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Long Live the Lie Bill!

Lucila I. van Dam
University of Michigan Law School

LONG LIVE THE LIE BILL!

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What successful defamation plaintiffs typically desire and doctrinally deserve is to have their reputations restored. Presently, however, a plaintiff who has established that she was defamed by the defendant is entitled only to an award of damages, which does nothing to restore reputation. This Note proposes that in addition to a damages award, courts—if they are to take seriously their obligation to compensate the plaintiff—should order the defendant to retract the defamatory statement. Contrary to the prevailing view, this Note argues that the proposed retraction order does not jeopardize the First Amendment guarantee of free expression.

INTRODUCTION

Legend has it that at the turn of the twentieth century, some intrepid Justices of the Peace in Madison County, Arkansas, developed a "lie bill," whereby upon adjudication that a statement was defamatory, the defendant was required to acknowledge in writing that he had lied about the plaintiff.[1] As the title suggests, this Note advocates the reinstatement of a type of "lie bill" as a component of the relief available to the defamed plaintiff.

The First Amendment guarantee of freedom of speech and of the press is not absolute. In the defamation context, the Supreme Court has held that there is no constitutional value in false statements of fact.[2] The Court has also recognized, as a corollary of this principle, that there is a compelling interest in compensating individuals for the harm inflicted on them by defamatory statements.[3]

The courts appear to have taken for granted that damages, which are the primary remedy for defamation, will adequately compensate the plaintiff for the harm sustained as a result of the defamatory publication. This Note takes the view, however, that a defamation plaintiff is only restored to her rightful position if, in addition to a damages award, she is able to obtain a retraction order

* University of Michigan Law School, LL.M. 2007; Victoria University of Wellington, New Zealand, LL.B./B.A., 2004. Fulbright Graduate Award. I am very grateful to Professor Laycock, who fostered my interest in remedies, and to everyone who made my year at Michigan Law School a remarkable one.

1. Robert A. Leflar, *Legal Remedies for Defamation*, 6 ARK. L. REV. 423, 423 (1952).

2. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

3. *Gertz*, 418 U.S. at 341, 348; *see also* Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 516 (1991); Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 773 (1986); Time, Inc. v. Firestone, 424 U.S. 448, 456 (1976); Rosenblatt v. Baer, 383 U.S. 75, 86 (1966).

against the defendant. Notwithstanding the coercive nature of this relief, this Note contends that a retraction order is indeed constitutionally permissible because of the recognized countervailing interests in protecting the private personality, and in compensating a defamed plaintiff.

Part I of this Note outlines two basic remedial goals which ought to inform the court's determination of the nature and amount of relief available to a successful plaintiff. The extent to which those goals are advanced by the current remedial framework for defamation is explored in Part II. Part III proposes that, in order to afford proper compensation and to redress the real injury caused by the defamatory publication, the plaintiff be given the option of a retraction order, in addition to an award of damages. In Part IV, the Note will identify and address each of the potential criticisms of this proposal, and will posit a theory to explain why, contrary to the prevailing view, ordering the defendant to retract does not violate the First Amendment protection against compelled speech.

This Note, in exploring the adequacy of the current remedial framework, is intended to contribute to the enduring debate on the reform of defamation law, an area of law that "is almost universally viewed as unsatisfactory."[4]

I. BASIC REMEDIAL GOALS

Although not expounded by the federal Constitution, it is an important legal principle that a plaintiff, who has sustained injury to her person, property, or character, is entitled to be redressed by the wrongdoer:

> The guaranty of a certain remedy in the laws for all injuries to person, property, or character . . . inserted in our bill of rights, the equivalents of which are found in almost every constitution in the United States, are but declaratory of general fundamental principles, founded in natural right and justice, and which would be equally the law of the land if not incorporated in the constitution.[5]

4. David A. Anderson, *Tortious Speech*, 47 WASH. & LEE L. REV. 71, 71 (1990); *see also* DAN B. DOBBS ET AL., PROSSER AND KEATON ON TORTS 771 (5th ed. 1984) (stating that the law of defamation is full of "anomalies and absurdities for which no legal writer ever has had a kind word").

5. Allen v. Pioneer Press Co., 41 N.W. 936, 938 (Minn. 1889).

Indeed, in the defamation context itself, the Supreme Court has recognized that there is a "strong and legitimate"[6] interest in "compensating private individuals for injury to reputation,"[7] which acts as a constraint upon the First Amendment right to freedom of speech and of the press.

The critical question, therefore, is how to compensate a plaintiff who has been injured as a result of a defamatory publication. There are two important principles that ought to guide the Court's determination of the nature of the remedy and of the measure of relief that is appropriate in any given case. The first principle, discussed immediately below, is that the remedy ought to have regard for and give effect to the substantive policy of the cause of action. The second principle is that compensatory relief ought to restore the plaintiff to the position she would have been in had the wrong never occurred.

The first principle that ought to guide the court's remedial determination concerns the nature of the remedy, rather than the quantum. In choosing a suitable form of redress for the plaintiff, the court must have regard for the rationale underlying the cause of action—that is, why the defendant's behavior is actionable in the first place—and have regard for the nature of the harm that has ensued from the wrong. The relief ultimately granted must tend to these two notions as directly as possible.

In the introduction to his seminal treatise on the law of remedies, Professor Dobbs of the University of Arizona College of Law provided the following insight:

> The remedy is merely the means of carrying into effect a substantive principle or policy. Accordingly it is a first principle that the remedy should be selected and measured to match that policy. It should not be broader than the substantive rule that invoked the remedy in the first place, nor, ideally, should it be narrower. Though this point would seem obvious, it is one sometimes overlooked, and a remedy is at times awarded or denied without any consideration whether it carries out the purpose for which the law was invoked.[8]

Similarly, Professor Laycock of the University of Michigan Law School has observed that "[r]emedies give meaning to obligations

6. *Gertz*, 418 U.S. at 348.

