A DEFENCE OF THE ASPIRATIONS — BUT NOT THE ACHIEVEMENTS — OF THE U.S. RULES LIMITING DEFAMATION ACTIONS BY PUBLIC OFFICIALS OR PUBLIC FIGURES

by Nadine Strossen*

[In light of the recent controversy in Australia concerning defamation suits by public figures, the author in an address delivered during the 23rd Australian Legal Convention discusses the American landmark decision New York Times v. Sullivan; *its implications and effect on American defamation law. The general principle underlying this decision is that defamation actions involving public officials or figures should be subject to special limitations, to encourage freedom of the press. The Court declared that a public official could not recover damages unless he proved the defamatory statement was made with "actual malice." The author defends the decision from criticism that it creates an inequality between public officials and other citizens, and continues to discuss the actual effect of* Sullivan *and possible reforms to the law which could more effectively enact its principles.]*

INTRODUCTION

The legal rules governing defamation actions by public officials or public figures have been the subject of much debate in Australia recently. Such actions constitute a high percentage of the overall civil litigation docket in many Australian courts. Various new rules have been proposed, at both the national level and within individual Australian states, which would modify the common law defamation principles governing these actions.

One reform proposal under consideration is that Australia adopt the special defamation rules that the United States Supreme Court has promulgated for defamation actions brought by public officials or public figures, or involving matters of public concern. With the goal of assisting in the evaluation of Australian reform proposals that are modeled after the United States rules, this paper discusses those rules from both theoretical and practical perspectives. Readers are invited to draw their own conclusions as to any implications that these observations might have for the Australian situation.

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Part I explains and defends the general principle enunciated in *New York Times v. Sullivan*[1] and other leading defamation decisions by the U.S. Supreme Court: that defamation actions involving public officials, public figures, or matters of public concern should be subject to special limitations to encourage freedom of the press. In particular, Part I responds to two common criticisms of this general principle: that it creates an unjustifiable inequality between public officials or public figures and other defamation plaintiffs; and that it is inconsistent with general tort law concepts.

Part II demonstrates that the free press principles underlying *Sullivan* and its progeny have not in fact been adequately promoted by the legal standards embodied in these cases. The concern expressed by some critics of the United States defamation rules, that they tilt the law too far in favor of press freedom, and against the reputational interests of public officials and public figures, is unwarranted in light of the actual experience under such rules. Twenty years after *Sullivan*, there is scant evidence that defamed public officials or figures are deprived of legal redress. To the contrary, there is substantial evidence that the press and other media are not sufficiently protected from the economic and associated free speech burdens imposed by defamation litigation.

Part III offers some theories as to why the *Sullivan* rules have not effectively promoted the *Sullivan* goals, and Part IV suggests some alternative measures that might more effectively promote those goals.

I. THE GOALS UNDERLYING THE *SULLIVAN* RULES LIMITING DEFAMATION ACTIONS BY PUBLIC OFFICIALS OR FIGURES

In 1964, in the landmark decision of *New York Times v. Sullivan*,[2] the U.S. Supreme Court for the first time evaluated common law defamation standards in light of the fundamental principles expressed in the First Amendment to the U.S. Constitution, which guarantees freedom of speech and of the press.[3] The Court declared that it was considering the case against a background of 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open'.[4] The Court recognized that some erroneous statements are inevitable in such a free debate, and therefore that even such erroneous statements 'must be protected if the freedoms of expression are to have the "breathing space" that they "need to survive" '.[5] Another way this concept is often expressed is that it is not enough for laws simply not to prohibit free expression outright; they must go further and avoid any deterrent or 'chilling' effect on free speech.[6]

[1] 376 U.S. 254 (1964).
[2] *Ibid.*
[3] U.S. CONST. Amend. I. It provides, in pertinent part: 'Congress shall make no law. . . abridging the freedom of speech, or of the press . . . ' This provision is also binding upon state governments. *Gitlow v. New York*, 268 U.S. 652 (1925).
[4] 376 U.S. 254, 270 (1964.)
[5] *Ibid.* 271-72 (quoting *N.A.A.C.P. v. Button,* 371 U.S. 415, 433 (1963)).
[6] See generally Tribe, L., *American Constitutional Law* (1978) § 12-12, 634.

In *Sullivan*, the Supreme Court found that the common law defamation rules — which held a defendant strictly liable for words that tended to defame the plaintiff — had an impermissible chilling effect on freedom of the press, by inducing members of the press to engage in 'self-censorship' even of accurate statements in order to avoid liability.[7] To prevent this chilling effect or self-censorship, the Court declared that a public official could not recover damages for a defamatory falsehood regarding his official conduct unless he proved that the statement was made with what the Court termed 'actual malice' — *i.e.*, 'with knowledge that it was false or with reckless disregard of whether it was false or not'.[8]

One rationale for *Sullivan's* limitation upon defamation suits *by* public officials was to bring them into parity with defamation suits *against* public officials. Both the federal and the state governments in the United States had long granted immunity to government officials, absolutely shielding them from defamation suits based upon statements made in connection with their official duties. This immunity has been viewed as necessary to prevent government officials from being inhibited in the vigorous administration of government policy.[9] The *Sullivan* Court concluded, however, that this one-way defamation immunity was unfair.[10]

The pre-*Sullivan* non-mutual immunity is one factor that belies the contention, which is made by some *Sullivan* critics, that the *Sullivan* rule *creates* an inequality between public officials and other defamation plaintiffs. To the contrary, *Sullivan removed* such an inequality. Before that decision, government officials were unequally favored by United States defamation law. On the one hand, government officials were immune from defamation suits that arose from their official conduct. On the other hand, if a private citizen should criticize the official conduct of a public officer, he or she could be held strictly liable for defamation.

The pre-*Sullivan* inequality between public officials and other citizens was not only inconsistent with general notions of fairness. Even worse, it was

[7] 376 U.S. 254, 279.

[8] *Ibid.* 279-80. To remedy the chilling effect that public officials' defamation actions had upon freedom of the press, counsel for the *New York Times* argued that such actions should be absolutely barred. In the alternative, the *New York Times* counsel advocated rules that would allow these actions to be maintained, but were designed to limit their damaging impact upon freedom of the press. One proposed rule was the 'actual malice' standard, which had been adopted by several states. Another suggested rule was to limit a public official's recovery to the amount of actual financial injury demonstrated to have been caused by the defamation. Brief for Petitioner at 51-54. *See infra* text accompanying notes 85-86 (recommending that damage recoveries in defamation actions by public officials or figures should be limited to actual financial injuries caused by the defamation). The written and oral arguments presented on behalf of the New York Times are recounted in Lewis, 'New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment"', 83 *Col. L. Rev.* 603, 605-608 (1983).

