1-1-1993

Rogues' Rights: The Constitutionality of the Libel-Proof Plaintiff Doctrine

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ROGUES' RIGHTS: THE CONSTITUTIONALITY OF THE LIBEL-PROOF PLAINTIFF DOCTRINE

Good name in man and woman, dear my lord,
Is the immediate jewel of their souls:
Who steals my purse steals trash; 'tis something, nothing,
'Twas mine, 'tis his, and has been slave to thousands;
But he that filches from me my good name
Robs me of that which not enriches him,
And makes me poor indeed.¹

I. INTRODUCTION

Although the doctrine has not been codified, judges in several jurisdictions have held that a person's reputation may be so tarnished that it could not be lowered in the eyes of the community.² Such persons are considered "libel-proof" as a matter of law, and are thus precluded from bringing a libel case to trial.³ A doctrine stating that a person is incapable of being defamed denies that person due process and equal protection under the law.

Justifications for the libel-proof plaintiff doctrine are deeply flawed. Identifying certain plaintiffs as beyond the scope of libel law effectively makes these plaintiffs outlaws in the classic sense,⁴ and American jurisprudence rejects out-

¹. RODNEY A. SMOLLA, LAW OF DEFAMATION § 1.01 at 1-2 (1992) (quoting WILLIAM SHAKESPEARE, OTHELLO act 3, sc. 3 in COMPLETE WORKS OF WILLIAM SHAKESPEARE: THE CAMBRIDGE TEXT 995, 971 (1980)).
². See generally id § 9.10[4][d].
⁴. "The libel-proof plaintiff is an outcast of the law of defamation whose reputation may be kicked and trod upon with impunity." SMOLLA, supra note 1, § 9.10[4][d] at 9-25. See also Schiavone Constr. Co. v. Time, Inc., 847 F.2d 1069 (3d Cir. 1988), in which the plaintiffs argued that applying the doctrine would "declare open season on libel proof plaintiffs." Id. at 1081.

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lawry. Treating a person as beyond the scope and protection of the law is contrary to the basic tenets of our society.\(^5\)

Even without the judicially created libel-proof plaintiff doctrine, defenses and privileges applicable to libel cases sufficiently protect First Amendment interests of defendants. If a libel plaintiff's reputation is tarnished, the defendant publisher can assert truth as a defense, supplying evidence that the allegedly defamatory statement is at least substantially true in its implication.\(^6\) If the plaintiff is a public official or a public figure, the plaintiff cannot prevail absent a showing that the defendant published the allegedly libelous statement with knowledge that it was false or with reckless disregard of whether or not it was false.\(^7\) Further, the plaintiff must prove the defendant's knowledge or reckless disregard with convincing clarity.\(^8\) Given these substantial barriers to recovery in libel actions, there is simply no need to identify certain plaintiffs as libel-proof.

This comment traces the development of both the issue-specific and the incremental harm branches of the libel-proof plaintiff doctrine.\(^9\) The comment then sets forth the central question of a libel plaintiff's right of access to the courts, analyzing this question from the standpoint of due process and equal protection.\(^10\) Concluding that the libel-proof plaintiff doctrine violates fundamental constitutional rights, this comment proposes abrogation of the doctrine and suggests other avenues open to libel defendants who wish to protect themselves against meritless claims.\(^11\)

II. BACKGROUND

A. Brief Overview of Libel Law

Defamation can be defined as a communication that excites adverse, derogatory, or unpleasant feelings or opinions

\(^5\) See, e.g., Davis v. United States, 409 F.2d 453, 457 (1969). The court ruled that persons with criminal records "must be assured that they have a stake in our society, and that they can achieve justice by application to the law and its guardians." Id. at 457. See also infra text accompanying notes 184-88.


\(^8\) Id. at 285-86.

\(^9\) See infra text accompanying notes 56-161.

\(^10\) See infra text accompanying notes 179-261.

\(^11\) See infra text accompanying notes 262-72.
against the plaintiff. Both written and oral communications may be actionable if defamatory; libel encompasses written communications, and slander addresses oral ones.

As one commentator notes, an examination of the validity of a "slander-proof plaintiff doctrine" would differ substantially from a discussion of the libel-proof plaintiff doctrine, because slander actions differ from libel actions in significant respects. The torts have different histories, and slander is generally actionable only upon proof of actual, pecuniary harm to the plaintiff. This comment is limited to a discussion of the libel-proof plaintiff doctrine.

At English common law, libel was actionable even if the plaintiff could not prove any impairment of reputation or other harm as a result. Juries sometimes awarded substantial sums in compensation for the purported harm to the plaintiff's reputation, even where no such harm was proven. Until the 1960's, American courts generally considered matter defamatory on its face and unambiguous to be actionable per se; accordingly, harm was presumed.

In recent years, however, American courts have narrowed the contours of the tort of libel in the interest of protecting free speech and freedom of the press. Libel cases require the courts to "chart the proper course between the Scylla of inadequately guaranteeing First Amendment pro-

12. W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111 at 773 (5th ed. 1984). Keeton cites several definitions of defamation, ranging from the narrow (communication that "tends to hold the plaintiff up to hatred, contempt or ridicule, or to cause him to be shunned or avoided") to the broad (communication that "tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating with him"). Id. at 773-74.

13. Id. § 112 at 785.


15. KEETON et al., supra note 12, § 112, at 785. Libel was criminal in origin, and remains a common law crime, but slander was never criminal in itself, and could only become criminal when the words constituted some other offense (such as sedition, blasphemy, or breach of the peace). Id.

16. Id. § 112, at 793-94.

17. Id. § 112, at 795.

18. Id. See also Youssouppoff v. Metro-Goldwyn-Mayer Pictures, Ltd., 50 T.L.R. 581 (1934) (jury awarded £25,000 to plaintiff, a Russian aristocrat, who claimed that defendant's characterization of a Russian noblewoman seduced by Rasputin libeled her).


20. See infra text accompanying notes 24-40.
tections and the Charybdis of diminishing an individual's right to reputation." The courts have recognized a strong interest in preventing or vindicating attacks on reputation, likening libelous speech to constitutionally unprotected "fighting words." Nevertheless, in the mid-1960's, the balance between plaintiffs' and defendants' interests in libel cases began to shift in favor of defendants.

In *New York Times Co. v. Sullivan*, the Supreme Court found that libel laws could lead to self-censorship, thus deterring public criticism of official conduct. To prevent such censorship, the Court held that public officials could not recover damages for defamatory falsehoods relating to their official conduct absent proof that the statements were made with "actual malice," which the Court defined as "knowledge that [the statement] was false or . . . reckless disregard of whether it was false or not." Quoting *Sweeney v. Patterson*, the Court decreed that imposing liability for "erroneous reports of the political conduct of officials reflect[s] the obsolete doctrine that the governed must not criticize their governors . . . ." Thus, after *New York Times*, a plaintiff's right to recover damages in a libel action depended not only upon the defendant's conduct, but also upon the plaintiff's profession or role in society.

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22. Marder, supra note 14, at 995 (citing Rosenblatt v. Baer, 383 U.S. 75, 86 (1966)).
23. See id. at 996 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)).
25. Id. at 279. The Court reasoned that a rule compelling critics of official conduct to guarantee the truth of all their factual assertions or else risk libel judgments of potentially unlimited amounts would deter any such criticism. *Id.* "The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments." *Id.*
26. Id. at 279-80. Additionally, the Court reasoned, the Constitution mandates that actual malice be proven with "convincing clarity." *Id.* at 285-86. *See also*, e.g., Brooks v. American Broadcasting Cos., No. 91-3948, 1993 WL 265034 (6th Cir. July 20, 1993), in which the Sixth Circuit affirmed the district court's granting of a directed verdict for the defendants because the plaintiff failed to demonstrate by clear and convincing evidence that the defendants acted negligently in their publication of the allegedly libelous statements.
The Court expanded the "Times malice" standard somewhat in *Curtis Publishing Co. v. Butts*, where the plaintiff, a college football coach, was merely a "public figure" and not a public official. In *Curtis*, the Court held that such a public figure could recover damages for a defamatory falsehood upon a showing of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." Absent such extreme negligence by the defendant, however, the public-figure plaintiff could not recover damages for libel.

The libel plaintiff's right to recovery was further circumscribed in *Gertz v. Robert Welch, Inc.* Although the *Gertz* Court held that defamation of a private individual is not protected by constitutional privilege, it also sought to protect the media from "the rigors of strict liability for defamation." Ruling that the state interest in the protection of reputation "extends no further than compensation for actual injury," the Court barred recovery of presumed or punitive damages when liability is not based on *Times* malice.

