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Punitive Damages in Defamation Actions: An Area of Libel Law Worth Reforming

Nicole B. Cásarez*

I. INTRODUCTION

Libel law in America is complex, confusing, expensive, unworkable and ultimately inefficient. Although the U.S. Supreme Court's enunciation of the actual malice rule in New York Times v. Sullivan\(^1\) initially drew acclaim,\(^2\) thirty years later many commentators appear ready to scrap the doctrine and begin anew.\(^3\) Various proposals for libel reform have been offered, including both comprehensive and piecemeal approaches.\(^4\) Professor David Anderson, a

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I am grateful to Professor Peter Linzer, University of Houston School of Law, for reviewing and commenting on this article.

noted expert in the field, has concluded that the inadequacies of our current libel system render it unsalvageable. In Anderson's opinion, only the Supreme Court can successfully undertake the kind of drastic reworking of libel law necessary to provide meaningful protection to both reputational and speech interests.

Meanwhile, however, jury awards in defamation actions continue to escalate alarmingly. According to data gathered by the Libel Defense Resource Center ("LDRC"), the median jury award in libel and other communication tort trials has increased from $200,000 in the 1980s to $1.5 million for 1990 and 1991. Furthermore, punitive damages were included in more than three-quarters of the 1990-91 damage awards, with the median punitive award totalling $2.5 million—compared to a median punitive award of $200,000 in the 1980s. The study also revealed that in the 1980s, only about twenty-five percent of the initial jury and bench awards were ultimately affirmed as entered; the remaining seventy-five percent were reduced or overturned to the benefit of the libel defendant.

These statistics show juries granting large awards, usually including a punitive component, that are often overturned post trial or on appeal. The increasing size of jury awards is hard to reconcile with the Iowa Libel Research Project's ("ILRP") conclusion that most libel plaintiffs bring suit not to receive money damages, but rather to clear the air and re-establish their reputations. Our present system of assessing damages in defamation actions appears to be an expensive exercise in futility. If juries continue to bestow

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7. The Libel Defense Resource Center is a non-profit media clearinghouse for information on libel developments.
9. LDRC RECAP AND UPDATE, cited at note 8, at 3-5.
10. Id.
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Punitive damages at the same rate they did during 1990 and 1991, the LDRC has estimated that over one billion dollars in judgments could be assessed against the media by the end of the decade.\(^\text{12}\)

Given the size of the LDRC figures, should these excessive jury verdicts be ignored while we wait for the Supreme Court to rewrite the law of libel? Even before \textit{Sullivan} was decided in 1964, commentators called for restrictions on or the elimination of punitive damages in libel actions.\(^\text{13}\) Others view punitive damages as the last hope of already outgunned libel plaintiffs, who languish in a system that favors speech, and a powerful press, too much over individual reputations.\(^\text{14}\)

The objective of this article is to reconsider the wisdom of awarding punitive damages in libel actions. It will briefly discuss the history and function of punitive damages, review the Supreme Court's treatment of punitive damages in defamation and other tort actions, review the arguments both for and against eliminating punitive damages in libel law, and analyze suggested limitations on punitive damages. Finally, this article will take the position that punitive damages should be eliminated in public plaintiff libel and certain related communication tort cases. However, this conclusion should not be seen as an attempt to solve libel's many woes, but rather as a worthwhile stop-gap measure to implement while waiting for more comprehensive libel law reform.

II. History and Function of Punitive Damages

Punitive damages have a long history dating back as far as the Babylonian Code of Hammurabi (1792-1750 B.C.).\(^\text{15}\) Reference to punitive-type damages, damages above that necessary for compensation, also appear in the Hittite Law (1400 B.C.), Hebrew Mosaic Law (1200 B.C.), the Roman Law of Twelve Tables (450 B.C.), and

12. LDRC Recap and Update, cited at note 8, at 5.
15. Linda L. Schlueter & Kenneth R. Redden, Punitive Damages § 1.0 (2d ed. 1989). Hammurabi was the king of Babylonia in the first dynasty, believed to have reigned in the 18th century B.C. RANDOM HOUSE ENCYCLOPEDIA 2258 (3d ed. 1990).
the Hindu Code of Manu (200 B.C.). In 1763, an English court used the phrase "exemplary damages" when it upheld a jury award of three hundred pounds in an action for trespass and false imprisonment where the plaintiff's actual damages totalled just twenty pounds.

Three major theories explain why the doctrine of punitive damages developed. The first revolves around the ability of English litigants to hold jury members accountable for awarding excessive verdicts. Early English appellate courts lacked power to review or reduce such verdicts, but the aggrieved party could proceed directly against jury members by using a writ of attaint. To justify large jury awards and thereby avoid punishing local jurors, English courts recognized a punitive function of damage awards. However, this rationale for punitive damages became irrelevant as courts began to exercise control over the size of monetary judgments.

The second theory surmises that courts allowed punitive damages to recompense plaintiffs for varieties of mental suffering at a time when such injuries were not recognized by the common law. For example, in Tullidge v. Wade, the court awarded punitive damages against the defendant in a seduction action to redress the plaintiff's affronted honor. Once again, this compensatory role of punitive damages has no significance in current law. Most jurisdictions now allow actual damages to be awarded for all types of mental anguish, emotional suffering and related intangible harms.

Finally, punitive damages have been justified as a socially bene-

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18. SCHLUETER & REDDEN, cited at note 15, §1.3(B); Sales & Cole, cited at note 16, at 1120-1121 at n. 12.
21. SCHLUETER & REDDEN, cited at note 15, §§ 1.3(C)-1.3(D); Sales & Cole, cited at note 16, at 1121.
23. SCHLUETER & REDDEN, cited at note 15, § 1.4(B); Sales & Cole, cited at note 16, at 1122. See also, Peisner v. Detroit Free Press, 364 N.W.2d 600 (Mich. 1984). In Michigan, "exemplary damages" are purely compensatory in nature and may be awarded for injury to feeling if not duplicative of actual damages. Id.
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Punitive damages are awarded to punish serious, harmful tortious conduct that falls outside of the parameters of the criminal law, and to discourage future misconduct. Most American courts today advance this dichotomy of punishment and deterrence to support the doctrine of punitive damages. However, both judges and commentators have criticized this rationale, objecting that compensation is the proper goal of the civil law system, and that punishment and deterrence are more appropriately left to the criminal law system.

Despite these objections, most American jurisdictions recognize punitive damages as part of the common law. A minority of states have abolished punitive damages in all civil cases, or allow them only when authorized by statute. Additionally, several states apply the doctrine in such a way that any punitive award is in essence compensatory in nature.

Recent developments in tort law have heightened the controversy over punitive damages and have drawn the attention of the

24. See e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), where the Supreme Court described punitive awards as “private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.” Id. at 350.

25. Schlueuter & Redden, cited at note 15, § 1.4(B); Sales & Cole, cited at note 16, at 1123. Some courts have suggested that punitive damages provide necessary financial incentive for tort victims to bring suit to enforce their rights. Sales & Cole, cited at note 16, at 1123. See also the text accompanying notes 195-207.


30. These jurisdictions include Connecticut, Michigan and New Hampshire. See, e.g., Venturi v. Savitt, Inc., 468 A.2d 933, 935 (Conn. 1983) (punitive damages limited to compensation for litigation expenses, less taxable costs); Peisner v. Detroit Free Press, 364 N.W. 2d 600 (Mich. 1984) (“exemplary damages” are purely compensatory in nature and may be awarded for injury to feeling if not duplicative of actual damages); Vratsenes v. New Hampshire Auto, Inc., 289 A.2d 66, 68 (N.H. 1972) (although punitive damages are not allowed, compensatory damages may reflect the egregious nature of the defendant’s wanton, malicious or oppressive conduct).
Supreme Court. Beginning in the late 1970s, juries began awarding punitive damages more often, in greater amounts, and in a wider variety of cases than in the past. Commentators attacked the unlimited and standardless discretion exercised by juries in granting punitive damages, and questioned the fairness and constitutionality of the doctrine.

By the mid-1980s, the Court had recognized that constitutional challenges to punitive damages raised "important issues"; however, the Court resolved the first two cases to present these issues on other grounds. But foes of punitive damages were heartened by Justice O'Connor's concurring opinion in *Bankers Life & Casualty Co. v. Crenshaw*. Justice O'Connor, joined by Justice Scalia, noted that giving a jury "wholly standardless discretion to determine the severity of punishment appears inconsistent with due process."

The Court first considered the merits of a constitutional objection to punitive damages in *Browning-Ferris Industries v. Kelco Disposal*. That case considered whether a $6,000,000 punitive award in an antitrust case constituted an excessive fine prohibited by the Eighth Amendment. In an opinion that provided a historical analysis of the origins of the Excessive Fines Clause, the Court

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34. *Lavio*, 475 U.S. at 827-29 (state court justice's failure to recuse himself resulted in a violation of the due process clause); Banker's Life & Casualty Co. v. *Crenshaw*, 486 U.S. 71, 79-80 (1988) (challenge to the size of the punitive award had not been raised in the state court).


38. *Browning-Ferris*, 492 U.S. at 262-64.
held that the clause does not apply to punitive damage awards between private parties. Once again, the Court raised expectations that it would consider a due process challenge in an appropriate case.

Three years later, an appropriate case properly raising a due process challenge to punitive damages presented itself. In *Pacific Mutual Life Insurance Co. v. Haslip*, six of the justices agreed that although due process imposes some limits on punitive damages, those limits were not exceeded by Alabama's system of awarding punitive damages. Although the Court again mentioned its "concern about punitive damages that 'run wild'," it refused to draw a "mathematical bright line" to determine whether punitive damages are excessive. Instead, the Court considered Alabama's procedures for awarding punitive damages, including the jury instructions and post-verdict and appellate standards of review, to conclude that Pacific Mutual's due process rights had not been violated.