[9] See *Barr v. Mateo,* 360 U.S. 564, 575 (1959) (holding statement of federal official to be absolutely privileged, and not subject to defamation claim, so long as it is made 'within the outer perimeter' of his or her duties). The states accord the same immunity to statements of at least their highest officers. See also *Sullivan*, 376 U.S. 254, 282-83.

[10] 376 U.S. 254, 282-83.

inconsistent with the most basic premises underlying the United States' democratic form of government. As stated by James Madison, one of the nation's Founding Fathers, in the United States, 'the censorial power is in the people over the Government, and not in the Government over the people.'[11] Moreover, in the American political system, the citizen is regarded as having not only a right, but also a *duty*, to criticize government officials.[12] For these reasons, the *Sullivan* opinion concluded that '[i]t would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves.'[13]

Subsequent to *Sullivan*, the Supreme Court extended the actual malice requirement to cases involving 'public figures.'[14] The definition of public figures for purposes of this doctrine lacks optimal clarity. However, the trend in the Supreme Court's decisions has been to focus and to narrow the concept.[15] Specifically, the Court has clarified that there are two types of public figures: (1) general purpose public figures — those who 'occupy positions of such persuasive power and influence that they are deemed public figures for all purposes'; and (2) limited purpose public figures — those who 'have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.'[16]

The rationale underlying the Court's extension of the actual malice requirement to public figures underscores additional flaws in the contention of some critics that this requirement *creates* inequalities. To the contrary, this rule is designed to *lessen* certain inequalities that would otherwise exist between public figures and other defamation plaintiffs.

On a pragmatic level, as the Supreme Court noted in *Gertz v. Robert Welch, Inc.*,[17] both public officials and public figures would probably enjoy more access than private individuals have to channels of effective communication. In consequence, public officials and public figures generally have a more realistic opportunity to counteract false statements. Private individuals are therefore more vulnerable to injury from defamation, and the state interest in protecting them from such injury is correspondingly greater.[18]

The Supreme Court found even more persuasive a second, normative distinction that sets public officials and figures apart from private individuals. In seeking the public limelight, the Court said, the public official or figure

[11] Report on the Virginia Resolutions of 1798, 4 J. Elliot *Debates on the Federal Constitution of 1787,* 553-54 (1876), quoted in *Sullivan*, 376 U.S. 254, 282.
[12] 376 US. 254, 282.
[13] *Ibid.* 282-83.
[14] *Curtis Publishing Co. v. Butts,* and *Associated Press Inc. v. Walker*, 388 U.S. 130 (1967).
[15] See, *e.g., Wolston v. Readers Digest Ass'n*, 443 U.S. 157 (1979); *Hutchinson v. Proxmire*, 443 U.S. lll (1979); *Time, Inc. v. Firestone,* 424 U.S. 448 (1976); *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974).
[16] *Gertz,* 418 U.S. 323, 345.
[17] 418 U.S. 323.
[18] *Ibid.* 344-45.

should be deemed to accept certain necessary consequences, including the risk of closer public scrutiny and criticism. This is simply a manifestation of the venerable common law concept of assumption of the risk. The public official or figure has assumed a greater risk of being the subject of defamatory statements than has the private individual![19] Therefore, to make it more difficult for the former than the latter to recover for defamation is simply a fair reflection, in accordance with fundamental common law precepts, of the pre-existing inequality between them. It does not create a new inequality.

Because private individuals do not assume such a great risk of defamation, and because they have less access to channels for effectively counteracting defamation, the U.S. Supreme Court held in *Gertz v. Robert Welch, Inc.* that private plaintiffs could recover damages for actual injuries caused by defamation merely by showing negligence.[20] However, the *Gertz* decision further held that, where the defamation relates to a matter of public concern, even a private plaintiff cannot recover presumed or punitive damages without showing actual malice.[21] The rationale for this holding points to another flaw in the arguments commonly advanced by critics of the post-*Sullivan* United States defamation rules. Such critics often contend that these rules *create* a distinction between the principles governing defamation and those governing other torts. In actuality, however, these rules were necessary to *eliminate* such a distinction. Specifically, as the Court stated in *Gertz*, '[t]he common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss'.[22] Instead, 'the existence of injury is presumed from the [mere] fact of publication', thus leaving juries free to 'award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred'.[23]

The anomalous doctrine of presumed damages for defamation is inconsistent with the fundamental axioms of tort law that a plaintiff should be allowed to recover damages only upon proof that he actually incurred injuries, and that these injuries were proximately caused by the alleged tortious

[19] *Ibid.* Even the seminal Warren and Brandeis article on privacy, which may well be the foremost exposition of individual right to legal redress for publications about them, recognizes this distinction between public and private figures:

> There are persons who may reasonably claim as a right, protection from the notoriety entailed by being made the victim of journalistic enterprise. There are others who, in varying degrees, have renounced the right to live their lives screened from public observation.

Warren & Brandeis, 'The Right to Privacy', 4 *Harv. L. Rev.* 193, 215 (1890).

[20] *Ibid.* 347. The Court subsequently held that emotional distress alone could constitute 'actual injury' under the *Gertz* standard. *Time, Inc. v. Firestone,* 424 U.S. 448 (1976).

[21] *Ibid.* 348-50. *Gertz* did not expressly decide what showing would be necessary for a private plaintiff's recovery of presumed or punitive damages where the defamation does not relate to a matter of public concern. The Supreme Court first resolved that issue in its subsequent *Dun & Bradstreet* decision, discussed *infra* text accompanying notes 27-28.

[22] *Ibid.* 349.

[23] *Ibid.*

conduct.[24] These basic rules reflect, in part, the absence of any public interest in facilitating tort plaintiffs' recoveries of money damages in excess of their actual injuries. There is no greater public interest in facilitating gratuitous recoveries for defamation than for any other tort. To the contrary, there is a particularly powerful public interest in preventing gratuitous recoveries in defamation actions. As the Supreme Court noted in *Gertz*, the peculiar doctrine of presumed damages in defamation actions invites juries 'to punish unpopular opinion rather than to compensate individuals for injuries sustained by the publication of the false fact'.[25] Thus, this doctrine 'compounds the potential' of defamation cases 'to inhibit the vigorous exercise of First Amendment freedoms'.[26]

In a decision issued during its 1984-1985 Term, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[27] the Supreme Court added a further refinement to the principles delineated in the *Sullivan* line of cases. For the first time, the Court expressly addressed an issue that had been implicated, but not directly presented, in the *Gertz* case: the degree of fault that a private plaintiff must show to recover presumed or punitive damages for defamation regarding matters not of public concern. The Court clarified that, in such cases, a private plaintiff may recover presumed and punitive damages (as well as damages for actual injuries caused by the defamation) merely by showing negligence.[28] Thus, in defamation actions brought by private individuals, the actual malice requirement for recovery of presumed or punitive damages is limited to speech regarding matters of public concern. This limitation is logical for two principal reasons. First, there is a particularly great public interest in curbing self-censorship of speech regarding matters of public concern. Second, when such matters are involved, the subject of the alleged defamation should more readily be able to publicize his or her version of the relevant facts, because matters of public concern by definition are of special interest to the media.