7. *Gertz*, 418 U.S. at 348–49; *see also Rosenblatt*, 383 U.S. at 86. ("Society has a pervasive and strong interest in preventing and redressing attacks upon reputation.").

8. DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 3 (1973) [hereinafter HANDBOOK].

imposed by the substantive law. . . . [I]t is the means by which substantive rights are given effect."[9]

The basic point is that the *type* of remedy awarded to the plaintiff should, "as precisely as possible,"[10] reflect and affirm the underlying purpose of the substantive right. In order to give effect to the substantive right, it is imperative that the courts are cognizant of the "law's basic purpose in recognizing the plaintiff's claim at all."[11]

A second important principle in the field of remedies is that if the Court is committed to *compensating* the plaintiff, as indeed it purports to be in the defamation context,[12] then it must endeavor to restore the plaintiff to the position she would have been in had the tort not been committed.[13] Anything short of that commitment fails to compensate the plaintiff adequately.

This Note contends that the current remedial framework fails to advance both of these basic principles.

II. CURRENT FRAMEWORK

A. Does the Remedy Give Effect to the Substantive Policy?

Defamation is a false statement published about the plaintiff that tends "to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held."[14] Defamation is also frequently described as a communication that harms the plaintiff by lowering her in the estimation of the community or by deterring third persons from associating or dealing with her.[15] Defamation can be

9. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 1–2 (3d ed. 2002).

10. DAN B. DOBBS, 1 LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION 27 (2d ed. 1993) [hereinafter REMEDIES].

11. HANDBOOK, *supra* note 8, at 4.

12. *See* Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991); Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986); Time, Inc. v. Firestone, 424 U.S. 448 (1976); *Gertz*, 418 U.S. at 323; *Rosenblatt*, 383 U.S. at 75.

13. *See* KENNETH H. YORK ET AL., CASES AND MATERIALS ON REMEDIES 4 (5th ed. 1992) ("One of the most obvious remedial goals in tort cases is to restore things as they were before the wrong. . . . While unavailable in many cases (e.g., personal injuries), restoration in specie is clearly a recognized and legitimate remedial goal in tort cases."); *see also* RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (1979) ("[T]he law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort.").

14. DOBBS ET AL., *supra* note 4, at 772 (citing GEORGE SPENCER BOWER, A CODE OF THE LAW OF ACTIONABLE DEFAMATION 4 (2d ed. 1923)).

15. RESTATEMENT (FIRST) OF TORTS § 559 (1938).

regarded as an assault on the plaintiff's personality,[16] which may cause "deep harm."[17]

As a "dignitary tort,"[18] the defamation cause of action has as its basic purpose the protection of an individual's interest in her reputation, dignity, and emotional tranquility.[19] The object of the defamation action is to "vindicat[e] the plaintiff's character."[20] Accordingly, where possible, the Court should opt for a remedy that is best able to vindicate the plaintiff's dignitary interests in her reputation.

Presently, the principal remedy afforded to a successful defamation plaintiff is a judgment for damages. This remedy is consistent with the courts' general preference for damages awards.[21] Leaving aside the vexed issue of punitive damages, there are two types of damages that a defamation plaintiff can recover: "general" and "special."

The "general" damages award addresses the *personal* injury suffered by the plaintiff as a result of the defamatory statement. That is, the award aims to compensate the plaintiff for the anguish, humiliation, and injury to feelings and self-image that she endured from seeing or hearing, and knowing that others have seen or heard, claims about her that are false and that bring her character into disrepute.[22] "Special" damages, on the other hand, seek to compensate the plaintiff for any pecuniary loss that flows from the publication, such as, the loss of business opportunities, wages, and trade. Special damages are consequential in nature.[23]

One of the problems with the damages remedy generally is that it is extremely difficult, and indeed somewhat artificial, to quantify the injury caused by a defamatory statement. The courts tend to rely on market value to determine the amount of damages needed to compensate the plaintiff, but where one's *personality* is injured, "there is no market price for such matters, and experts in reputation do not

16. Sheldon W. Halpern, *Values and Value: An Essay on Libel Reform*, 47 WASH. & LEE L. REV. 227, 238 (1990).

17. *Id.* at 239.

18. David A. Anderson, *Rethinking Defamation*, 48 ARIZ. L. REV. 1047, 1047 (2006).

19. *See* HANDBOOK, *supra* note 8, at 510.

20. Allen v. Pioneer Press Co., 41 N.W. 936, 938 (Minn. 1889).

21. 1 REMEDIES, *supra* note 10, at 3. *But see* DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 4 (1991) (contending that notwithstanding the extensive rhetoric to the contrary "[o]ur legal system does not prefer damages").

22. RESTATEMENT (SECOND) OF TORTS § 621 cmt. a (1979) ("In defamation actions general damages are imposed for the purpose of compensating the plaintiff for the harm that the publication has caused to his reputation.").

23. *Id.* § 575 cmt. b ("Special harm . . . is the loss of something having economic or pecuniary value.").

exist"[24] to assist in the calculation. As articulated by one court, general damages which are intended to compensate for "injured feelings, mental suffering and anguish, and personal and public humiliation . . . [are] not susceptible of being accurately measured in dollars and cents."[25] Professor Dobbs has argued, even more vehemently, that "such interests are never measurable in money."[26] That may be true, and quantification is certainly one of the challenges inherent in a damages award, but it is not a difficulty unique to this context;[27] juries are frequently required to undertake artificial calculations, most notably, in personal injury and wrongful death cases. This complaint is not, on its own, a sufficiently compelling reason to dispense with the damages award in the defamation context.