In a concurring opinion, Justice Scalia advocated a historical approach to the due process issue. Based on venerable common-law tradition of jury-assessed punitive damages, Justice Scalia would have approved the punitive award against Pacific Mutual without inquiring into questions of reasonableness. At the other extreme, Justice O'Connor wrote a forceful dissent arguing that Alabama's common-law procedures for awarding punitive damages were void for vagueness and, alternatively, that the lack of procedural safeguards violated the defendant's right to procedural due process.

Although the Court in *Haslip* left open the possibility that a punitive award might under some circumstances violate due process, the Court's balancing approach and fact-specific holding provided little guidance as to what those constitutional limits might be. Lower courts reviewing punitive verdicts in light of *Haslip* have

39. *Id.* at 264.
40. *Id.* at 276-77. "There is some authority in our opinions for the view that the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme . . . ." *Id.* at 276 (citing *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919)).
42. *Haslip*, 499 U.S. at 19-23.
43. *Id.* at 18.
44. *Id.*
45. *Id.* at 19-20.
46. *Id.* at 37 (Scalia, J., concurring).
47. *Id.* at 43 (O'Connor, J., dissenting).
upheld a variety of state punitive damage procedures, including some that differ substantially from Alabama's.48

Whether a logical relationship need exist between the size of a punitive award and the plaintiff's compensatory damages was considered by the Court in the 1993 case, *TXO Production Corp. v. Alliance Resources Corp.*49 In that case, a common-law slander of title action, the plaintiff had been awarded $19,000 in compensatory damages and $10,000,000 in punitive damages in the state trial court.50 The plaintiff argued at trial that any damages awarded should be based on the defendant's vast wealth and the financial gains the defendant hoped to achieve by its conduct.51 In its appeal before the Supreme Court, the defendant argued that the unlimited discretion of the jury in granting the punitive award, and the lack of a reasonable relationship between the plaintiff's actual injury and the size of the punitive award, deprived the defendant of its property without due process of law.52

Despite the magnitude of the punitive award, which was 526 times larger than the accompanying compensatory damages, the Court rejected the due process objection.53 Writing for a plurality of the Court, Justice Stevens cited *Haslip* to reiterate that the Court could not devise a mathematical formula to determine the constitutionality of punitive damages.54 Although the plurality stated that reasonableness should be considered, the Court found that the jury's award could be justified based on the potential harm posed by the defendant's conduct.55

Justice Scalia, joined by Justice Thomas, repeated his *Haslip* argument that as long as the traditional common-law procedures are followed in assessing punitive damages, due process has been met.56 Justice O'Connor dissented, joined this time by Justices White and Souter, calling the $10 million punitive award "monstrous" and the system for awarding punitive damages "arbitrary

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48. For a partial list of cases considering the constitutionality of state punitive damages procedures, see Wollersheim v. Church of Scientology of Cal., 6 Cal. Rptr. 2d 532, 537, n.4 (1992).
49. 113 S. Ct. 2711 (1993).
50. *TXO*, 113 S. Ct. at 2714.
51. *Id. at 2716-17*.
52. *Id. at 2718*.
53. *Id. at 2718-20*.
54. *Id. at 2720*.
55. *TXO*, 113 S. Ct. at 2720-21.
56. *Id. at 2726* (Scalia, J., concurring).
and oppressive."

After Haslip and TXO, it appears that a majority of the Court is unwilling to engage in meaningful reform of traditional punitive damages procedures in cases involving only due process considerations. As Justice Scalia noted in his concurring opinion, the Court now may dispose of most due process challenges to punitive damages by concluding that "this is no worse than TXO." However, when punitive damages are awarded in libel cases, significant First Amendment concerns arise. To evaluate First Amendment arguments against punitive damages in defamation actions, it is necessary to consider the Court's previous decisions in this area.

III. PUNITIVE DAMAGES IN LIBEL ACTIONS

The threat of large, potentially fatal damage awards against the press in libel actions was a decisive factor in the Supreme Court's 1964 landmark decision in New York Times v. Sullivan. In that case, an Alabama jury imposed a $500,000 verdict against the New York Times for allegedly libeling a Montgomery police commissioner in an editorial advertisement supporting the civil rights movement. At that time, the $500,000 verdict was the largest libel verdict ever awarded in the state, and was considered huge by national standards. Meanwhile, four other Montgomery officials commenced libel actions against the Times seeking various amounts in damages, all based on the same advertisement, with one of the suits resulting in another $500,000 judgment. Even a newspaper as prestigious and successful as the Times could not afford a possible three million dollars in liability.

In the early 1960s, Commissioner Sullivan was not the only Southern officeholder who attempted to use libel law to dissuade the press from reporting on racial strife. By 1964, libel suits totaling approximately three hundred million dollars had been brought against the press by various Southern officials. That the Court

57. Id. at 2728 (O'Connor, J., dissenting).
58. Id. at 2727 (Scalia, J., concurring).
60. Sullivan, 376 U.S. at 256. The jury did not indicate whether any part of the verdict was punitive in nature. Id. at 284.
62. Sullivan, 376 U.S. at 278 n.18.
63. In his book about the Sullivan case, Anthony Lewis quotes a Times representative who feared that had the jury verdicts ultimately been upheld, the Times continued existence would have been imperiled. Lewis, cited at note 61, at 35.
64. Lewis, cited at note 61, at 36.
was troubled about the impact of these lawsuits was clear from the Court’s opinion, where Justice Brennan wrote:

The judgment awarded in this case—without the need for any proof of actual pecuniary loss—was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the Sedition Act. And since there is no double-jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded against petitioners for the same publication. Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive.66

The Court dealt with its concern about the chilling effect of large libel judgments not by limiting libel damages, but rather by engrafting a fault requirement onto the libel tort.66 Before the Sullivan decision, libel as defined in Alabama and in most states was a strict liability tort. To prove a prima facie case, the plaintiff needed only to show that the defendant published a defamatory statement concerning the plaintiff.67 Removing ultimate control of libel law from the states, the Court held that the First Amendment would no longer allow public officials to recover damages because of someone’s innocent mistake.68 Instead, public officials suing for defamatory falsehoods about their official conduct would have to prove that the defendant acted with “actual malice”—knowledge of falsity or reckless disregard of the truth.69 The common law defense of truth was insufficient protection against libel actions, the Court said, because the difficulty and cost of proving truth would necessarily result in self-censorship.70 In free debate, factual mis-statements are unavoidable and must be tolerated to provide the

65. Sullivan, 376 U.S. at 277-78.
66. Interestingly, the Times’ attorney, constitutional scholar Herbert Wechsler, considered asking the Court to limit libel damages to the amount of proven financial injury. He decided against doing so for fear the Court would be reluctant to change traditional, common-law methods of awarding libel damages. See Lewis, cited at note 61, at 223.
68. Sullivan, 376 U.S. at 277-78.
69. Id. at 279-80.
70. Id. at 279. The Court predicted that:
[under such a rule, 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.

Id.
"breathing space" needed for free expression. Drawing an analogy to seditious libel, the Court concluded that because speech criticizing the activities of public officials is essential for self-government, it therefore must be accorded the highest First Amendment protection.

Three years after Sullivan, a severely fragmented Supreme Court in Curtis Publishing Co. v. Butts expanded the scope of the actual malice rule to apply to public figures and public officials. In an opinion joined by only three other justices, Justice Harlan rejected the defendant magazine’s argument that an unlimited jury award of punitive damages in a libel action constitutes a prior restraint. Justice Harlan reasoned that First Amendment concerns are adequately defended by the judicial power to control both excessive jury verdicts and damage awards based on jury bias. Although Justice Harlan stated that punitive damages "serve a wholly legitimate purpose in the protection of individual reputation", he noted that they must "not be founded on the mere prejudice of the jury."

In extending the actual malice rule to public figures, the Court in Butts recognized the importance of the free flow of information regarding all matters of public interest. Chief Justice Warren, in his concurring opinion, reasoned that in modern society, "the distinctions between governmental and private sectors are blurred," meaning that important policy decisions are often made by persons who are in the public eye but do not hold public office.

In a 1971 case, Rosenbloom v. Metromedia, three dissenting justices expressed disapproval with the status of punitive damages in libel law. Justice Marshall, joined by Justice Stewart, compared punitive damages to criminal penalties that are awarded in unlimited amounts. Marshall reasoned that standardless jury discretion to impose punitive awards creates unpredictability — which leads

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71. Id. at 271-72.
72. Id. at 273-78.
73. 388 U.S. 130 (1967).
74. Butts, 388 U.S. at 159-160.
75. Id.
76. Id. at 161.
77. Id. at 147.
78. Id. at 163-64 (Warren, C.J., concurring).
80. 403 U.S. 29 (1971).
81. Rosenbloom, 403 U.S. at 82-83 (Marshall, J., dissenting).
to self-censorship and defeats any state interest in deterrence.³² Unrestrained discretion also "allows juries to penalize heavily the unorthodox and the unpopular and exact little from others. Such free wheeling discretion presents obvious and basic threats to society's interest in freedom of the press."³³

Because of these objections, Justice Marshall advocated abolishing punitive damages in private libel actions while allowing states to apply any fault standard above strict liability.³⁴ In addition, Justice Harlan reconsidered his earlier position and concluded that to be constitutional, punitive damages must "bear a reasonable and purposeful relationship to the actual harm done."³⁵

The misgivings expressed in these dissents about the propriety of punitive damages in libel actions were reflected by the majority of the Court in *Gertz v. Robert Welch, Inc.*³⁶ By a vote of five to four, the Court in *Gertz* held that as long as state law does not impose strict liability, states may decide which standard of fault to apply in defamation actions involving private plaintiffs.³⁷ Writing for the Court, Justice Powell identified the state interest justifying libel laws as compensation for harm resulting from defamatory falsehoods.³⁸ This meant that the state had no interest in compensating defamed plaintiffs beyond their actual injury.³⁹ Justice Powell noted that both presumed⁴⁰ and punitive damages create a danger of media self-censorship. Powell also described punitive damages as "wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."⁴¹

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82. *Id.* at 84.
83. *Id.*
84. *Id.* at 86-87.
85. *Id.* at 77 (Harlan, J., dissenting).
87. *Gertz,* 418 U.S. at 347.
88. *Id.* at 341.
89. *Id.* at 349. "[T]he States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury." *Id.*
90. SMOLLA, cited at note 67, at § 9.05[1]. Presumed damages are compensatory damages awarded in libel actions without proof of actual injury. The jury is allowed to presume the existence of injury from the fact that defamatory falsehoods were published. The rationale for the doctrine rests on the difficulty of proving actual harm in defamation cases. Epstein, cited at note 3, at 794.
Consequently, the Court held that neither presumed nor punitive damages could be recovered in a case without a finding of "at least" knowledge of falsity or reckless disregard of the truth, even when the plaintiff is a private individual. With this holding, the Court acknowledged that the First Amendment limits the award of punitive damages in libel suits. Justice White, however, vigorously disagreed, stating that no evidence had been shown to justify the Court's fear that punitive damages are "unduly burdensome."

