

RETHINKING DEFAMATION

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Whether defamation belongs in a Restatement of economic torts is an easy question to answer: It doesn't. Defamation is a dignitary tort; attempting to reduce it to a remedy for economic loss would be historically unfaithful, doctrinally radical, and destructive of important cultural values. Whether the law of defamation should be restated at all is a more difficult question. It is so diminished in practical importance that the effort required to make sense of its doctrinal intricacy might be disproportionate to the benefits. Rethinking the entire subject of reputation and free speech, on the other hand, would be immensely useful, but a Restatement may not be the most appropriate or politically feasible vehicle for that enterprise.

I. DEFAMATION IS NOT AN ECONOMIC TORT

Economic harm is not conceptually essential to the law of defamation. Except in some slander cases, it is not a prerequisite to recovery.¹ Whether a statement is actionable is determined not by asking whether it caused harm, but by a more abstract inquiry into the nature of the words themselves. The threshold

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1. Special harm, a subtype of economic harm, must be shown in slander cases that are not actionable per se, but neither special harm nor any other variety of economic harm need be proved in cases of slander per se or in libel cases generally. *See, e.g., Matherson v. Marchello*, 473 N.Y.S.2d 998, 1001–02 (App. Div. 1984). By constitutional rule, some private plaintiffs must prove “actual injury.” *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349–50 (1974). But that is not limited to economic harm. *See Time, Inc. v. Firestone*, 424 U.S. 448, 460 (1976) (holding that emotional distress alone meets the actual injury requirement). A number of states require proof of special harm in some types of libel cases, but these are departures from the common law. *See, e.g., Holtzscheiter v. Thomson Newspapers, Inc.*, 411 S.E.2d 664, 666 (S.C. 1991) (noting that special harm must usually be shown when the libel is not apparent on its face but depends on extrinsic evidence); *D’Agrosa v. Newsday, Inc.*, 558 N.Y.S.2d 961, 966–67 (App. Div. 1990) (special harm must be shown when the defamation accuses a professional of a single instance of negligence).

question in a defamation case, unlike an economic tort case, is not whether the plaintiff has suffered an economic loss, but whether the statement complained about is “defamatory.”² The classic definition of a defamatory statement is one that exposes the plaintiff to “hatred, contempt, or ridicule.”³ The more modern version is a statement that “tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”⁴ Neither of these inquiries asks whether the statement actually did harm the plaintiff. The question is more abstract: It asks whether the statement *exposes* the plaintiff to injury or *tends* to cause injury.⁵ Conversely, plaintiffs who *can* show reputational harm will still lose unless they can show that the statement causing the harm is of a sort that the law recognizes as “defamatory.”⁶ The explanation is that the law of defamation takes cognizance only of certain kinds of attacks on reputation. For example, saying that a person has cancer may harm the person's reputation, but it is not defamatory;⁷ the law simply chooses not to deal with that kind of reputational affront.

Whether the plaintiff's reputation was actually damaged is a question that goes to damages, rather than the existence of a cause of action, and even at the damages stage, actual injury isn't always a requisite.⁸ Until relatively recently, damages could be presumed in all libel and slander per se cases, and they can still be presumed if actual malice is shown, which is to say in any public figure or public official case in which the constitution permits recovery at all.⁹ The presumption of harm serves important pragmatic purposes. For one, it spares plaintiffs the need to suborn exaggeration (if not worse) to get their friends and associates to testify that the defamation lowered their estimation of the plaintiff. For another, it's efficient. If the jury had to decide whether the plaintiff had proved harm, it would have to determine how much credence to give the plaintiff's testimony about the effect the defamation had on her and her friends' testimony about the effect the defamation had on them. The nature and severity of claimed emotional and cognitive consequences usually can best be inferred from the nature and seriousness of their cause—in this instance, the defamatory statement. The presumption of harm allows the crucial inference to be drawn directly rather than indirectly, in one step instead of two.

Defamation was not an economic tort historically. The origins of libel were in the Crown's desire to control the effects that the advent of the printing

2. See RESTATEMENT (SECOND) OF TORTS § 558 (1977).

3. *Parmiter v. Coupland*, (1840) 151 Eng. Rep. 340, 342 (Exch.).

4. RESTATEMENT (SECOND) OF TORTS § 559.

5. *Id.* § 559 cmt. d.

6. See *Decker v. Princeton Packet, Inc.*, 561 A.2d 1122, 1127 (N.J. 1989) (holding an erroneous report that plaintiff had died not actionable).

7. *Golub v. Enquirer/Star Group, Inc.*, 681 N.E.2d 1282, 1283 (N.Y. 1997).

8. Thus, one who is liable for a libel “is *also* liable for any special harm legally caused by the defamatory publication.” RESTATEMENT (SECOND) OF TORTS § 622 (emphasis added).