The real problem with damages as the principal relief given to a defamation plaintiff concerns the first of the remedial principles outlined above; a damages award simply fails to capture the essence of, or the policy underlying, the cause of action.

The objective of the defamation action is to vindicate an individual's interest in her reputation, dignity, and self-image, but an award of money simply cannot accomplish this goal.[28] The "real sting"[29] of the defamatory publication—the community's significantly diminished perception of the plaintiff—is not in any way alleviated by a damages award. As one commentator noted, "[t]he basic defect in the present defamation action is its failure to respond in kind to the injury caused by a defamatory statement. The primary injury resulting from such a statement is to the personal interest in reputation and not to a pecuniary interest."[30]

Moreover, according to one comprehensive study on defamation litigation, defamation plaintiffs "mainly sue to restore their reputa-

24. George E. Frasier, Note, *An Alternative to the General-Damage Award for Defamation*, 20 STAN. L. REV. 504, 506 (1968) (quoting ZECHARIAH CHAFEE, JR., GOVERNMENT AND MASS COMMUNICATION: A REPORT 99–100 (1947)); *see also* LAYCOCK, *supra* note 21, at 165 ("Neither reputation nor distress is sold in market transactions, so neither can be accurately valued in dollars.").

25. Hanson v. Krehbiel, 75 P. 1041, 1042 (Kan. 1904).

26. HANDBOOK, *supra* note 8, at 514.

27. *But see* LAYCOCK, *supra* note 21, at 165 (stating that it is "unusually difficult" to measure actual damages in defamation cases).

28. Halpern, *supra* note 16, at 242 ("Of course, money damages cannot restore the damaged reputation.").

29. John C. Martin, Comment, *The Role of Retraction in Defamation Suits*, 1993 U. CHI. LEGAL F. 293, 306 (quoting RODNEY A. SMOLLA, SUING THE PRESS 108 (1986)).

30. Frasier, *supra* note 24, at 505; *see also* DOBBS ET AL., *supra* note 4, at 771 (citing FREDERICK POLLOCK, THE LAW OF TORTS 249 (13th ed. 1929)).

tion by setting the factual record straight."[31] The average defamation plaintiff does not desire a financial windfall, but merely to have the falsity of the defendant's publication acknowledged and her reputation restored to the extent possible.

Given this disjunction between the current framework of relief and the substantive policy of the defamation tort, Professor Dobbs would conclude that the remedy must be wrong in some way and should be augmented to reflect that substantive right.[32] Part III of this Note proposes a way of enhancing the current remedial framework so as to provide an antidote to the sting of the defamatory publication. In short, Part III explains that notwithstanding the problems outlined above, which are inherent in a damages award in the defamation context, this Note does not propose abandoning damages altogether. Rather, it suggests that a damages award is a necessary but not sufficient way of redressing the injury and restoring the plaintiff to her rightful position. Accordingly, a defamed plaintiff, in order to be made whole, needs and is entitled to more than a damages award.

B. Does the Remedy Restore the Plaintiff to her Rightful Position?

The Supreme Court has repeatedly acknowledged that there is a compelling interest in compensating a plaintiff for the harm inflicted on her by a defamatory publication.[33] Compensation means that the plaintiff should be restored, as closely as possible, to the position she was in before the defamatory statement was published. Granted, it is somewhat contrived to speak of restoring the plaintiff to her pre-defamation position, as one cannot simply erase the injurious statements from the minds of those it has reached, but the courts should endeavor to do so to the extent that they can.

Damages, if correctly assessed, can undoubtedly recompense the plaintiff for the consequential losses she suffered as a result of the defamatory publication and arguably can even help to placate the

31. Randall P. Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 226–33 (1985). Professor Bezanson spent two years collecting and analyzing information on libel litigation. *Id.* at 226. One of his central findings was that the correction of falsehood, rather than a monetary award, is what chiefly motivates plaintiffs to sue. *Id.* at 227.

32. 1 REMEDIES, *supra* note 10, at 29.

33. *See* Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991); Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986); Time, Inc. v. Firestone, 424 U.S. 448 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Rosenblatt v. Baer, 383 U.S. 75 (1966).

plaintiff for her distress and her loss of dignity, but "[m]oney damages cannot replace a reputation once lost."[34]

A large part of the injury in defamation cases is the unwarranted diminishment in the way others perceive the plaintiff, and, as noted above, this is the part of the injury that plaintiffs are most concerned to have addressed. Compensating the plaintiff for the harm caused by the defamatory publication requires not just restoring her financially to the position she would have been in absent the publication or providing financial redress for the humiliation and general suffering she endured. Compensation additionally requires the "alteration of the perception of the plaintiff by the community, restoration of the prior perception."[35] Money can do a number of things to ameliorate the plaintiff's position, but it is simply incapable of removing the tarnish on her reputation. Accordingly, without the retraction, the plaintiff cannot be fully restored to her pre-defamation position.

In failing to give effect to the substantive policy of the defamation action, and in failing to restore the plaintiff to her rightful position, the current framework can be criticized for its "blind and almost perverse refusal to compensate the plaintiff for real and very serious harm."[36] And it seems that the Supreme Court has resigned itself to this remedial predicament.

The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. "Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored."[37]

The Court's despondence is unnecessary; this Note contends that it is not beyond the capacity of the law to vindicate the reputation of the plaintiff, and a damages award is not the only hope for redress.

