The Charge is Libel: The Best Defense is an Aggressive Offense When a Public Official Sues the Media

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I. INTRODUCTION

When delivering his first inaugural address, President Thomas Jefferson paid tribute to the principles on which the nascent government was founded. Among those principles, Jefferson praised "the diffusion of information" prompted by freedom of the press, and counseled that:

The wisdom of our sages and blood of our heroes has been devoted to their attainment; they should be the creed of our political faith; the text of civic instruction; the touchstone by which to try the services of those we trust; and should we wander from them in moments of error or alarm, let us hasten to retrace our steps and to regain the road which alone leads to peace, liberty, and safety.

Despite Jefferson's admonitions, the dual intent of the first amendment's freedom of the press clause, to provide the public with a marketplace for ideas and to serve as an independent check on governmental activities, has been eroded by unwarranted libel suits brought by public officials against the print and broadcast media.

In 1964, the United States Supreme Court warned that, if abused, libel suits could cast a "pall of fear and timidity" over the media's right to freely criticize the conduct of public officials.

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2. Id.
3. U.S. CONST. amend. I provides that "Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances."
Twenty years later, the high Court's apprehension concerning "media chill" was realized when two widely publicized actions were filed in federal court: General William Westmoreland filed a $120 million libel suit against CBS, Inc., and former Israeli Defense Minister General Ariel Sharon sought $500 million in a libel suit against Time, Inc. Although neither case was decided in favor of the plaintiff, the repercussions were felt immediately throughout the news industry: some publishers and producers demanded that reporters adhere to more exacting journalistic standards; others discontinued investigative reporting on controversial subjects.

Various privileges protect the media's constitutional right to question and comment on the conduct and actions of public officials. These privileges are based on the first amendment and on the notion that public officials have ample access to resources with which to counter the media's allegations and thus avert damage to their reputation. However, since the mid-1970's an increasing number of "public official plaintiff-media defendant" libel cases have been allowed to proceed to trial. For example, Senator Paul Laxalt filed a $250 million suit against the McClatchy Newspapers for libel, conspiracy, and intentional infliction of emotional distress. The McClatchy Newspapers published three articles in 1983 which alleged improprieties in the operation of a Nevada casino owned by Senator Laxalt, and linked Laxalt to organized crime.

The "chill" resulting from libel suits initiated by public officials such as General Westmoreland, General Sharon, and Senator Laxalt is heightened by media centralization. In fact, the omnipresence of the media is a strong narcotic, inducing the illusion that a variety of distinct perspectives accompanies the abundance of media. The significant reduction in print media that has occurred in recent years, balanced by the increase in electronic media, lends credence to this perception.

However, the apparent offset is deceptive. The nine largest newspaper publishers own over thirty percent of the country's newspapers and control approximately twenty-five percent of the televi-
Although the Federal Communication Commission (FCC) regulates the number of radio and television stations that any one group can hold, the nine largest newspaper publishers nonetheless could control approximately forty percent of the present radio and television stations. Consequently, when a substantial portion of the media is controlled by a small group of individuals, the marketplace for ideas, which appears to be offered by the numerous broadcast stations, newspapers, and other publications in fact is reduced to a "neutral conduit of information." Media centralization thus exacerbates the libel chill issue by further restricting both subject matter and perspectives on that material.

Therefore, it is imperative that attorneys who represent media...


15. Stewart, supra note 4, at 634.
defendants have an immediate and appropriate tool with which to deter public officials from filing frivolous or intentionally intimidating libel suits. This comment will examine the chilling effect that libel suits have on the "Fourth Estate," and will propose the use of a tort combining abuse of process and 42 U.S.C. § 1983, with which to counter unjustified libel litigation initiated by public officials.

II. BACKGROUND

A. The Chilling of the Media

1. Brief History of Libel Law

In 1964, the Supreme Court declared that the first amendment freedom of expression clause entitled defendants involved in defamation actions to a wide zone of protection, and so devised a rigorous burden of proof for potential plaintiffs in New York Times Co. v. Sullivan. That ruling required public officials to prove actual malice on the part of the media with convincing clarity before recovering damages for a defamatory falsehood relating to their official conduct. The Court defined actual malice as either knowledge of the falsity of a statement, or reckless disregard of that statement's truth or falsity. Of equal import, the New York Times decision altered the common law of strict liability in defamation actions by affirming the supremacy of the United States Constitution, particularly the first amendment.

16. Stewart, supra note 4, at 634. Thomas Carlyle, the early nineteenth century English essayist and historian, coined the term "Fourth Estate" to describe the role of the Reporters' Gallery in relation to the Three Estates of Parliament. Justice Stewart compared the role of the American press to its British counterpart, and observed that the press acts as a fourth branch of government, ensuring the integrity of the three official branches. Stewart, supra note 4, at 634.

17. Abuse of process is an "improper use or perversion of process after it has been issued." Black's Law Dictionary 11 (5th ed. 1979). See also infra notes 142-53 and accompanying text.


Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.


20. Id. at 286.

21. Id. at 279-80.

22. Id. at 284.
The Court followed the *New York Times* standard in *Rosenblatt v. Baer* and designed a two-pronged test for determining whether a party was a public official. The first prong focused on whether the position in government was of particular interest to the public; the second prong addressed whether the public had an "independent interest" in the qualifications and performance of the aggrieved individual beyond the general public's interest in government employees and their performance.

*Curtis Publishing Co. v. Butts* extended the *New York Times* constitutional limitations to suits brought by public figures involved in issues of important public interest. In addition, the *Curtis* Court held that the "actual malice" requirement was satisfied by a showing of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." Four years later, the Court in *Rosenbloom v. Metromedia* expanded the *New York Times* standard to cases involving an event of public or general interest.

