to retract would seemingly indicate sincere regret over error.

This analysis, however, holds true only if the costs avoided by retraction do not outweigh the costs attached to such a retraction. Once retraction bars recovery by conclusively disproving malice (or if, under a retraction statute, retraction serves to curtail damages), retraction ceases to reliably indicate an absence of malice. For example, retraction may be motivated, not by regret for past error, but by a desire to reap the benefits of a favorable dismissal or a reduced defamation judgment. By reducing the costs of defamation, retraction may also reduce the deterrent effect of libel judgments and may effectively subsidize malicious defamation.

Courts have not yet fallen victim to this potential problem. Indeed, even the most retraction-friendly court might be willing to find malice in a pattern of repeated defamation and retraction. Nevertheless, most retraction laws implicitly recognize that their provisions do provide opportunities for malicious behavior. For example, the “good faith” requirement found in many statutes prevents defamation laws from being used to reduce the costs of malicious defamation. “Election clauses,” which specifically exempt statements made about political candidates within a few days of an

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69 Franklin, Libel Reform and Repeat Players at 179 (cited in note 63). See Part III for a more extensive analysis of the costs of retraction.

70 Dissenting in Werner, Justice Schauer of the California Supreme Court noted this problem. Justice Schauer took exception to the majority’s reasoning only insofar as it applied to deliberately false and malicious publications. 216 P2d at 843 (Schauer dissenting). Because section 48a prevented recovery of either punitive or general damages from defendants who retract their defamatory statements, the legislature effectively created a “license to defame,” allowing the defendant to escape all but the most minimal consequences of his actions by a retraction that “may be followed immediately by a new defamation” without loss of the exemption from damages. Id at 844. See also Note, 38 Cal L Rev at 961 n 56 (cited in note 59).

71 See note 33 and accompanying text.
election from the reach of retraction statutes, also recognize the potential for misuse of retraction statutes.\(^7\)

Equating retraction with an absence of malice is thus fundamentally flawed. If retraction leads to reduced judgments, a retraction is at least as likely to reveal a desire to avoid the costs of a defamation judgment as it is to demonstrate sincere regret for an honest mistake. Although this problem may exist whenever retraction serves to reduce the probability or amount of an adverse judgment, the modern tendency to accept retraction as dispositive of an absence of malice, or as a bar to recovery of all but the most minimal damages, would seem to reduce the probability that any given defendant retracts from pure regret.

B. Retraction and Damages

1. Does retraction "cure" defamation?

Supporters of modern trends in retraction law frequently point to retraction’s potential to repair the damage done by defamation.\(^7\) By providing incorrect information, defamation works as a fraud on the marketplace of ideas.\(^7\) Given that an individual’s reputation provides “a basis for inducing others to engage in market or nonmarket transactions” with the individual,\(^7\) this misinformation harms both the individual and third parties with whom the individual interacts. The individual is unfairly prevented from entering into transactions with others because of false reports which he can do nothing to prevent; third parties are injured because false information prevents them from entering into desirable transactions with the individual.

If defamation is solely an information problem, retraction would seem the perfect solution. Retraction remedies the problems created by defamatory statements by providing society with the correct information about an individual. Moreover, it does so in a

\(^7\) Effectively, these exceptions prevent a candidate from libeling his or her opponent before the election and then retracting after the vote to show “good faith” and to avoid punitive damage awards—buying office, in essence, at a reduced price. See, for example, Ariz Rev Stat Ann § 12-653.05 (West 1989); Iowa Code Ann § 659.4 (West 1988); SD Cod Law § 20-11-7 (1989).

\(^7\) See Note, 22 Harv J Leg at 490 (cited in note 60) (“retraction makes the defamation plaintiff whole”); Note, 20 Stan L Rev at 505 (cited in note 60) (retraction serves as better remedy than pecuniary awards).


way unavailable to the individual alone. As Judge Richard Posner points out, unequal access to the marketplace of ideas makes it difficult to leave the truth to the marketplace: "[H]ow do I compete with *Time* magazine if it libels me?" Retraction solves this problem by providing the libelled individual with *Time* magazine's voice. If damage to a victim's reputation can be completely repaired in this way, special damages, which compensate the individual for lost opportunities during the period of misinformation, should put the victim back in the same position in which he was before the defamation occurred.