III. PROPOSAL: RETRACTION ORDER

In the Norman era of twelfth century England, the custom was that a "'man who has falsely called another "thief" or "manslayer" must pay damages and, holding his nose with his fingers, must pub-

34. LAYCOCK, *supra* note 21, at 165.
35. Halpern, *supra* note 16, at 240.
36. DOBBS ET AL., *supra* note 4, 772.
37. *Rosenblatt*, 383 U.S. at 92 (Stewart, J., concurring).

licly confess himself a liar.' "[38] In a similar vein, this Note proposes that, in addition to judgment for damages, a successful plaintiff should be able to obtain from the Court injunctive relief in the form of an order compelling the defendant to retract the injurious publication.

A. Benefit of Retraction

Prominent jurist Jeremy Bentham once declared, "the only effective remedy [for defamation] is an authoritative declaration which destroys the falsehood."[39] More than a century later, the Supreme Court of Minnesota reiterated that view, claiming:

> [A]s far as vindication of character or reputation is concerned, it stands to reason that a full and frank retraction of the false charge, especially if published as widely and substantially to the same readers as was the libel, is usually in fact a more complete redress than a judgment for damages.[40]

The basic idea is that the circulation of the retraction in the same media source counters the effect of the original statement.[41] That is, when the original audience is apprised of the fact that the impugned statement was found to be false, it will desist from holding the plaintiff in low esteem and from continuing to shun her. The revelation of falsity may even cause contrition in the original audience. For the average plaintiff, setting the record straight is the very objective of litigating,[42] and retraction brings the court's determination of falsity to the attention of the public in a way that a typical defamation judgment does not.[43]

B. What Constitutes A "Retraction Order"

Retraction, as envisaged in this Note, does not require the defendant to "confess himself a liar," to "correct[] the false part or

38. Leflar, *supra* note 1, at 426 (quoting 2 SIR FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 537 (Cambridge Univ. Press 2d ed. 1968) (1898).

39. *Id.* at 425 (quoting JEREMY BENTHAM, 2 THEORY OF LEGISLATION 81 (1864)).

40. Allen v. Pioneer Press Co., 41 N.W. 936, 938 (Minn. 1889).

41. *See* Frasier, *supra* note 24, at 512.

42. Bezanson, *supra* note 31, at 227.

43. Frasier, *supra* note 24, at 529.

parts of the original statement,"[44] or even to apologize for the injurious publication. Instead, a retraction order demands only that the defendant publish an unequivocal statement drawing attention to the Court's determination that the original publication was false and defamatory. The retracting statement must be as prominently, "widely and fairly published"[45] as the original impugned statement.

In acting as a personal command to the defendant to act in a particular way, the retraction order constitutes injunctive relief.[46] Injunctions are considered to be coercive remedies because, in contrast to a judgment for damages, the court can ensure the defendant's compliance by invoking its contempt power.[47] A defendant who fails to comply with the injunction may be charged with civil or criminal contempt of court.

More specifically, the retraction order is an example of a reparative injunction that "compels the defendant to engage in a course of action that seeks to correct the effects of a past wrong."[48] Reparative injunctions are available to a plaintiff where an existing right that has been violated can be effectively repaired.[49] Because of its coercive nature, the retraction order is fraught with difficulties. These difficulties are examined in Part IV.

C. What Does Not Constitute a "Retraction Order"

The retraction order advocated in this Note is wholly different to the retraction remedy contained in the various state 'retraction statutes,' which "offer [the defendant] the carrot of reduced liability, not the stick of an injunction."[50]

Unlike a retraction order, retraction statutes allow a defendant to decide whether to retract the impugned statement; a defendant who chooses not to retract a statement will not be punished (although, of course, he may be held liable for substantial damages). The plaintiff can request a retraction, but she will not necessarily be indulged. The defendant's incentive to retract is not fear of

44. *Id.* at 531 (discussing Section 3(a) of the Tentative Draft of the Reply-Retraction Statute). The defamation proceeding is concerned with proving the falsity of the publication, rather than with establishing what is the true state of affairs, so a defendant should not be required to make a *correction*. Moreover, requiring the defendant to make a correction assumes a binary world, where if a statement is false, then the opposite must be true, but that is not necessarily the case.

45. HANDBOOK, *supra* note 8, at 519.

46. 1 REMEDIES, supra note 10, at 7.

47. *Id.*

48. OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 7 (1978).

49. 1 REMEDIES, *supra* note 10, at 225.

50. 2 REMEDIES, *supra* note 10, at 301.

punishment but rather awareness that the retraction will mitigate the amount of damages payable to the plaintiff, if not preclude the defamation action altogether.[51]

In not providing for compulsory retraction, and in acting as a defense for publishers rather than as an award in the plaintiff's favor,[52] retraction statutes have been described as a mechanism "to protect libelers."[53] Thus, the retraction statute is an entirely different species than the retraction order whose *raison d'être* is the enhancement of the plaintiff's remedial position.

The retraction order I propose in these pages is also different from the "vindication remedy" which was incorporated into, but promptly withdrawn from, the proposed Uniform Defamation Act.[54] The vindication remedy was envisaged as an alternative to the damages remedy and could be obtained by the plaintiff without having to prove fault on the part of the defendant.[55] The "no-fault, no damages" vindication remedy was met with intense opposition and was quickly abandoned.[56]

Unlike the vindication remedy, the retraction order I propose does not require any changes to the substantive law of defamation, such as the abandonment of the fault requirement. In further contrast to the vindication remedy, the proposed retraction order is intended to augment the relief currently available to the defamed plaintiff, such that damages would continue to be available. The question of whether, and how, the damages remedy ought to coexist with the retraction order is a difficult one.