The Court's holding in *Gertz*, that no punitive or presumed damages could be recovered without a showing of actual malice, was significantly restricted eleven years later in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* The case involved a construction contractor who brought suit against Dun & Bradstreet for circulating an erroneous and defamatory credit report. At trial, the plaintiff was awarded $300,000 in punitive damages even though the defendant was not found to have acted with actual malice. The issue before the Court was whether the *Gertz* rule regarding presumed and punitive damages applied to speech that did not involve "matters of public concern."

Although five justices agreed to uphold the jury verdict, the Court could not agree on an opinion. Justice Powell, writing for a plurality that included himself, Justice Rehnquist, and Justice O'Connor, reasoned that because private matters do not affect debate on public issues, the First Amendment allows punitive and presumed damages to be awarded in such cases without a showing of actual malice. With respect to presumed damages, Justice Powell based his conclusion on the long common-law history regarding such damages in libel actions. As for punitive damages, Justice Powell asserted that in private plaintiff actions, they further the state interest in providing effective remedies for defamation.

In a concurring opinion, Justice White indicated his disenchantment with the *Sullivan* rule, stating that it "struck an improvident balance" between the public's right to know and the individual's
right to reputation. He suggested setting constitutional limits on recoverable damages in libel cases, in exchange for a return to the common-law strict liability standard. Punitive and/or presumed damages might be eliminated, which would provide “breathing room” for speech without overly restricting libel victims’ ability to restore their reputation.

Justices Blackmun, Marshall, and Stevens joined Justice Brennan’s dissent, which would have allowed the punitive award to stand only upon a showing of actual malice. Despite this conclusion, Justice Brennan criticized the propriety of awarding punitive and presumed damages in libel cases at all. Limits on speech must be narrowly tailored to serve a legitimate state interest, Justice Brennan observed, and the “ready availability and unconstrained application of presumed and punitive damages in libel actions is too blunt a regulatory instrument to satisfy this First Amendment principle . . . .”

In this string of cases setting forth standards of recovery for different types of libel plaintiffs, the Court has not directly considered a challenge to punitive damages awarded to a public plaintiff involved in a matter of public concern. However, the Court has had the opportunity to rule on such a situation, but declined to do so. For example, in Brown & Williamson Tobacco Corp. v. Jacobson, the Seventh Circuit upheld $2,000,000 in punitive damages and $1,000,000 in presumed damages against CBS in a case involving a public figure plaintiff. One commentator theorized that the Supreme Court refused to grant certiorari because of reluctance to consider First Amendment aspects of punitive damages in a case where the defendant had acted in a blatantly reckless fashion. In another case, DiSalie v. P.G. Publishing Co, the Supreme Court refused to consider a punitive award to a public figure plaintiff predicated on a showing of both actual and common law malice.

In summary, the Supreme Court in Gertz precluded the recovery of punitive and presumed damages in libel cases involving private plaintiffs and public issues except on a showing of actual malice.

100. Dun & Bradstreet, 472 U.S. at 767 (White, J., concurring).
101. Id.
102. Id. at 771-72.
103. Id. at 778 (Brennan, J., dissenting).
104. Id.
With respect to private plaintiffs involved in matters of private concern, *Dun & Bradstreet* held that punitive and presumed damages could be recovered on a lesser showing of fault. To date, the Court has not considered the constitutionality of punitive damages in a case involving a public plaintiff involved in a public concern. Based on these precedents, how likely is it that the Court would entertain a First Amendment challenge to punitive damages in a public plaintiff libel case?

Beginning with the *Sullivan* case, the Court has shown obvious apprehension about the chilling effect of unlimited punitive awards in libel cases involving public plaintiffs. Based on the language and reasoning in *Gertz*, a strong First Amendment argument can be made to eliminate punitive damages in defamation actions, at least those involving public figures in matters of public interest. The membership of the Court has changed since certiorari was denied in *Brown & Williamson* and *DiSalle*. The Court may now be more receptive to empirical data showing the continued growth of punitive awards in libel cases.\(^{108}\) Even if the Supreme Court is unwilling to abolish punitive damages in public plaintiff defamation actions, this article takes the position that public policy considerations justify state regulation of punitive awards by either legislative reform or judicial determination.

IV. RATIONALE FOR ELIMINATING PUNITIVE DAMAGES IN LIBEL

*New York Times v. Sullivan*\(^{109}\) sought to prevent the threat of immense libel verdicts from stifling robust debate about public issues.\(^{110}\) By adding a fault requirement to the common law libel tort, the Court may have succeeded in assuring that fewer libel plaintiffs ultimately recover against the press.\(^{111}\) However, the economic concern that motivated the actual malice rule has survived and become more dangerous.\(^{112}\) Even adjusting for inflation, libel

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108. Of course, the fact that the Supreme Court has denied a petition for certiorari in a given case carries no precedential value. However, following the Court's denial of certiorari in *Brown & Williamson Tobacco Corp. v. Jacobson*, 485 U.S. 933 (1988), one commentator was led to describe the chances of the Court eliminating punitive damages in libel law as "quite bleak." SMOLLA, cited at note 67, at § 9.08[4].


111. Anderson, cited at note 3, at 509; Epstein, cited at note 3, at 806.

112. See, eg., Henry R. Kaufman, *Trend in Damage Awards, Insurance Premiums and the Cost of Media Libel Litigation*, in THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS, cited at note 4, at 4. Data from an LDRC study show that damage awards in pre-*Sullivan* cases from 1954 to 1964 averaged $128,933. This figure includes one multi-million
damage awards in the 1980s were estimated as between four and five hundred percent larger than those imposed during the decade before Sullivan. According to one study, average libel verdicts in the early 1980s were approximately three times greater than average damages awarded in medical malpractice and product liability actions.

Punitive damages have played a substantial part in the growing size of libel judgments. LDRC statistics show that punitive damages were granted in fifty-seven percent of libel verdicts in the 1980s and in seventy-six percent of such verdicts in 1990 and 1991. When libel judgments included a punitive element, figures for 1980 to 1991 indicated that punitive damages made up from sixty to seventy percent of the total dollars awarded. The apparent failure of the actual malice rule to protect the press from shockingly large damage awards makes it essential to evaluate the arguments for eliminating punitive damages in libel law, at least in cases involving public plaintiffs where First Amendment concerns are the strongest.

A. Punitive Damage Awards Chill Protected Speech

In the early 1980s, the Alton Telegraph, an Illinois paper, incurred a $9.2 million libel judgment, which included $2.5 million in punitive damages. Rather than declare bankruptcy, the paper settled the case for $1.4 million. Following this episode, the paper significantly changed its reporting policies and refused to investigate possible government misconduct for fear of libel suits. "We're like a tight end who hears footsteps every time he runs to catch a pass," the paper's editor told the Wall Street Journal. "Wouldn't you be gun-shy if you nearly lost your livelihood and dollar award. If this award is excluded from the calculation, the average initial damage award in the decade before Sullivan drops to $49,715.

In comparison, LDRC figures for 1980 to 1989 show the average jury award in libel and related communication tort cases at $1,467,525 and the average bench award at $1,020,549. For 1990-91, the average jury award increased to more than $9 million. LDRC Recap and Update, cited at note 8, at 3-5.

114. Id. at 5.
115. LDRC Recap and Update, cited at note 8, at 3-5.
117. Id.
118. Id.
119. Id.
your home?"  

The Alton Telegraph's libel experience illustrates the chilling effect associated with the possibility of huge libel verdicts. The risk of incurring a potentially devastating libel judgment deters the press from engaging in protected, newsworthy speech—what noted expert Professor Anderson termed the "in terrorem" effect. Deciding not to cover a story will rarely make or break a media outlet's reputation or fortune; however, covering a story that results in a libel suit raises the possibility of financial ruin. Dropping the controversial story may often be the editor's safest course.

Furthermore, the fear of exorbitant awards means the press must defend each libel claim to the death, resulting in long and expensive litigation. At least part of libel's chill comes from the enormous legal fees attendant upon fighting defamation suits. According to one study, libel defense spending in the mid-1980s ranged from $75,000 to $150,000; the ILRP found libel defense expenditures reaching as high as $95,000. In comparison, a 1982 Rand Corporation Institute for Civil Justice study found the average cost per tort case filed in federal court was $1,740 and the average cost for a federal jury trial in all cases varied from $8,000 to $15,000.

Empirical evidence has shown that most libel verdicts are overturned or reduced on appeal. Figures gathered by the LDRC show that from 1980 to 1989, approximately twenty-nine percent of libel jury awards were overturned or modified in the defendant's favor at the post-trial motion stage, and on appeal more than fifty percent of the surviving verdicts were reversed. In total, approximately seventy-five percent of initial jury and bench awards were reversed or reduced in favor of the libel defendant.