This picture of retraction's utility, however, is impossible to square with that painted by the overwhelming majority of courts. Indeed, the common law's insistence that retraction should mitigate, rather than eliminate, damages appears rooted in a consistent belief that "the truth rarely catches up with a lie." In arguing against the mitigatory effect of retraction, one court noted:

Retractions are often dilatory, offensive and ineffective. The reluctance of the libeler to make a proper retraction promptly, or if made, to couch it in proper language, results in aggravating the injury resulting from the libel and increasing the harm. The failure to give a retraction sufficient prominence by placing it in an obscure part of the newspaper, or, when made, to phrase it in proper language, makes it worthless.

Retraction statutes generally avoid such extreme abuses by specifying the size and manner of sufficient retraction. The retraction must be substantially as prominent as the original statement and must represent an unequivocal withdrawal of the defamatory charge. Even the strictest requirements, however, cannot guarantee that a retraction will undo the harm caused by a defamatory statement. As the Supreme Court recognized, "[r]etractions are rarely 'hot' news and thus will rarely reach the same audience as the initial publication." Even when a retraction does reach the same audience as the defamatory publication, there is no way to guarantee that the retraction will have the desired effect; readers

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76 Id at 669.
77 Gertz, 418 US at 344 n 9.
79 See Keeton, ed, Prosser and Keeton on the Law of Torts § 116A at 846 (cited in note 4). See also notes 30-33 and accompanying text.
may assume that "where there is so much smoke, there must be some fire."\textsuperscript{81}

Thus, an increased emphasis on retraction will most likely result in a systematic undercompensation of plaintiffs. Statutes that eliminate compensation for all but special damages do not provide compensation for the harm caused by false information remaining in the marketplace after a retraction has been published. In sharp contrast, the traditional mitigation rule and statutes that allow recovery for damages to reputation permit a jury to tailor damage awards to the injury left unremedied by retraction.

2. \textit{Need retraction cure defamation?}

Assuming that retraction does not entirely cure the damage wrought by defamatory statements, it is unclear whether such damage is worth compensating. The uncertain nature of reputational damages might justify the modern limitation on libel damages. Indeed, cases upholding limitations on damages rarely rest upon the proposition that retraction serves as a complete remedy, but instead argue that "the harm to a plaintiff is likely to be irreparable either by way of money or through retraction,"\textsuperscript{82} or that retraction provides a "reasonable substitute" for money damages.\textsuperscript{83}

As one scholar noted, "in most libel litigation, the real sting of the libelous statements has nothing to do with money; the real damage is of a more intangible nature—the humiliation, shame, injured feelings, and sense of personal invasion that comes from a well-published lie."\textsuperscript{84}

This argument, however, has two problems. First, it implies that money does not cure "intangible" harms. Our modern tort system, however, awards damages for comparable intangible harms, most notably for pain and suffering.\textsuperscript{85} Second, damage to reputation may have real effects: "Reputation is not some lifeless abstraction, but the summation of all the possibilities for gainful interactions—economic, social and political—with others that are stripped away by false statements."\textsuperscript{86} While awards of special damages may compensate the plaintiff for demonstrable economic inju-

\begin{itemize}
  \item \textsuperscript{81} Werner, 216 P2d at 841 (Carter dissenting).
  \item \textsuperscript{82} \textit{Holden v Pioneer Broadcasting}, 228 Or 405, 365 P2d 845, 850 (1961).
  \item \textsuperscript{83} Werner, 216 P2d at 828.
  \item \textsuperscript{84} Rodney A. Smolla, \textit{Suing the Press} 108 (Oxford University Press, 1986).
  \item \textsuperscript{85} Id at 242.
  \item \textsuperscript{86} Epstein, 53 U Chi L Rev at 798 (cited in note 74).
\end{itemize}
ries, they will not compensate for the more subtle injury done to a person's reputation.  

Even this response, however, does not adequately rebut the challenge. Unquestionably, the most powerful justification for granting increased importance to retraction, despite its possible harmful effects, relies upon the special status of defamation law in the wake of *New York Times Co. v Sullivan*. In *New York Times Co.*, the Court found the lower court's imposition of tort liability an unconstitutional "chilling" of debate insofar as it made it possible for a good-faith critic of the government to be penalized for his criticism; in effect, *New York Times* recognized that if false statements are punished, true statements will not be made at all.  

These First Amendment issues suggest that, unlike in other areas of tort law, the proper concern in defamation law should not be with undercompensation of plaintiffs but with overrestriction of speech. As the Supreme Court recognized in *Gertz v Robert Welch, Inc.*:

> Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. . . . It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved.