Insofar as they provide greater protection for speech regarding matters of public concern, the defamation principles embodied in *Sullivan* and its progeny are at least arguably harmonious with common law negligence concepts. According to the Restatement of Torts, which summarizes the common law principles followed in the majority of states in the United States, conduct is negligent if the risk of harm it entails outweighs its social utility.[29] So, the greater the social utility, the lower the degree of care required. Accordingly,

[24] See Anderson, 'Reputation, Compensation, and Proof', 25 *Wm. & Mary L. Rev.* 747, 748-49 (1984) (even when plaintiffs may recover presumed damages for other common law or constitutional torts, such damages are only nominal, unless plaintiff proves that the tort caused actual harm).

[25] 418 U.S. 323, 349.

[26] *Ibid.*

[27] 105 S.Ct. 2939 (1985).

[28] *Ibid.* 2948.

[29] Restatement (Second) of Torts § 291 (1965). The Restatement formulation is essentially the same as Judge Learned Hand's classic formula for determining whether conduct is negligent, see *United States v. Carroll Towing Co.*, 159 F.2d 159, 173 (2d Cir. 1947).

because greater social utility attaches to speech respecting matters of public concern than other speech,[30] the common law itself should impose a lower standard of care as a condition for engaging in such speech.

For the reasons stated above, the principles enunciated in the *Sullivan* line of cases are consistent with — and, indeed, mandated by — the paramount importance of free speech and press in the United States' legal-political system. In particular, these principles reflect the supreme importance of free criticism of public officials and figures, and free comment about matters of public concern.

The United States' legal system is also very respectful of the individual's right to protect his or her good name. As stated by the Supreme Court, the protection that the United States' legal system accords to individual reputational interests 'reflects . . . our basic concept of the dignity and worth of every human being — a concept at the root of any decent system of ordered liberty'.[31] However, as the Court further stated in the same opinion, free speech and press values require that, 'in order to protect speech that matters', we must also 'protect some falsehood' and other speech that would not independently be worthy of protection.[32] The Supreme Court thus regards the consequence of this necessity — that individuals' reputational interests regarding matters of public concern are not as easily vindicated as they would be under the common law system — as a price well worth paying for robust, wide-ranging debate on such matters.

II. THE FAILURE OF THE *SULLIVAN* RULES TO PROMOTE EFFECTIVELY THEIR UNDERLYING GOALS

The laudable goals underlying the *Sullivan* decision — to increase press freedom by decreasing burdensome defamation claims — have not in fact been promoted through the actual malice rule that *Sullivan* devised in an effort to advance these goals.

Most journalists had expected that *Sullivan* would cause considerable declines both in the number of defamation cases filed, and in their success rate. In response to these anticipated declines, according to some distinguished journalists, immediately after *Sullivan* the media 'moved . . . into a period of exuberant and probing coverage, frequently poking into areas that might not have been reported at all, or reported rather differently', before *Sullivan*.[33] In fact, the journalists' expectations about *Sullivan* appeared to be borne out

[30] See, *e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 105 S.Ct. 2939, 2946 (1985) (speech on matters of public concern is more important under First Amendment than speech on matters of purely private concern); *Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964) ('speech concerning public affairs is more than self-expression; it is the essence of self-government'); *Roth v. United States,* 354 U.S. 476, 484 (1957) (purposes of First Amendment is 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people').

[31] *Gertz,* 418 U.S. 323, 341 (quoting *Rosenblatt v. Baer,* 383 U.S. 75, 92 (1966)).

[32] *Ibid.* 341.

[33] Abel, 'The First Amendment Is Under Attack Both at Home and Abroad', 3 *Communications Law* 3 (1985).

by the decision's immediate aftermath. For years after the *Sullivan* decision, public officials won virtually no defamation recoveries.[34]

However, today — two decades after *Sullivan* — the anticipated decreases in defamation actions and recoveries by public officials or figures clearly have not materialized. Three major recent defamation suits by public officials or public figures, which involved huge damage claims and protracted litigation, are symptomatic of broader trends in the past decade: *Sharon v. Time, Inc.*,[35] *Westmoreland v. CBS, Inc.*,[36] and *Tavoulareas v. Washington Post*.[37] Neither public officials nor public figures appear reluctant to press defamation claims against media defendants, notwithstanding the actual malice standard. Moreover, these plaintiffs generally seek, and often recover, large damage awards. Although defendants ultimately prevail in approximately two-thirds of all defamation cases, many such victories occur only at the appellate level of litigation, following defendants' expenditure of large, unrecoupable sums for attorneys' fees, and the diversion of substantial amounts of time from defendants' primary, journalistic pursuits.[38]

These trends have been thoroughly documented by an organization called the 'Libel Defence Resource Center' or 'LDRC', an information clearinghouse that was organized by media groups to monitor developments in defamation litigation. According to the LDRC, media defendants lost fifty-four per cent

[34] Lewis, *supra* note 8, 608.

[35] The former Israeli Defense Minister, Ariel Sharon, claimed $50 million (U.S.) in damages concerning an allegedly defamatory passage in a *Time Magazine* article. Sharon claimed that the passage accused him of knowingly perr ·itting or encouraging the murder of Palestinian refugees at camps in West Beirut, Lebanon. In res onse to the judge's special verdict questionnaire, the jury found that the challenged passage had a defamatory meaning and was false. *N.Y. Times,* Jan. 25, 1985. However, judgment was entered for the magazine because the jury found that it did not act with 'actual malice.' In announcing the jury's conclusion that *Time Magazine* had not acted with the necessary degree of fault, the foreman also read the following statement: 'We find . . . that certain *Time* employees . . . acted negligently and carelessly in reporting and verifying the information which ultimately found its way into the published paragraph of interest in this case.' *N.Y. Times*, Jan. 25, 1985. The case produced three reported decisions concerning pre-trial issues, see 596 F. Supp. 538 (S.D.N.Y. 1984) (denying defendant's motions to dismiss or for summary judgment); 103 F.R.D. 86 (S.D.N.Y. 1984) (ruling on various discovery issues); 10 Med. L. Rptr. 1146 (S.D.N.Y. 1983) (denying defendant's motion to dismiss).