The zeal with which the Court upheld freedom of the press began to wane in 1974. In *Gertz v. Robert Welch, Inc.*, the Court restricted its prior rulings by holding that the actual malice standard applied only to public officials and figures, but not to matters regarding solely public or general interest. The *Gertz* Court also ruled that although the states were required to apply the actual malice standard in suits brought by public officials, that standard was not required in suits initiated by private parties so long as strict liability was not imposed. Instead, private parties merely were required to show negligent publication and actual damages, including damage to reputation.

In 1979, the Court injected confusion into then existing libel law in *Herbert v. Lando*, when it allowed inquiry into the defend-
ant's state of mind to prove actual malice. Thus, notes, conversations, and memoranda which reflected the defendant's state of mind prior to publication could be used to establish actual malice regardless of the content of the final publication. As such, the defendant's thoughts, not the alleged defamatory publication, became the focal point for determining actual malice. Not surprisingly, the Herbert decision has been attacked for obscuring the actual malice issue, unduly prolonging the discovery phase, and ensuring an increased financial burden, particularly for defendants.

2. Recent Libel Litigation

The increase in libel litigation initiated by public officials, and the willingness of many judges to allow those suits to proceed to trial, has led to several phenomena. Some journalists take greater care to ensure the accuracy of their stories, thus hoping to produce libel-proof materials. Alternately, others are wary of reporting on controversial issues or litigious individuals. Two recent cases, Westmoreland v. CBS, Inc. and Sharon v. Time, Inc., provide a useful perspective regarding libel litigation's chilling effect on the media.

a. Westmoreland v. CBS, Inc.

General William Westmoreland's $120 million libel action against CBS was brought in response to a 1983 60 Minutes television documentary. The documentary probed the veracity of intelligence reports estimating enemy strength provided to top military personnel and the press during General Westmoreland's command in Vietnam. General Westmoreland asserted that the documentary was biased and inadequate, and that CBS exhibited "dishonesty

36. Id. at 160-65, 171-75.
37. Massing, supra note 9, at 34.
38. Herbert, 441 U.S. at 160-65, 171-75.
42. Westmoreland, 596 F. Supp. at 1171. General Westmoreland served as Commander of the United States Military Assistance Command, Vietnam (MACV) from 1964 through 1968. Id. at 1171. The documentary, entitled The Uncounted Enemy: A Vietnam Deception, aired January 23, 1983, after CBS had researched the subject for approximately one year and conducted interviews with more than 80 people, many of whom had participated in the disputed events. Id. at 1173.
43. Id.
and willful falsity in the editing and presentation of evidence"\textsuperscript{44} sufficient to support a finding of constitutional malice. CBS claimed immunity under the first amendment from a public official "challenging commentary on his performance of the duties of his office,"\textsuperscript{45} and urged the court to make the immunity absolute, even though no such precedent existed.\textsuperscript{46}

No conclusive holding developed from the case; General Westmoreland settled the action before it was submitted to the jury.\textsuperscript{47} Nonetheless, the court reaffirmed the notion that "a publisher who honestly believes in the truth of his accusations (and can point to a non-reckless basis for his beliefs) is under no obligation under the libel law to treat the subject of his accusations fairly or even-handedly."\textsuperscript{48}

In spite of CBS' apparent victory, the extensive discovery proceedings, the damages requested by General Westmoreland, and the propensity of juries to "give away the farm"\textsuperscript{49} created a wave of concern within the news industry. The Westmoreland case reiterated the unwelcome fact that controversial articles concerning public officials, no matter how thoroughly researched, were always subject to libel litigation.

b. \textit{Sharon v. Time, Inc.}

General Ariel Sharon, Israeli Defense Minister from August 1981 through mid-February 1983, brought a $500 million libel action against Time magazine over an article regarding Israel's 1982 campaign to rid Lebanon of the Palestine Liberation Organization.\textsuperscript{50} At the time of the article's publication, Israel occupied West Beirut and supervised several Palestinian refugee camps.\textsuperscript{51} Between September 16-18, 1982, members of the Christian Phalangist militia entered two of the camps by prior arrangement with the Israeli Defense forces; hundreds of Palestinian refugees were massacred.\textsuperscript{52}

\begin{itemize}
\item \textsuperscript{44} Id. at 1174.
\item \textsuperscript{45} Id. at 1171.
\item \textsuperscript{46} Id.
\item \textsuperscript{47} Rothmyer, \textit{Westmoreland v. CBS: Reflections on a Major Media Event—and the Issues it Did Not Resolve}, COLUM. JOURNALISM REV. 25, 26 (May-June 1985).
\item \textsuperscript{48} Id. at 30.
\item \textsuperscript{49} Massing, \textit{supra} note 9, at 33.
\item \textsuperscript{51} Id. at 542.
\item \textsuperscript{52} Id.
\end{itemize}
The Israeli government subsequently convened a special commission, headed by Yitzhak Kahan, President of the Israeli Supreme Court, to investigate the attack. The Kahan Commission ultimately assigned General Sharon indirect responsibility for the massacre. The Kahan Commission's report, referred to as Appendix B. The disputed paragraph detailed a meeting between General Sharon and the family of Lebanese President, Bashir Gemayel, who had been assassinated just two days before the Phalangist attack on the Palestinian refugee camps. Time alleged that General Sharon discussed with the Gemayels the need for the Phalangists to extract revenge for Bashir Gemayel's assassination.