D. Retraction as an Alternative, or in Addition to a Damages Award?

This Note's principal departure from the "lie bill" developed in Arkansas, and from the "vindication remedy" described above, is that this proposed retraction order would be afforded to the plaintiff in addition to a damages award. The availability of a retraction

51. *See* Frasier, *supra* note 24, at 513.

52. Leflar, *supra* note 1, at 440.

53. *Id.* at 454.

54. The "vindication remedy" in the Proposed Uniform Defamation Act was drafted under the auspices of the National Conference of Commissioners on Uniform State Laws and is discussed in Robert M. Ackerman, *Bringing Coherence to Defamation Law Through Uniform Legislation: The Search for an Elegant Solution*, 72 N.C. L. REV. 291, 308 n.88 (1994).

55. *Id.* at 308.

56. *Id.* at 308 n.88.

order does not obviate the need for money damages[57] because the two forms of relief address different kinds of injury resulting from the defamatory publication.

The objective of the retraction is to vindicate the plaintiff's reputation. But the retraction cannot, and does not purport to, ameliorate the pecuniary harm flowing from the defamatory statement, like lost wages, a downturn in clientele, or missed business opportunities. As a result, a plaintiff who obtains both a retraction order and "special" damages, which redress these instances of consequential loss, cannot be accused of double recovery.[58] Accordingly, there is no doctrinal difficulty with awarding both a retraction order and "special" damages.

The more nuanced question is whether a defamed plaintiff is entitled to obtain both "general" damages, which seek to redress the plaintiff for the anguish, humiliation, and injury to feelings she sustained as a result of the publication *and* a retraction order.

One view is that a retraction order precludes recovery of money damages for the plaintiff's anguish and distress because the retraction constitutes a "reasonable substitute for general damages."[59] What makes this approach so attractive is that it dispenses with the need to have the jury purport to quantify, in financial terms, the emotional harm sustained by the defamed plaintiff. Notwithstanding this appeal, this Note does not propose substituting the general damages award with a retraction order, as this substitution would perpetuate the under-compensation of the defamed plaintiff.

The retraction order and the "general" damages play different roles and attend to different injuries. General damages are meant to redress the plaintiff for the emotional distress and anxiety she endured upon discovering that harmful falsities had been published about her, resulting in being shunned by the community.[60]

The retraction order sets the record straight, and in doing so, helps to repair or restore the plaintiff's reputation and to provide some closure. The retraction order, unlike the general damages

57. *See* Halpern, *supra* note 16, at 240. (arguing that a retraction order does not obviate the need for damages, though for different reasons); *see also* Leflar, *supra* note 1, at 441 ("[V]indication will often be incomplete, so that additional money damages are also proper.").

58. The corollary of the principle that this combination does not constitute double recovery is that in advocating the retraction remedy as *an alternative* to damages, the "lie bill" and the "vindication remedy" seriously under-compensate the defamed plaintiff.

59. Werner v. S. Cal. Associated Newspapers, 216 P.2d 825, 828–29 (Cal. 1950). Similarly, the proposed Uniform Defamation Act, which morphed into the proposed Uniform Correction and Clarification of Defamation Act, also limits the plaintiff's claim for damages to the economic loss caused by the publication. *See* DAN B. DOBBS, THE LAW OF TORTS 1195 (2001).

60. RESTATEMENT (SECOND) OF TORTS § 621 cmt. a (1979).

award, can do nothing to ameliorate the anguish already suffered, but it can prevent further anguish.

In other words, a retraction order constitutes prospective relief, whereas the general damages award compensates the plaintiff retrospectively for the injury sustained at the time of the publication that continued until the moment of retraction. On their own, the retraction order and the general damages award constitute necessary but not sufficient forms of compensatory relief for defamation.

From a remedies law perspective, it is not problematic to award a defamed plaintiff special damages, general damages, *and* a retraction order. In redressing different kinds of injuries, the danger of double recovery is avoided. But the question of how to compensate a defamed plaintiff is not simply a question concerning the law of remedies. The way in which one goes about remedying the defamed plaintiff may have a profound impact on the First Amendment freedom of speech, and this impact cannot be disregarded. Concerns about the impact of the First Amendment are explored in detail in Part IV below.

In addition to its implications for freedom of speech, this proposal must also overcome two other challenges: basic criticisms of the retraction order, and the courts' historic opposition to providing injunctive relief for defamation.

IV. THE THREE HURDLES

A. Basic Criticisms of the Retraction Order

The retraction order has been criticized as ineffective in vindicating the plaintiff's good name. Specifically, the retraction order has been criticized because of the lack of sincerity said to be inherent in the retraction;[61] the possibility that the retraction may never reach the original audience;[62] and the inevitable delay in "trumpet[ing] the news of [the] victory".[63] Alternatively, retraction has been dismissed as a valuable form of relief because of the risk of renewing public interest in the original defamation,[64] or in aggravating the injury.[65]

61. Leflar, *supra* note 1, at 440.

62. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 46 (1971).

63. Frasier, *supra* note 24, at 514; *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 & n.9 (1974) (observing that the "truth rarely catches up with a lie"). Benzanson estimates that it may take up to four years for litigation to conclude. Bezanson, *supra* note 31, at 231.

64. HANDBOOK, *supra* note 8, at 527.

65. Martin, *supra* note 29, at 305.

The short answer to each of these concerns is that retraction may well be an imperfect remedy, but retraction is nevertheless the remedy of choice for the majority of defamation plaintiffs who want the falsity of the statement to be acknowledged.[66] Retraction is also what defamation plaintiffs are doctrinally entitled to obtain in order to be made whole. Accordingly, it should always be within the plaintiff's prerogative to have the record set straight, notwithstanding the possible delay, the involuntary nature of the retraction, or the risk of drawing attention to the impugned statement.