9. Not until *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), did the Court limit presumed damages, and then only in cases in which a plaintiff recovers without showing actual malice.

press might have on government.¹⁰ The roots of slander lay in the church's ambitions to save souls from the sins of scandal-mongering.¹¹ The remedies were criminal and ecclesiastical; the idea that individuals should be compensated for the economic losses caused by defamatory words is a comparatively recent addition to the objectives of defamation law.¹²

The law of defamation could be revised to make it a remedy for economic loss only, and if this were done perhaps disparagement (or injurious falsehood, as the Restatement calls it¹³) could be brought under the same tent. This seems unwise because, as I shall argue in a moment, defamation (unlike disparagement) does more than compensate for economic loss. A less drastic step would be to eliminate the presumption of harm. Many years ago I advocated this, arguing that compensating individuals for harm to reputation was the only legitimate purpose of defamation law, and that proof of injury to reputation (though not necessarily pecuniary loss) should be required in every case.¹⁴ I can only say that the matter does not appear to me now as it appears to have appeared to me then.¹⁵ Compensation is *not* the only legitimate purpose of defamation law. Robert Post is right: The law aims to do more than protect one's proprietary interest in one's good reputation.¹⁶ It aims also to vindicate the honor of the person defamed¹⁷ and to enforce society's civility norms.¹⁸ As Post shows, the presumption of harm allows courts to advance these objectives even in cases in which no economic loss can be shown. Reducing defamation to a remedy for economic loss would exalt commercial values over the more important social and cultural values that the law serves, not only in defamation but in tort law generally.

II. SHOULD THE LAW OF DEFAMATION BE RESTATED?

I see no pressing need for a new Restatement of defamation, at least not one that only restates. As a source of litigation, there is little left of the law of defamation. In the past quarter-century, on average fewer than twenty libel cases

10. These origins are concisely summarized in William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 102–08 (1984).

11. See Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 548–552 (1903). A commentary by Judge Veeder in the Restatement (First) of Torts explains the migration of slander from ecclesiastical law to the common law. RESTATEMENT (FIRST) OF TORTS § 568 cmt. b, historical note (1938).

12. Libel became a tort only after the abolition of the Star Chamber in 1641, although it appears that an action on the case for slander could be maintained in the common law courts by the end of the sixteenth century. RESTATEMENT (FIRST) OF TORTS § 568 cmt. b.

13. RESTATEMENT (SECOND) OF TORTS § 623A.

14. See David A. Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747 (1984).

15. Apologies to Baron Bramwell. See *Andrews v. Styrax*, (1872) 26 L.T. 704, 706 (Exch.) (Eng.).

16. Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 691–693 (1986).

17. *Id.* at 703.

18. *Id.* at 711.

against media have gone to trial per year in the entire United States.¹⁹ That of course is not the full measure of the importance of defamation law. There are defamation cases against non-media defendants, media cases that do not go to trial, and most important, assaults on reputation that do not occur because of the law's deterrent effect. But the rarity of media libel trials is at least an indicator of the state of libel litigation; media are the most obvious class of defamers, and if plaintiffs suing media have little chance of getting before a jury we can probably assume that in general media settlements are neither large nor numerous. There is no interest group to keep track of nonmedia libel litigation, but I see no evidence that it is any livelier.

Reasons for the demise of defamation litigation are many and varied. The most obvious are the federal constitutional limitations,²⁰ and of these, the well-known rule that public officials and public figures cannot recover without showing actual malice²¹ is just the beginning. More important are the gloss that defines actual malice as subjective awareness of probable falsity,²² the subsidiary rule requiring clear and convincing proof of actual malice,²³ and the independent review requirement that authorizes appellate courts to substitute their judgment for jury findings.²⁴ The requirement of clear and convincing proof usually applies even at the summary judgment stage, so plaintiffs can't get before a jury unless they can convince the judge on the basis of discovery evidence that they will be able to prove clearly and convincingly that the defendant knew the defamatory statement was probably false.²⁵

Plaintiffs who aren't public figures or public officials also must prove actual malice unless they are willing to forego presumed and punitive damages,²⁶ and in any event they must at least prove that the defendant was negligent.²⁷ All plaintiffs bear the burden of proving that the defamatory statement is false,²⁸ and it

19. See Press Release, Media Law Res. Ctr., MLRC Annual Study of Media Trials: 14 Trials in 2005: 7 Wins, 7 Losses, Relatively Modest Damage Awards, http://www.medialaw.org/Content/NavigationMenu/About_MLRC/News/2006_Bulletin_No_1.htm (March 2, 2006) (noting that the were an average of 27 trials per year in the 1980s, 18.8 trials per year in the 1990s, and 13.8 trials per year thus far this decade).