*Gertz* also explicitly recognized that "[t]he need to avoid self-censorship by the news media is, however, not the only societal value at issue. . . . The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood." Thus, the ultimate goal of libel law must be to balance the competing claims of both individual reputation and free speech. Ultimately, the modern tendency to

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87 See notes 82-84 and accompanying text.  
88 376 US at 292.  
89 Epstein, 53 U Chi L Rev at 802 (cited in note 74).  
90 418 US at 323.  
91 Id at 349.  
92 Id at 341.
emphasize the curative aspects of retraction upsets this balance by
tending to produce future libels.

Investigation costs are justified by the greater assurance that a
given statement is true. Unfortunately, under laws that limit re-
covery, investigation costs may not be wise expenditures. While the
market may place some premium on correct information, it may
place a higher one on entertaining falsehoods. As one scholar notes,
"while, ideally, readers would honor quality, the circulation figures
of various journals suggest that audiences like to be entertained as
well as informed, and fiction is cheaper to produce than fact."94

The legal costs of inaccuracy are also uncertain. While litiga-
tion costs in libel suits are unusually high, chances of recovery are
unusually low. The result is a system that may provide insuffi-
cient incentives to prompt publishers to investigate stories before
printing. When retraction serves as a complete bar to reputational
damages, the problem is aggravated. If, in contrast, retraction only
serves to mitigate damages, the potential libel defendant has a
greater incentive to investigate or to take greater care before
publishing.

III. A Final Justification: Providing a More Satisfactory
Means of Resolving Defamation Disputes

Because increasing the weight attached to retraction both de-
creases the traditional evidentiary utility of retraction and leaves
defamation plaintiffs systematically undercompensated, justifica-
tion for this modern trend must be sought outside the purported
goals of libel law. The best alternative justification is that origi-
nally advanced by the Annenberg Libel Reform Project: an over-
whelming dissatisfaction with a system of libel law that fails to sat-
sify anyone.96 Even this reason, however, cannot justify the
departure from retraction's traditional role.

Presently, libel law exacts an enormous toll in litigation costs
alone. Despite the fact that more than 90 percent of seriously liti-

94 Alain Sheer and Asghar Zardkoohi, An Analysis of the Economic Efficiency of the
95 Dennis & Noam, eds, The Cost of Libel, Editor's Introduction at x (cited in note 63).
(cited in note 63).
96 Annenberg Project, Proposal (cited in note 1).
gated media libel cases never go to trial,\textsuperscript{97} the cost of defending against libel suits dwarfs the defense cost of other tort actions.\textsuperscript{98}

This statistic is even more troubling in light of evidence that plaintiffs generally prefer a public recognition of falsity to monetary damages. For example, in his suit against \textit{Time} (estimated to have cost $6 million to defend),\textsuperscript{99} General William Westmoreland announced that he "would not retain any monetary award for [his] personal use, but, instead, [would] donate it to charity."\textsuperscript{100}

Studies suggest that Westmoreland is not alone. In 1982, the Iowa Libel Research Project ("ILRP") began studying the feasibility of resolving libel disputes without resort to litigation.\textsuperscript{101} The study found that only about one-fifth of libel plaintiffs sued to win money damages. Nearly all of the plaintiffs, even those who had suffered some financial harm, stated that they would have been satisfied with a retraction, correction, or apology.\textsuperscript{102} The study also found that half of all libel plaintiffs contacted the offending newspaper before contacting a lawyer, turning to suit only after requests for retraction had failed or led to unsatisfactory results.\textsuperscript{103}

These statistics suggest that encouraging the retraction of defamatory statements would provide an effective means of checking the costs of libel suits.\textsuperscript{104} While increasing the significance of retraction might lead to more malicious defamation and might leave some of the victims of libel undercompensated, these costs may be offset by across-the-board reductions in litigation costs.

Further scrutiny, however, reveals weaknesses in this argument. First, attaching greater significance to retraction cannot totally eliminate litigation costs, especially if suits ensue over what

\\textsuperscript{97} Kaufman, \textit{Trends in Libel} at 6 (cited in note 95).
\textsuperscript{98} While studies suggest that the average defense expenditure per tort case was only $1,740 in 1982, the average cost of libel defense in the same year was $75,000. Id at 9. By 1986, the average cost of libel defense had doubled. Id.
\textsuperscript{99} Id.
\textsuperscript{100} Smolla, \textit{Suing the Press} at 21 (cited in note 84).
\textsuperscript{103} Id.
\textsuperscript{104} One of the Directors of the ILRP has even suggested as much. See Randall P. Bezanson, \textit{Legislative Reform and Libel Law}, 338 PLI/Pat 629, PLI Order G4-3883 (1992) (advocating reform plan with significant retraction provisions).
constitutes legally sufficient retraction. Furthermore, because retraction statutes often cover only limited classes of defendants, entire classes of defendants may be unable to avoid suit. Such provisions thus create means by which plaintiffs can evade damage caps or bars to suit.