General Sharon contended that the paragraph implied both that he instigated the massacre at the refugee camps, and that the Kahan Commission "had secret evidence . . . that he had lied when he testified that he had not known in advance that a massacre would occur." General Sharon also accused Time of anti-Semitism and "blood libel," a phrase "historically associated in Western consciousness with Christians' attacks on Jews."

In response, Time asserted that the first amendment provided the press with absolute immunity from litigation for statements concerning the official conduct of high government officials. Time further argued that such statements should be granted absolute immunity for three reasons:

[F]irst, because eliminating the danger of legal liability would

54. Sharon, 599 F. Supp. at 542.
55. The allegedly libelous paragraph read as follows:
One section of the report, known as Appendix B, was not published at all, mainly for security reasons. That section contains the names of several intelligence agents referred to elsewhere in the report. TIME has learned that it also contains further details about Sharon's visit to the Gemayel family on the day after Bashir Gemayel's assassination. Sharon reportedly told the Gemayels that the Israeli army would be moving into West Beirut and that he expected the Christian forces to go into the Palestinian refugee camps. Sharon also reportedly discussed with the Gemayels the need for the Phalangists to take revenge for the assassination of Bashir, but the details of the conversation are not known.
56. Id. at 543.
57. Id.
58. R. SMOLLA, supra note 53, at 82. Mr. Smolla explains that "blood libel specifically refers to pogroms in which the irrational attacks on Jews were fed by the charges that Jews had kidnapped Christian children to use their blood in religious and medicinal rites involving ritualistic murders." Id.
encourage full and free discussion of critically important issues, such as responsibility for the brutal slaughter of innocent civilians; second, because giving the press absolute immunity for statements about public officials' performance of their jobs is consistent with the absolute immunity such officials enjoy for statements made in the course of their public duties; and third, because public officials such as Minister Sharon have sufficient access to the press to rebut charges made against them.60

However, the court denied Time's motions to dismiss and for summary judgment,61 observing that prior Supreme Court decisions provided the media with ample protection. Indeed, the court noted that the actual malice standard and the various privileges for fair reporting and statement of opinion "prohibit the imposition of liability on any defendant who has acted in good faith."62

Judge Sofaer,63 presiding judge, played a unique role in the Sharon trial. Israel initially refused to release Appendix B,64 citing reasons of national security. Judge Sofaer, who had extensive personal contact with Israeli academicians and politicians, arranged for the Israeli attorneys for Time and General Sharon to read the secret document in Israel in the presence of Yitzhak Kahan.65 Kahan would answer "yes" or "no" to three questions, and both sides agreed to accept Kahan's answers as evidence and further stipulated to keep the document's contents secret.66 From this process it was determined that Appendix B lacked the information asserted by Time.

In addition, Judge Sofaer detoured from the standard jury instructions for libel. He instructed the jury to return to the courtroom as soon as it reached an answer to each of the following separate questions: 1) Was the article defamatory?; 2) Was it false?; 3) Was it written with actual malice?67 From this process the jury found Time not guilty of actual malice and thus innocent of libel. However, this three-part approach to a verdict enabled General Sharon to claim a moral, although not a legal, victory: the jury found Time

60. Id. at 554.
61. Id. at 588.
62. Id. at 554.
64. See supra note 55.
65. R. Smolla, supra note 53, at 81.
66. R. Smolla, supra note 53, at 90.
guilty of publishing a false, defamatory article. 68

68. Id. Unwarranted libel actions filed by public officials are not the exclusive source of media chill. The concentration of control and ownership within the print and broadcast media has greatly exacerbated that chill. In fact, the potential for libel litigation has caused numerous reporters, writers, and publishers to reduce coverage on controversial subjects and litigious individuals. Simultaneously, the marketplace for ideas is being depleted by mergers, acquisitions, and takeovers of both the print and electronic media. Recent demographics indicate that the dual intent of the first amendment's freedom of the press clause to provide a forum for a multitude of views and to serve as a check on the three branches of government could be faltering.

Between 1960 and 1986, the United States' population increased by over 60 million persons. Abstracts, supra note 12, at 8. Simultaneously, the American passion for electronic gadgetry soared as indicated by the dramatic increase in all areas of electronic media. In 1960, approximately 46 million households owned television sets; by 1986, that number had risen to 86 million. Abstracts, supra note 12, at 531. The number of television stations increased from 559 to 1235, during the same period, and average television viewing hours per day rose from 5.1 in 1960 to 7.1 in 1985. Abstracts, supra note 12, at 531. Likewise, the number of radio stations increased from 6595 in 1969 to 9766 in 1985. 102 F.C.C.2d 145, 202 (1986).

In contrast, the daily print news circulation maintained a steady circulation rate, increasing only slightly from 58.9 million in 1960 to 62.8 million in 1986. Abstracts, supra note 12, at 531. When compared to the substantial increase in population, this figure actually indicates a seven percent decline in readership. In order to maintain readership at the 1960 levels (33%), daily print news circulation in 1986 should have been 79.4 million.

Concurrent with the overall decline in readership, the total number of weekly newspapers in operation decreased from 11,315 in 1960 to 9144 in 1986, Abstracts, supra note 12, at 536, while daily newspapers dropped approximately 10% from 1854 to 1671 during the same period. Abstracts, supra note 12, at 536.