20. I catalogued these in David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 493–510 (1991).

21. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

22. *St. Amant v. Thompson*, 390 U.S. 727, 730–31 (1968).

23. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 659 (1989).

24. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984).

25. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). This decision is based on the Federal Rules of Evidence, not the Constitution, so it is not binding on state courts, but most states follow it. See *Huckabee v. Time Warner Entm't Co.*, 19 S.W.3d 413, 431 n.3 (Tex. 2000) (Hecht, J., dissenting) (citing decisions from thirty-seven states applying substantive evidentiary burden—often the clear and convincing standard—at summary judgment stage).

26. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

27. See *id.* at 350.

28. See *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 770 (1986). The burden of proving falsity falls on both public and private plaintiffs, *id.*, but the Court left open the

isn't enough to show that the statement is literally false; it must be sufficiently false that it produces a different effect than a truthful statement would have produced.²⁹ Defamation couched as satire, hyperbole, opinion, or conjecture is likely to be constitutionally protected on the ground that it is not capable of being proved true or false.³⁰

Less widely appreciated, but equally important, are a phalanx of nonconstitutional obstacles. A federal statute, expansively interpreted, appears to totally immunize all Internet defamation except as to the originator,³¹ and the Internet's easy anonymity often shelters even the originator.³² In California and several other states, SLAPP statutes require plaintiffs to demonstrate a probability of prevailing before they are allowed even to engage in substantial discovery;³³ plaintiffs who fail at this step may be liable for defendants' attorneys fees,³⁴ which further discourages suits. In Texas, a statute gives media defendants a right of interlocutory appeal from denial of their constitutionally-based summary judgment motions,³⁵ which spares defendants the expense of going to trial in cases that should be resolved as a matter of constitutional law, but imposes on plaintiffs the cost of two appeals before they even get to a jury.

In many states, shield statutes and constitutional privileges impede plaintiffs' ability to discover evidence as to the defendant's sources, imposing additional costs and delays even in cases in which the evidence is eventually produced.³⁶ Retraction statutes sometimes forestall litigation by reducing the potential liability of a defendant who retracts to an amount that makes it uneconomical to sue.³⁷ Statutory and common law fair report privileges are no

possibility that states might still treat truth as a defense in cases not involving matters of public concern. *Id.* at 775.

29. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991).

30. *E.g.*, *Greenbelt Coop. Publ'g. Ass'n v. Bresler*, 398 U.S. 6, 14 (1970) (hyperbole not actionable); *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 282-83 (1974) (figurative speech not actionable).

31. *See Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997).

32. *See, e.g.*, *Doe v. Cahill*, 884 A.2d 451, 457 (Del. 2005) (reversing a judgment ordering ISP to disclose the identity of anonymous poster); *O'Grady v. Santa Clara County Super. Ct.*, 44 Cal. Rptr. 3d 72, 84-85, 105 (Ct. App. 2006) (holding that federal statute, First Amendment, and state shield statute precluded enforcement of subpoena seeking identity of anonymous bloggers).

33. *E.g.*, CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2004 & Supp. 2006). Decisions to grant or deny motions to strike complaints under the statute are immediately appealable. § 425.16(i).

34. § 425.16(c); *see also, e.g.*, *Braun v. Chronicle Publ'g.*, 61 Cal. Rptr. 2d 58, 67 (Ct. App. 1997).

35. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(6) (Vernon 1997).

36. *See, e.g.*, *Oak Beach Inn Corp. v. Babylon Beacon, Inc.*, 464 N.E.2d 967 (N.Y. 1984). In *Oak Beach Inn*, it took three years and appeals to the Appellate Division and the New York Court of Appeals to determine whether a shield statute precluded plaintiffs from discovering the identity of the writer of a defamatory letter.

37. *See, e.g.*, CAL. CIV. CODE § 48a (West 1982) (restricting recovery to special damages if defendant complies with retraction procedures).

longer limited to reports of official proceedings,³⁸ with the result that most repetition of defamation contained in any governmental document or statement is immune. At the federal level, all government employees are now effectively immune from personal liability for defamation.³⁹

Tort reform also has a limiting effect on defamation litigation. The federal constitutional limitations and state law caps on punitive damages reduce the potential payout of defamation cases.⁴⁰ Whether caps on noneconomic damages and limitations on joint and several liability are applicable to defamation cases has yet to be sorted out,⁴¹ but many of the procedural aspects of tort reform, such as limitations on expert testimony, are clearly applicable.⁴² The public relations campaign against large verdicts and “frivolous lawsuits” has an immeasurable, no doubt significant, effect on jurors.