[36] Former U.S. General William Westmoreland claimed $120 million (U.S.) in damages from the television network concerning a televised documentary. Westmoreland contended that the broadcast's central theme was that he had led a conspiracy to suppress and distort intelligence reports about the size of the enemy forces in Vietnam. After five months of trial, shortly before the case would have gone to the jury, the parties entered into a settlement: no money was exchanged, and the parties agreed to a joint statement containing certain mutual acknowledgments of each other's good faith. *N.Y. Times* Feb. 19, 1985. The case produced one reported decision concerning pre-trial issues, see 596 F. Supp. 1170 (S.D.N.Y. 1984) (denying defendant's motion for summary judgment).

[37] The President and Chief Executive Officer of Mobil Oil Corporation and his son sued the newspaper (and other defendants) over a story alleging that the father had misused his position and corporate assets to benefit his son. The jury returned verdicts of $2.05 million (U.S.) for plaintiffs, but the trial judge entered a judgment notwithstanding the verdict for defendants. 567 F. Supp. 651 (D.D.C. 1983). A panel of the appellate court reversed, holding that there was sufficient evidence to sustain the jury verdict against the newspaper defendants, 759 F.2d 90 (D.C. Cir. 1985). Defendants sought a rehearing by the appellate court en banc, which was granted. 763 F.2d 1472, 1481 (D.C. Cir. 1985).

[38] *Libel Defense Resource Center,* [Herein after referred to as "LDRC"], *Bull. No. 11, Defamation Trials, Damage Awards and Appeals: Two-Year Update (1982-1984).* See also *Infra* note 63 and accompanying text.

of the defamation cases that were tried during the period 1982-1984,[39] and the compensatory damage awards averaged more than two million U.S. dollars.[40] In that two-year period, compensatory damage awards exceeded one million U.S. dollars in approximately one-third of all cases. In contrast, before 1980, there had been only one damage award of one million U.S. dollars in the entire history of United States defamation litigation.[41] Punitive damages were awarded in almost sixty per cent of the defamation cases tried during the 1982-1984 period, and these punitive damage awards averaged more than 2.9 million U.S. dollars.[42]

Notwithstanding the actual malice showing that public officials and figures must make to prevail in defamation cases, their record of victories and damage awards has been comparable to that of defamation plaintiffs generally. In the 1982-1984 period, fifty-five per cent of the defamation trials concluded against media defendants were instituted by public officials or public figures. These plaintiffs won more than fifty per cent of their cases at the trial level.[43] Following trial, approximately thirty percent of them recovered compensatory damages of one million U.S. dollars or more, and the same percentage recovered punitive damages of that magnitude.[44]

According to the available data, both the loss rates and the damage awards faced by defamation defendants significantly exceed the corresponding figures for civil litigation defendants generally, as well as for defendants in other areas of civil litigation where plaintiffs have been faring relatively well — namely, medical malpractice and products liability. For example, a survey of all civil jury trials in a large United States county during the period 1960-1979 — which was apparently the largest survey of civil jury trials ever undertaken in the United States — revealed that the defendants' overall victory rate was thirty per cent higher than defendants' victory rate in all defamation cases during the period for which such figures are available, 1976-1983.[45] More current, nationwide data demonstrate that the average compensatory damage award in defamation cases during the period 1980-1982 — more than two million U.S. dollars — is approximately three times the average compensatory damage award in products liability cases (approximately $786,000 U.S.) and medical malpractice cases (approximately $666,000 U.S.) during the same period.[46]

[39] *Ibid.* 6.
[40] *Ibid.* 14.
[41] *Ibid.* 12.
[42] *Ibid.* 15.
[43] *Ibid.* 10.
[44] *Ibid.* 16.
[45] *LDRC, Bull. No. 9, Juries and Damages: Comparing the Media's Libel Experience to Other Civil Litigations,* 24-25 (1984). The Institute for Civil Justice, an adjunct of the Rand Corporation, surveyed 9,000 civil jury trials in Cooke County, Illinois, in both state and federal courts. This was apparently the largest survey of civil jury trials ever undertaken in the United States. Although the plaintiffs' success rates varied significantly as between different causes of action, and also over time, none of these rates approached the corresponding rates of plaintiffs' jury trial victories in defamation actions. *Ibid.* (citing Peterson, and Priest, 'The Civil Jury: Trends in Trials and Verdicts, Cooke County, Illinois, 1960-1979' (1982) *FIC Quarterly* 361).
[46] *Ibid.* 26 (citing Jury Verdict Research, Inc., *Injury Valuation Reports, Current Award Trends,* No. 270 (Solon, Ohio 1983)).

To put these numbers in the proper perspective, it must be borne in mind that, 'to the extent there is any actual injury'[47] as a result of defamation, such injury 'is rarely of a quality or degree comparable to the massive physical impact and permanent, costly physical debilitation so often caused by medical malpractice or by defective, dangerous products'.[48]

Ironically, in countries that extend less protection to freedom of expression, and more protection to reputational interests, than does the United States, defamation damage awards on the scale of recent such awards in the United States are unknown. For example, although United States journalists say they fear Great Britain's relatively strict defamation rules, the largest defamation judgment known to have been paid in Britain as of 1983 was for 100,000 pounds, which was approximately 150,000 U.S. dollars.[49] By United States standards, this is a small award, equivalent to only less than eight per cent of the average compensatory damage award assessed in United States defamation trials during the period 1982-1984.[50]

Burdensome as post-*Sullivan* defamation damage awards are in the United States, they are nevertheless estimated to constitute only about twenty per cent of the total expenses incurred in defending defamation actions, with the remaining eighty per cent going to attorneys' fees and costs.[51] And, in the American civil litigation system, the prevailing party almost never has a right to collect these sums from the unsuccessful party.[52] Mirroring the trend towards increasing damages and costs in defending defamation actions, defamation insurance rates in the United States have also risen sharply in the past few years, a trend that is expected to continue.[53]

Perhaps an even more costly burden borne by defamation defendants, beyond their large, unrecoupable litigation expenditures, is the diversion of substantial amounts of time from their primary, journalistic pursuits.[54] For all of these reasons, media defendants are inevitably economic losers — and,

[47] *LDRC, Bull. No. 9, supra* note 45, 27. See also *infra* text accompanying note 65.

[48] *LDRC, Bull. No. 9, supra* note 45, 27. See also *ibid.* (citing Jury Verdict Research, Inc., *supra* note 46)('[T]he jury's decision to grant' awards of one million U.S. dollars or more in a medical malpractice or product liability case 'is usually based upon testimony presenting legitimate computations of the plaintiff's projected lost earnings and the medical expenses necessary to sustain him for life').