Two years after *Gertz*, the Court was asked to define "actual injury" in the context of libel. In *Time, Inc. v. Firestone*, the Supreme Court established that "actual injury" encompasses not only harm to the plaintiff's reputation, but humiliation and mental anguish as well. The Court held that libel plaintiffs may recover damages for emotional dis-

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30. *Id.* at 148.
31. *Id.* at 155.
33. *Id.* at 348.
34. *Id.* at 349.
35. *Id.* at 350. In justifying a high standard of proof for plaintiffs, the Court reasoned that any liability system encompassing presumed and punitive damages could potentially "inhibit the vigorous exercise of First Amendment freedoms." *Id.* at 349.
37. The plaintiff sued a magazine publisher for anxiety and concern resulting from a defamatory article about her divorce; the article erroneously claimed she had been found guilty of adultery. *Id.* at 449-52. Although the plaintiff could not show that her reputation had been harmed, the Court noted that emotional distress falls within the *Gertz* requirement of actual injury. *Id.* at 460.
tress even though actual injury to reputation is minimal.\textsuperscript{38} Further, in \textit{Dun & Bradstreet v. Greenmoss Builders},\textsuperscript{39} the Court ruled that plaintiffs may recover presumed and punitive damages if the libel does not involve matters of public concern, "even absent a showing of 'actual malice.'"\textsuperscript{40}

In summary, public-official and public-figure plaintiffs must prove "\textit{Times} malice" (which can include extreme negligence) in order to recover in libel actions, and private-figure plaintiffs must prove at least negligence.\textsuperscript{41} Although the plaintiff must meet a high standard of proof to recover damages for libel, damage to reputation is not the only ground for recovery; emotional distress damages, presumed damages, and punitive damages have also been awarded.\textsuperscript{42}

\textbf{B. Development of the Libel-Proof Plaintiff Doctrine}

The libel-proof plaintiff doctrine originated in \textit{Cardillo v. Doubleday & Co., Inc.}.\textsuperscript{43} Cardillo, a prison inmate, sued the authors and publishers of a book mentioning his alleged participation in various criminal activities.\textsuperscript{44} The court noted that Cardillo had been convicted of several federal felonies in Florida, Maryland, and New Hampshire,\textsuperscript{46} as well as "numerous minor infractions of the law" in Massachusetts.\textsuperscript{46} Additionally, the court found that Cardillo knowingly associated with criminals and had been involved in several minor crimes with one of the book's authors.\textsuperscript{47} Accordingly, the Second Circuit declared, as a matter of law, that Cardillo was libel-proof

\begin{itemize}
    \item \textsuperscript{38} \textit{Id.} at 460-61.
    \item \textsuperscript{39} 472 U.S. 749 (1985). Plaintiff sued Dun & Bradstreet for damages from a highly inaccurate credit report, which the defendant failed to fully correct. \textit{Id.} at 751-52.
    \item \textsuperscript{40} \textit{Id.} at 761.
    \item \textsuperscript{41} \textit{See supra} text accompanying notes 24-33.
    \item \textsuperscript{42} \textit{See supra} text accompanying notes 36-40.
    \item \textsuperscript{43} 518 F.2d 638 (2d Cir. 1975).
    \item \textsuperscript{44} \textit{Id.} at 638. Thomas Renner and Vincent Teresa wrote the book, entitled \textit{My Life In The Mafia}. The book portrayed Teresa as a high-ranking figure in organized crime, and Cardillo was mentioned in the book as participating in specific crimes with Teresa, including a robbery and the fixing of a certain horse race. \textit{Id.} at 639-40.
    \item \textsuperscript{45} These included bail-jumping, conspiracy, and interstate transportation of stolen securities. \textit{Id.} at 640.
    \item \textsuperscript{46} \textit{Id.}
    \item \textsuperscript{47} \textit{Id.} The court also cited testimony before a congressional committee regarding Cardillo's frequenting of a place where "the mob generally hung out."
\end{itemize}
for the purposes of this case; "i.e., so unlikely by virtue of his life as a habitual criminal to be able to recover anything other than nominal damages as to warrant dismissal of the case, involving as it does First Amendment considerations." 48 The court further opined that given Cardillo's record and associations, "we cannot envisage any jury awarding, or court sustaining, an award under any circumstances for more than a few cents' damages," 49 even if Cardillo could prevail on the legal issues. 50 Thus, the court apparently discounted the possibility that Cardillo might have grounds for recovery other than for damage to his admittedly besmirched reputation.

From its first articulation in Cardillo, the libel-proof plaintiff doctrine developed along two branches: the "issue-specific" branch and the "incremental harm" branch. 51 Under the issue-specific branch, a court may determine that a plaintiff's reputation is so tarnished with respect to a particular issue that, as a matter of law, the plaintiff is libel-proof regarding that issue. 52 By contrast, a court applying the incremental harm branch examines an entire communication to determine the degree of harm inflicted by the allegedly libelous statements. 53 If the court finds that the actionable statements cause the plaintiff no appreciable harm beyond that caused by the non-actionable statements, the court may dismiss the case. 54 The following sections trace the development of each branch of the doctrine. 55

1. The "Issue-Specific" Branch

A year after Cardillo was decided, the Second Circuit confronted the libel-proof plaintiff defense in Buckley v. Lit-
Franklin H. Littell had written a book in which he characterized William F. Buckley, Jr. as a "fellow traveler" of totalitarians. Littell claimed that Buckley's publications printed items "picked up from the openly fascist journals [and] repeat[ed] radical right malice and rumor." The United States District Court for the Southern District of New York entered a judgment for Buckley, and Littell appealed.

On appeal, the Second Circuit rejected the claim that William F. Buckley, Jr. was libel-proof according to the rationale of Cardillo. Although the court found that Buckley was a principal spokesperson for a controversial political position, it hastened to add that Buckley's reputation was one that "could suffer under the onus of defamation." The court reasoned that, like the victims of McCarthyism who had occupied prominent positions in broadcasting, Buckley's reputation could be damaged even though he had the communications resources to answer a false and defamatory attack.

According to the court, the libel-proof doctrine articulated in Cardillo was "a limited, narrow one, which we will leave confined to its basic factual context." Thus, the Second Circuit appeared to restrict the doctrine to plaintiffs who are habitual criminals.

57. Id. at 884 & n.1 (quoting FRANKLIN LITTELL, WILD TONGUES: A HANDBOOK OF SOCIAL PATHOLOGY (1969)).
58. Id. at 885 & n.1 (quoting FRANKLIN LITTELL, WILD TONGUES: A HANDBOOK OF SOCIAL PATHOLOGY (1969)).
60. Id.
61. Buckley v. Littell, 539 F.2d 882, 888-89 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977). Interestingly, the opinion was written by Judge Oakes, author of the opinion in Cardillo. Id. at 884.
62. Id. at 889.
63. Id.
64. Id.
65. The Cardillo reasoning was applied in Ray v. Time, Inc., 452 F. Supp. 618 (W.D. Tenn. 1976), aff'd 582 F.2d 1280 (6th Cir. 1978), in which James Earl Ray, a convicted felon and the confessed murderer of Martin Luther King, Jr., was held to be libel-proof as to defendant's article characterizing Ray as a "narcotics addict and peddler." Id. at 622. As "a convicted habitual criminal" unlikely to recover damages in light of his background and criminal activities, the court dismissed Ray's action as frivolous. Id. See also Logan v. District of Columbia, 447 F. Supp. 1328 (D.D.C. 1978), where plaintiff, an admitted drug user with an extensive criminal record, sued defendant for false statements concerning plaintiff's drug use. Id. at 1330. Citing Cardillo, the court held the plaintiff
However, the United States District Court for the Central District of California extended the doctrine, applying it to a plaintiff who was not a habitual criminal (but who had a criminal record) in *Wynberg v. National Enquirer, Inc.* Henry Wynberg had a "brief but celebrated 'close personal relationship'" with Elizabeth Taylor. The *National Enquirer* published an article alleging that Wynberg had used this relationship for his own financial gain. In its opinion, the court asserted that Wynberg's prior criminal convictions, which had been highly publicized, damaged his general reputation sufficiently that he could recover "only nominal damages for subsequent defamatory statements." The *Wynberg* court conceded the difficulty of determining the proper accommodation between libel law and First Amendment freedoms, but noted that prior federal and state decisions provided trial courts with "flexible rules" for resolving such conflicts. The court decreed that when "an individual engages in conspicuously anti-social or even criminal behavior, which is widely reported to the public, his reputation diminishes proportionately." Abandoning the *Cardillo* limitation of the libel-proof plaintiff doctrine to habitual criminals, the *Wynberg* court reasoned that criminal or anti-social conduct diminishing a person's reputation could make that person libel-proof as a matter of law regarding that specific conduct. Eventually, according to the court, the person's reputation for specific conduct, or the person's general

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67. Id. at 925.
68. Id. at 925 & n.3.
69. Id. at 928. Wynberg's convictions included contributing to the delinquency of minors involving sex and drugs, bribery, prostitution, grand theft, and fraud. Id. at 928.
71. Id.
72. Id. at 928.
73. Id. One commentator was unconvinced that the court would apply the libel-proof plaintiff doctrine in the absence of criminal behavior. According to Marder, the court failed to clarify whether anti-social conduct that is not criminal could trigger the doctrine. See Marder, supra note 14, at 1001.
reputation for honesty and fair dealing, could sink so low as to render that person libel-proof on all issues. As to Wynberg himself, the court found that due to his specific criminal conduct and its attendant publicity, "it is beyond dispute . . . that [Wynberg's] . . . general reputation for integrity, truth, honesty, and fair dealing in personal and business matters is bad." Accordingly, the court granted the defendant's summary judgment motion.