The upshot is that defamation is not a major field of litigation crying out for guidance. Law of course can exercise its influence without litigation, and many actors no doubt consult the law of defamation to determine what they can safely say or to decide whether to sue. A clear, authoritative, and up-to-date statement of the law of defamation would be useful in these settings. But as the likelihood of suing or being sued for libel and slander suits has faded, one has to assume that the importance of the law as a guide to conduct has diminished, too.

38. See, e.g., MICH. COMP. LAWS ANN. § 600.2911(3) (2004) (extending the fair report privilege, previously limited to official proceedings, to any “governmental notice, announcement, written or recorded report or record generally available to the public”); *Medico v. Time, Inc.*, 643 F.2d 134, 140 (3d Cir. 1981) (applying the privilege to defamatory statements in nonpublic documents leaked to media from confidential FBI files).

39. A federal statute provides that in a suit against any federal employee for defamation, if the Attorney General determines the statement was made within the scope of employment, the United States is substituted for the individual defendant and the case is removed to federal court, 28 U.S.C. § 2679(d)(1)–(2) (2000), where the suit must be dismissed because the federal government has not waived sovereign immunity with respect to defamation claims. 28 U.S.C. § 2680(h); see also, e.g., *Williams v. United States*, 71 F.3d 502, 507 (5th Cir. 1995).

40. See, e.g., *Stack v. Jaffee*, 306 F. Supp. 2d 137 (D. Conn. 2003) (reducing an award of punitive damages for violation of First Amendment rights, emotional distress, and defamation in accordance with *State Farm Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003)). Statutory limitations generally apply at least to all tort claims. See, e.g., TEX. CIV. PRAC. & REM. CODE ANN. §§ 41.001, 41.008 (Vernon 1997 & Supp. 2006) (limiting exemplary damages in all cases in which claimant seeks damages for harm to another person). However, some states, like Nevada, expressly exempt defamation claims from their statutory limits on punitive damages. NEV. REV. STAT. § 42.005(2)(e) (2002).

41. These sometimes apply to negligence cases but exempt intentional torts. E.g., HAW. REV. STAT. §§ 663-10.9(2)(A), 663-8.7 (1993 & Supp. 2005). Since defamation doesn’t necessarily fit either category, the applicability of these limitations is unclear.

42. E.g., *Melaleuca, Inc. v. Clark*, 78 Cal. Rptr. 2d 627, 633–34 (Ct. App. 1998) (holding that expert testimony in defamation case must rely on techniques that have gained scientific acceptability); see, e.g., *Houston Livestock Show & Rodeo, Inc. v. Hamrick*, 125 S.W.3d 555, 586–88 (Tex. App. 2003) (applying the multi-factor test for reliability of expert witnesses in a libel case).

III. PROBLEMS THAT A THIRD RESTATEMENT WOULD HAVE TO ADDRESS

Considering how far defamation law has diverged from the common law, the Second Restatement is remarkably current. Dean Wade, who took over the Reporter's role at the height of the constitutional revolution,⁴³ did an admirable job of recognizing the importance of the changes and foreseeing how they would be implemented. As a result, the Second Restatement is not badly outdated. In most respects, it still accurately states the law of defamation.

Dean Wade and/or the ALI did make one decision, however, that was fundamentally misguided, in my opinion. The Second Restatement attempts to absorb the constitutional limitations into the tort law of defamation.⁴⁴ If it were possible to do that harmlessly, it would be a laudable consolidation, sparing us all the need to keep in mind two different sources of law. But they *are* two different sources, and conflating them has harmful consequences.

Despite the pervasiveness of the constitutional intervention, very little of the tort law of defamation has actually been supplanted. Rather, the constitutional law operates as an overlay, leaving the tort law generally intact, but subjecting it to constitutional limitations. For example, the tort-law presumption that defamation causes compensable harm remains in place, subject only to a constitutional rule that the presumption cannot be indulged unless actual malice is shown.⁴⁵ And although the actual malice rule operates as a sort of constitutional super-privilege,

43. The revolution began in 1964 with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The original ALI Reporter, Dean William L. Prosser, in 1966 and 1967 suspended work on the defamation sections until the constitutional law became clearer. He resigned in 1970 and was replaced by Dean John W. Wade, who resumed work on the defamation sections in 1974 after the decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). RESTATEMENT (SECOND) OF TORTS intro., vii–viii (1977).