The print and electronic media enjoy a symbiotic relationship, as reflected in the cross-ownership of the two mediums. The nine largest newspaper publishers, owning over 30% of the country's newspapers, also control 25% of the television stations. See supra note 13 and accompanying text. While newspaper publishers are allowed to own an unlimited number of daily and weekly newspapers and similar publications, the federal government restricts multiple ownership of broadcast stations. In fact, the FCC limits multiple ownership to 12 AM stations, 12 FM stations, and 12 television stations, as long as the 12 television stations reach no more than 25% of the nation's homes. B/C, supra, note 13, at A34. However, if two stations in each service are owned by minorities, then group broadcasters are allowed to own a maximum of 14 stations. B/C, supra note 13, at A34.

Cross-ownership of print and electronic media is best understood by examining the holdings of organizations such as Capital Cities/ABC, Inc., with 20 daily and weekly newspapers, and eight television stations. B/C, supra note 13, at A53. Capital Cities/ABC and NBC together reach over 20% of the country's viewers; CBS stations, on the other hand, alone reach 19% of all viewers. Newsweek Magazine, Jul. 27, 1987, at 30. However, not all media behemoths engage in extensive cross-ownership. For example, the Donrey Media Group owns approximately 120 daily and weekly newspapers, and only one television station. B/C, supra note 13, at A53-54.

Nonetheless, of the largest newspaper publishers who also own a substantial number of broadcast stations, Gannett Co. Inc. and Park Communications are more typical, owning 88 papers and seven television stations, B/C, supra note 13, at A54, and 75 papers and seven television stations, respectively. B/C, supra note 13, at A57.

Furthermore, the FCC restrictions have not dissuaded groups such as Time, Inc. from purchasing a cable television system from Group W Cable for $55 million, Wall St. J. Index, Jan. 13, 1987, at 13, col. 4 (hereinafter WSJI); or NBC from purchasing WJLVJ-TV in Miami, Florida, for $270 million, WSJI, Jan. 19, 1987, at 8, col. 1; or William Dean Single-
B. The Implications of Westmoreland and Sharon

The Westmoreland and Sharon cases epitomize the problems inherent in current libel litigation. Enormous legal costs, complex legal issues, and questionable political motives for bringing suit were present in both cases.

Small newspapers and independent television stations can ill afford to engage in libel litigation. The Westmoreland and Sharon defenses together cost well over $10 million.\(^6\) Large organizations that generate substantial income, such as Time and CBS, obviously are in a better position to engage in legal battles than smaller organizations.\(^7\)

Furthermore, some issues are "too large, too subjective, [and] too political to be decided by juries on a true-false basis. \ldots\)\(^7\) In fact, after the Westmoreland suit was settled, the judge commented that "judgments of history are too subtle and too complex to be resolved satisfactorily with the simplicity of a jury verdict."\(^7\) Nonetheless, suits initiated by government officials over news articles criticizing their political conduct are proceeding to trial with increasing

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\(^6\) Massing, \textit{supra} note 9, at 34. General Westmoreland's legal fees alone amounted to approximately $3 million. Rothmyer, \textit{supra} note 47, at 26-27. Similar expenses were incurred in the Sharon trial, prompting Judge Sofaer to comment: "That this process has proved enormously expensive, and painfully contentious, is as much the product of Time's all-out litigation strategy as of any plan by the defendant to intimidate the press." Sharon v. Time, Inc., 599 F. Supp. 538, 556 (S.D.N.Y. 1984).

frequency.

In addition, circumstances surrounding the Westmoreland and Sharon trials suggest that protecting or redeeming reputation was not the sole reason for initiating the libel actions. General Westmoreland's legal counsel, provided to him free of charge, received large donations from conservative organizations staunchly opposed to CBS' political and social views. One conservative organization, Fairness in Media, also attempted to influence CBS' policy by purchasing network stock. Another organization, the American Legal Foundation, expressed their criticism of CBS by filing a complaint regarding the General Westmoreland documentary with the FCC.

Finally, General Sharon's repeated claims of anti-Semitism and blood libel led Time's attorneys to question whether General Sharon initiated the suit solely to "vindicate the State of Israel and the Jewish people." General Sharon's motives for bringing suit were deemed irrelevant by the court, which insisted that "[t]he claim that Time is biased against Israel or Jews is so unsubstantiated that no evidence on the subject will be allowed." Nonetheless, General Sharon's continued use of the term "blood libel" illustrates the degree to which libel suits can be used as political weapons, and not merely as efforts to restore one's damaged reputation.

III. Problem

The chill resulting from libel suits and the attendant controversies indicate a larger national malaise. It evinces a general distrust of the media, considered perhaps too pervasive, powerful, and manipulative. Consequently, it is thought that:

Important news, responsible commentary, and political advocacy may not be reaching the public. For example, apparently out of

73. See supra note 58 and accompanying text.
74. Massing, supra note 9, at 27. At the time of trial, General Westmoreland's attorney, Dan Burt, was the head of the conservative organization, Capital Legal Foundation. Richard Scaife, publisher of the Sacramento Union and the Greensburg, Pennsylvania Tribune-Review, donated $2 million to aid Burt's preparation of General Westmoreland's case. Scaife also established the American Legal Foundation in 1980 with a generous grant. Rothmyer, supra note 47, at 28.
75. Rothmyer, supra note 47, at 28.
76. Rothmyer, supra note 47, at 27. The FCC rejected this complaint in March 1983. Id.
78. Id. at 586.
79. Id. at 587.
fear of libel suits, some twenty scientific journals declined to publish a study by scientists at the National Institute of Health which criticized the methodology of other prominent researchers. Newspaper and magazine publishers acknowledge decisions not to run controversial stories that they believed to be true but could not economically afford to stand behind. Fear of libel suits is also silencing citizens' criticism of powerful community figures. 80

Media chill also suggests an intellectual retreat from first amendment rights. In fact, some legal scholars maintain that undue self-censorship by the press and lack of circulation of ideas lead, eventually, to tyranny. 81 The progression of Supreme Court policy since 1974 indicates a shift away from nurturing first amendment free press principles, and toward guarding the reputation interests of those whose actions should be subjected to open discussion and debate. It is questionable whether such policy is either in keeping with the intent of Thomas Jefferson and the other Enlightenment Framers of the Constitution, 82 for whom "freedom of inquiry and liberty of expression were deemed essential to the discovery and spread of truth," 83 or conducive to ensuring an independent check on the three branches of government. Freedom of the press is essential if people are to make informed decisions and legislators are to implement those decisions. A press shackled by public distrust and increasing libel litigation cannot adequately serve either as a check on the three branches of government or as a marketplace for ideas.