[49] Lewis, *supra* note 8, 615-16.

[50] See, *supra* text accompanying notes 40-41.

[51] See, *e.g.,* Guzda, 'Dealing With Libel Suits', *Editor & Publisher* May 11, 1985, 16; Newsom, 'Insurance', *Presstime,* Mar. 1985, 16, 18.

[52] See, *e.g., Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters,* 456 U.S. 717, 721 (1982) ('Under the American rule, it is well established that attorneys' fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor' (quoting *Fleischmann Distilling Corp. v. Maier Brewing Co.,* 386 U.S. 714, 717 (1967)). The economic burden that defamation defendants face is inequitable in that plaintiffs can — and usually do — avoid out-of-pocket expenditures for attorneys' fees by being represented on contingency fee bases. See *infra* text accompanying note 71. Moreover, when defamation plaintiffs prevail, juries can impose punitive damage awards against defendants as a means of requiring defendants to bear the burden of plaintiffs' attorneys' fees. No such fee-shifting device is available when defamation defendants prevail. See *infra* note 91. These factors underscore that, under the current American law, the defamation defendant faces a greater risk than the plaintiff.

[53] See, *e.g.* Newsom, *supra* note 51.

[54] See Lewis, *supra* note 8, 611-612. See also *infra* note 63 and accompanying text.

still more significantly, losers in terms of free press concerns — even if they ultimately emerge from the litigation as technical legal victors.

One would certainly expect that the trends described above would result in precisely the chilling or self-censorship effect that the *Sullivan* actual malice standard was designed to prevent. A nationwide survey of reporters, editors, and media lawyers that was discussed in the May-June 1985 issue of the *Columbia Journalism Review* confirmed that the recent spate of defamation litigation has indeed chilled the vigor and openness of the press.[55] This phenomenon was observed not just among smaller news organizations, but also among major news organizations.[56] According to the Columbia survey, actual or threatened defamation litigation has driven some newspapers to abandon investigative journalism altogether; others have abandoned certain reporting techniques; and still others are focusing on topics that they perceive as less likely to generate defamation claims.[57]

III. REASONS FOR FAILURE OF *SULLIVAN* RULES TO PROMOTE EFFECTIVELY THEIR UNDERLYING GOALS

How did this decreased press freedom come about? Why the remarkable resilience of defamation claims by public officials and public figures? And why have these claims had such a chilling effect, notwithstanding the actual malice standard? There are several factors at play, each pointing to reforms that would assist in transforming *Sullivan's* aspiration of increasing press freedom into a reality.

First, the discrepancy between jury verdicts for plaintiffs and appellate court reversals[58] indicates that judges may not be adequately instructing juries about the *Sullivan* standards. The *Tavoulareas* case, which was brought by Mobil Oil Company's Chief Executive Officer and his son against *The Washington Post*,[59] illustrates this phenomenon. Extensive post-verdict interviews with the jurors in that case suggested that they found for plaintiffs because they concluded that the *Post* had not proven the truth of every detail of the challenged story. When asked what the verdict would have been if the issue were whether the *Post* had acted intentionally or recklessly, the jurors indicated that the newspaper would have won.[60] Yet, under *Sullivan*, that is of course precisely the issue that the jurors should have decided.

This disturbing example underscores the importance of judges' taking an active role in defamation cases, to ensure that jurors understand and implement the *Sullivan* standards. The excellent jury instructions issued by

[55] Massing, 'The Libel Chill: How Cold Is It Out There?', May-June 1985 *Col. Journ. Rev.* 31.
[56] *Ibid.* 38.
[57] *Ibid.* 43.
[58] Of the concluded appeals from lower court judgments in favor of defamation plaintiffs between 1980 and 1984 (most of which involved jury trials), forty-seven per cent were reversed, with judgment entered for defendants. In an additional eight per cent of these cases, a new trial was ordered, and in another eight per cent, the damage award was reduced on appeal. *LDRC Bulletin No. 11, supra* note 38, 20.
[59] See *supra* note 37.
[60] See Lewis, *supra* note 8, 612 (citing *American Lawyer,* November 1982, at 1, 93-94).

Judge Sofaer in *Sharon v. Time, Inc.*, as well as the special verdict questionnaire he required the jurors to answer, demonstrate how a judge can effectively facilitate a jury's adherence to the *Sullivan* standards.

There are also intrinsic problems with the actual malice standard, which cause it to have a negative impact on press freedom even if the jury fully understands and adheres to the standard. By making the central issue in defamation cases the reporter's or publisher's state of mind, *Sullivan* and its progeny have subjected editorial and thinking processes to extensive scrutiny. Before *Sullivan*, the media had successfully contended that such materials as reporters' notes and drafts were privileged and not subject to discovery. Because the disputed issues in common law defamation cases were only truth or falsity and reputational injury, these materials were essentially irrelevant.[61] However, as the Supreme Court ruled in 1979, in *Herbert v. Lando*,[62] the actual malice standard elevates such materials to central relevance. Therefore, a publication's editorial processes, and the individual reporter's thought processes, are now subject to intense and prolonged evaluation. Largely due to this painstaking dissection of how a story was prepared, contemporary defamation litigation is characterized by protracted pre-trial discovery, as well as lengthy trials. Consequently, defamation defendants face very large attorneys' fees and other litigation costs.[63]

Further light is shed on why *Sullivan's* actual malice rule has, ironically, had a negative impact on the freedom of the press, by a study that was conducted at the University of Iowa and is known as the 'Iowa Research Project'.[64] Based upon extensive analysis of all defamation suits in the past ten years, this study concluded that the motivation of most defamation plaintiffs in general — and of almost all public official or public figure plaintiffs in particular — is to correct a falsehood and to vindicate their reputations, not to recover money damages. The Iowa Research Project reported that plaintiffs' interest in reputational vindication is supreme because

[61] See Lewis, *supra* note 8, 610-11.

[62] 441 U.S. 153 (1979).

[63] See Lewis, *supra* note 8, 611-12. For example, Lewis describes the protracted, costly discovery process in the *Lando* case itself, which arose from a CBS documentary concerning Colonel Anthony Herbert:

> Mr. Lando [the documentary's producer] was deposed at twenty-eight lengthy sessions generating almost 3000 pages of transcript . . . The last two sessions, after the Supreme Court decision, were devoted exclusively to Lando's thought processes and editorial judgments as he made the program; in others he was taken over volumes of his handwritten notes. Also produced by CBS were videotapes and transcripts of all interviews done for the program, notes of interviews conducted with 130 people, [and] all of Lando's files . . . .