44. A special note asserts that the First Amendment “is being used by the United States Supreme Court to *rewrite many aspects of the law of defamation*,” RESTATEMENT (SECOND) OF TORTS div. 5, special note (emphasis added), and adds that a “section of the Restatement that does not accord with an existing or later decision of the Supreme Court is simply wrong, and no amount of authority from other courts can make it accurate.” *Id.* Another section notes,

[t]he effect of the Constitution upon a cause of action for defamation may be described in two different ways. One method is to state that the Constitution imposes a limitation on the action so that the plaintiff cannot maintain it unless he shows that his cause of action does not come within the limitation. The other method is to say that the Constitution affords a privilege to the defendant

Id. § 580A cmt. 3. The commentary rejects the privilege approach without addressing whether a constitutional limitation on a cause of action should be treated as tort law itself. *Id.*

45. *Gertz* held only that “the States may not permit recovery of presumed or punitive damages, *at least* when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.” 418 U.S. at 349 (emphasis added). But the courts have assumed that the constitutional ban on presumed damages does not apply when actual malice is shown. *See, e.g.*, *Babb v. Minder*, 806 F.2d 749, 758 (7th Cir. 1986); *Mittleman v. Witous*, 552 N.E.2d 973, 980 (Ill. 1989).

protecting defamation of public figures unless the defendant is aware of probable falsity, it doesn't replace the numerous common law privileges that may also protect the speaker.⁴⁶

The Court did not purport to revise the tort law of defamation for a very good reason: It has no power to do so. It can declare that a tort rule violates the First Amendment, but it has no power to change the tort rule, just as it has no power to rewrite a statute that it finds unconstitutional. In the law of defamation, there are two sets of decision-makers whose powers are mutually exclusive: The Supreme Court can't change tort law, and the legislatures and state courts can't change the constitutional law. Conflating the two sources of law inhibits change because it creates "rules" that no decision-maker is empowered to unilaterally revise.

For example, the Second Restatement, attempting to foresee what the Court would decide, says defendants are liable only for proven, actual harm to reputation.⁴⁷ That turns out to be erroneous, or at least misleading; the subsequent decisions still permit presumed harm when actual malice is shown.⁴⁸ The section is qualified by a caveat saying the Institute takes no position on the question of presumed harm when actual malice is shown.⁴⁹ But the caveat ameliorates the effect of the misstatement only if the reader understands that it really means that the blackletter isn't a rule of tort law at all, only a possible constitutional limitation that didn't eventuate. If the section actually stated the tort rule, the Court's subsequent decisions wouldn't affect it; tort law need not permit all the damages that the constitution permits, and the Restatement's blackletter plainly says presumed harm isn't recoverable.

This is not merely an aesthetic objection. Treating constitutional limitations as tort rules makes it impossible to know what the tort law is if the constitutional rule changes. Respected authorities have pointed out, for example, that the Court has never said the actual malice rule is the only constitutionally acceptable accommodation of free speech and reputational interests.⁵⁰ Limitations on damages,⁵¹ or nonmonetary remedies such as declaratory judgment,⁵² might be

46. For example, absolute privileges protect defendants even when actual malice might be shown. *See, e.g.,* *Hutchinson v. Proxmire*, 443 U.S. 111, 123 (1979). Even a qualified privilege may do so; for example, the fair report privilege may protect fair and accurate reporting even of charges the defendant knows are false. *See, e.g.,* *Crane v. Ariz. Republic*, 972 F.2d 1511, 1522 n.7, 1523 (9th Cir. 1992) (holding that portions of an article that constituted fair and accurate report were protected despite proof of actual malice, although other portions not subject to the privilege were actionable).

47. RESTATEMENT (SECOND) OF TORTS § 621.

48. *See supra* note 45.

49. RESTATEMENT (SECOND) OF TORTS § 621 caveat.

50. *See* Marc A. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CAL. L. REV. 809, 820-22 (1986); Pierre N. Leval, *The No-Money, No-Fault Libel Suit: Keeping Sullivan in its Proper Place*, 101 HARV. L. REV. 1287, 1289-92 (1988).

51. The most prominent advocate of the alternative of limiting damages was Justice White. *See* *Dun & Bradstreet Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 771-72 (1985) (White, J., concurring).

constitutionally permissible alternatives. But the Second Restatement purports to enshrine the actual malice rule as a principle of tort law.⁵³ That has two pernicious effects. First, if it is taken seriously as a statement of tort law, it creates an additional obstacle for a court that might want to embrace an alternative; the court has to repudiate the Restatement's view of tort law as well as take a chance on the constitutionality of the alternative. Second, if it is understood as a constitutional limit rather than a tort rule, it leaves a void if the Court should change the constitutional rule; what *would* the tort rule be if the First Amendment did not require actual malice?

One might argue that these objections aren't substantial as long as everyone understands that the Restatement isn't merely stating tort law, but is attempting to summarize an amalgam of tort law and constitutional law. One who studies the Second Restatement carefully and reads all its caveats and special notes will understand that many of its provisions are attempts to state (or anticipate) the effects of constitutional limitations, and therefore that some of the principles it states aren't necessarily rules of tort law. But the ordinary user is likely to assume that a Restatement of torts states rules of tort law.