While these figures may seem to undercut the chilling effect argument against punitive damages in libel actions, it is important to

120. Id.
121. Anderson, cited at note 3, at 516. Professor Anderson also identifies the chilling effect of a large judgment on a media outlet's balance sheet, where until overturned, it may negatively affect the ability of the organization to acquire financing. Id.
123. Anderson, cited at note 3, at 516; LDRC Recap and Update, cited at note 8, at 19.
125. Bezanson, cited at note 11, at 35.
127. Id.
128. LDRC Recap and Update, cited at note 8, at 3-4.
remember that the press can be "chilled" as much from the payment of legal fees incurred to avoid huge verdicts as from the verdicts themselves. Furthermore, the chilling consequences of a large damage award arise when the verdict is entered; post-verdict and appellate review cannot undo the harm. Under the current damage system, even winning a libel case can cause the press to tread more cautiously.

It has been argued that punitive damages are not unique to libel law, and should not be eliminated in defamation if they remain in other types of actions.129 Doctors, lawyers, and other professionals adapt their conduct to the threat of punitive damages, so journalists should behave with potential punitive liability in mind.130 However, this rationale neglects the core of the chilling effect argument. Punitive damages in defamation suits deter speech—an activity protected by the First Amendment. Defamation law cannot be treated just like another area of tort law; the First Amendment guarantees that speech will be afforded an extra measure of protection, especially when the speech involves matters of public interest.131

Others maintain that the chilling effect objection is irrelevant because no constitutionally protected speech is at issue when punitive damages are awarded in libel actions.132 According to this view, defamatory speech falls outside the scope of First Amendment coverage, and therefore punitive damages in defamation actions raise no constitutional considerations.133 For example, the Seventh Circuit in Brown & Williamson134 used this reasoning to uphold a $2,000,000 punitive award against CBS, saying that "false statements of fact made with actual malice are not protected by the First Amendment." 135

130. A plurality of the Supreme Court took this view in Curtis Publishing Co. v. Butts, 338 U.S. 130 (1967), where Justice Harlan wrote, "[t]o exempt a publisher, because of the nature of his calling, from an imposition generally exacted from other members of the community, would be to extend a protection not required by the constitutional guarantee." Butts, 338 U.S. at 159-60. See text accompanying notes 73-79.
131. Van Alstyne, cited at note 13, at 819. Professor Van Alstyne has decried the tendency of courts to consider freedom of speech as just another factor to be measured in balancing interests. Rather, the First Amendment provides a "subsidy" that "exempts free speech and freedom of the press from being treated simply as any other activity examined in the common law." Id.
132. See, e.g., Committee on Communications Law, cited at note 122, at 60.
133. Id.
134. 827 F.2d 1119, 1143 (7th Cir. 1987).
135. Brown, 827 F.2d at 1143.
The problem with this contention, as noted by Professor Barron, is that it relies on a circular argument.\textsuperscript{136} Speech in general is sheltered by the First Amendment; it can only be classified as constitutionally unprotected after a legal determination to that effect. As with obscenity, reasonable minds may not agree which statements or broadcasts rise to the level of defamatory speech. Unfortunately, the journalist must publish without the benefit of a legal ruling; therefore, the mere possibility of an adverse finding may chill speech that ultimately would not have resulted in liability.\textsuperscript{137}

A more troublesome objection to the chilling effect argument contests its very existence. Professor Barron, for example, has asserted that it can be neither proven nor disproven that punitive damages chill free expression.\textsuperscript{138} Justice White, dissenting in \textit{Gertz}, objected that the Court's decision requiring private libel plaintiffs to show actual malice to recover punitive damages was based on no more than "undifferentiated fear of unduly burdensome punitive damages awards."\textsuperscript{139} In fact, Justice White questioned the wisdom of relying on the chilling effect argument to justify imposing any fault requirement in libel actions involving private plaintiffs:

The press today is vigorous and robust. To me, it is quite incredible to suggest that threats of libel suits from private citizens are causing the press to refrain from publishing the truth. I know of no hard facts to support that proposition, and the Court furnishes none.\textsuperscript{140}

Here it becomes almost impossible to separate the chilling effect associated with a particular standard of liability in libel actions from the chilling effect of exorbitant punitive damage awards. Of course, the two are intimately related. A media outlet may refrain from publishing newsworthy information because it fears both being found guilty of publishing defamatory material with actual malice and the consequent imposition of a money judgment that includes punitive damages. Huge damage awards are the teeth that provide the bite associated with libel liability standards.

Because of this interdependence between libel liability standards and damage awards, a 1986 study establishing that legal standards in defamation suits influence editorial behavior is relevant when evaluating the effect of punitive damages. The study, which in-

\begin{itemize}
  \item \textsuperscript{136} Barron, cited at note 14, at 110.
  \item \textsuperscript{137} Barron, cited at note 14, at 110. \textit{See also}, Committee on Communications Law, cited at note 122, at 21.
  \item \textsuperscript{138} Barron, cited at note 14, at 108.
  \item \textsuperscript{139} \textit{Gertz}, 418 U.S. at 397 (White, J., dissenting).
  \item \textsuperscript{140} \textit{Id.} at 390. (White, J., dissenting).
\end{itemize}
olved a survey of 206 newspaper editors, revealed that newspapers would be substantially less likely to publish information on matters of public interest if the fault requirement for libel was reduced to either negligence or strict liability. Factors that influenced the extent of the chilling effect for specific papers included whether the publication relied on significant street sales, whether it faced competition in its market, and whether it had previously been sued for and paid damages in a libel suit. Interestingly, neither geographic location of the paper nor existence of libel insurance was shown to reduce the chilling effect of a change in liability standards.

Admittedly, this study did not address the chilling effect of punitive damages; however, it cannot be disputed that the possibility of huge damage awards constitutes a major factor in how willing an editor will be to publish a particular story. The press is not unaware of the trend toward oversized libel verdicts, most of which include large punitive awards. The study provides empirical evidence of libel's chilling effect at work, and refutes the claim that all evidence of self-censorship is anecdotal.

B. Punitive Damage Awards Are Used to Punish Unpopular Speakers or Opinions

Closely related to the chilling effect argument is the propensity of jurors to use exemplary awards to penalize publications they find distasteful. The LDRC's compilation of libel cases brought from 1980 to 1991 shows that defendants such as the National Enquirer, Hustler and Penthouse magazines have suffered punitive

141. Stephen M. Renas et al., An Empirical Analysis of the Chilling Effect: Are Newspapers Affected by Liability Standards in Defamation Actions?, in THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS, cited at note 4, at 48. The survey provided definitions of the three liability standards (strict liability, negligence, and actual malice) and presented four "scenarios" involving public officials. Editors were asked to indicate their willingness to publish the stories under each of the liability standards. The percentage of editors who were less likely to publish when liability changed from actual malice to negligence varied by scenario from 23.3% to 34%. The percentage of editors chilled as a result of a change from actual malice to strict liability ranged by scenario from 35.9% to 49.5%. Approximately 70% of the editors who were chilled as a result of a shift from actual malice to strict liability were also chilled when the standard switched from actual malice to negligence. Id. at 45-50.
142. Renas et al., cited at note 141, at 55.
143. Id. at 54.
144. See, DeVore & Nelson, cited at note 13, at 178-79; Van Alstyne, cited at note 13, at 807-08.
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Jury verdicts reaching into the millions of dollars. Considering that most of these awards are reversed or reduced on appeal, it appears that juries base their decisions at least in part on the unsavory nature of the periodical in question. The ability of juries to punish unpopular speakers by awarding punitive damages in ruinous amounts flies in the face of the First Amendment, which protects unorthodox as well as mainstream speech.

Exacerbating the problem is the fact that juries almost always award punitive damages upon a finding of actual malice, even if the state law requires a further showing of common law malice or ill will. By focusing on the defendant's degree of culpability, libel law creates what Professor Anderson described as "potent threats of punishment for unpopular journalism." Trial judges may also sustain punitive damage awards based on their own "constitutionally improper" aversion to disreputable or obscure publications.

Sometimes punitive damages are awarded in libel actions even though the plaintiff has suffered no significant injury or does not have a case justifying liability. According to one estimate, from one third to one half of all defamation suits against the press are essentially harassment suits. These actions are often brought by plaintiffs who desire to retaliate against the press for publishing reports that are derogatory but basically truthful, and to intimidate publishers from printing similar critical stories in the future. When such stories involve public officials, juries and judges may use punitive damages to punish the press for being "disrespectful."

Although these verdicts usually will be overturned

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146. Anderson, cited at note 3, at 523; Van Alstyne, cited at note 13, at 797.
147. Anderson, cited at note 3, at 523; see also Van Alstyne, cited at note 13, at 797.
148. Van Alstyne, cited at note 13, at 808.
149. Committee on Communications Law, cited at note 122, at 53 n.86.
151. Hollander, cited at note 150, at 266.
152. See Matheson, cited at note 3, at 274. Matheson speculated that judges may have "exaggerated respect for aggrieved plaintiffs in substantial positions of authority." Id.
post-trial or on appeal, they may succeed in stifling dissent.

Additionally, it must be noted that it is often the smaller, financially insecure publications that contain the most unorthodox content. The threat of a huge exemplary award would be particularly devastating to such a defendant, and could leave a special interest group without a voice.153

C. Punitive Damage Awards Do Not Serve the State Interest in Punishment or Deterrence, Resulting in a Violation of Due Process

Punitive damages are most commonly defended as a means of prohibiting and penalizing reprehensible behavior that, although deleterious to society, does not violate the criminal law.154 Mere compensation of the victim is seen as insufficient either to punish such egregious conduct or to protect the community from its recurrence.155 One general objection to this rationale for punitive damages is based on the historic compensatory function of the civil law system.156 According to this view, punishment has no place in the civil law, where juries have neither the ability to devise appropriate penalties nor the ability to identify which defendants deserve to be punished. Furthermore, civil punishments are imposed without the safeguards guaranteed to criminal defendants, such as the protection against double jeopardy, the limitation on amounts of criminal fines, and the evidentiary standard of proof beyond a reasonable doubt.157

In libel law, this general objection to punitive damages becomes even more acute because the conduct being punished and prevented enjoys constitutional protection. The First Amendment raises speech above the norm and requires special considerations not attendant in other areas of tort law. According to the Sullivan decision, wide-ranging deliberation on matters of public concern

153. Note, Punitive Damages in Defamation Litigation: A Clear and Present Danger to Freedom of Speech, 64 YALE L.J. 610, 613 (1955). "A punitive damage award that is not so excessive as to shock the judicial conscience may be a sufficient financial burden to silence a voice of dissent." Id.