In Guccione v. Hustler Magazine, Inc., the Second Circuit departed from its position in Buckley and declared that the libel-proof plaintiff doctrine is not confined to plaintiffs with criminal records. Robert Guccione, publisher of Penthouse magazine, sued Hustler Magazine over an article alleging that Guccione was married and also had a "live-in girlfriend, Kathy Keeton." In "a boisterous trial that gave new meaning to the term 'adversary proceeding,'" Guccione contended that although he and Ms. Keeton had been living together during his marriage to Muriel Guccione, he and Mrs. Guccione were divorced prior to the article's publication. Guccione argued that because he had not been convicted of the crime of adultery, he could not be held libel-proof regarding that issue. The court disagreed, ruling that plaintiffs may be rendered libel-proof by evidence apart from criminal convictions. Although the court conceded that "few plain-

74. Wynberg v. National Enquirer, Inc., 564 F. Supp. 924, 928 (C.D. Cal. 1982). As noted by Marder, supra note 14, at 1002, Wynberg directly contradicts the holding in Buckley, which limited the doctrine to cases in which a plaintiff is libel-proof only regarding the specific issues on which the plaintiff's reputation has been tarnished. Therefore, "Wynberg may represent a substantial expansion of the doctrine, rendering the term 'issue-specific' a misnomer in this jurisdiction." Marder, supra note 14, at 1002.

75. Wynberg, 564 F. Supp. at 928.
76. Id. at 930.
77. 800 F.2d 298 (2d Cir. 1986), cert. denied, 479 U.S. 1091 (1987).
79. Guccione, 800 F.2d at 303.
80. Id. at 299. Magazines published by Guccione contained articles that advocate extramarital sexual relations. Id. at 300.
81. Id. at 299.
83. Id. at 303.
84. Id. In particular, the court noted Guccione's testimony that from 1966 until 1979, his relatives, friends, and business associates knew he was living with Ms. Keeton while still legally married. Id. at 304.
tiffs will have so bad a reputation that they are not entitled to obtain redress for defamatory statements,\textsuperscript{86} it had little sympathy for those unfortunate few plaintiffs. The court reasoned that "where an allegedly libelous statement cannot realistically cause impairment of reputation, . . . the claim should be dismissed so that the costs of defending against the claim of libel, which can themselves impair vigorous freedom of expression, will be avoided."\textsuperscript{86}

The \textit{Guccione} court noted that Guccione had not restored his reputation between the time the \textit{Hustler} statements would have been true and the time the article was actually published,\textsuperscript{87} thus raising the question of how recent a libelous statement must be to have a perceived impact on the plaintiff's reputation. The Fifth Circuit addressed this question in \textit{Zerangue v. TSP Newspapers, Inc.}\textsuperscript{88} \textit{In Zerangue}, two Louisiana law enforcement officers sued a newspaper publisher over two articles erroneously stating that the officers had been convicted of felonies rather than of misdemeanor malfeasance.\textsuperscript{89} The articles appeared nearly six years after the convictions.\textsuperscript{90} Defendant TSP Newspapers argued that the plaintiffs, as law enforcement officers stripped of their offices and jailed, were libel-proof; the plaintiffs replied that in the intervening six years, they had restored their reputations.\textsuperscript{91} The Fifth Circuit ultimately affirmed the trial court's holding that whether or not the plaintiffs were libel-proof was a question for the jury.\textsuperscript{92} Courts have admitted articles published as much as eight years before the fact to show that a plaintiff is libel-proof,\textsuperscript{93} leaving unanswered the question of when, if ever, a plaintiff's tarnished reputation could be deemed rehabilitated.

\textsuperscript{85} Id.

\textsuperscript{86} Id. at 303. The court decreed that in libel-proof plaintiff cases, even nominal damages may not be awarded. \textit{Id}.


\textsuperscript{88} 814 F.2d 1066 (5th Cir. 1987).

\textsuperscript{89} \textit{Id}. at 1067-69.

\textsuperscript{90} \textit{Id}. at 1068-69.

\textsuperscript{91} \textit{Id}. at 1074.

\textsuperscript{92} \textit{Id}.

Not all federal courts have embraced the libel-proof plaintiff doctrine. The Third Circuit declined to apply the issue-specific branch of the doctrine in \textit{Marcone v. Penthouse International Magazine for Men}.\footnote{754 F.2d 1072, 1079 (3d Cir.), \textit{cert. denied}, 474 U.S. 864 (1985).} In 1976, Frank J. Marcone, an attorney who represented motorcycle gangs,\footnote{Id. at 1076. Marcone also associated with these gangs "on a non-professional basis." Id.} was indicted by a grand jury for conspiring to possess marijuana with intent to distribute.\footnote{Id.} The charges were subsequently withdrawn,\footnote{Id. at 1077. An assistant United States Attorney said the charges were dropped because of "legal technicalities" tying Marcone to the larger conspiracy involving defendants in the United States and Canada. Id.} but in 1978, \textit{Penthouse} published an article including Marcone in a list of "attorney criminals."\footnote{Id. at 1077. The article also stated that the charges against Marcone were dropped because he cooperated with further investigations. Id.} On appeal from a judgment in Marcone's favor, Penthouse argued that Marcone's highly publicized drug indictment, his notorious relationship with motorcycle gangs engaged in illegal activity, and his widely reported 1978 trial for income tax evasion made him, in effect, libel-proof before the publication of the allegedly libelous statement and therefore entitled only to nominal damages.\footnote{Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072, 1078-79 (3d Cir.), \textit{cert. denied}, 474 U.S. 864 (1985).} Rather than declaring Marcone libel-proof, however, the Third Circuit ruled that "[e]vidence of a tarnished reputation is admissible and should be considered as a factor to mitigate the level of compensatory damages."\footnote{Id. at 1079.} The court found that the jury had been informed of the evidence regarding Marcone's reputation, and that its verdict for compensatory damages of $30,000 may have reflected Marcone's diminished status as of 1978.\footnote{Id. at 1077, 1079.}

In \textit{Brooks v. American Broadcasting Cos.},\footnote{932 F.2d 495 (6th Cir. 1991).} the Sixth Circuit also declined to apply the issue-specific branch. ABC television personality Geraldo Rivera traveled to Akron, Ohio to investigate rumors concerning a local judge's alleged corruption.\footnote{Id. at 496. These rumors stated that the judge persuaded women to have sex with him in exchange for favorable rulings in certain cases. Id.} Rivera suspected that William G. Brooks, an Akron resident with a substantial and slightly publicized crimi-
nal record, was assisting the judge by intimidating those who might testify against the judge.\textsuperscript{104} A 1980 episode of ABC's 20/20 broadcast Rivera's and others' negative remarks about Brooks, to the effect that Brooks was the judge's "hitman," and that Brooks was a "pimp," a "muscleman," and a "street knowledgeable jive turkey."\textsuperscript{105} The district court granted ABC's motion for summary judgment, agreeing with ABC that Brooks was libel-proof as a matter of law.\textsuperscript{106} On appeal, the Sixth Circuit called the libel-proof plaintiff doctrine "a rather loose-woven legal conception of the federal courts,"\textsuperscript{107} indicating that "we may question whether all aspects of the libel proof doctrine are sound policy."\textsuperscript{108} Regrettably, the Brooks court did not address the policy questions (most notably the question of whether protecting free speech justifies placing anyone outside the protection of the law), as the court found genuine issues of material fact that justified allowing the case to go to a jury.\textsuperscript{109}