IV. MISCONCEIVING CONSTITUTIONAL LAW

One might even argue that synthesizing the tort and constitutional law is the only appropriate way to restate the law of defamation. The argument would be that even though it is located in a Restatement of *torts*, it is a Restatement of the law of *defamation*, which comprises constitutional law as well as tort law. Whether that view is correct depends on the outcome of an unresolved debate about the nature of these constitutional limitations.

Everyone agrees that the Court has no power to prescribe rules of tort law, or even to modify tort law. When the Court says “[t]he constitutional guarantees require . . . a federal rule . . .”⁵⁴ it cannot mean that the constitution prescribes a particular tort rule. Just what it does mean is highly contestable. It can be plausibly argued that the Court has no business prescribing any rule—that its power is only to hold that a judgment based on state defamation law abridges freedom of speech or of the press, leaving the state free to decide whether and how to modify its law to meet the constitutional objection.⁵⁵ That is the usual assumption when the Court holds a statute unconstitutional; it does not rewrite the statute to make it constitutional.⁵⁶

52. See, e.g., RANDALL P. BEZANSON, GILBERT CRANBERG & JOHN SOLOSKI, *LIBEL LAW AND THE PRESS: MYTH AND REALITY* (1987); David A. Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 CAL. L. REV. 847 (1986).

53. See RESTATEMENT (SECOND) OF TORTS § 580A.

54. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).

55. I sketched this argument, without fully embracing it, in David A. Anderson, *First Amendment Limitations on Tort Law*, 69 BROOK. L. REV. 755, 796–801 (2004).

56. Cf. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 502 (1985) (stating that even when a violation of the First Amendment is found, “a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it”).

In the defamation area, however, the Court has habitually prescribed how state law should be modified to make it constitutional.⁵⁷ Some describe such prescriptions as prophylactic rules,⁵⁸ some call them rules of federal common law,⁵⁹ and some view them as constitutional principles in their own right.⁶⁰ Which they are, and whether they are binding rules at all, are questions the Court has not resolved. It won't actually decide those issues unless and until a state adopts an alternative modification to the law of defamation and the Court has to decide whether its own pronouncements are in fact the only permissible solution. A Restatement that treats them as part of the law of defamation assumes the answer to a fundamental question of power that the Supreme Court hasn't answered.

Even if one is prepared to concede the Court's *power* to prescribe rules of defamation law, it doesn't follow that the Court must or should do so. The Court might think it prudent to preserve a role for the state courts and legislatures in accommodating speech and reputational interests, and might therefore want to treat its own prescriptions as only default solutions, even if it believes it has the power to treat them as constitutional rules.⁶¹ By doing so it can avoid creating a constitutional straitjacket that precludes the evolution, experimentation, and pluralism that are hallmarks of tort law. If one wishes to preserve this option, it would be a mistake to promulgate a Restatement that would treat constitutional limitations as if they were indistinguishable from tort rules.

V. FRAGMENTARY THOUGHTS ABOUT A THIRD RESTATEMENT

The present law of defamation gives us the worst of worlds. It is elaborate and cumbersome. The Second Restatement contains sixty-six sections,⁶² plus numerous caveats and special notes, and it still fails to cover several important recent developments (e.g., the neutral report privilege,⁶³ SLAPP statutes,⁶⁴ and the libel-proof doctrine⁶⁵). Defamation law doesn't fit anywhere in the usual spectrum of intentional, negligent, and strict liability torts. It uses familiar-sounding terms,

57. Anderson, *supra* note 55, at 787 (summarizing these prescriptions).

58. See Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 105 (1985) (defining a prophylactic rule as one "that functions as a preventive safeguard to insure that constitutional violations will not occur"). The Court itself has described the rule of *Miranda v. Arizona*, 384 U.S. 436 (1966), as a prophylactic rule. *New York v. Quarles*, 467 U.S. 649, 653 (1984).

59. See Henry P. Monaghan, *The Supreme Court, 1974 Term Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2-3 (1975).

60. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 455-56 (1998) (arguing that so-called prophylactic rules are prototypes of constitutional jurisprudence).

61. The advantages of this approach, and strategies for carrying it out, are described in Anderson, *supra* note 55, at 802-24.

62. RESTATEMENT (SECOND) OF TORTS §§ 558-623 (1977). Eleven of these numbers represent sections from the First Restatement that were omitted, but eleven new sections were added by adding an "A" and a "B" to the number.