Ibid. 611. Mike Wallace of CBS, who was a defendant in *Lando*, was quoted in mid-1982 as estimating that CBS had so far spent between three and four million U.S. dollars for legal fees in that lawsuit. *Ibid.* 612 (citing Kahn, 'Profiles — "60 Minutes": The Candy Factory (Part 2)', *New Yorker*, July 26, 1982, 38, 42).

[64] The Iowa Research Project is being conducted under the auspices of the School of Journalism and Mass Communication and the College of Law at the University of Iowa. Its findings have been reported in Bezanson, Cranberg & Soloski, *Libel and the Press, Setting the Record Straight*, The 1985 Silha Lecture, University of Minnesota, May 15, 1985. Essays based upon this lecture appear at (1985) 71 *Iowa L. Rev.* 215.

most defamatory statements do not cause their subjects to incur financial losses. Rather, the Project disclosed, the subject generally experiences only the psychic harm attendant upon a blow to his or her reputation, particularly when the subject is a public official or a public figure.[65] The study found that, in the wake of the *Sullivan* rule, defamation plaintiffs perceive the mere act of initiating a lawsuit, independent of its outcome, as serving their reputational goals. Simply by invoking the legal system, defamation plaintiffs legitimize their claims of falsity. In other words, few plaintiffs sue to win; rather, they win by the very act of suing. This conclusion is corroborated by the fact that the vast majority of plaintiffs surveyed who had lost defamation suits stated that they would still have sued again anyway, even had they foreseen the unsuccessful outcomes of their actions. Even more significantly, *every single* public official who lost a defamation suit and responded to the survey said he or she would sue again notwithstanding the legal loss.[66]

The observed phenomenon that defamation plaintiffs believe they can vindicate their reputations merely by initiating a lawsuit can be attributed to *Sullivan's* alteration of the disputed issues in defamation actions. As noted above, pursuant to *Sullivan* and *Herbert v. Lando,* a reporter's and editor's state of mind for the first time became relevant in defamation actions. The Iowa Research Project established that these novel issues are not simply relevant in current defamation actions, but moreover, they constitute the dominant focus of such actions. Correspondingly, the study found that, post-*Sullivan,* the previously central issues of truth or falsity, and the presence or absence of reputational harm, are of scant significance in current defamation litigation.[67] As the study phrased it, *Sullivan's* actual malice rule has transformed the traditional tort of defamation into the novel 'tort for abuse of constitutional privilege, regardless of truth or falsity and irrespective of reputational harm'.[68] Defamation plaintiffs are accordingly relieved of the risk that the truth of any challenged statement will ever be confirmed. Losing plaintiffs can 'save face' by saying they lost on the basis of the 'technicality' of the constitutional privilege.[69]

In sum, because of the altered focus of defamation suits under the *Sullivan* rules, defamation plaintiffs have essentially everything to gain, and very little to lose, in terms of their paramount reputational goals. Likewise, defamation plaintiffs often have everything to gain, and very little to lose, in economic terms as well. Under the so-called 'American rule', an unsuccessful civil litigant is almost never required to pay the victorious party's attorneys' fees.[70] Moreover, the unsuccessful defamation plaintiff will probably not even have to pay his or her own attorneys' fees; according to the Iowa Research Project,

[65] Bezanson, Cranberg & Soloski, *supra* note 64, 9-11.
[66] *Ibid.* 26-27.
[67] *Ibid.* 28-29.
[68] *Ibid.* 29.
[69] *Ibid.* 29-32.
[70] See *supra* note 52.

about eighty per cent of defamation plaintiffs are represented pursuant to contingency fee arrangements, and virtually all public officials who sue for defamation are represented on a contingency basis.[71] The defendants' perspective, however, is exactly the opposite. In terms of both free speech and economic concerns, defendants are inevitably the real losers of any defamation action, regardless of its legal outcome. Thus, defamation defendants have essentially everything to lose, and very little to gain.[72]

IV. PROPOSED ALTERNATIVE MEASURES TO PROMOTE GOALS UNDERLYING *SULLIVAN* RULES

The facts outlined in the preceding section point to at least one reform of current defamation procedure that would simultaneously promote the legitimate function of such actions — to vindicate plaintiffs' reputations — and advance the *Sullivan* goal of increasing press freedom: as a threshold matter, defamation plaintiffs should be required to prove falsity and reputational harm. The issue of the reporter's knowledge and intent, and other matters bearing on the constitutional privilege, should not be reached unless the plaintiff has satisfied this initial evidentiary burden.

A preliminary focus upon the issue of truth or falsity should alter the present situation whereby defamation plaintiffs incur little risk to their reputational interests by suing. Because the proposed threshold requirement would impose upon plaintiffs a risk that they might not be able to prove the falsity of alleged defamatory statements, it should deter some plaintiffs from commencing defamation actions, and would therefore constitute an improvement over the status quo from the viewpoint of defamation defendants. Even in defamation cases that plaintiffs choose to pursue, these initial evidentiary requirements would also effect an improvement from defendants' perspective, because they would eliminate the burdensome discovery concerning journalists' thought processes and editorial judgments in cases where plaintiffs could not meet such initial burdens. Furthermore, for those defamation plaintiffs who are primarily interested in vindicating their reputations through unequivocal adjudications of falsity, a separate determination on that issue would also constitute an improvement over the status quo, which often does not produce a clear finding on such issue.

Because the primary — if not, indeed, the sole — legitimate purpose of defamation actions is to enable plaintiffs to vindicate their reputations,[73] and because so many defamation plaintiffs suffer little or no economic injury,[74] it would be sensible to devise a new form of action that would concentrate exclusively upon a defamed person's reputational interests. Such a new form of action would determine only the truth or falsity of any alleged defamatory statement and, by way of remedy, would assure correction or retraction if

[71] Bezanson, Cranberg & Soloski, *supra* note 64, 25.
[72] See notes 51-54 and accompanying text.
[73] See, *e.g.*, Anderson, *supra* note 24, 749 ('compensating individuals for actual harm to reputation is the only legitimate purpose of defamation law today').
[74] See *supra* text accompanying note 65.

the plaintiff proved the statement to be false. This type of procedure and remedy should be advantageous both from the perspective of an individual whose reputation has been damaged by a defamatory falsehood, and from the perspective of the media. It should enable the defamed individual to vindicate his claim that the challenged statement was false more promptly and clearly than is possible through a defamation action. The proposed procedure should also relieve the media from the great economic and associated free press burdens they face in defamation actions, because it would eliminate both the threat of enormous damage awards, and the intensive probing into editorial processes, that defamation actions entail.[75]