154. See Restatement (Second) of Torts § 908(1) (1977): "Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future." Id.

155. Ellis, cited at note 32, at 11.


157. Id.
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should be nurtured and promoted, not punished and deterred.\textsuperscript{158} Errors in debate are certain to occur and must be countenanced to achieve the free exchange of ideas needed for a healthy society.\textsuperscript{159} The Court in \textit{Sullivan} sought to reduce the capacity of libel law to punish speech. The ability of courts to award punitive damages in defamation actions, at least those involving matters of public interest, directly contradicts this goal.\textsuperscript{160}

The Court in \textit{Gertz} recognized compensation for reputational injury as the sole state interest supporting libel law.\textsuperscript{161} Obviously, punitive damages generally do not serve to compensate, but rather provide a monetary award above and beyond the plaintiff's actual injuries. However, the Court went on to allow punitive damages in libel cases involving private figure plaintiffs involved in matters of public concern on a showing of "at least" actual malice.\textsuperscript{162} This reasoning leaves room for a decision holding that the First Amendment prevents assessing punitive damages against defendants in public figure and public official cases at least in the context of unintentional defamation.

Even assuming that punishment and deterrence of speech are found to be acceptable goals of defamation law, these ends can be achieved through less onerous means than exorbitant punitive damage awards. Compensatory damages awarded in libel actions, plus high legal defense costs, arguably constitute sufficient reason for most defendants to exercise more care in the future.\textsuperscript{163} Four types of compensatory damages can be recovered in libel actions: (1) special damages, such as those involving pecuniary injury such as lost wages; (2) general damages to plaintiff's reputation supported by proof of injury; (3) general emotional damage supported by proof of injury; and (4) general damages to plaintiff's reputation not supported by evidence but "presumed" to exist.\textsuperscript{164} Therefore, compensatory damages in libel do more than simply compensate

\begin{itemize}
  \item \textsuperscript{158} \textit{Sullivan}, 376 U.S. at 270. "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." \textit{Id.}
  \item \textsuperscript{159} \textit{Id.} at 271-72.
  \item \textsuperscript{160} See DeVore & Nelson, cited at note 13, at 166.
  \item \textsuperscript{161} \textit{Gertz}, 418 U.S. at 341.
  \item \textsuperscript{162} \textit{Id.} at 349. See also text accompanying notes 86-93.
  \item \textsuperscript{163} Jollymore, cited at note 13, at 1386, n.28. For figures relating to legal defense costs in libel actions, see text accompanying notes 123-128.
  \item \textsuperscript{164} Smolla, cited at note 67, at § 9.08[4]. In \textit{Gertz}, the Court held that private plaintiffs involved in matters of public concern must show actual malice on the part of the defendant to recover presumed damages. \textit{Gertz}, 418 U.S. at 349.
\end{itemize}
the plaintiff for out of pocket expenses; actual injuries include mental suffering, humiliation, and loss of status in the community.

Additionally, the stigma of an adverse libel judgment imposes less obvious negative consequences on a reporting or publishing defendant. As a result of the actual malice requirement, inquiry in a libel case focuses on the adequacy of the defendant’s conduct in reporting a story. A libel verdict, therefore, indicates to readers or viewers that the defendant has acted without regard for the truth. This may result in lessened demand for the defendant’s product, reducing the media outlet’s bottom line.165

Similarly, the media defendant’s diminished reputation for quality journalism may result in increased labor costs. By being found guilty of defamation, the organization in question becomes a less attractive place to work for media professionals. To attract and retain quality employees, the organization will have to provide higher compensation.166

Finally, the dishonor associated with an adverse libel judgment may affect the organization’s ability to gather news. Some news sources may prefer to impart their information to other, seemingly more accurate and credible, news organizations.167 Given that unsuccessful media defendants suffer these non-award costs on top of providing compensation for all imaginable injury, a further award of punitive damages can hardly be necessary either as punishment or to dissuade future defamation.

As a consequence of the Gertz actual malice rule, punitive damages may be imposed on a defendant who is guilty of reckless or negligent misconduct. But commentators have concluded that punitive damages are needed to attain optimal deterrence only when the defendant has received an “illicit benefit” or acted in a morally blameworthy fashion.168 In a libel context, punitive damages can deter defamatory speech only when the defendant acted purpose-

166. Cass, cited at note 165, at 75-76.
167. Id. at 76.
168. See Ellis, cited at note 32, at 32; Jollymore, cited at note 13, at 850-51. Punitive damages may also achieve optimal deterrence where compensatory damages do not adequately reflect the harm caused, such as may occur when a tort victim refuses to sue to redress an injury. This circumstance is unlikely to have much application in libel law. See Jollymore, cited at note 13, at 856.
fully and knowingly to inflict harm on the plaintiff. Some states require a finding that the defendant acted with intentional ill will, or common law malice, before punitive damages may be awarded. In certain rare cases, a media defendant may indeed publish defamatory falsehoods for the purpose of harming another. More commonly, however, a jury will assume the existence of common law malice based on the evidence presented to prove actual malice. In this case, a defendant who has not exhibited conduct appropriate for retribution is subjected to a punitive award not needed for deterrence.

Not only are punitive damages unnecessary to prevent unintentional defamation, they are inefficient as well. Historically, juries have been given wide latitude to compute exemplary awards. Most states temper the jury's pleasure by requiring only that such awards bear a "reasonable relationship" to compensatory damages, or that punitive awards not be "excessive." However, excessiveness is often determined simply by comparing the size of the punitive award to the defendant's wealth, or what has been called the "net worth test." Virtually unlimited jury discretion results in unpredictability. Damage awards cannot effectively deter misconduct when no logical correlation exists between the size of the award and the severity of the defendant's behavior. Neither can exemplary damages discourage contemplated conduct when potential defendants cannot determine either the likelihood or the magnitude of such awards.

Accordingly, it can be argued that the arbitrary imposition of

169. Id. at 855.
170. Anderson, cited at note 3, at 514. Professor Anderson reported that most states require common law malice be shown to recover punitive damages in defamation suits. Id. But see, Jollymore, cited at note 13, at 854 (most states require a mere showing of actual malice to award punitive damages).
174. DeVore & Nelson, cited at note 13, at 171. For example, the Seventh Circuit Court of Appeals upheld a $2,000,000 punitive verdict as not excessive against CBS after considering the network's net worth of one and a half billion dollars. Brown & Williamson Tobacco Corp. v. Jacobson, 827 F.2d 1119 (7th Cir. 1987), cert. denied, 485 U.S. 933 (1988).
176. Id. at 176.
punitive damages in libel cases violates the requirements of due process guaranteed by the Fourteenth Amendment.\textsuperscript{177} Although \textit{TXO} seems to indicate that an exemplary award will not offend due process solely on the grounds of disparity between compensatory and punitive damages, \textit{TXO} did not involve a communications tort.\textsuperscript{178} Defamation cases raise First Amendment considerations, which compel heightened due process procedures.\textsuperscript{179} Standardless jury discretion to award unlimited punitive damages in a First Amendment context where jurors may impose exemplary awards based on the same evidence used to determine liability, coupled with post-trial review using considerations of excessiveness measured by net worth, may be found by the Supreme Court to exceed the due process limits acknowledged in \textit{Haslip} but not defined.\textsuperscript{180}

Although plaintiffs in libel cases usually ask for large compensatory and punitive awards, empirical evidence shows that few public plaintiffs sue for either money or retribution. Data gathered by the Iowa Libel Research Project revealed that most public official and public figure libel plaintiffs file suit to clear their names.\textsuperscript{181} Only about thirty percent of public or private plaintiffs brought suit to punish the defendant.\textsuperscript{182} Few litigants can realistically be expected to refuse a windfall punitive award; however, it cannot be convincingly argued that the state has a valid interest in punishing libel defendants when retribution is not a major concern for libel victims.

D. Punitive Damage Awards Are Not Effective to Vindicate Reputational Interests

One major goal of the \textit{Sullivan} actual malice rule was to reduce the number of libel suits brought by public officials who objected to criticisms of their official conduct.\textsuperscript{183} However, plaintiffs—especially public officials and public figures—continue to bring defamation suits against the press, even though the necessity

\begin{itemize}
  \item \textsuperscript{177} \textit{Id.} at 169.
  \item \textsuperscript{178} \textit{TXO}, 113 S. Ct. 2711. See text accompanying notes 49-58.
  \item \textsuperscript{179} For a thorough discussion of the due process objections to punitive damage awards in defamation actions, see DeVore & Nelson, cited at note 13, at 168-175.
  \item \textsuperscript{180} See text accompanying notes 41-48.
  \item \textsuperscript{181} Bezanson et al., cited at note 11, at 33.
  \item \textsuperscript{182} \textit{Id.} at 35-36.
  \item \textsuperscript{183} Harry Kalven, Jr., A Worthy Tradition: Freedom of Speech in America 63 (1988). Professor Kalven described the case as “authoritatively declaring the unconstitutionality of seditious libel.” \textit{Id.}
\end{itemize}
of proving actual malice has considerably lessened their chances of success.\textsuperscript{184} Studying cases decided ten to twenty years after \textit{Sullivan}, the Iowa Libel Research Project found most libel plaintiffs were well-known community leaders whose actions were based on stories concerning their public or political conduct.\textsuperscript{185} Why would a public plaintiff sue for defamation knowing that the alleged libel will probably be repeated in media coverage of the suit, knowing that the average libel suit takes four years to complete, and knowing that the likelihood of ultimate victory is slim?\textsuperscript{186}