Only the District of Columbia Circuit flatly rejects the doctrine. In \textit{Liberty Lobby, Inc. v. Anderson},\textsuperscript{110} Liberty Lobby and its founder and treasurer, Willis Carto, sued Jack Anderson for writing and publishing three articles that were allegedly libelous.\textsuperscript{111} The articles characterized Carto as "racist, fascist, anti-Semitic, and a neo-Nazi," and indicated that Liberty Lobby was established to pursue Carto's goals.\textsuperscript{112} The

\begin{itemize}
\item \textsuperscript{104} \textit{Id.}
\item \textsuperscript{105} \textit{Id.} at 496-97.
\item \textsuperscript{107} Brooks v. American Broadcasting Cos., 932 F.2d 495, 500 (6th Cir. 1991).
\item \textsuperscript{108} \textit{Id.} at 501.
\item \textsuperscript{109} \textit{Id.} at 502. While Brooks was known to some people as an occasionally violent criminal, the court found that "no popular nationwide television program or other publicity had portrayed Brooks as a 'hitman' for a corrupt judge, a 'pimp,' a 'muscleman,' or a 'street knowledgeable jive turkey.' We leave it to a trier of fact to determine whether, and to what extent, the '20/20' episode damaged Brooks' reputation." \textit{Id.} On remand, at the conclusion of Brooks' evidence, the defendants moved for a directed verdict on the grounds that Brooks had failed to prove fault—an essential element of his case. Brooks v. American Broadcasting Cos., No. 91-3948, 1993 WL 265034, at *1-2 (6th Cir. July 20, 1993). The district court's directed verdict was affirmed on appeal. \textit{Id.}
\item \textsuperscript{110} 746 F.2d 1563 (D.C. Cir. 1984), \textit{vacated on other grounds}, 477 U.S. 242 (1986).
\item \textsuperscript{111} \textit{Id.} at 1565-66.
\item \textsuperscript{112} \textit{Id.} at 1567.

On appeal, the defendants argued both the issue-specific and the incremental harm theories of the libel-proof plaintiff doctrine.\footnote{114. Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563, 1568 (D.C. Cir. 1984), vacated on other grounds, 477 U.S. 242 (1986).} As to the issue-specific branch, the defendants contended that the reputations of Liberty Lobby and Carto had been irreparably damaged by prior publications, thus rendering them libel-proof.\footnote{115. \emph{Id.} at 1568. See infra text accompanying notes 141-46 for a discussion of the court's treatment of the defendants' incremental harm theory.}

Writing for the majority, then-District Court Judge Scalia denounced the libel-proof plaintiff doctrine as a "fundamentally bad idea."\footnote{116. Liberty Lobby, 746 F.2d at 1569.} Judge Scalia opined, "we cannot envision how a court would go about determining that someone's reputation had already been 'irreparably' damaged—\textit{i.e.}, that \textit{no} new reader could be reached by the freshest libel."\footnote{117. \textit{Id.} at 1568.} He also asserted that no significant First Amendment interests are furthered by the doctrine,\footnote{118. \textit{Id.}.} declaring that the doctrine is neither part of the law of the District of Columbia nor part of federal constitutional law.\footnote{119. Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563, 1569 (D.C.Cir. 1984), vacated on other grounds, 477 U.S. 242 (1986).}

2. The "Incremental Harm" Branch

Under the incremental harm branch of the doctrine, a libel case may be dismissed if non-actionable statements within an article damage a plaintiff's reputation so greatly that the harm caused by the actionable statements is minimal.\footnote{120. See, \textit{e.g.}, Masson v. New Yorker Magazine, Inc., 111 S. Ct. 2419 (1991); Herbert v. Lando, 781 F.2d 298 (2d Cir. 1986), \textit{cert. denied}, 476 U.S. 1182 (1986); Simmons Ford, Inc. v. Consumers Union of U.S., Inc., 516 F. Supp. 742 (S.D.N.Y. 1981).} This branch of the doctrine was first articulated in

A statement may be non-actionable for reasons other than its substantial truth. For example, in Schiavone Constr. Co. v. Time, Inc., 847 F.2d 1069 (3d Cir. 1988), the plaintiffs argued that they had valid reasons, including limited resources and quality of evidence, for challenging only the last portion of the magazine article at issue, and they had no intention of conceding that the rest was true. \textit{Id.} at 1080 n.13.
Simmons Ford, Inc. v. Consumers Union of United States, Inc. 121 Plaintiff Simmons Ford was a retailer of the CitiCar, one of two electric cars that received a highly critical review in the October 1975 issue of Consumer Reports. 122 Consumers Union’s Auto Test Division rated the CitiCar “Not Acceptable” based on the car’s poor acceleration, low top speed, poor braking, poor handling, and poor ride, among other problems. 123 The Auto Test Division submitted its findings to the defendant’s editorial office, and the published article included many of these findings. 124

The only portion of the article Simmons Ford challenged was the portion describing the CitiCar as unsafe for the particular reason that it did not meet allegedly mandatory federal safety regulations. 125 Simmons Ford did not contend that the CitiCar could meet these tests; it merely argued that the alleged mandatory requirements did not exist for conventional cars, and therefore the article was false. 126 Granting summary judgment for the defendants, the court ruled that “[g]iven the abysmal performance and safety evaluations detailed in the article, plaintiffs could not expect to gain more than nominal damages based on the addition to the article of

121. 516 F. Supp. 742 (S.D.N.Y. 1981). One author contends that Simmons Ford is a product disparagement action, not a libel case. Marder, supra note 14, at 1015. “Libel actions . . . are not limited to pecuniary harm and thus require an entirely different analysis from product disparagement actions. Reliance on Simmons Ford is therefore entirely misplaced and exemplifies the confusion surrounding this anomalous body of law.” Id. at 1015.

122. Simmons Ford at 743-44.

123. Id. at 744 (quoting Two Electric Cars, Consumer Rep., October 1975, at 596). The Test Division chief stated that the car was “‘an extremely dangerous and unsafe vehicle, wholly unsuited for transportation on the public highway, and raising a genuine threat of serious injury or death to any person foolhardy enough to drive one.’” Id. (quoting affidavit of Robert D. Knoll ¶ 31, Simmons Ford v. Consumers Union of U.S., Inc., 516 F. Supp 742 (S.D.N.Y. 1981) (No. 80-1901)).

124. Id.


126. Id. at 745. Later, the magazine printed a correction of its statement regarding the federal safety standards, but it reiterated its “‘Not Acceptable’” rating on the other safety grounds detailed in the article. Id. at 746 (quoting Consumer Rep., October 1976, at 573).
the misstatement relating to federal safety standards." The court stated that Simmons Ford’s reputational interest in averting further negative comment regarding the safety and performance of the CitiCar was “minimal when compared with the First Amendment interests at stake.”

The Second Circuit adopted the incremental harm branch of the doctrine in *Herbert v. Lando*. In *Herbert*, the plaintiff claimed that eleven statements made by the defendants were libelous and made with “Times malice.” On a motion for summary judgment, the district court had found nine of the statements non-actionable because there was no evidence that these statements had been made with actual malice. On appeal, the Second Circuit evaluated the remaining two statements under the incremental harm branch of the doctrine, and dismissed the case. The court decreed that “[f]or Herbert to base his defamation action on subsidiary statements whose ultimate defamatory implications are themselves not actionable . . . would be a classic case of the tail wagging the dog.”

Two years after *Herbert*, the Third Circuit confronted the incremental harm branch of the libel-proof plaintiff doctrine in *Schiavone Construction Co. v. Time, Inc.* An article published by *Time* magazine reasserted Ronald Schiavone’s widely reported underworld connections and stated that Schiavone’s name appeared several times in the FBI files on Jimmy Hoffa’s disappearance. Schiavone brought a libel action against *Time* on the basis of the last paragraph of the article, which contained the information about the FBI files. The district court granted the defendant’s summary judgment motion because, among other grounds, it ruled that Schiavone and the other plaintiffs suffered no more than incremental damage from the unchallenged portion of the arti-

127. *Id.* at 750.
128. *Id.* at 751.
130. *Id.* at 304. The eleven challenged statements are listed in the appendix to the opinion. *Id.* at 313-14.
131. *Id.* at 304-07.
132. *Id.* at 312.
133. *Id.*
134. 847 F.2d 1069 (3d Cir. 1988).
135. *Id.* at 1072.
136. *Id.* at 1075.
137. *Id.* at 1074.
On appeal, the Third Circuit explicitly declined to rule on the viability of the libel-proof plaintiff doctrine, holding that depending on how a jury evaluated the sting of the article, Schiavone might be able to recover compensatory damages and thus could not be libel-proof as a matter of law.\textsuperscript{139}