B. Equitable Nature of the Relief

The second challenge that the retraction order must surmount lies in equity's long tradition of refusing to enjoin a defamatory statement. The explanation for this tradition is three-fold. First, injunctions were developed to protect rights of a proprietary nature and did not extend to purely personal interests.[67] Because defamation is a personal right, equity was not prepared to grant injunctive relief, unless a property right was also implicated by the defendant's conduct.[68] Second, because the original rationale for equity jurisdiction was the inadequacy of the legal remedy,[69] injunctive relief was not available where damages were an adequate remedy. Third, because a jury trial is not available in the equitable jurisdiction, equity would not enjoin a defamatory communication because it would have the effect of depriving the defendant of a jury trial.

The traditional arguments against injunctive relief for defamation are no longer convincing. Professor Dobbs has indicated that "the notion that equity will not protect personal rights is largely outmoded . . . Injunctions can now be obtained for personal rights so long as there is a need for such protection and no reason of policy prevents it."[70] Professor Dobbs also observed, "the damages remedy is not apt to be adequate where damages are difficult to prove, as is very often the case, or where the defendant has no funds, or where the thing to be protected is unique, as reputation

66. *See supra* note 31 and accompanying text.

67. W.E. Shipley, Annotation, *Injunction as Remedy Against Defamation of Person*, 47 A.L.R. 2d 715, § 6 (1956).

68. HANDBOOK, *supra* note 8, at 120.

69. LAYCOCK, *supra* note 21, at 4. (stating that the irreparable injury rule "says that equitable remedies are unavailable if legal remedies will adequately repair the harm").

70. HANDBOOK, *supra* note 8, at 524.

surely is."[71] Furthermore, as I have already argued, damages alone are not sufficient to compensate the plaintiff because they invariably fail to vindicate the plaintiff's reputation, which for plaintiffs is often considered the main injury requiring redress.

While the third argument might be persuasive with respect to an application for a preliminary injunction, a reparative injunction would not issue until after the jury has determined that the impugned statement is false and defamatory. Thus, the defendant would not in fact be deprived of a jury trial.

Accordingly, equity's traditional rationale for refusing to enjoin a defamatory statement ought not prevent a court from issuing a reparative injunction in the form of a retraction order.

C. First Amendment

The First Amendment is said to be "the most formidable obstacle"[72] to injunctive relief for defamation. The Supreme Court has held that the "chief purpose" of the First Amendment, which proscribes laws abridging the freedom of speech or of the press, is "to prevent previous restraints upon publication."[73] Accordingly, prior restraint of speech has been described as the "most serious and the least tolerable infringement on First Amendment rights."[74]

The Supreme Court has described prior restraints as "administrative and judicial orders forbidding certain communications when issued *in advance of the time that such communications are to occur.*"[75] The typical examples of prior restraints are administrative rules requiring a license or permit before the communication will be allowed to take place, and judicial orders enjoining certain speech.[76] Court-issued injunctions of speech are regarded as a form of prior restraint because they effectively place the judge in the role of censor.[77]

The reparative injunction advocated in this Note is not a *prior* restraint. The retraction order would issue only after the statement

71. *Id.*

72. 3 REMEDIES, *supra* note 10, at 525.

73. Near v. Minnesota *ex rel* Olson, 283 U.S. 697, 713 (1931).

74. Christina E. Wells, *Bringing Structure to the Law of Injunctions Against Expression*, 51 CASE W. RES. L. REV. 1, 1 (2000) (quoting Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976)).

75. Alexander v. United States, 509 U.S. 544, 550 (1993) (quoting MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT § 4.03, at 4–14 (1984)) (emphasis added).

76. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 950 (3d ed. 2006).

77. *Near*, 283 U.S. at 713.

has already been published and after the jury has determined that the statement is false and defamatory. In ordering the defendant to retract his injurious statement, the judge is not censoring the speech or forbidding the defendant from repeating the defamatory statement. The retraction order simply provides relief to the plaintiff for a communication that has already taken place. The retraction order cannot be described as a form of censorship and therefore does not offend this facet of the First Amendment.

Professor Dobbs has nevertheless argued that there is a "high probability" that compulsory retractions[78] "might offend against First Amendment principles of the federal constitution."[79] Specifically, he contends that compulsory retraction might intrude upon the editorial decisions of the press, may constitute compelled speech,[80] and might be regarded as "an effort to prescribe an official version of the truth".[81]

1. First Amendment Protection Against Compelled Speech

The Supreme Court's First Amendment jurisprudence is said to have "established the principle that freedom of speech prohibits the government from telling people what they must say."[82] At first glance, this observation seems extremely troubling for the viability of the proposed retraction order. However, after analyzing the leading cases in this area, it appears that the principle is not absolute.

The most pertinent of these leading precedents is *Miami Herald Publishing Co. v. Tornillo*,[83] a case cited as illustrative of the principle that the First Amendment protection of free speech encompasses the right to refrain from speaking,[84] and a case that addressed the constitutionality of a "right of reply" statute.

Florida's statute, which was challenged as unconstitutional in *Miami Herald*, required any newspaper, which had assailed the character or the performance in office of an electoral candidate, to

78. Professor Dobbs had in mind compulsory retractions *pursuant to statute*, which may make a difference to the question of constitutionality, as some of the statutes do not require an adjudication of falsity, or alternatively, a finding of fault. *See* HANDBOOK, *supra* note 8, at 526.