Defamation actions brought by public officials are usually motivated by reasons unconnected with financial injury or loss of income.\textsuperscript{187} While private plaintiffs sue chiefly for damages and retribution, public plaintiffs litigate to reestablish their good names.\textsuperscript{188} Most of the rewards of officeholding and community service are nonmonetary; those who choose the path of public service can be expected to value reputational interests more than loss of income.\textsuperscript{189} Almost three-quarters of the libel plaintiffs interviewed by the ILRP contended they would have been sufficiently appeased by a retraction, correction, or apology by the press to refrain from litigation.\textsuperscript{190}

Several commentators have concluded that libel litigation continues to attract public plaintiffs because bringing a libel suit serves in itself to vindicate tarnished reputations.\textsuperscript{191} Because public plaintiffs generally prize their reputations more intensely than do private individuals, they are more likely to overemphasize the impact of an alleged libel on their professional lives.\textsuperscript{192} Just by filing a libel suit, public officials generate media coverage and convey the impression that their cases are solid enough to surmount the hurdles associated with the actual malice rule.\textsuperscript{193} In fact, the prospect of continued media attention invites public plaintiffs not only to commence libel suits, but also to pursue them actively.\textsuperscript{194} Whether or not such a plaintiff actually recovers a damage award

\begin{enumerate}
\item \textsuperscript{184} Cass, cited at note 165, at 70.
\item \textsuperscript{185} Bezanson et al., cited at note 11, at 24.
\item \textsuperscript{186} \textit{Id.} at 23.
\item \textsuperscript{187} \textit{Id.} at 25.
\item \textsuperscript{188} \textit{Id.} at 25.
\item \textsuperscript{189} Cass, cited at note 165, at 86-87.
\item \textsuperscript{190} Bezanson et al., cited at note 11, at 25.
\item \textsuperscript{191} Cass, cited at note 165, at 85; Bezanson et al., cited at note 11, at 22.
\item \textsuperscript{192} Bezanson et al., cited at note 11, at 26.
\item \textsuperscript{193} Cass, cited at note 165, at 81.
\item \textsuperscript{194} \textit{Id.} at 87.
\end{enumerate}
is irrelevant; significant nonmonetary objectives have already been achieved.

This analysis reveals troubling flaws in our libel law system. Ironically, the actual malice rule deters private plaintiffs more than it does public plaintiffs, who continue to sue based on nonfinancial incentives. At least with respect to public plaintiffs, punitive damage awards fail to provide what libel plaintiffs want or need.

On the other hand, some scholars believe that the possibility of receiving punitive damages constitutes the only reason libel plaintiffs bring suit at all. According to this view, exemplary damages protect reputational interests that otherwise get short-changed under our current system. Professor Barron has called punitive damages “virtually the last weapon left to the libel plaintiff” and has suggested that without punitive damages, public plaintiffs would be completely powerless against defamatory attacks. If punitive damages are eliminated without changing some other aspect of defamation law to make recovery easier for libel plaintiffs, this position holds that reputational interests will be left totally unprotected and libel may as well be abolished. Furthermore, both professors Anderson and Barron surmise that without the lure of punitive recoveries, plaintiffs could not hire attorneys to represent them in defamation actions. Lawyers would refuse to undertake libel actions on a contingent fee basis if recovery were restricted to actual injury.

Despite the surface appeal of these arguments, various empirical findings contest their accuracy. First, eight states have abolished or significantly limited punitive damages in all civil cases, or in defamation actions in particular. Yet according to the LDRC study of all reported communication tort cases from 1980 to 1991, libel cases were brought in all but one of these jurisdictions. In fact, the study revealed that healthy numbers of libel cases had been brought in several of these states despite the impossibility of tradi-

195. See Anderson, cited at note 3, at 542; Barron, cited at note 14, at 111.
198. Id.
199. Id.; Barron, cited at note 14, at 122.
200. See notes 28-30. These eight states are Connecticut, Louisiana, Massachusetts, Michigan, Nebraska, New Hampshire, Oregon, and Washington.
201. LDRC Recap and Update, cited at note 8, at A1-B8. Although no libel cases were listed for Oregon, three invasion of privacy cases, at least one of which involved a false light privacy claim, were reported. Id.
tional punitive recoveries. For example, Massachusetts and Michigan each reported twelve libel cases since 1980. In comparison, the survey listed only six states with more than twelve libel cases during the years covered. Although the survey showed only one or two libel cases brought in four of the states that disallow punitive damages, twelve states that permit exemplary recovery also had two or fewer defamation actions brought during the same time period. Based on these figures, the availability of punitive damages does not appear to be a determinative factor with regard to the continued vitality of the libel tort.

Second, data collected by the ILRP refute the notion that without punitive damages, public libel plaintiffs will not find attorneys willing to represent them on a contingent fee basis. According to that study, public plaintiffs—those who must prove actual malice and whose chances of victory are therefore reduced—are most likely to be represented pursuant to a contingency arrangement, while private plaintiffs most often shoulder their own litigation expenses. This anomalous result highlights the importance of libel lawyers' non-award stakes, which affect the availability of legal representation in defamation cases. By representing a public official or public figure in a high-profile defamation suit, the plaintiff's lawyer attracts significant media attention. The publicity attendant to a media defamation case, comparable to lawyer advertising without the stigma, makes it worth the attorney's time to accept such a case on contingency, even if it does not promise much chance of recovery. Additionally, a lawyer who represents...

202. Id.
203. Id.
204. Id. The states and the number of libel cases in each were as follows: New York, 20; Pennsylvania, 19; California, 18; Florida and Texas, 16 each; and Ohio, 13. Twelve libel cases were also listed for Illinois.
205. Id. The states and the number of libel cases in each were as follows: Connecticut and Nebraska, one each; and New Hampshire and Washington, two each.
206. LDRC RECAP AND UPDATE, cited at note 8, at A1-B8. These states were Indiana and Vermont, each of which reported two libel cases; Iowa, Kansas, Montana, Utah, and Wyoming, each of which reported one libel case; and Idaho, North Carolina, North Dakota, South Dakota, and Wisconsin, none of which reported a libel case during the period covered.
207. Id. The remaining states and the number of libel cases brought in each as follows: Virginia, 11; Missouri, 8; Mississippi, Georgia, and South Carolina, 7 each; Rhode Island, 6; Arkansas, Colorado, Delaware, Hawaii, Louisiana, New Jersey, and West Virginia, 5 each; Alabama, Arizona, Kentucky, New Mexico, and Maryland, 4 each; and Maine, Minnesota, Nevada, and Oklahoma, 3 each.
208. Bezanson et al., cited at note 11, at 34.
209. Id. at 34.
a public figure may fear losing an influential client should the attorney refuse to accept the client’s defamation case.\textsuperscript{211}

Finally, it should be noted that most plaintiffs bear significantly less expense in bringing libel suits than do the media in defending them. The ILRP found that total litigation costs of libel plaintiffs averaged less than $10,000, with most suits requiring an expenditure of less than $5,000.\textsuperscript{212} Because approximately three-quarters of defamation actions are resolved before trial, many plaintiffs’ cases involve little more than the filing of a complaint.\textsuperscript{213}

Of course, some celebrity libel plaintiffs have incurred much greater litigation expenses, including General William Westmoreland and entertainer Wayne Newton, in their respective libel suits against network television.\textsuperscript{214} However, it seems unrealistic to posit that these high profile plaintiffs would be unable to attract attorneys to take their cases if punitive recoveries became unavailable. The better known the defamation plaintiff, the more tempting the nonaward stakes become for the plaintiff’s counsel. Because attorneys would continue to represent public plaintiffs for nonfinancial reasons and because the cost of suing for libel in most cases would remain relatively inexpensive, the elimination of punitive damages should have little impact on the ability or desire of public plaintiffs to pursue defamation litigation.

E. Punitive Damages Create a Costly and Unnecessary Drain on Judicial Resources

Abolishing punitive damages in public plaintiff libel cases would be unlikely to reduce the number of defamation actions that are initiated because public plaintiffs generally sue for nonfinancial reasons.\textsuperscript{215} However, eliminating punitive recoveries would help make damage awards more realistic, which could limit the number of costly post-trial motions and appeals that are currently made as


\textsuperscript{212} Bezanson et al., cited at note 8, at 34. Libel defendants, on the other hand, may spend as much as $150,000. See text accompanying notes 124-25.

\textsuperscript{213} Id. But see, Anderson, cited at note 3, at 542 (for well-known public figure plaintiffs, libel expenses may exceed $1 million).

\textsuperscript{214} Bezanson, cited at note 11, at 34. In a libel suit against a Dallas television station where the jury awarded a record $58 million to a former county attorney, Vic Feazell, Feazell’s attorney said the plaintiff’s costs totaled $106,000. Gordon Hunter, \textit{How Belo Settled Last of the Red-Hot Libel Wars}, \textit{Tex. L.J.}, Oct. 4, 1993 at 1, 28, col. 2.

\textsuperscript{215} See text accompanying notes 187-211.
a matter of course in defamation litigation.216

According to LDRC statistics for communication tort cases brought from 1980 to 1990, approximately fifty-seven percent of all jury verdicts included a punitive portion, which averaged more than $1.5 million.217 However, almost twenty-nine percent of initial jury awards were overturned or modified for the defendant at the post-trial motion stage.218 In about ten percent of these cases, judgments notwithstanding the verdicts were granted.219 Almost seventeen percent of jury awards were reduced by the trial judge, and motions for new trials were granted in almost two per cent of the cases.220

The survey goes on to show that more than half of the libel verdicts that survived the post-trial motion stage were reversed on appeal.221 For those not overturned, damages were subsequently reduced or further reduced in another seventeen percent of the cases.222 The end result: less than twenty-five percent of the initial awards were affirmed as entered, while more than seventy-five percent were modified in the libel defendant’s favor.223 Although the average award actually paid totaled more than a quarter of a million dollars, less than ten percent of the money initially awarded was ultimately paid.224

These figures reveal a libel system where large verdicts are granted, only to be reversed or reduced on appeal. If punitive damages were eliminated in public plaintiff cases, initial damage awards would be lower and accordingly, would need less post-trial adjustment. Even a small reduction in the current drain on judicial resources created from endless defamation appeals would achieve a significant social good.