The District of Columbia Circuit Court attacked this branch of the doctrine in \textit{Liberty Lobby}.\textsuperscript{140} In the majority opinion, then-Judge Scalia wrote that the apparently equitable incremental harm doctrine "loses most of its equity when one realizes that the reason the unchallenged portions are unchallenged may not be that they are true, but only that [plaintiffs] were unable to assert that they were willfully false."\textsuperscript{141} The court rejected the incremental harm doctrine because "it rests upon the assumption that one's reputation is a monolith, which stands or falls in its entirety."\textsuperscript{142} According to Judge Scalia, the law either presumes that "there is a little bit of good in all of us, [or, alternatively, presumes that] no matter how bad someone is, he can always be worse."\textsuperscript{143} Judge Scalia went on to state that "[i]t is shameful that Benedict Arnold was a traitor; but he was not a shoplifter to boot, and one should not have been able to make that charge while knowing of its falsity with impunity."\textsuperscript{144}

Interestingly, the Ninth Circuit has adopted only the incremental harm branch of the libel-proof plaintiff doctrine, applying it in \textit{Masson v. New Yorker Magazine, Inc.}\textsuperscript{145} Jeffrey Masson, a Sanskrit scholar and psychoanalyst, served for a time as Projects Director of the Sigmund Freud Archives in England.\textsuperscript{146} Shortly after assuming his post, he became disenchanted with Freudian psychology and began advancing his own theories regarding Freud.\textsuperscript{147} Approximately one year

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\textsuperscript{139} Schiavone Constr. Co. v. Time, Inc., 847 F.2d 1069, 1075 (3d Cir. 1988).
\textsuperscript{141} Id. at 1568.
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{145} 895 F.2d 1535 (9th Cir. 1989), rev'd and remanded, 111 S. Ct. 2419 (1991).
\textsuperscript{147} Id. Specifically, Masson advanced his theories in 1981 at a lecture before the Western New England Psychoanalytical Society in New Haven, Connecticut. Id.
\end{flushleft}
after his being hired, the Board of the Archives terminated Masson as Project Director. Janet Malcolm, an author and contributor to *The New Yorker*, contacted Masson about the possibility of an article on his relationship with the Archives. Masson agreed, and he spoke with Malcolm in a series of interviews. Malcolm's article included lengthy passages enclosed in quotation marks and attributed to Masson, even though the passages were not exact quotes. The work portrayed Masson unflatteringly, and he sued Malcolm for libel in the District Court for the Northern District of California.

At trial, the district court held that the alleged inaccuracies did not raise a jury question, as they were either substantially true or were rational interpretations of an ambiguous conversation and thus entitled to constitutional protection. The Ninth Circuit affirmed the district court's summary judgment for defendants, applying the incremental harm branch of the libel-proof plaintiff doctrine and concluding that "[g]iven the . . . many provocative, bombastic statements indisputably made by Masson and quoted by Malcolm, the additional harm caused by the 'intellectual gigolo' quote was nominal or nonexistent, rendering the defamation claim as to this quote non-actionable." The United States Supreme Court, however, was unwilling to discount the possibility that this quote could have harmed Masson's reputa-

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148. Id.
149. Id. The article appeared first in *The New Yorker Magazine* and was subsequently published as a book by Alfred A. Knopf, Inc. Id. at 2425.
150. Id. at 2424.
151. Masson v. New Yorker Magazine, Inc., 111 S. Ct. 2419, 2425-28 (1991). For example, Malcolm quoted Masson describing the role he played, in his relationship with Dr. Kurt Eissler (head of the Sigmund Freud Archives) and Dr. Anna Freud (daughter of Sigmund Freud), as that of an "'intellectual gigolo — you get your pleasure from him, but you don't take him out in public.'" Id. at 2424-25 (citation omitted). Tape recordings of this interview show that Masson actually said, "[t]hey felt, in a sense, I was a private asset but a public liability. . . . They liked me when I was alone in their living room, . . . but I was much too junior within the hierarchy . . . for these important training analysts to be caught dead with me." Id. at 2426 (citation omitted).
152. Id.
The Court found that Masson was entitled to argue that the quote falsely purported to represent the views of Masson's senior colleagues, and as such could be more damaging than a similar self-appraisal.

The Supreme Court expressed reservations concerning the Ninth Circuit's application of the incremental harm doctrine, explaining that the Ninth Circuit's "reasoning requires a court to conclude that, in fact, a plaintiff made the other quoted statements and then to undertake a factual inquiry into the reputational damage caused by the remainder of the publication." Moreover, the Court pointed out that the Ninth Circuit had not indicated whether it considered the incremental harm branch of the libel-proof plaintiff doctrine to be grounded in California law or the First Amendment. To the extent that the Ninth Circuit had based its ruling on the First Amendment, the Supreme Court tersely noted that "it was mistaken." While stating that "we are given no indication that California accepts this doctrine, though it remains free to do so," the Court emphatically "reject[ed] any suggestion that the incremental harm doctrine is compelled as a matter of First Amendment protection for speech." Thus, the Court's decision in Masson seriously undercuts any constitutional justification for the libel-proof plaintiff doctrine.

C. Access to the Courts

Both the Fifth and the Fourteenth Amendments provide that no person shall be deprived of life, liberty, or property

156. Id.
157. Id. at 2436 (citation omitted). The Court noted that "the most 'provocative, bombastic statements' quoted by Malcolm are those complained of by petitioner, and so this would not seem an appropriate application of the incremental harm doctrine." Id. (quoting Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1541 (9th Cir. 1989)).
158. Id.
159. Id. at 2436.
161. Id. The Court ultimately reversed the Ninth Circuit's judgment and remanded the case for further proceedings consistent with its opinion. Id. at 2437. Justice White concurred in part and dissented in part, filing an opinion in which Justice Scalia joined. Id. This dissent does not address the constitutionality of the incremental harm doctrine, but states that if, as a matter of law, reasonable jurors could not conclude that falsely attributing quotes to Masson amounted to libel, a motion for summary judgment on this ground would be justified. Id. at 2438.
without due process of law.\textsuperscript{162} The Fourteenth Amendment also provides that “[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”\textsuperscript{163} While no Constitutional provision explicitly requires the federal government to provide equal protection of the laws, the United States Supreme Court has held that where the federal government makes a classification which, if made by a state, would violate the Fourteenth Amendment’s Equal Protection Clause, such a classification violates the Fifth Amendment’s Due Process Clause—a clause that is directly applicable to the federal government.\textsuperscript{164}

The issue of access to the courts has been analyzed both as a due process question\textsuperscript{165} and an equal protection question.\textsuperscript{166} An equal protection analysis implicitly incorporates the due process question in libel-proof plaintiff cases. The classification of plaintiffs as “libel-proof” by a federal judge raises equal protection scrutiny of the classification itself; if such a classification violates the Fourteenth Amendment’s Equal Protection Clause, it also violates the Fifth Amendment’s Due Process Clause.\textsuperscript{167}

A fundamental principle of equal protection law is that a classification must treat similarly those persons who are similarly situated.\textsuperscript{168} In determining whether a classification violates the Equal Protection Clause, three factors are considered: (1) the character of the classification in question; (2) the individual interests affected by the classification; and (3) the

\textsuperscript{162} U.S. Const. amend. V & XIV, § 1.
\textsuperscript{163} U.S. Const. amend. XIV, § 1.
\textsuperscript{164} See Bolling v. Sharpe, 347 U.S. 497 (1954). The Bolling Court held that racial segregation of District of Columbia public schools violated the Fifth Amendment’s Due Process Clause because the segregation was not reasonably related to a legitimate governmental objective and was therefore an arbitrary deprivation of black students’ liberty. \textit{Id.} at 500. Such segregation by the states would be unconstitutional, so the Court reasoned that “it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.” \textit{Id.}
\textsuperscript{166} See Boddie, 401 U.S. at 385 (Douglas, J., concurring); Griffin v. Illinois, 351 U.S. 12 (1956).
\textsuperscript{167} See supra text accompanying note 164.
\textsuperscript{168} See, e.g., F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). “[T]he classification must be reasonable, not arbitrary, . . . so that all persons similarly circumstanced shall be treated alike.” \textit{Id.} at 415.
governmental interests asserted in support of the classification.\(^{169}\) Traditionally, cases affecting economic and commercial interests are subject to a lenient standard of judicial review.\(^{170}\) In such cases, governmental action is typically upheld if the action is rationally related to a legitimate state interest.\(^{171}\) However, if a classification is considered "suspect" (such as a classification by race), or if the individual interest affected is considered "fundamental," the governmental action is subject to strict scrutiny—that is, the action will not be upheld unless the action is necessary to promote a compelling state interest.\(^{172}\)