IV. ANALYSIS

A. The Present State of Libel Law

1. Problematic Areas

Present libel law has spawned far-reaching social and legal problems. Substantial confusion exists over the precise meaning of "actual malice," and how actual malice differs from other forms of malice. In New York Times, 84 the Court defined "actual malice" as

81. See generally Meiklejohn, The First Amendment is an Absolute, 1961 SUP. CT. REV. 245.
knowledge or reckless disregard of a statement's truth or falsity. Confusion has arisen when lower courts interpret actual malice to denote hatred or ill will. Not surprisingly, "[g]arbled interpretations [of the actual malice standard] by the lower courts have already begun to appear, introducing ill will and evil intent into the New York Times test." Even the Supreme Court has not been immune from confusing the various types of malice.

Furthermore, many libel actions have been initiated under the guise of other tort actions in an attempt to escape the strenuous constitutional limitations imposed by New York Times. However, most courts appear unwilling to tolerate creative pleading in defamation actions.

In addition, under current libel law, unlimited discovery has resulted in immense litigation costs. By allowing evidence regarding

85. Id. at 279-80.
86. The California legislature, for example, defined actual malice as "that state of mind arising from hatred or ill will toward the plaintiff." CAL. CIV. CODE § 48a(4)(d) (West 1982).
88. In his dissent in Herbert v. Lando, 441 U.S. 153, 199-202 (1979), Justice Stewart commented that, while the majority had "carefully enunciated the correct New York Times test[,] . . . [i] . . . then followed a false trail, explainable only by an unstated misapprehension of the meaning of New York Times 'actual malice'. . . ." Id. at 200-01.
89. For example, Synanon brought suit against the Reader's Digest Association over the publication of a 1981 article concerning Synanon's history, methods and success rates of treatment, and alleged policy of intimidation. Reader's Digest Ass'n v. Superior Court, 37 Cal. 3d 244, 249-50, 690 P.2d 610, 612-13, 208 Cal. Rptr. 137, 139-40 (1984). While Synanon's main cause of action was based on libel, the second amended complaint, based on false light invasion of privacy ("invasion of privacy by placing plaintiffs in a 'false light'. . . .") Id. at 265, 690 P.2d at 624, 208 Cal. Rptr. at 151) and intentional infliction of emotional distress, arose from the same facts as the libel cause of action. Id. at 265, 690 P.2d at 624, 208 Cal. Rptr. at 151. The California Supreme Court asserted that "constitutional protection does not depend on the label given the cause of action; it bars not only actions for defamation, but also claims for invasion of privacy." Id. (citations omitted).

In a similar manner, author William Peter Blatty sued the New York Times Company for failing to include his novel, Legion, on the Times' weekly best seller list. Blatty v. New York Times Co., 42 Cal. 3d 1033, 728 P.2d 1177, 232 Cal. Rptr. 542 (1986). Blatty's complaint was based on injurious falsehood of a statement, id. at 1039, 728 P.2d at 1180, 232 Cal. Rptr. at 545, and asserted negligent and intentional interference with prospective economic advantage, negligence, and trade libel. Id. at 1036, 728 P.2d at 1178, 232 Cal. Rptr. at 543. Once again, the California Supreme Court refused to allow "creative pleading" to "[render constitutional] limitations nugatory," id. at 1045, 728 P.2d at 1184, 232 Cal. Rptr. at 549, and maintained that no cause of action could claim "talismanic immunity" from the limitations set forth in New York Times v. Sullivan. Id. at 1042-43, 728 P.2d at 1182-83, 232 Cal. Rptr. at 547 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964)).

Finally, real estate mogul Donald Trump filed a $500 million suit against the Chicago Tribune for mocking his intent to build the world's largest building. Massing, supra note 9, at 33.
the defendant’s state of mind and the editorial process to be admitted, the Supreme Court has increased the amount of discovery and, hence, overall litigation costs. Inevitably, such costs “intimidate the press and lead to self-censorship, particularly where smaller newspapers and broadcasters are involved.”

In like manner, damage awards have increased in proportion to litigation costs. Juries have demonstrated a propensity to “give away the farm” when determining damage awards, making libel litigation even more frightening to the media. Consequently, courts occasionally aid the media by setting aside clearly outrageous awards.

The increase in libel insurance deductibles and the reluctance of some insurance companies to provide libel insurance to the media has exacerbated problems for smaller newspapers and broadcasters. In 1983, approximately seventy-five percent of the print and electronic media carried libel insurance. Today, however:

[L]ibel insurance is often unavailable at any cost, or, if available, is beyond the means of many small publishers. Insurers have raised deductibles and lowered coverage maximums. At least one insurer requires twenty percent copayment of defense costs after the deductible has been exceeded. One major libel insurance carrier has dropped out of the field entirely and others have ceased writing new policies.