According to a 1992 report of the American Bar Association’s special committee on funding the justice system, both federal and state judicial systems are overloaded to the point that the quality

216. But see, Barron, cited at note 14, at 112 (punitive damages spur litigation that otherwise might not occur, providing a voice to those victimized by the media).
217. LDRC RECAP AND UPDATE, cited at note 8, at 3. Approximately one-third of bench awards also included a punitive element. Id.
218. Id.
219. Id.
220. Id.
221. Id.
222. LDRC RECAP AND UPDATE, cited at note 8, at 3.
223. Id. at 4.
224. Id.
and availability of justice are threatened.\textsuperscript{225} The report noted that the federal judiciary has endured a budget crisis for the past three years and that about fifty percent of the states have had to reduce funds allocated to their court systems.\textsuperscript{226} The fact that many of our judges face overwhelming caseloads is well known.\textsuperscript{227} The judicial time and energy spent reversing, modifying and reducing exorbitant punitive damage awards in defamation cases could no doubt be put to a more socially preferable use.

However, it has been argued that even if punitive damages are done away with in public plaintiff cases, juries could continue to punish libel defendants by increasing compensatory awards to punitive heights.\textsuperscript{228} Because judges and juries are allowed to presume that the plaintiff suffered injury merely from the defendant’s publication of defamatory statements, damages may be assessed without proof of out-of-pocket loss.\textsuperscript{229} Although libel plaintiffs who are defamed in connection with matters of public interest must prove actual malice if they cannot provide evidence of actual injury, actual injury can be established by a showing of emotional suffering and humiliation.\textsuperscript{230} As Professor Anderson has noted, most libel plaintiffs allege an abundance of mental distress,\textsuperscript{231} tempting the trier of fact to grant compensation for emotional suffering greatly in excess of any real pecuniary loss.

One frequently proposed way to curb the unlimited ability of judges and juries to award exorbitant compensatory damages is to eliminate presumed damages in libel law.\textsuperscript{232} Some who have suggested barring presumed damages would continue to grant recovery for nonpecuniary reputational harm, but not for mental suffering,\textsuperscript{233} while others would permit recovery for emotional harm if supported by sufficient evidence.\textsuperscript{234} Despite the obvious appeal of this solution, it gives no consideration to the inevitable difficulties

\textsuperscript{225} \textsuperscript{226} \textsuperscript{227} \textsuperscript{228} \textsuperscript{229} \textsuperscript{230} \textsuperscript{231} \textsuperscript{232} \textsuperscript{233} \textsuperscript{234}
plaintiffs would have in proving all reputational injuries. Presumed damages may be necessary in certain defamation actions because "it is quite often impossible to reconstruct the ever-expanding web of influence that false statements can spin." 235

For this reason, perhaps the best alternative would be to permit presumed damages in libel actions, but cap them at a judicially or legislatively determined amount. 236 Damage limits have become quite common in state law, especially in wrongful death actions and with respect to punitive awards. 237 Although some states have limited punitive awards in specific causes of actions, many of these existing statutes do not apply in defamation cases. 238

If punitive damages were outlawed in public plaintiff libel cases and a ceiling was placed on recoverable presumed damages, it has been objected that plaintiffs could still recover gigantic punitive verdicts by recasting their suits as invasion of privacy or intentional infliction of emotional distress claims. 239 However, this dilemma has been previously raised and solved in libel law, when the Sullivan case imposed the actual malice standard in public plaintiff libel cases. Following that decision, the Supreme Court ruled that plaintiffs in communication tort cases cannot avoid the fault requirement by bringing either false light privacy actions or actions for intentional infliction of emotional distress where defamatory statements are at issue. 240 This circumvention problem with respect to punitive damages can be addressed in the same way: in any communication tort case where a fault requirement exists, punitive damages must be disallowed. So, for example, punitive damages would be recoverable in a public plaintiff appropriation of

235. Epstein, cited at note 3, at 793.
236. RODNEY A. SMOLLA, SUING THE PRESS 242 (1986). Professor Smolla has suggested $500,000. Another possibility would be to use a combination of a flat rate and a multiple of compensatory damages. For example, presumed damages would not exceed $500,000 or three times compensatory damages, whichever is greater.
237. Id.
238. See, e.g., TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (West Supp. 1993), which provides that the statute limiting exemplary damages to four times the amount of actual damages or $200,000, whichever is greater, does not apply to damages resulting from a malicious or an intentional tort; NEV. REV. STAT. ANN. § 42.005 (Michie Supp. 1993), which establishes a limitation on punitive awards of three times the compensatory damages or $300,000, whichever is greater, but does not apply to defamation actions. For a discussion of various state legislative statutes limiting punitive damages, see Volz & Fayz, cited at note 31.
239. See Van Alstyne, cited at note 13, at 809-10. Professor Van Alstyne has called this the "problem of circumvention." Id.
identity for commercial purposes case, but not in a false light invasion of privacy action. Misappropriation, intrusion, and publication of private facts privacy claims do not involve publications of defamatory falsehoods, and therefore do not raise the same First Amendment concerns regarding the chilling effect of punitive awards.

V. REMAINING ARGUMENTS IN FAVOR OF PUNITIVE AWARDS IN DEFAMATION ACTIONS

Most of the arguments for retaining exemplary damages in public plaintiff libel cases have been addressed and answered in the preceding section of this article as the flip side to the reasons for eliminating such awards. These included discussions concerning the existence of the chilling effect of punitive verdicts on protected speech, and whether punitive awards serve to deter and punish reprehensible conduct, or to protect reputational interests. However, several additional assertions regarding the appropriateness of punitive damages in defamation actions also merit consideration. These arguments contend that punitive damages are needed in libel law to preserve media accountability; that punitive damages serve to recompense successful plaintiffs for attorney's fees; and that punitive awards are justified in certain cases where the media act with specific intent to injure. Additionally, this section considers whether removing damage issues from the jury in libel cases would redress the problem of excessive punitive awards.

A. PUNITIVE DAMAGES ENCOURAGE MEDIA ACCOUNTABILITY

Advocates of punitive damages in libel litigation have argued that the threat of large exemplary awards is needed to ensure media responsibility. According to this position, any limitations on recoverable damages in libel actions would create lower press accuracy, resulting in increased reputational injuries. The elimination of punitive damages would further infuriate jurors who al-

242. Cf. Committee on Communications Law, cited at note 122, at 23, n.10 (where the committee recommended abolishing punitive damages in all invasion of privacy cases, including misappropriation, intrusion, publication of private facts, and false light privacy claims, as well as in libel and intentional infliction of emotional distress actions).
243. See text accompanying notes 116-143.
244. See text accompanying notes 154-182.
245. See text accompanying notes 183-213.
247. See Hollander, cited at note 150, at 268, 270.
ready view the press as thoughtless and overpowerful.\textsuperscript{248} This point of view reflects a general attitude of some that the press has become irresponsible since, and perhaps because of, the change in libel liability rules brought about by \textit{Sullivan} and its progeny.\textsuperscript{249}

But the conclusion that punitive damages are all that stands between the press and total irresponsibility relies on a number of insupportable assumptions. First, it presumes that the media as a whole are motivated entirely from fear of monetary judgments, without any desire for professionalism or quality reporting. However, the media apparently care enough about their reputation for accuracy to pay a high price to defend libel suits.\textsuperscript{250} The ILRP found that settlements are scarce in defamation cases, with only about twenty-five percent of libel suits being settled,\textsuperscript{251} compared with a fifty percent overall settlement rate in tort cases generally.\textsuperscript{252} The insistence on defending practically every libel claim evidences the high priority most media outlets place on credibility.\textsuperscript{253} Furthermore, several states already disallow punitive recoveries in defamation actions,\textsuperscript{254} and no evidence exists that the press is more villainous in those states than it is elsewhere.\textsuperscript{255}

Second, the idea that punitive awards keep the press responsible ignores the function and purpose of the fault requirement in libel law. As noted by Professor Cass, before the \textit{Sullivan} case, if a defendant suffered an adverse libel judgment it meant that a false statement had slipped into the paper.\textsuperscript{256} After \textit{Sullivan}, an adverse ruling now indicates that the defendant published the false statement with a certain level of culpability.\textsuperscript{257} A post-\textit{Sullivan} determination of recklessness implicates the defendant’s credibility and threatens the defendant’s relationships with its consumers, workers, and sources.\textsuperscript{258} For this reason, the fault requirement in libel law should encourage press accountability with or without the addition of punitive damages.

\textsuperscript{248} Barron, cited at note 14, at 114-15.  
\textsuperscript{250} See text accompanying notes 123-126.  
\textsuperscript{251} Bezanson et al, cited at note 11, at 34.  
\textsuperscript{252} Hollander, cited at note 150, at 267.  
\textsuperscript{253} Bezanson et al., cited at note 11, at 22.  
\textsuperscript{254} See text accompanying notes 200-207.  
\textsuperscript{255} SMOLLA, cited at note 236, at 242.  
\textsuperscript{256} Cass, cited at note 165, at 77.  
\textsuperscript{257} \textit{Id.}  
\textsuperscript{258} \textit{Id.} at 76. Also see text accompanying notes 165-167.
Even if it could be shown that the media has become less concerned with accuracy since the *Sullivan* case was decided in 1964, the problem should then be addressed by rethinking liability standards, rather than by imposing an award of exorbitant punitive damages. Several scholars have advocated relinquishing the actual malice rule and either returning to strict liability, 259 or replacing it with some type of "professional negligence" standard. 260 However, before a different liability standard can be considered, it must be empirically established that lower levels of accuracy are a result of the actual malice rule, and not the unavoidable consequence of other transformations in the media since the 1960s, such as tighter deadlines, increased competition, and new media technology. Would raising the standard of care expected of the media result in more accurate reporting, or simply less reported information? The relationship between liability standards and self censorship is admittedly hard to evaluate, but the First Amendment requires that any change in liability must promote higher media precision without creating intolerable burdens on expression. 261