79. *Id.*

80. DOBBS, *supra* note 59, at 1195.

81. HANDBOOK, *supra* note 8, at 526.

82. Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 61 (2006).

83. Miami Herald Publ'g Co. v. Tornillo (*Miami Herald*), 418 U.S. 241 (1974).

84. Wooley v. Maynard, 430 U.S. 705, 714 (1977).

afford that candidate the opportunity to reply to those charges, at the newspaper's expense.[85] Failure by the newspaper to do so constituted a misdemeanor.[86]

The Supreme Court held the statute to be in violation of the First Amendment because it "operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter,"[87] with the result that "political and electoral coverage would be blunted or reduced."[88]

2. Distinguishing *Miami Herald*

The main difficulty with Florida's "right of reply" statute, or as the Court described it, the "right of access" statute, is that it purported to provide a remedy for behavior analogous to, but not reaching the legal threshold of, defamation. Moreover, the statute purported to do this with respect to speech concerning political candidates and electoral matters, arguably the most highly-protected speech.[89]

What made the statute so objectionable was that it effectively circumvented the defamation action by allowing a plaintiff to obtain relief in the form of a right of reply, in circumstances where she certainly would not have been able to recover under the common law notion of defamation, let alone under its recently federalized counterpart.

That is, relief would have been available to the plaintiff without adjudication by an impartial jury that the statement was indeed false or defamatory; without any proof of fault on the part of the defendant or proof of injury sustained by the plaintiff; and without the defendant having the benefit of the defenses of opinion or fair comment, both of which are particularly relevant in this context where the criticism is directed at public figures. The statute had the effect of carving huge inroads into the substantive law of defamation, creating an incentive, utterly incompatible with the

85. FLA. STAT. § 104.38 (1973) (repealed 1975).

86. *Id.*

87. *Miami Herald*, 418 U.S. at 256.

88. *Id.* at 257.

89. That the Supreme Court is more protective of communications involving political candidates, or political matters, is evidenced in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), in which the Supreme Court added an "actual malice" requirement where the plaintiff is a public official, and in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), in which the Supreme Court held that where the publication involves a matter of "public concern," the plaintiff can only claim presumed or punitive damages if "actual malice" is proved.

constitutional value of free expression, for the media not to comment on electoral matters at all.

In short, Florida's statute represented the antithesis of the trend contemporaneously taking place at the Federal level,[90] of tailoring the common law defamation action so as to safeguard First Amendment values.

The retraction order proposed in this Note does not raise the same issues. This Note is concerned only with the way in which a plaintiff—who has successfully brought a defamation action against the defendant—ought to be compensated. The substantive law of defamation would remain unscathed.

Furthermore, the retraction order would not have the same obvious "chilling effect"[91] as the right of reply statute,[92] because retraction would only be required where defamation is established as a matter of law. In contrast to capricious, excessive, and "largely uncontrolled"[93] jury awards, which the Supreme Court has been concerned with eliminating, it is difficult to conceive of any way in which the narrowly tailored retraction order described in this Note would deter publication any more than "special" or "general" damages, which are deemed acceptable. Accordingly, the holding in *Miami Herald* does not seem to be controlling in this context. Moreover, this conclusion is supported by Justice Brennan's emphatic statement that:

> the Court's opinion which, as I understand it, addresses only 'right of reply' statutes . . . implies no view upon the constitutionality of 'retraction' statutes affording plaintiffs able to prove defamatory falsehoods a statutory action to require publication of a retraction.[94]

As one Federal court observed, "[t]his careful reservation by the author of *New York Times v. Sullivan*, leads me to conclude that the constitutionality of retraction statutes is an entirely open issue, not

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90. *Miami Herald* was decided on the same day as *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), a case which further limited the common law defamation tort by restricting the availability of presumed and punitive damages.

91. This "chilling effect" may not be a justified concern. *See* Halpern, *supra* note 16, at 237 (in which he observes "[n]otwithstanding prophecies to the contrary, there is little hard evidence, although much speculative assumption, of significant press self-censorship").

92. As noted above, the right of reply statute effectively induced the media not to comment at all on electoral matters.

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

94. Miami Herald Publ'g Co. v. Tornillo (*Miami Herald*), 418 U.S. 241, 258 (1974) (Brennan, J., concurring).

prejudiced by the determination in *Miami* at all."[95] The constitutionality of compulsory retraction orders has yet to be authoritatively determined.

3. Retraction Order is Constitutionally-Permissible

Since its unanimous decision in *New York Times v. Sullivan*, the Supreme Court has been consistently refining the common law tort of defamation for the purpose of safeguarding the First Amendment freedom of speech. There are various facets to this constitutionalization of the defamation action.[96] For instance, it is now incumbent on the plaintiff to prove that the impugned statement is false;[97] if a plaintiff is a public official or a public figure he must additionally prove "actual malice" on the part of the defendant to succeed;[98] and if a statement is a "matter of public concern," the plaintiff—whether private or public—must prove "actual malice" if she wishes to recover presumed or punitive damages.[99] In essence, "*Sullivan* and its progeny . . . [have significantly altered] the common law by the erection of constitutional hurdles in the way of recovery."[100]

Yet the First Amendment protection of freedom of speech is neither absolute, nor is it the "only guidepost"[101] in the defamation context. The Supreme Court has, in fact, recognized two countervailing interests: "[t]he protection of the private personality," a concept at the "root of any decent system of ordered liberty" and a basic principle of our constitutional system;[102] and the "strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation."[103]

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95. Coughlin v. Westinghouse Broad. & Cable, Inc., 689 F. Supp. 483, 489 (E.D. Pa. 1988) ("[A] carefully crafted retraction statute could well be constitutional.").