Finally, there has been increased public cynicism “regarding press accuracy and the integrity of public figures and officials.” A recent Gallup Poll indicates that public confidence in the print and electronic media is extremely low. Of the ten major American institutions covered, television received the lowest ranking, while the print media ranked fourth from the bottom.

91. Indeed, Lando’s deposition alone required 26 sessions and spanned 3,000 pages. Comment, supra note 87, at 722-23.
92. Comment, supra note 87, at 723 n.211 (citing Herbert, 441 U.S. at 176 n.25.
93. Massing, supra note 9, at 33.
94. For example, a Texas court of appeals overturned a $2 million libel award against the Dallas Morning News, noting that the jury acted out of “passion and prejudice against newspapers” and had no foundation on which to base their verdict. Massing, supra note 9, at 33.
95. Barrett, supra note 80, at 858.
96. Barrett, supra note 80, at 858 (citations omitted).
97. Barrett, supra note 80, at 861.
99. Id. In descending order, the percentage of those polled had “a great deal” of confi-
Allowing libel suits, which have a chilling effect on the media, to proceed to trial is an imprudent use of the judicial system. High legal costs and lengthy preparation time ensures that other, potentially more urgent, litigation must wait.\textsuperscript{100} Such suits also force journalists to devote substantial amounts of time preparing for litigation rather than attending to their professional responsibilities.\textsuperscript{101}

2. Proposals to Change Current Libel Law

Legal scholars, jurists, and legislators recognize the need to make current libel law both more manageable and more equitable. In light of this recognition, several possible solutions have been proposed. For example, in 1985, Representative Charles Schumer introduced H.R. 2846 to establish a new cause of action for public officials allegedly defamed by the media.\textsuperscript{102} The Schumer Bill was intended to “protect the constitutional right to freedom of speech by establishing a new action for defamation,”\textsuperscript{103} allowing public officials to bring lawsuits for declaratory judgment.\textsuperscript{104}

Professor Marc Franklin recently proposed a modified version of the Schumer Bill entitled the Plaintiff’s Option Libel Reform Act (POLRA).\textsuperscript{105} Citing the failure of state courts to appreciate the differences between libel law and other types of damages law,\textsuperscript{106} Franklin recommends a declaratory judgment cause of action in which, first, there would be no proof requirement regarding state of mind evidence, thus effectively abolishing \textit{Herbert v. Lando};\textsuperscript{107} second, no damages would be awarded; third, the plaintiff would have the burden of proving each element with clear and convincing evidence.

\textsuperscript{100} Barrett, \textit{supra} note 80, at 861.
\textsuperscript{101} The Charleston Gazette, for example, was forced into 25 libel suits in 10 years. Of the 13 suits pending in 1984, 10 of those were filed on behalf of public officials, candidates, and attorneys. One particular suit well represented the type of harassment endured by the Charleston Gazette: a Republican candidate for public office sued over a cartoon depicting him as an “elephant-tamer, claiming it portrayed him as a practitioner of bestiality.” Massing, \textit{supra} note 9, at 33.
\textsuperscript{102} Barrett, \textit{supra} note 80, at 847-51.
\textsuperscript{104} Barrett, \textit{supra} note 80, at 851.
\textsuperscript{106} \textit{Id.} at 811.
\textsuperscript{107} 441 U.S. 153 (1979). \textit{See also supra} notes 35-37.
dence; and, all privileges currently existing at common law would continue in effect.\footnote{108} In addition, an “appropriate retraction”\footnote{109} by the defendant before the action was filed would be considered a complete defense.

In a POLRA action for damages based on libel, slander, or false light invasion of privacy, Franklin recommends preserving the \textit{New York Times} standard for proving both falsity and actual malice by clear and convincing evidence.\footnote{110} Moreover, while punitive damages would be disallowed under POLRA, reasonable attorneys’ fees would be awarded to the prevailing party, with some exceptions.\footnote{111}

Under the POLRA plan, a retraction issued by the media would foreclose declaratory judgments, but not damage actions.\footnote{112} A retraction published after the plaintiff brought an action for declaratory judgment would not be considered a complete defense, but would entitle a prevailing defendant to recover attorneys’ fees.\footnote{113} Franklin maintains that this would encourage plaintiffs to settle once the retraction is published.\footnote{114}

Franklin asserts that POLRA would be successful for three reasons. First, POLRA plaintiffs would be more inclined to present evidence of falsity at the outset.\footnote{115} Second, media defendants would feel less threatened by libel litigation, knowing that punitive damages would not be allowed and that a prevailing defendant could recover attorneys’ fees.\footnote{116} Finally, the public would be aware of a maligned plaintiff’s alternative to extensive and costly litigation, and thus have less sympathy for those plaintiffs choosing to sue for extravagant sums of money.\footnote{117}

Franklin advocates implementation of POLRA at the state level because states are in a better position to experiment with the proposal,\footnote{118} and such experimentation could take years before being perfected. In the meantime, however, small publishers and broadcasters remain vulnerable,\footnote{119} and the chilling effect of libel litigation would