The dual advantages of a procedure that would identify and correct defamatory falsehoods, in terms of both reputational and free press concerns, are highlighted by two dissenting opinions in *Gertz v. Robert Welch, Inc.* Justice Brennan, the author of *New York Times v. Sullivan* and an ardent free speech champion, dissented in *Gertz* because he believed the majority opinion did not impose enough limitations upon a private plaintiff's traditional defamation action for damages.[76] Justice White dissented in *Gertz* for precisely the opposite reason, asserting that the majority had imposed too many limitations upon such actions.[77] Yet, notwithstanding their opposite perspectives concerning traditional defamation actions for damages, Justices Brennan and White agreed that a separate vehicle should be devised to enable a defamed plaintiff to vindicate his or her reputation without imposing damages upon defendant.[78] Justice Brennan expressly stated that neither his dissenting opinion nor the majority opinion in *Gertz* 'should be read to imply that a private plaintiff, unable to prove fault, must inevitably be denied the opportunity to secure a judgment upon the truth or falsity of statements published about him.'[79]

The defamation law of other nations affords precedents for the proposed non-fault-based action for retraction upon a showing of falsity. For example,

[75] Any governmental compulsion upon the media to publish a retraction or correction would probably raise constitutional questions in light of *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974), which invalidated on free press grounds a statute requiring newspapers to print political candidates' replies to editorials. The free press concerns underlying *Tornillo* should not preclude the proposed retraction remedy for defamation falsehoods, however. The statute invalidated in *Tornillo* granted a right of reply absent any showing that the material replied to was false or defamatory. As Justices Brennan and Rehnguist noted in their concurring opinion, the Court's ruling therefore '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.' 418 U.S. 241, 258. See also Le Bel, 'Defamation and the First Amendment: The End of the Affair', 25 *Wm. & Mary L. Rev.* 779, 789-90 (1984) (proposes giving defendant choice between paying damages for reputational injury or providing new remedy of 'repair' whereby defendant counters false statements of fact through expenditure of equivalent resources to those used to defame plaintiff; argues that this option eliminates potential *Tornillo* problem).

[76] 418 U.S. 323, 361-69 (Brennan, J., dissenting) (actual malice standard should govern defamation actions by private figures concerning reports of their involvement in events of public or general interest).

[77] 418 U.S. 323, 369-404 (White, J., dissenting) (private figure should be able to prevail in defamation action simply by showing falsity and defamatory meaning; such a plaintiff should not further have to show that defendant acted negligently, or with any other degree of fault).

[78] 418 U.S. 323, 368 (Brennan, J., dissenting); *ibid.* 401 (White, J., dissenting).

[79] *Ibid.* 368 (Brennan, J., dissenting).

West Germany has done away with defamation damages altogether, and instead merely provides a legal forum for establishing the truth or falsity of any challenged statement.[80] Likewise, the British House of Commons recently considered a bill providing that a successful defamation plaintiff would not win damages, but instead a judicial declaration of falsehood and an order that a correction be published with the same prominence as had been accorded to the defamatory statement.[81] A United States Congressman recently proposed similar legislation, which would create a new declaratory judgment remedy, in lieu of damages, in defamation actions by public officials or public figures.[82]

From the perspective of defamation defendants, this proposed new form of action would entail the advantage of removing the onerous economic burdens currently associated with defamation suits. Perhaps even more significantly, it would remove the focus of the litigation from the reporters' state of mind, and therefore curtail the burdensome discovery into editorial processes. For these reasons, such an action should significantly reduce the chilling effect or self-censorship now resulting from defamation litigation.[83]

From the plaintiffs' perspective, a non-fault-based action for retraction upon a showing of falsity would more effectively serve the purpose for which most defamation actions are instituted. As discussed above, very few defamation victims incur financial losses as a result of the defamation. Therefore, an action with a remedy of retraction or acknowledgement of falsehood would provide most plaintiffs with the specific type of redress that they seek. In contrast, as explained above, the protracted litigation in current defamation actions, which focuses on the reporters' state of mind and not upon the truth or falsity

[80] See Davila, A., *Libel Law and the Press* 35 (1971) (citing Strafgesetzbuch [StGB] art. 186 (W. Ger.)).

[81] *The Times* (London), February 19, 1983.

[82] H.R. 2846, 99th CONG., 1st SESS., introduced by Representative Schumer on June 24, 1985. The bill's major provisions are as follows: a public official or figure who seeks a declaratory judgment that a published statement was false and defamatory must prove the same by clear and convincing evidence; a plaintiff who seeks such a declaratory judgment may not recover damages in the action, and is also barred from asserting any other claim arising out of the challenged statement; a defendant in a defamation action brought by a public official or figure has the right, within a limited period following commencement of the action, to designate it as one for declaratory judgment, in which case it will be treated as if plaintiff had initially filed a declaratory judgment action; and punitive damages are abrogated in all defamation actions.

[83] The media would no doubt view it as burdensome to be compelled to retract a statement that had been determined to be false, if the falseness were disputed. The Supreme Court's creation of a constitutional privilege in the *Sullivan* case probably reflected its view that the determination of truth or falsity in the defamation context can be difficult. Free press concerns would be promoted by imposing upon all defamation plaintiffs the burden of proving falsity, as an element of a *prima facie* claim, rather than assigning the burden of proving truth to the defendant, as an affirmative defence. Indeed, citing free press concerns, the Supreme Court has held that public officials and public figures must bear this burden. *Herbert v. Lando,* 441 U.S. 153, 176 (1979) (public figures); *Garrison v. Louisiana,* 379 U.S. 64, 74 (1964) (public officials). Moreover, the Court recently ruled that, 'at least where a newspaper publishes speech of public concern', even 'a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false.' *Philadelphia Newspapers, Inc. v. Hepps,* 106 S.Ct. 1558, 1563 (1986). The Schumer bill (*see supra* note 82), would further protect press freedom by requiring a plaintiff to prove a challenged statement's falsity by 'clear and convincing evidence,' rather than by the usual 'preponderance of the evidence.'

of the allegedly defamatory statements, does not effectively vindicate plaintiffs' reputations. That most defamation plaintiffs would be satisfied by a retraction or similar remedy has further confirmation in the Iowa Research Project. This study revealed that most subjects of defamatory publications rush to the publisher, immediately after publication, to seek a retraction, correction, or apology. Only if these efforts are unavailing do the defamed individuals commence lawsuits.[84]

The data establishing that the primary goal of defamation plaintiffs is to secure a retraction or equivalent remedy points to another desirable reform, albeit not of the applicable legal standards or procedures: the media themselves should devise better methods for responding to individuals' complaints about false, defamatory statements. The Iowa Research Project found that most publications have no systematic method for resolving these complaints, and typically commit such errors as leaving it to the very reporter who wrote a story to respond to complaints about the story.[85] What is suggested is voluntary media accountability as a matter not of legal compulsion, but instead of professional journalistic ethics.