Second, defendants will resort to retraction whenever the benefits of retraction outweigh the costs of publishing the retraction. While a retraction law that sharply curtails damages upon publication of a correction will certainly increase the incentive to retract, even the traditional treatment of retraction may provide significant incentives to settle. Retraction provisions that allow for mitigation of damages or that increase the odds against a plaintiff proving actual malice also result in a reduction of damage awards. The question ultimately turns, then, upon whether these benefits outweigh the costs of retraction.

Once an error has been brought to the attention of the publisher by a potential plaintiff, retraction presents two potential costs: the cost of space to print the retraction and the cost of embarrassment in admitting error. Although neither of these costs is entirely negligible, neither presents the potential defendant with an overwhelming burden. As the Supreme Court recognized in Miami Herald Publishing Co. v Tornillo, a suit invalidating a mandatory reply statute, requirements of newspaper space can be considered an opportunity cost. Although these costs led the Court to invalidate the reply statute, the Court stressed that the cost was impermissible primarily because it was required by statute. Under retraction law, however, publishers choose whether to retract. Indeed, in light of the countless retractions published on a daily basis, there is no reason to presume this cost is prohibitive.

More significantly, admissions of error may impose two entirely separate costs on media defendants. First, news consumers may prove sensitive to the perceived veracity of their news sources,
selecting what they perceive to be the most accurate publica-
tions.111 Second, sources who value accurate transmission of their
material may discriminate in favor of news enterprises with a
higher expected fidelity to the truth.112

These error costs, however, have corresponding and perhaps
compensatory benefits. While admission of error may damage rep-
utation for veracity, judicial determinations of defamation liability
pose an even greater threat to newspaper reputation. Indeed, any
finding of malice suggests that the defendant publishes false infor-
mation knowingly or recklessly, and thus possesses little respect
for the truth.113

Quite apart from any legal benefit, the prompt admission of
error may carry reputational benefits. Because "the public is aware
that no one is perfect and that errors are inevitable in the pursuit
of good journalism,"114 the public might even admire an organiza-
tion with the courage to admit fault. Indeed, when the Detroit
Free Press and Detroit Free News assigned full-time editors to
oversee corrections and began to announce those corrections prom-
minently, the circulations of the papers increased.115

In light of the minimal costs and possible benefits of retrac-
tion under the traditional approach, attaching more weight to re-
traction under a modern approach will not result in a significantly
greater incentive to retract defamatory statements. Although the
modern approach unquestionably will provide publishers who re-
tract the added bonus of reduced defamation awards, the limited
cost of retraction ensures that it will provide an appealing option
to publishers even under traditional retraction rules. In light of the
costs attached to modern retraction rules,116 whatever minimal ad-
ditional deterrence results from stronger retraction rules cannot be
justified.

CONCLUSION

The law of retraction is presently in transition. Whether as a
natural development of common law tradition, from a heightened
desire to protect media defendants from uncertain "actual" dam-

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Incentive Analysis, in Dennis & Noam, eds, The Cost of Libel at 75 (cited in note 63).
112 Id at 78.
113 Id at 76-77.
115 Id.
116 See generally Part II.
age judgments, or, as seems more likely, from a desire to offset the costs of libel litigation, defamation law increasingly focuses on retraction as a "quick fix"—employing retraction to avoid complicated questions of malice or damages which would otherwise be left in the hands of a jury.

Unfortunately, this trend ultimately cannot serve the interests it purports to advance. Attempts to increase the significance of retraction in defamation suits will ultimately diminish retraction's utility as proof of malice and as a means of compensating plaintiffs justly. Moreover, such attempts are unlikely to increase the incentive for publishers to avoid suit by retracting.

This Comment suggests that proposed changes in retraction law do not provide easy answers to the problems confronted by modern defamation law. Although such changes might prove useful as part of some broader, systematic reform, such as the Annenberg Proposal, changes to retraction law in and of themselves only interfere with a fundamentally sound system.