63. See *Edwards v. Nat'l Audubon Soc'y, Inc.*, 556 F.2d 113, 120 (2d Cir. 1977).

64. See *supra* text accompanying notes 33-34.

65. See *Cardillo v. Doubleday & Co.*, 518 F.2d 638, 639 (2d Cir. 1975) (habitual criminal held incapable of being defamed).

such as “malice” and “per se,” but then gives them unusual meanings. It is burdened with historical artifacts like the libel-slander distinction. The intricate and elaborate doctrinal structure is difficult for ordinary lawyers and judges to penetrate, leading to muddled strategies⁶⁶ and confused decisions.⁶⁷

But for all its complexity, it accomplishes very little. It begins with an expansive notion of liability, which invites plaintiffs to think they have a cause of action.⁶⁸ It provides defendants with an arsenal of special definitions, procedural impediments, privileges, defenses, and constitutional limitations, which are usually successful.⁶⁹ The litigation is expensive,⁷⁰ and thus a significant burden on speech, yet it rarely provides a remedy for harm to reputation.

Merely restating that unsatisfactory state of affairs is not a worthwhile undertaking. What’s needed is a rethinking of the entire enterprise of accommodating speech and reputational interests. What needs attention is the *future* of defamation law, not its past or its present incarnation. Defamatory speech presents a very different set of issues than it did in seventeenth century England, when the law of libel and slander crystallized. And in this age of unprecedented mobility, easy anonymity, and cultural heterogeneity, reputation occupies a different role in the social order than it did even when the Second Restatement was written.

Describing the appropriate accommodation of speech and reputational interests is far beyond the scope of this paper, but I will suggest some starting points.

66. *Cf.* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). The plaintiff, evidently believing his case was doomed if he was required to prove actual malice, fought all the way to the Supreme Court to establish that a private plaintiff need not do so. But after successfully establishing that, on remand he proved actual malice. Gertz v. Robert Welch, Inc., 680 F.2d 527, 531 (7th Cir. 1982). As it turned out, the miscalculation was serendipitous, because his eventual judgment was \$400,000 instead of the \$50,000 he won at the first trial. *Id.*

67. For example, a line of Texas cases confuses the argument that a report is accurate enough to qualify for the fair report privilege with an argument that the publication is substantially true. *See, e.g.,* Herald-Post Publ’g. Co. v. Hill, 891 S.W.2d 638, 639 (Tex. 1994) (holding that newspaper’s incorrect report of trial testimony was substantially true); Langston v. Eagle Printing Co., 797 S.W.2d 66, 69–70 (Tex. App. 1990) (newspaper’s exaggerated report of accusations in lawsuit was “substantially true”).

68. *See* RESTATEMENT (SECOND) OF TORTS § 558 (1977) (indicating that a false, defamatory and unprivileged statement published to a third party may be actionable).

69. The Media Law Defense Center reported that 73 percent of all libel and related claims brought against media from 1983–2003 were dismissed. Press Release, MEDIA LAW RES. CTR., MOTIONS TO DISMISS MAY BE WINNING STRATEGY FOR MEDIA IN LIBEL AND PRIVACY LAWSUITS, http://www.medialaw.org/Content/NavigationMenu/About_MLRC/News/2004_Bulletin_No_3B.htm (last visited Oct. 18, 2006). Another study indicates that of the claims that survive to trial, media defendants win slightly more than half. *See* Media Law Res. Ctr., *supra* note 19 (stating that plaintiffs received nothing in 51.4 percent of all claims against media that went to trial from 1980–2005).

70. Defense costs are said to comprise 75 to 80 percent of all losses paid by media libel insurers. *See* James T. Borelli, Caveat Emptor: A Buyer’s Guide to Media Liability Insurance, COMM. LAW., Winter 2006, at 23, 23.

The law need not memorialize every step in the accretion of doctrine. After four centuries, it's time to take the measure of the total accretion. The Second Restatement describes 18 different privileges, ten absolute and eight conditional.⁷¹ These privileges developed separately, from cases asserting different interests in different circumstances, but that doesn't mean they must continue to be treated as distinct; they should be synthesized and distilled into general principles. The same might be said of the categories of slander *per se*⁷² and sections dealing with defamation of various categories of entities.⁷³ The publication requirement has proved too rigid in some settings⁷⁴ and perhaps not rigorous enough in others.⁷⁵

The law should recognize that perfection is often the enemy of justice. Doctrinal refinements that would produce finely calibrated results in a cost-free system that always works as intended may produce delay and injustice in the real world where costs are high, mistakes are inevitable, and unintended consequences are frequent. Consider, for example, the privilege to defame another to protect one's own interests. The Second Restatement makes that privilege available only when "the circumstances induce a correct or reasonable belief" that the information "affects a sufficiently important interest of the publisher" and "the recipient's knowledge of that defamatory matter will be of service in the lawful protection of the interest."⁷⁶ Theoretically, those limitations make perfectly good sense, but they won't be much help to the person trying to decide whether to shout, "Stop that man, he's stolen my purse," or to the person trying to decide whether to sue over such a remark, or to the jury trying to decide whether to impose liability.