B. Punitive Damages Recompense Successful Plaintiffs for Attorney's Fees

Compensatory damages in our legal system generally do not reimburse successful plaintiffs for attorney's fees. Should the plaintiff be victorious, the plaintiff's recovery will be reduced by the amount of legal fees incurred. Therefore, it has been suggested that punitive damages are needed in libel actions to make prevailing plaintiffs whole in this regard. 262

However, rather than justify punitive damages on this shaky ground, a more satisfactory approach would be to change the rules regarding compensatory damages to include recovery for legal fees. 263 Certainly, a recovery for litigation expenses is intended to compensate the plaintiff, rather than punish the defendant. Fur-

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259. See, e.g., Epstein, cited at note 3, at 802.
261. See text accompanying notes 141-143.
263. This idea has been suggested by several commentators. See, e.g., Jollymore, cited at note 13, at 1400, Comment, *Punitive Damages and Libel Law*, cited at note 13, at 849 n.11 (1985); Note, *Punitive Damages in Defamation Litigation*, cited at note 13, at 615.
Punitive Damages in Libel Actions

C. Punitive Damages are Needed to Punish the Press When it Acts With Specific Intent to Injure

A hard issue remains in determining whether punitive damages should be allowed in public plaintiff libel cases where the defendant published defamatory falsehoods pursuant to a plan specifically designed to injure the plaintiff. For example, two weeks before an election, a West Virginia newspaper published a series of articles carrying misleading headlines implying that a gubernatorial candidate had engaged in shady real estate transactions. The West Virginia Supreme Court of Appeals found that the newspaper published the headlines even though it had no evidence of impropriety by the candidate. According to the court, the newspaper orchestrated a scheme to discredit the plaintiff's character for personal motives and had not acted in its capacity as a news-gathering organization.

In this unusual situation, are punitive damages proper when a defendant repeatedly defames a public official based on a personal vendetta? When a defendant does engage in such reprehensible conduct, it becomes difficult to argue that punitive damages are inappropriate. A solution as suggested by Professor Epstein, assuming a return to strict liability, would be to allow punitive damages when the defendant repeatedly and systematically defames a public plaintiff after receiving clear and convincing evidence as to the falsity of the publications.

The alternative would be to forbid punitive recoveries even in these situations, recognizing that the First Amendment requires toleration of some reprehensible speech in order to fully safeguard informative and accurate speech regarding matters of public interest. After all, the plaintiff in this type of case will still be entitled to full compensation for all pecuniary loss, including some measure of presumed damages, as well as emotional suffering and personal humiliation. Assuming that punitive damages are eliminated in

265. Sprouse, 211 S.E.2d at 688.
266. Id. at 691.
267. Epstein, cited at note 3, at 816.
public plaintiff libel actions, the problem with providing an exception for egregious conduct is that juries may abuse it, using the exception to punish unpopular or unorthodox expression. For example, several commentators have advocated conditioning the award of punitive damages in libel cases on a finding of common law malice or ill will. While this rule would appear to create a meaningful limitation on punitive recoveries, in practice it has not. Most states do require a finding of ill will or spite; however, juries imply the existence of common law malice from the same evidence used to establish actual malice. It is therefore not unimaginable that juries may find the existence of a plan to defame in public plaintiff libel actions as often and as easily as they find the existence of common law malice. Because of the potential for abuse, it appears that the better solution would be to simply forbid punitive recoveries in all public plaintiff defamation cases.

D. Exorbitant Punitive Awards Can Be Eliminated in Libel Actions by Removing Damage Issues from the Jury

It has been suggested that, rather than eliminate punitive recoveries in libel actions, the Supreme Court should simply take damage determinations away from the jury. Juries do not fully understand the complexities and First Amendment implications of libel law, expecting newspaper publishers to be accountable for the consequences of false information in the same way that manufacturers are required to bear the costs associated with a defective product. Because the actual malice rule focuses on the defendant's conduct rather than on the truth or falsity of the publication, juries are likely to award punitive damages whenever actual malice is established. Judges, it is argued, have the necessary legal expertise to determine when punitive damages would be appropriate and in what amounts, without being swayed by irrelevant factors.

LDRC statistics for 1980 through 1989 confirm that exemplary damages are generally awarded less frequently by judges than by juries, with approximately one-third of bench awards including a

268. See Halpern, cited at note 3, at 249 n. 98; Jollymore, cited at note 13, at 1409; Comment, Punitive Damages and Libel Law, cited at note 13, at 860.
270. Id. at 554.
271. Van Alstyne, cited at note 13, at 795; Matheson, cited at note 3, at 281.
273. Id.
Punitive Damages in Libel Actions

Punitive component, compared with jury awards of punitive in almost three out of every five verdicts. The average punitive bench award during that time period cannot be fairly contrasted with the comparable figures for jury awards because one $5 million punitive bench award distorts the results. Although comparisons are of questionable value when so few libel cases are determined by bench trial, the study showed that no punitive damages were imposed in the three bench trials reported from 1990 to 1991.

Would the Supreme Court be likely to accept the assumption that judges are superior to juries in assessing damages in complicated legal matters? Historically, juries have been authorized to determine even more delicate questions than libel liability, including life and death decisions in criminal law. Removing the issue of damages from the jury in libel actions could open a Pandora's box of objections to jury damages in antitrust cases and other “complex” areas of the law. Furthermore, the existence of the one $5 million punitive bench award in a libel case mentioned in the LDRC survey portends that judges may not be superior in assessing realistic damage amounts after all.

More importantly, removing the determination of libel damages from the jury does not address the underlying concerns regarding the propriety of punitive damages in public plaintiff libel actions. Whether they are imposed by judges or juries, punitive awards still create a chilling effect on protected speech, an opportunity for discrimination against unpopular speakers, and an ineffective and unpredictable means to vindicate reputational interests. The only possible justification for eliminating jury-assessed punitive damages would be that bench awards might reduce the drain on judicial resources by removing the need for post-trial review. While this alternative might be better than nothing, it clearly fails to address most of the problems generated by punitive damage awards in public plaintiff defamation actions.

VI. Conclusion

Libel law involves competing interests: the protection of individual reputations on one hand and the First Amendment freedom to speak and publish on the other. As Professor Anderson has noted, the mere existence of defamation law deters speech; the only way

274. LDRC Recap and Update, cited at note 8, at 3.
275. Id.
276. Id. at 5.
to erase this chilling effect entirely is to do away with the libel tort.\textsuperscript{277} However, all but First Amendment absolutists admit that libel law advances a social good by safeguarding reputational interests. The question presented by this article is whether punitive damage awards in public official and public figure defamation actions can similarly be justified.

The Supreme Court, in \textit{Gertz v. Robert Welch, Inc.},\textsuperscript{278} stated that libel law serves the underlying state interest of "compensation of individuals for the harm inflicted on them by defamatory falsehood."\textsuperscript{279} Punitive damages, which reward the plaintiff beyond compensation for injury ostensibly to punish and deter reprehensible conduct, are inappropriate when the conduct in question enjoys significant First Amendment protection. Considering the massive legal fees necessary to defend against them, exemplary awards create a chilling effect that is particularly evident to publications that are outside the mainstream. The arbitrary and unpredictable manner in which punitive damages generally are awarded in libel cases provides little guidance to publishers who seek to avoid such liability in the future. The easiest way for an editor to protect against incurring ruinous punitive awards may simply be to refrain from publishing controversial matters. Ironically, research shows that public plaintiffs usually engage in libel litigation in order to clear their names, rather than to recoup windfall punitive verdicts.

The best and most administratively efficient solution to the problems created by exorbitant libel verdicts would be for the Supreme Court to hold that punitive awards in public plaintiff libel cases violate the First Amendment for the reasons described here. To avoid the problem of circumvention, the Court should extend this holding to all communication-related torts where liability is predicated on a finding of actual malice. Additionally, the Court should either devise a reasonable limit on presumed damages, or instruct the states to do so. Otherwise, libel verdicts are likely to become punitive in substance although compensatory in name.

If the Supreme Court is unwilling to act to eliminate punitive recoveries in public plaintiff defamation actions, the states should not hesitate to do so, based on their ability to act under the federal or state constitutions. Contrary to the fears of some scholars, state law after \textit{Sullivan} remains important in media defamation actions.

\begin{itemize}
\item \textsuperscript{277} Anderson, cited at note 3, at 551.
\item \textsuperscript{278} 418 U.S. 323 (1974).
\item \textsuperscript{279} \textit{Gertz}, 418 U.S. at 341.
\end{itemize}
and especially in the realm of damages.\textsuperscript{280} Some states have already outlawed or limited punitive damages in libel actions and no evidence exists to prove that defamation has become a dead letter or that reputations go unprotected in those jurisdictions.\textsuperscript{281}

Many other aspects of libel law have been denounced as inefficient and counterproductive,\textsuperscript{282} but so far the calls for reform have gone unanswered. Perhaps the press would be better served with a return to strict liability, as Professor Epstein has suggested,\textsuperscript{283} and perhaps the Supreme Court will refashion the libel tort completely, as Professor Anderson has advocated.\textsuperscript{284} But while we wait for the Supreme Court to announce sweeping changes in libel law or for a uniform defamation statute to be adopted by the states, the problem of exorbitant punitive damage awards in public plaintiff libel cases continues to grow. Abolishing punitive damages in public plaintiff libel actions, combined with reasonable limits on presumed damages, would alleviate a serious and escalating problem in libel law and provide impetus for further reform.

\textsuperscript{280} Marc A. Franklin, \textit{Suing Media for Libel: A Litigation Study}, 1981 Am. B. Found. Res. J., 795, 831. For example, one libel insurance provider has identified nine states in which it imposes a double premium for defamation insurance. \textit{Id.} at 827.

\textsuperscript{281} See text accompanying notes 200-207, 254-255.

\textsuperscript{282} For a detailed discussion of the imperfections existent in the current libel law system, see Anderson, cited at note 3.

\textsuperscript{283} Epstein, cited at note 3, at 802.

\textsuperscript{284} Anderson, cited at note 3, at 552.