Increased voluntary media accountability would be completely consistent with the constitutional guarantees of free speech and press. The First Amendment insulates the United States media from accountability only to the *government.* The First Amendment does not say or mean that the media should be accountable to no one. To the contrary, respected United States journalists have suggested that, precisely because the First Amendment insulates the media from accountability to the government, they should be accountable to everyone except the government.[86] Not only would voluntary media remedies for defamatory falsehoods be consistent with First Amendment guarantees, but also, such measures should affirmatively promote First Amendment freedoms. If the media were willing to investigate complaints conscientiously, and to publish corrections or retractions when warranted, the number of defamation claims reaching the courts, and the attendant economic and other burdens upon the media, would necessarily decrease.

An additional reform that would help bring the actuality of United States defamation law into conformity with the aims of such law, as stated in the *Sullivan* line of cases, would be the elimination of punitive damages, at least in actions by public officials.[87] The purpose of punitive damages is the same

[84] Bezanson, Cranberg & Soloski, *supra* note 66, 12-13, 35.
[85] *Ibid.* 13-21.
[86] Abel, *supra* note 33, 4.
[87] At least two state supreme courts in the United States have held, as a matter of state law, that punitive damages cannot be recovered in any defamation action. *Stone v. Essex County Newspapers,* 367 Mass. 498, 330 N.E.2d 161 (1975); *Wheeler v. Green,* 286 Or. 99, 593 P.2d 777 (1979). Justice Marshall of the U.S. Supreme Court has expounded the view that the First Amendment bars punitive damages in all defamation actions. *Rosenbloom v. Metromedia, Inc.* 403 U.S. 29, 78, 82-87 (1971) (Marshall, J., dissenting). Several scholars have endorsed this proposed reform on a national level. See, *e.g.,* Franklin, 'Good Names and Bad Law: A Critique of Libel Law and a Proposal', 18 *U.S.F.L. Rev* 1, 39 (1983); Smolla, 'Let the Author Beware: The Rejuvenation of the American Law of Libel', 132 *U. Pa L. Rev.* 1, 92, 93 (1983).

as the purpose of criminal penalties — to punish and to deter.[88] But the huge amounts of punitive damages that are awarded in defamation cases are out of all proportion to the maximum amount of fines that could be imposed for criminal defamation. For example, in *Sullivan* itself, the maximum fine for criminal defamation was $500, but the jury awarded punitive damages of $500,000 — one thousand times that amount.[89] There is another, even more fundamental problem with punitive damages when public officials sue for defamation. Such damages violate the deep-seated belief that, in the United States, citizens cannot be held criminally liable for criticizing their government or their government officials.[90] Yet, punitive damages serve precisely the same purposes as — and are substantially more onerous than — criminal penalties.[91]

Another reform conducive to press freedom would be to limit damages in defamation actions to those that can be proven to have been caused by the defamatory falsehood.[92] In a related vein, damages for emotional distress should be 'parasitical' only — *i.e.,* recoverable only if tangible economic injury is first established.[93] These limitations would reduce the likelihood that juries will award damages not for the permissible purpose of compensating plaintiffs for real injuries that were actually caused by the defamation, but instead for the impermissible purpose of punishing defendants for having expressed unpopular opinions. The proposed limitations would also bring the principles

[88] See *Gertz,* 418 U.S. 323, 350 (punitive damages 'are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence').

[89] 376 U.S. 254, 277.

[90] The Sedition Act of 1798, 1 Stat. 596, is the sole statute that has purported to make the defamation of United States public officials a crime. Although its constitutionality was never as tested in the Supreme Court, the Court noted in *Sullivan* that 'the attack upon its validity has carried the day in the court of history.' 376 U.S. 254, 276. Citing actions by the contemporaneous Congress and President, as well as Supreme Court decisions, the *Sullivan* opinion said:

> These views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.

[91] There is some evidence that punitive damage awards may reflect juries' attempts to shift plaintiffs' attorneys' fees to defendants. See, *e.g.,* Lewis, *supra* note 8, 612. The availability of punitive damage awards to defamation plaintiffs creates at least the potential for one-way fee-shifting, which is inherently inequitable, because prevailing defamation defendants lack a corresponding opportunity to recover their attorneys' fees. Under the 'American rule' the prevailing party generally cannot recover any attorneys' fees from the opponent. See *supra* note 52. Of course, a jury cannot circumvent this rule through a punitive damage award when a defendant prevails, as it can potentially do when a plaintiff prevails. This inequity constitutes an additional reason to abrogate punitive damages in defamation actions by public officials or figures.

[92] U.S. Supreme Court Justice Marshall has set forth the view that the First Amendment limits compensatory damages in all defamation actions to those based upon 'proved, actual injuries.' *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 84 (1971) (Marshall, J., dissenting). He said that such a limitation would significantly reduce press fears of large damage awards that lead to self-censorship, while simultaneously advancing 'society's interest in protecting individuals from defamation.' *Ibid.* In the *Sullivan* case itself, the *New York Times* counsel had urged the Court to impose such a damage limitation upon defamation actions by public officials. See *supra* note 8.

[93] For a scholarly endorsement of this proposed limitation, see Anderson, *supra* note 24, 758-63 (1984) (noting that tort law historically has refused to compensate emotional injuries alone, in part because of inability to determine objectively whether injuries have occurred). At least one respected journalist and scholar has proposed that damages for emotional distress should never be recoverable in defamation actions, even when actual economic injury has been proven, because such damages 'allow juries to speculate at large and in effect bring back presumed damages.' Lewis, *supra* note 8, 615.

governing damages in defamation actions into conformity with the principles governing damages in other tort actions.[94]

CONCLUSION

As James Madison pointed out during the debates on the United States Constitution: 'Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.'[95] Accepting this proposition, the Supreme Court has recognized, in the *Sullivan* line of cases, that toleration of some abuse of press freedom constitutes the necessary price for the proper use of such freedom. For example, in *Gertz v. Robert Welch, Inc.,* the Court stated:

> [P]unishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. Our decisions recognize that [common law defamation rules] may lead to intolerable self-censorship . . . and [do] not accord adequate protection to First Amendment liberties.[96]

The Court created and implemented the actual malice rule in *Sullivan* and its progeny in order to avert self-censorship and to give adequate breathing space to First Amendment liberties. Because the actual malice rule has not effectively served the compelling goals underlying it, those goals should instead be pursued through reforms such as the ones proposed in this paper.

[94] See *supra* notes 24, 89.
[95] Elliot, *supra* note 11, 571.
[96] 418 U.S. 323, 340.