At a minimum, due process requires that "absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."\(^{173}\) Because due process is explicitly guaranteed by the Constitution,\(^{174}\) it is a fundamental right for purposes of Equal Protection Clause analysis.\(^{175}\) A state's denial of a fundamental right is subject to strict scrutiny under Equal Protection Clause jurisprudence, even where the denial is not based on a suspect classification such as race, nationality, or alienage.\(^{176}\) One commentator notes that "[s]uch inequalities are particularly injurious when they interfere with either of the two major sources of political and legal legitimacy—namely, voting and litigating—or with the exercise of inti-

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172. Graham v. Richardson, 403 U.S. 365, 375-76 (1971). In Craig v. Boren, 429 U.S. 190 (1976), reh'g denied, 429 U.S. 1124 (1977), the Court articulated an intermediate level of scrutiny for gender-based classifications. Id. at 197. Under this level of scrutiny, "classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." Id.
175. Rights either implicitly or explicitly guaranteed by the Constitution are considered "fundamental" by the United States Supreme Court. See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973), reh'g denied, 411 U.S. 959 (1973). "[T]he right to due process reflects a fundamental value in our American constitutional system." Boddie, 401 U.S. at 374.
176. Graham, 403 U.S. at 365.
mate personal choices." Denying libel plaintiffs access to the courts denies them due process and equal protection.

III. ANALYSIS

A. Statement of the Problem

Traditional analysis of defamation balances the individual's right to reputation against society's right to free speech and a free press. When a plaintiff is declared libel-proof, however, the defendant's right to free expression must be balanced against the plaintiff's right to due process and equal protection under the law. Courts have not directly addressed this conflict.

B. Due Process and Equal Protection Considerations

1. Character of the Classification

The Equal Protection Clause has been construed to apply to classifications by race, alienage, poverty, and class or caste. The libel-proof plaintiff classification falls within the last category. By ruling that the plaintiff's character may be attacked with impunity, the court, in effect, declares the

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179. See McLaughlin v. Florida, 379 U.S. 184 (1964) (invalidating state law prohibiting cohabitation by interracial married couples); Strauder v. West Virginia, 100 U.S. 303 (1880) (invalidating state law restricting jury membership to white males).
180. See Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (invalidating state law denying commercial fishing licenses to aliens).
181. See Griffin v. Illinois, 351 U.S. 12 (1956) (holding that a state must provide a trial transcript or its equivalent to an indigent criminal defendant appealing the conviction).
182. See Skinner v. Oklahoma, 316 U.S. 535 (1942) (invalidating a state law permitting forced sterilization of "habitual criminals"). Oklahoma's Habitual Criminal Sterilization Act provided for the sterilization of any person who, having been convicted two or more times for felonies involving moral turpitude, was thereafter convicted of such a felony in Oklahoma and sentenced to imprisonment in an Oklahoma penal institution. Id. at 536. The Court found that sterilization of those who have committed grand larceny three times, with immunity for those who are embezzlers, amounts to "a clear, pointed, unmistakable discrimination" that runs afoul of the Equal Protection Clause. Id. at 541. Given this holding, even habitual criminals do not forfeit their right to equal protection.
plaintiff to be an outlaw—one outside the protection of the law.\textsuperscript{183} American jurisprudence has rejected the creation of an outlaw class.\textsuperscript{184} In \textit{Davis v. United States},\textsuperscript{185} for example, the District of Columbia Circuit held that the trial court properly excluded evidence of a robbery victim’s own convictions for assault, felonious assault, and rape. The court reasoned that admitting such evidence for the purpose of impeaching the complainant creates a risk that the jury will “acquit a man plainly guilty of crime because of their distaste for the victim. They may, for example, conclude that an established rapist is not one to complain . . . of a robbery.”\textsuperscript{186} Additionally, the court found that persons with prior criminal convictions “must be assured that they have a stake in our society, and that they can achieve justice by application to the law.”\textsuperscript{187} To indicate otherwise, the court admonished, “would tend to go contrary to our society’s basic tenets, by establishing a kind of outlaw, outside the protection of the law.”\textsuperscript{188} In libel-proof plaintiff cases, discrimination according to this “outlaw” status is particularly egregious, because the label is applied by only one judge. Evaluation of reputation is inherently subjective; without a jury to assess the plaintiff’s reputation in the community, the judge’s ruling could easily be arbitrary and capricious. Thus, although the “outlaw” classification falls outside the more traditional suspect classifications of race and alienage, it arguably leads to discrimination repugnant to the Equal Protection Clause.

To determine how much harm a plaintiff must allege in order to bring a libel claim to a jury, the judge must subjec-
tively decide what is part of the same "issue" or how much damage is merely "incremental."

No clear guidelines exist for these distinctions. As formulated in Cardillo, the libel-proof plaintiff doctrine applied originally to "habitual criminals." However, the Cardillo court did not set forth a standard for determining how many, or what types of, offenses render a person's criminality sufficiently "habitual" to trigger the libel-proof plaintiff doctrine. Consequently, even courts that have applied the doctrine to some plaintiffs with significant criminal records have hesitated to apply it to other such plaintiffs. For example, the Sixth Circuit affirmed the judgment of the Western District Court of Tennessee that James Earl Ray was libel-proof, but it declined to apply the doctrine to William Brooks, who also had a criminal past. Brooks had been taken into police custody 20 times over the years and had been convicted of numerous felonies, but instead of declaring Brooks a libel-proof habitual criminal, the Sixth Circuit found genuine issues of material fact as to whether the 20/20 broadcast damaged his reputation. Without adequate guidelines for its application, the libel-proof plaintiff classification is inherently arbitrary, even within its original context of plaintiffs who are "habitual criminals."

Outside the criminal context, the libel-proof plaintiff classification is even more arbitrary. As to the issue-specific branch of the doctrine, the Second Circuit held that William

189. The Libel-Proof Plaintiff Doctrine, supra note 51, at 1924. One commentator asks:

For example, does being termed a "child molester" in addition to a "rapist" add significant or only incremental damage to the plaintiff's reputation? Or a "crook" and a "liar"? The same questions also arise in the issue-specific context, with the focus appropriately shifted to the plaintiff's reputation instead of the communication itself.

Id. at 1925-26.

193. Brooks' criminal convictions included breaking and entering, grand larceny, first-degree manslaughter, and carrying a concealed weapon under a disability. Id. at 497.
194. Id. at 501-02.
195. See supra text accompanying notes 43-55.
F. Buckley, Jr., a conservative ideologue,\textsuperscript{196} was not libel-proof on the issue of his alleged membership in the "radical right."\textsuperscript{197} However, the Second Circuit also held that Robert Guccione, a similarly outspoken advocate of extramarital sex,\textsuperscript{198} was libel-proof on the issue of his purported adultery.\textsuperscript{199} As to the incremental harm branch, the Third Circuit held that a reasonable jury could have found that Ronald Schiavone had suffered more than incremental harm from the portion of an article alleging that Schiavone's name appeared in FBI reports on the disappearance of Jimmy Hoffa,\textsuperscript{200} even though Schiavone did not challenge the portions of the article reporting his ties to the Mafia.\textsuperscript{201} Yet the Second Circuit held that because Anthony Herbert, whom defendants Barry Lando and Mike Wallace had accused of lying about reporting war crimes, could not prove that nine of eleven challenged statements were published with actual malice, Herbert could not ask a jury to evaluate the harm caused by the two remaining statements, even if those two statements were published with the requisite malice.\textsuperscript{202} Thus, in either the criminal or the non-criminal context, and under either the issue-specific or the incremental harm branch of the doctrine, the libel-proof plaintiff classification does not treat similarly those plaintiffs who are similarly situated.

2. Individual Interests Affected by the Classification

Everyone has a right to have the historical record set straight. As the \textit{Liberty Lobby} court noted, "[w]e are not yet

\textsuperscript{196} Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), \textit{cert. denied}, 429 U.S. 1062 (1977). The court said Buckley could "fairly be described as perhaps the leading advocate, ideologue or theoretician of conservative political beliefs and ideas." \textit{Id.} at 886.

\textsuperscript{197} \textit{Id.} at 884.


\textsuperscript{199} \textit{Id.} at 303-04.