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\item \footnote{108} Franklin, \textit{supra} note 105, at 812.
\item \footnote{109} Franklin, \textit{supra} note 105, at 812.
\item \footnote{110} Franklin, \textit{supra} note 105, at 813.
\item \footnote{111} Franklin, \textit{supra} note 105, at 813.
\item \footnote{112} Franklin, \textit{supra} note 105, at 816.
\item \footnote{113} Franklin, \textit{supra} note 105, at 817.
\item \footnote{114} Franklin, \textit{supra} note 105, at 817.
\item \footnote{115} Franklin, \textit{supra} note 105, at 814.
\item \footnote{116} Franklin, \textit{supra} note 105, at 815.
\item \footnote{117} Franklin, \textit{supra} note 105, at 816.
\item \footnote{118} Franklin, \textit{supra} note 105, at 819.
\item \footnote{119} Barrett, \textit{supra} note 80, at 865.
\end{itemize}
Alternatively, Judge Lois Forer proposes a "return to the common law rationale and standard for punitive damages" by reinstating the negligence standard for libel actions. This would dispense with both the public figure/private figure distinction, and the emphasis placed on proving the defendant's state of mind in order to determine actual malice. Judge Forer further advocates statutory change in which "fact" and "opinion" would be defined, and "libel" would be redefined. Judge Forer maintains that a redefinition of libel is necessary because the present terms are "read with the gloss of centuries of interpretation, [they are] anachronistic." The test of truth, then, would be based on the document as a whole, rather than one paragraph or three sentences.

Concerned with similar matters, the Tort Policy Working Group (TPWG) is reassessing the damages issue for tort actions. TPWG recommends both a limit of $100,000 for non-economic damages including punitive damages, and a sliding scale for attorneys' fees. While TPWG has not specifically addressed libel litigation, the limitation on damages could apply to all tort litigation, including libel.

Other suggestions to improve libel law include: establishing a "National News Council to arbitrate libel cases", requiring the losing side to pay all attorneys' fees, permitting retraction or equal time remedies, eliminating punitive damages, setting maximum

120. Barrett, supra note 80, at 881.
122. Id. at 340.
123. Id. at 341. See also supra notes 35-37.
124. L. Forer, supra note 121, at 338-42.
125. Id. at 340.
126. Id. at 339.
127. Id. at 340.
128. See supra note 55 and accompanying text.
130. L. Forer, supra note 121, at 329.
131. L. Forer, supra note 121, at 329.
132. L. Forer, supra note 121, at 329.
134. R. Smolla, supra note 53, at 239.
levels for non-pecuniary losses; and granting absolute immunity from libel suits brought by high ranking public officials for matters arising out of public duty.

Several of the recommendations are viable and presently may be under discussion at either the federal or state level. If enacted, any of these solutions could take years to implement. Many publishers and broadcasters cannot wait that long, and hence must consider other alternatives under existing libel law.

V. PROPOSAL

A. The Combined Tort

A combined tort based on abuse of process and 42 U.S.C. § 1983 could be used to alleviate some of the problems caused by libel suits. The proposed strategy is intended to aid those media defendants who have commented on the actions of public officials acting in their official capacity.

1. Abuse of Process

Abuse of process is an action based on "misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish," rather than filing an action without justification. The abuse of process tort consists of two elements: an improper willful act performed during the regular course of a proceeding; and an ulterior motive, which "usually takes the form of coercion to obtain a collateral advantage not properly involved in the proceeding itself." Because establishing ulterior motive alone is not sufficient, the tort must be viewed in terms of how the public

137. R. SMOLLA, supra note 53, at 242; Ingber, supra note 135, at 833.
139. See supra note 17.
140. See supra note 18.
142. Id. at 898.
official used the legal process.\textsuperscript{144}

Damages for an abuse of process tort may be awarded “to vindicate the right itself and to maintain the integrity of the judicial process.”\textsuperscript{144} Attorneys’ fees generally are not allowed because the complaint and prosecution are in fact proper; it is the coercive conduct of the plaintiff in the main action that is improper.\textsuperscript{146}

Filing an action based on abuse of process is often preferable to filing similar counter suits, such as a suit based on malicious prosecution. In fact, the abuse of process action was designed to provide an alternative to a malicious prosecution suit because that action “fail[s] to provide a remedy for a group of cases in which legal procedure has been set in motion in proper form, with probable cause, and even with ultimate success, but nevertheless has been perverted to accomplish an ulterior purpose for which it was not designed.”\textsuperscript{147} Whereas an abuse of process action may be initiated at any point, a malicious prosecution suit may be brought only when the prior litigation is terminated in favor of the defendant.\textsuperscript{148} Furthermore, the plaintiff in a malicious prosecution case must prove both lack of probable cause\textsuperscript{149} and malice.\textsuperscript{150} Some courts have held that favorable termination of the prior proceeding indicates that probable cause was lacking.\textsuperscript{151}

While malicious prosecution may be an appropriate response in some libel litigation,\textsuperscript{152} its main disadvantage is the requirement that

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\textsuperscript{144} Tellefson v. Key Sys. Transit Lines, 198 Cal. App. 2d 611, 616, 17 Cal. Rptr. 919, 922 (1961). For example, Senator Paul Laxalt brought suit against the McClatchy Newspapers for libel, conspiracy, and intentional infliction of emotional distress. See supra note 5 and accompanying text. The newspaper counterclaimed for abuse of process, alleging that Senator Laxalt knew that he could not win the suit, and therefore, merely filing the libel complaint amounted to an abuse of process. Laxalt v. McClatchy Newspapers, 622 F. Supp. 737, 751 (D. Nev. 1985). The presiding judge observed that merely filing a complaint did not amount to abuse of process; rather, abuse of process hinged on the actions taken by the defendant after filing the complaint. Id. at 752. Had Senator Laxalt alleged “minimal settlement offers or huge batteries of motions filed solely for the purpose of coercing a settlement,” id., the newspaper would have sustained its burden of proof.

\textsuperscript{145} PROSSER, supra note 141, at 900.

\textsuperscript{146} PROSSER, supra note 141, at 900.