Tweaking doctrine and consolidating privileges is not enough, however. A workable, efficient, understandable law of defamation would require more radical changes. The notion of what is defamatory, and thus within the ken of the law, should reflect a functional idea of what reputational interests the law ought to

71. Absolute privileges are described in RESTATEMENT (SECOND) OF TORTS §§ 585–592A (which includes § 590A). Qualified privileges are listed in §§ 594–598A and §§ 611–612. The Restatement describes these last two as "Special Types of Privilege" because they do not share all of the characteristics of the qualified privileges listed in §§ 594–598A nor are they absolute.

72. RESTATEMENT (SECOND) OF TORTS §§ 570–574.

73. RESTATEMENT (SECOND) OF TORTS §§ 560–562, 564A.

74. For example, in cases in which an employee has no choice but to convey a defamatory reference from a previous to a prospective employer, only to be told the defamation isn't actionable because she published it herself. *See, e.g., Starr v. Pearle Vision, Inc.*, 54 F.3d 1548, 1553–54 (10th Cir. 1995). Some states have modified the common law rule concerning publication to make such statements actionable if the employee is truly compelled to repeat them. *See, e.g., Raymond v. IBM Corp.*, 954 F. Supp. 744, 755 n.6 (D. Vt. 1997) (collecting cases).

75. Congress obviously believed the publication concept was too expansive as applied to internet service providers. *See* 47 U.S.C. § 230(c)(1) (2000) (providing that ISPs and others who repeat defamation originated by others on the Internet shall not be treated as publishers). The vast expansion of the fair report privilege since the Restatement was adopted, *see supra* note 38, suggests that courts also resist the results produced by a broad concept of publication.

76. RESTATEMENT (SECOND) OF TORTS § 594.

try to protect.⁷⁷ The notion that every communication tending to lower a person in the estimation of the community deserves the law's attention is untenable. Instead of sweeping such a broad range of speech within the law's maw and then shaking most of it out through an elaborate structure of privileges and defenses, we should try to identify a narrower range of communications that warrant legal intervention. This should reflect fresh judgments about what aspects of a person's dignity and standing deserve protection and can be successfully protected. We should be prepared to tolerate imperfect and incomplete protection of reputation in exchange for effective, predictable, and economical protection of some core values.

Likewise, we need fresh judgments about what really threatens free speech. We should acknowledge that the law probably can't simultaneously protect the most timid speakers and deter the most fearless; that for many speakers the relevant threat is the possibility of being sued rather than the prospect of having to pay a judgment; that unpredictability may be as oppressive a censor as liability; that defaming people creates both insurable and uninsurable risks.

It is by no means clear that these are suitable goals for a Restatement. Restatements do change the law, and appropriately so; otherwise, they wouldn't be worth doing. But they have not traditionally been law reform projects of the sort that are familiar in England and Australia. We don't have those mechanisms for reform, however, and if the ALI is unwilling to undertake the needed rethinking of defamation law, it is hard to see who will.

77. The relationship between defamation and other torts should also get some attention. It is hard to understand, for example, why false statements that are *not* defamatory should nonetheless be actionable as false light privacy cases. See RESTATEMENT (SECOND) OF TORTS § 652E.

When employees lose their jobs because of false reports of polygraph or drug tests, their claims seem to be analyzed as negligence cases, Amy Newman & Jay M. Feinman, *Liability of a Laboratory for Negligent Employment or Pre-Employment Drug Testing*, 30 RUTGERS L.J. 473, 478–84 (1999); see Claudia G. Catalano, Annotation, *Employee's Action in Tort Against Party Administering Polygraph, Drug, or Similar Test at Request of Actual or Prospective Employer*, 89 A.L.R.4TH 527 (1991), but they look a lot like defamation claims. See also RESTATEMENT (THIRD) OF TORTS: ECON. TORTS & RELATED WRONGS § 13 illus. 21 (Preliminary Draft No. 2, 2006) (mentioning that these kinds of testing cases might be handled in defamation); Jay M. Feinman, *The Economic Loss Rule and Private Ordering*, 48 ARIZ. L. REV. 813, 820–23 (2006) (discussing whether such cases should be handled in tort or contract and considering the Preliminary Draft's suggestion that the cases be handled in defamation); Travis M. Wheeler, Note, *Negligent Injury to Reputation: Defamation Priority and the Economic Loss Rule*, 48 ARIZ. L. REV. 1103, 1112–13, 1115–17 (arguing that the testing cases should be resolved under defamation rather than negligence).