\textsuperscript{201} \textit{Id.} at 1080 n.13. The plaintiffs argued that it was unfair to assume they did not challenge the rest of the article because its allegations were true; rather, they contended that they had valid reasons (including limited resources and quality of evidence) for electing to challenge only the last portion of the article, and that they had no intention of conceding that the rest was true. \textit{Id.}

\textsuperscript{202} Herbert v. Lando, 781 F.2d 298, 312 (2d Cir. 1986), \textit{cert. denied}, 476 U.S. 1182 (1986).
ready to adopt for the law of libel the principle that 10,000 repetitions are as good as the truth." Our judicial system exists not only to provide monetary damages, but to resolve disputes between parties "even if no more than personal honor is at stake." However, the United States Supreme Court has limited the extent to which equal access to civil adjudication may be claimed. In Boddie v. Connecticut, the Court struck down a state law conditioning the granting of a divorce on the claimant's ability to pay filing fees. The Court reasoned that because "the requirement that [the claimants] resort to the judicial process is entirely a state-created matter," a state may not pre-empt the right to dissolve a legal relationship without giving all its citizens access to the means prescribed for doing so. Nevertheless, in United States v. Kras, the Court refused to apply this rationale to indigents' filing of bankruptcy petitions, as bankruptcy is "not the only method available to a debtor for the adjustment of his legal relationship with his creditors." Professor Tribe notes that, given state and federal laws against forcible self-help, judicial decision may be "the only lawful mechanism for securing a binding determination against a recalcitrant opponent in any case." If libel plaintiffs are denied a meaningful opportunity to be heard, they cannot effectively combat the attacks on their reputation, as their opportunities for self-help may be severely limited. The Buckley court acknowledged that William F. Buckley may have been eminently capable of answering false and defamatory attacks with the communications resources at his command, yet still upheld his right to recover in a libel action. If a person of Buckley's political prominence, and

204. Marder, supra note 14, at 1011-12.
205. TRIBE, supra note 177, § 16-11.
207. Id.
208. Id.
209. Id.
211. Id. at 445.
212. TRIBE, supra note 177, § 16-11.
213. Marder, supra note 14, at 1012.
215. Id.
with Buckley's access to the media, was not left to his own devices to defend his reputation, why should anyone be? So-called libel-proof plaintiffs have achieved their tarnished reputations through highly publicized crimes or anti-social acts. Given their resultant low place in the public esteem, their credibility may be so damaged that even if they have access to channels of mass communication, they may be unable to change public opinion. As one commentator notes, 

"[w]ith little capacity to make an impact on the marketplace of ideas, such individuals have a strong interest in securing a judicial forum, the best possible means of vindication."

By extension, without an effective opportunity to vindicate their reputations, plaintiffs held to be libel-proof may never be able to restore their reputations. Even if years have elapsed since the plaintiff's alleged bad acts, courts may deny recovery on the basis that the plaintiff's reputation has not been rehabilitated in the interim. For example, the Second Circuit decided that Robert Guccione had not restored his reputation during the four years prior to the Hustler article, because of the "long duration" of Guccione's adulterous relationship and the "relatively short" period between its end and the article's publication. However, the better view is that of the Fifth Circuit, which agreed with the plaintiffs in Zerangue that whether or not they had improved their reputations during the six years prior to the publication of the allegedly libelous article was a question for the jury. Ex-convicts who have served their time and wish to start a new life, particularly if they move to a new community where their past acts are unknown, should not be prevented from protecting a fledgling good reputation merely because little

216. Marder, supra note 14, at 1012.
217. Id.
218. Id.
220. Id.
221. Zerangue v. TSP Newspapers, Inc., 814 F.2d 1066, 1074 (5th Cir. 1987). The defendants produced no evidence to refute the plaintiffs' contentions, but simply claimed the arguments were not believable. Id. The court reasoned that "summary judgment is not an appropriate stage at which to resolve credibility questions." Id.
222. See Marder, supra note 14, at 1013. "[W]hat is to be done when a plaintiff's community does not know of the past convictions? What of the criminal who has been rehabilitated and wants to start a new life?" Id.
time has elapsed since their crimes were committed. Such individuals have a strong interest in protecting their ability to be accepted as contributing members of their new communities.

Without a judicial forum, persons about whom society is mistaken have no recourse. In the case of Leo Frank, for example, Frank's reputation in his community led to his conviction for the murder of Mary Phagan.223 Prior to the trial, one reporter wrote that "'the public has not yet become convinced—and may never become convinced—that Leo Frank is innocent of the crime for which he has been indicted.'"224 Gossip about the murder so inflamed the Atlanta populace that some residents doubted an impartial jury could be assembled.225 Had Frank attempted to bring a libel suit against the newspapers reporting or inciting the gossip, and had the libel-proof plaintiff doctrine existed at that time, a judge could have declared Frank libel-proof despite his lack of a criminal record. As the Brooks court noted, "'criminal convictions are the well-worn path to achieving libel-proof status, but a specific reputation obtained through means such as newspaper and magazine articles also will suffice.'"226 The judge could have considered any false statements non-actionable if the judge considered Frank's past conduct sufficiently anti-social,227 or the judge could have concluded that any actionable statements would cause only incremental harm be-

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223. "One of the most infamous outbursts of anti-Semitic feeling in the United States occurred in Georgia in the years 1913, 1914, and 1915. Leo Frank, a Northern Jewish industrialist, was convicted of murdering a thirteen-year-old working girl." LEONARD DINNERSTEIN, THE LEO FRANK CASE xiii (1987).

224. Id. at 36 (citation omitted).

225. Id. at 36-37. The defense introduced over one hundred witnesses who testified to Frank's good character. On cross-examination, the prosecution repeatedly asked whether these witnesses had heard of Frank's reputation for lascivious behavior. "It mattered not how the witnesses responded. [The prosecutor] had already said enough to damage Frank's reputation . . . ." Id. at 51. At one point during the trial, the prosecutor implied that Frank might be homosexual, and "the insinuation that Frank indulged himself in this fashion 'went from mouth to mouth gaining credence as it went.'" Id. (citation omitted).


yond that caused by non-actionable ones. Leo Frank could not have countered these falsehoods without his day in court. Frank was ultimately lynched, although evidence discovered subsequent to his trial indicates that he was innocent.

Precluding libel plaintiffs from seeking vindication may not lead to their lynching, but certainly prevents them from proving that public opinion may be unfounded. Suppose, for example, that a man is in prison for rape and murder. The local newspaper prints a story saying the man is also a child molester. Assuming the man lived long enough to bring the libel action, a judge might declare him libel-proof; however, his reputation among the prison inmates could have been damaged to the point where his physical safety, if not his life itself, would be jeopardized. A judge may be unable or unwilling to assess the scope of damage to this plaintiff's reputation within the prison community, yet that is precisely the community having the most direct impact on the plaintiff's safety during his incarceration.

Without a trial on the merits, a judge cannot be certain that a libel plaintiff's recovery would be minimal. The plaintiff may be entitled to damages for emotional distress, and to punitive damages even if the defendant has not acted with malice. Such awards may be far from nominal in amount. During the 1980's, the median jury award in libel cases was $200,000, but in the two years from 1990 through 1992, the median award had risen to $1,500,000. Additionally, recent juries awarded punitive damages in three-quarters of the defense victories. By contrast, in the preceding decade punitives accompanied general damages in roughly


229. "Frank was arrested and convicted for a murder that he could not possibly have committed but which most Georgians firmly believed he had." DINNERSTEIN, supra note 223, at x. In 1982, Alonzo Mann, the eighty-two-year-old former office boy in the firm Frank supervised, stated he had additional evidence tending to exonerate Frank of the murder. Id. Mann claimed he had seen Jim Conley, the state's main witness against Frank at trial, carrying a girl's body at about the time Mary Phagan was murdered. Id. Conley reportedly threatened to kill Mann if he ever mentioned what he had seen. Id. Mann, thirteen years old at the time, returned home and told his mother, who advised him not to tell anyone about Conley and the body. Id. at x-xi.


half the awards."233 Those publishers who can mount a sustained defense prevail in only about twenty-five percent of their post-trial motions for reversals, new trials, or reduced damages.234 Given these trends, assertions that a libel plaintiff would be able to recover only nominal damages rest on shaky ground indeed. Thus, the individual interests affected by the libel-proof plaintiff classification include the plaintiff's interest in setting the record straight in perhaps the only effective forum for vindication; the interest in rebuilding a damaged reputation and protecting a new, good one; the interest in compensation for actual injury; and the interest in punishing the defendant and deterring future wrongful conduct.