96. *See* Anderson, *supra* note 4, at 77–79.

97. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). This requirement departs from the common law action, which allowed the defendant to prove truth as a defense. *See* RESTATEMENT (SECOND) OF TORTS § 581A cmt. b (1979).

98. *Id.* (for public officials); Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967) (for public figures).

99. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

100. Halpern, *supra* note 16, at 233; *see also Gertz*, 418 U.S. at 392 (White, J., dissenting) (complaining that the Court is consistently "escalating the threshold requirements of establishing liability").

101. Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

102. *Id.*

103. *Gertz*, 418 U.S. at 348.

The court's task is to strike "a more appropriate accommodation between the public's interest in an uninhibited press and its equally compelling need for judicial redress of libelous utterances."[104] This Note's view is that a refusal to allow retraction orders on account of the First Amendment does not appropriately balance the competing interests; this refusal gives too much weight to the First Amendment, effectively double-counting or over-enforcing it.

The basic values underpinning the First Amendment freedom of speech have already been given due weight in the Supreme Court's tailoring of the defamation action, which is now a shadow of its former common law self. In heavily circumscribing the circumstances in which a plaintiff can seek redress for false and injurious statements published about her, the Supreme Court has attached increasing weight to the value of freedom of speech, at the expense of the other interests. The scales are tipped heavily in favor of the First Amendment.

The way in which the competing interest of compensation can now be meaningfully accommodated, without disturbing that equilibrium, is precisely by allowing full compensation to plaintiffs who have successfully jumped over each of the constitutional hurdles. And, as discussed in Part II, a defamation plaintiff will only be truly compensated, in the sense of being restored to her rightful position, if she is given the option of a retraction order. So long as the Court professes to be concerned with compensating the defamed plaintiff, it should be prepared to invoke that principle as a compelling interest justifying a slight incursion into the First Amendment.[105]

And it is only a slight incursion. There appears to be a tendency in defamation scholarship instinctively to regard any proposals of reform, or any departure from the orthodox position, as "anti-First Amendment" or as "an intolerable threat to First Amendment values,"[106] thus hampering "meaningful debate"[107] on whether such proposals genuinely threaten the First Amendment.

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104. Time, Inc. v. Firestone, 424 U.S. 448, 456 (1976).

105. *See The Supreme Court, 1973 Term*, 88 HARV. L. REV. 13, 179–80 (1974) ("An interpretation of *Miami Herald* which makes compulsory access only presumptively unconstitutional could permit retraction statutes to be upheld if the important state interest in promoting the vindication of personal reputation were deemed sufficiently compelling." (citations and footnotes omitted)).

106. Halpern, *supra* note 16, at 234 (citing Paul A. LeBel, *Emotional Distress, the First Amendment, and "This Kind of Speech": A Heretical Perspective of* Hustler Magazine v. Falwell, 60 U. COLO. L. REV. 315, 318 (1989)).

107. *Id.*

All that the proposed retraction remedy requires of the defendant who is adjudged to have published a false and injurious statement concerning the plaintiff is that he publish, to the same extent as the original communication, the Court's finding of falsity. This remedy is a far cry from "an effort to prescribe an official version of the truth," which concerned Professor Dobbs, or from the "the intrusive editorial thumb of Government"[108] mandated by Florida's right-of-reply statute in *Miami Herald.*

On the contrary, one could argue that a retraction order actually enhances First Amendment values by encouraging the free-flow of *accurate* information.[109] If defamation can properly be said to act as a "fraud on the marketplace of ideas,"[110] a retraction serves the public interest in correcting those false and injurious statements.[111]

CONCLUSION

> The liberty of the press is indeed essential to the nature of a free state . . . . Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; *but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.*[112]

There is no doubt that freedom of speech and of the press are indispensable values in our democratic system of government. However, freedom of speech is not the only interest that the courts must take into account in prescribing the proper bounds of the modern defamation action. The protection of the private personality and the compensation of a plaintiff who has been injured by the defamatory publication are also compelling interests. The courts are ever-striving to accommodate these competing values.

The Supreme Court has affirmed and enhanced the first amendment freedom of speech by forbidding the use of preliminary injunctions, by significantly narrowing the scope of the defamation action, and by restricting the availability of the non-compensatory forms of relief, namely, presumed and punitive

108. RANDALL P. BEZANSON, HOW FREE CAN THE PRESS BE? 63 (2003) (quoting the Miami Herald's counsel's oral argument in the Supreme Court).

109. Frasier, *supra* note 24, at 507–08, 512.

110. Martin, *supra* note 29, at 304.

111. Frasier, *supra* note 24, at 507–08, 512.

112. WILLIAM BLACKSTONE, 4 COMMENTARIES *151–52, *cited with approval in* Near v. Minnesota *ex rel* Olson, 283 U.S. 697, 714 (1931) (emphasis added).

damages. At the same time, the Supreme Court has acknowledged that a plaintiff who has successfully navigated these hurdles standing in the way of the constitutionalized defamation action has a strong and legitimate interest in being compensated.

This framework appears to be the delicate balance reached by the Court. Accordingly, to refuse to make the defamed plaintiff whole, which requires providing both a damages award and a retraction order, is to distort that equilibrium, and to double count the First Amendment at the expense of those ostensibly compelling, countervailing interests.

If the Supreme Court is serious about compensating a plaintiff for the real injury caused by defamatory publications, then it must allow the recovery of a retraction order in addition to a damages award. Notwithstanding the prevailing rhetoric to the contrary, this Note considers that providing full compensation does not in fact do great violence to the First Amendment and is therefore constitutionally permissible.