3. Governmental Interests Asserted in Support of the Classification

In Cardillo, the Second Circuit justified the libel-proof plaintiff doctrine on the grounds that Cardillo's case "involv[ed] . . . First Amendment considerations"235 without explaining why these First Amendment considerations were particularly problematic if the libel plaintiff was a habitual criminal. Although the Second Circuit found no such First Amendment problems in Buckley,236 it explained in Guccione that the cost of defending against a libel claim can impair the defendant's "vigorous freedom of expression."237 Additionally, in Schiavone, the defendant argued that "the availability of punitive damages against newspapers threatens the system of a free and fearless press that is essential to democracy."238 In Schiavone, the Third Circuit declined to rule on the constitutionality of punitive damages in cases where the jury awards only nominal damages to plaintiffs, wisely electing to "resist the invitation to play leapfrog in this constitutional minefield."239

233. Id.
234. Id.
239. Id. at 1082.
The First Amendment interests purportedly at stake in libel-proof plaintiff cases are tenuous at best. As the *Buckley* court noted, "there is no constitutional value in false statements of fact."\(^{240}\) Recovery in libel cases is extremely difficult, even for plaintiffs not branded as libel-proof.\(^{241}\) As then-Judge Scalia pointed out in *Liberty Lobby*,\(^{242}\) where a person has been widely libeled by reputable sources, the defendant publisher's good-faith reliance upon those sources provides a complete defense.\(^{243}\) Judge Scalia did not consider either proving such good-faith reliance, or merely preventing the plaintiff from proving the opposite by clear and convincing evidence, to be sufficiently burdensome that "a prophylactic rule need be adopted sanctioning willful character-assassination so long as it is conducted on a massive scale."\(^{244}\) Given the weak justification for protecting publishers of malicious falsehoods, the governmental interest in First Amendment aspects of libel-proof plaintiff cases cannot be said to be compelling. Moreover, in *Masson*, the Supreme Court explicitly rejected "any suggestion that the incremental harm doctrine is compelled as a matter of First Amendment protection for speech."\(^{245}\)

Some proponents seek to justify the doctrine on the basis that it "prevents the waste of judicial resources that would occur if courts permitted fruitless claims to go to trial."\(^{246}\) Judicial economy is a legitimate, if not an altogether compelling, governmental interest. As Professor Tribe notes, "governmental interest in efficiency, convenience, or cost-saving may be cited in support of a challenged rule: strict scrutiny would include judicial wariness of interests such as these

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\(^{240}\) Buckley, 539 F.2d at 896 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 401 (1974)).

\(^{241}\) See supra text accompanying notes 24-35.


\(^{243}\) Id. at 1568.

\(^{244}\) Id.

\(^{245}\) Masson v. New Yorker Magazine, Inc., 111 S. Ct. 2419, 2436 (1991). Presumably the Court did not mention the issue-specific branch of the libel-proof plaintiff doctrine because the Ninth Circuit relied solely upon the incremental harm branch in its decision below. Id.

\(^{246}\) The Libel-Proof Plaintiff Doctrine, supra note 51, at 1917. "The libel-proof plaintiff doctrine, when applied according to a clearly articulated set of legal standards, assures that only plaintiffs with colorable reputational harm go forward to the jury and thus permits courts to dispose of meritless claims at an early stage." Id., at 1921.
which can be so easily and indiscriminately invoked . . . .”

In his concurring opinion in *Hudson v. McMillian*, Justice Blackmun admonished that docket management issues have “no appropriate role in interpreting the contours of a substantive constitutional right.” In any event, given the relative scarcity of cases involving the libel-proof plaintiff doctrine, its abolition probably would not open the floodgates of litigation. Thus, applying strict scrutiny under an Equal Protection Clause analysis, the libel-proof plaintiff doctrine cannot be said to further a compelling state interest.

Even if the state interest were compelling, however, the doctrine fails the second prong of the strict scrutiny test: the doctrine is not necessary to the furtherance of the state’s interest. Other means exist for conserving court time and protecting parties from frivolous litigation. As noted by the *Boddie* Court, defendants can sue for malicious prosecution or abuse of process. Additionally, the Federal Rules of Civil Procedure permit courts to impose sanctions on attorneys or parties who sign pleadings, motions, or other papers not filed in good faith. Under Rule 11, for example, a person signing a pleading, motion, or other paper in a case asserts (1) that he or she has read the document; (2) that to the best of the signer’s knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law (or by a good-faith argument for changing existing law); and (3) that the document is not being filed for any improper purpose, including harassment or causing unnecessary delay or needless increase in the cost of litigation. Sections of Title 28 of the United States Code authorize sanctions against attorneys who multiply the proceedings in a case “unreasonably and vexatiously,” by pleadings or otherwise; and against parties proceeding *in forma pauperis* who file actions that are “frivolous or mali-

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249. Id. at 1003 (Blackmun, J., concurring). *Hudson* considered a prisoner’s substantive constitutional right to be free from cruel and unusual punishment. Id. at 997.
252. Id.
Sanctions can include costs, expenses, attorneys' fees, and dismissal of the case. State courts have similar sanctioning powers that serve to deter meritless suits. Accordingly, the libel-proof plaintiff classification violates the Equal Protection Clause because it abrogates a fundamental right and is not necessary to the achievement of a compelling state interest.

IV. PROPOSAL

Because the libel-proof plaintiff doctrine is judicially created, it can and should be judicially abrogated. From its inception, the doctrine was a "fundamentally bad idea"; it evolved into "a rather loose-woven legal conception of the federal courts" that is both inequitable and unconstitutional. Labeling a class of persons libel-proof denies them due process and equal protection of the laws. Applying the strict scrutiny standard for Equal Protection Clause analysis, where a fundamental right such as due process is at stake, governmental discrimination against so-called libel-proof plaintiffs is invalid unless it is necessary to promote a compelling state interest. Proponents of the libel-proof plaintiff doctrine assert that it somehow protects First Amendment freedoms, and that it promotes judicial economy by preventing fruitless claims from proceeding to trial. However, the United States Supreme Court severely undercut any First Amendment justifications by stating that the doc-

259. See, e.g., CAL. CIV. PROC. CODE § 128.5(a) (West Supp. 1993), which permits trial courts to order "a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." Id.
262. See supra text accompanying notes 179-260.
265. The Libel-Proof Plaintiff Doctrine, supra note 51, at 1917.
trine “is not compelled as a matter of First Amendment protection for speech.”

Even if the governmental interest in precluding frivolous litigation were considered compelling, the libel-proof plaintiff doctrine is not necessary to promote that interest. Instead of denying libel plaintiffs due process and equal protection, judges can grant directed verdicts for malicious prosecution or abuse of process to defendants who establish that the plaintiffs’ claims are truly meritless. As to the potentially chilling effect of defense costs in libel claims, defendant publishers in federal court can use Rule 11 to seek reimbursement of their defense costs and attorneys’ fees as sanctions if the pleadings were signed without reasonable inquiry as to their grounding in fact or in law, or if the pleadings were filed for an improper purpose. Costs and attorneys’ fees may also be available as sanctions under Title 28, United States Code § 1927 if plaintiffs’ counsel multiplied the proceedings to increase costs unreasonably and vexatiously. In state court, defendants can seek reimbursement of costs, expenses, and attorneys’ fees under the state’s statutes governing frivolous or vexatious litigation. Thus, numerous avenues are open to libel defendants seeking to protect themselves against meritless claims.

V. Conclusion

The libel-proof plaintiff doctrine should be abrogated as unconstitutional and inequitable. As one commentator noted, “[t]he rapist or corporate plunderer does not lose his inherent worth as a person by committing the wrongful act . . . . The accused, innocent or guilty, retains the right to be heard in court.” So, too, should the libel plaintiff whose reputation has been attacked. “Even a criminal or a cad may have a vestige of honor that has been besmirched. It would be consonant with general tort law to let the jury decide

268. FED. R. CIV. P. 11.
270. See, e.g., CAL. CIV. PROC. CODE § 128.5(a) (West Supp. 1993). Section 128.5(b)(2) defines “frivolous” as either “totally and completely without merit,” or “for the sole purpose of harassing an opposing party.” CAL. CIV. PROC. CODE § 128.5(b)(2).
271. Collett, supra note 184, at 457.
what, if any, harm was done to that sullied reputation." Once the plaintiff has established that the defendant is a malicious tortfeasor, the jury should have broad discretion in measuring the plaintiff's damages. Defendants can pursue other remedies if they believe libel plaintiffs' actions are frivolous.

If person X has $100 in her wallet and person Y steals $99, X can sue Y for conversion. If X has $2 in her wallet and Y steals $1, X can still sue Y for conversion. The courts do not deny X a remedy simply because X had little to steal. Similarly, the courts should not deny libel plaintiffs an opportunity to present their case to a jury simply because a judge subjectively decides the plaintiffs have little or no reputation to lose. Such arbitrary and capricious denials protect publishers of malicious falsehoods and violate libel plaintiffs' rights to due process and equal protection under the law.

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