\textsuperscript{147} PROSSER, supra note 141, at 897.


\textsuperscript{149} Id. at 682.


\textsuperscript{151} Tool Research, 46 Cal. App. 3d at 682-83, 120 Cal. Rptr. at 296-97.

\textsuperscript{152} Brief for Appellant at 20-37, Walsh v. Bronson (No. A038686) (1st D. Cal. filed Oct. 2, 1987). In October 1987, Attorney Thomas E. Kotoske filed a civil action on behalf of
a claimant obtain a favorable termination of the prior proceeding before initiating suit. This requirement means increased litigation costs, it unduly prolongs the ordeal for media defendants, and there is no guarantee that the verdict rendered in the prior action will be favorable to the media defendant. Thus, abuse of process is the preferable course of action.

2. 42 U.S.C. § 1983

42 U.S.C. § 1983, most frequently associated with civil rights actions, is intended to preserve personal liberty and human rights. It was enacted to “interpose the federal courts between the States and the people, as guardians of the people’s federal rights—to protect the people from unconstitutional action under color of state law,” regardless of whether the disputed action was executive, legislative, or judicial. Section 1983 was also intended to provide an alternative to available state remedies.

Before a complainant may bring a section 1983 action, she or he must have been denied a federally-created right by a defendant acting under color of law. To sustain the burden of proof, a complainant must show that the defendant knew or reasonably should have known that his or her conduct would violate the plaintiff’s federal rights.

“Every person” who deprives an individual of a federally created right may be sued under section 1983. However, most courts limit liability “almost without exception, [to] state or local offi-
Suits against government officials in their individual capacities are always permissible. Furthermore, the acts of high-ranking government officials also might bind the governmental body. Likewise, governmental entities are liable in their official capacity if they are the "moving force behind the deprivation." A successful complainant may recover actual damages, including special damages for out-of-pocket expenses, general damages for such items as emotional distress, and punitive damages if the court finds actual malice, in which case anything short of an absolute privilege for the defendant indicates recovery for the plaintiff. Presumed damages also have been upheld in some instances. Recovery of attorneys' fees has been authorized by Congress and in fact, a prevailing plaintiff should "ordinarily recover an attorney's


161. S. Nahmod, supra note 154, at 180.

162. S. Nahmod, supra note 154, at 181. Prior to 1976, governmental entities could not be sued for 42 U.S.C. § 1983 violations. This rule was stated in Monroe v. Pape, 365 U.S. 167 (1961). In that case, 13 Chicago police officers broke into the plaintiffs' house in the early morning, routed them from bed, forced them to stand naked in the living room, and ransacked every room, emptying drawers and ripping mattresses. Id. at 169. One of the plaintiffs was then taken to the police station and questioned for 10 hours. It was later determined that the officers involved in the incident had neither search warrants nor arrest warrants. Id. at 169. Writing the majority opinion, Justice Douglas stated that because municipal corporations were not intended to be held liable in section 1983 actions, id. at 187, it was proper to dismiss the claim against the city, but improper to dismiss the claim against the individual officers. Id. at 192. The immunity from liability in section 1983 suits enjoyed by governmental entities ended in 1976 with the decision in Monell v. Dep't of Social Serv., 532 F.2d 259 (2d Cir. 1976). See infra note 163.

163. Monell, 532 F.2d 259 (2d Cir. 1976). In 1976, city employees brought an action against the Board of Education and the Department of Social Services, challenging a rule which compelled pregnant employees to take unpaid leaves of absence before medical reasons compelled them to do so. Monell overruled Monroe by holding that local government bodies are persons for section 1983 purposes. Id. Under Monell and subsequent decisions, governmental entities are liable in their official capacity when they are "the moving force behind the deprivation." Kentucky v. Graham, 473 U.S. 159, 166 (1985).

164. Smith, 485 F.2d at 345.


166. Smith, 485 F.2d at 344-45.

167. Lee, 429 F.2d at 291.

168. The Civil Rights Attorney's Fees Awards Act of 1976 states in pertinent part: In any action or proceeding to enforce a provision of sections. . .[42 U.S.C. 1981, 1982, 1983, 1985, and 1986], title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of a provision of, the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. Pub. L. No. 94-559, 90 Stat. 2641 (1976).
fee unless special circumstances would render such an award unjust.169 Prevailing defendants are awarded attorneys' fees only if the action is deemed frivolous, unreasonable, or without foundation.170

Numerous 42 U.S.C. § 1983 cases have been based on first amendment issues.171 Successful suits have been brought against government officials who intended the result which occurred, or officials who knowingly punished the plaintiff for exercising his or her first amendment rights.172

Defendants in 42 U.S.C. § 1983 actions have several defenses available to them, including the "good faith" defense. Although this defense generally is not considered a defense to civil rights violations,173 if properly raised, it can defeat a section 1983 action at the outset.174 Good faith is a qualified immunity for police officers, state executives, school board members, mental hospital administrators, prison officials, and parole board officers.175 If a qualified immunity is found, a judge must rule in favor of the defendant as a matter of

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169. S. Nahmod, supra note 154, at 26 (citing Newman v. Piggie Park Enter., 390 U.S. 400, 402 (1968)).


171. Section 1983 actions have been filed in freedom of speech cases, including one instance in which police officers destroyed a sign critical of the President of the United States, held by a woman standing along the route of the President's motorcade. Glasson v. Louisville, 518 F.2d 899 (6th Cir. 1975). A section 1983 religious freedom suit was filed by a member of the Unification Church who sued the police, his parents, and seven deprogrammers, alleging that the police knew of his abduction by his parents and deprogrammers but failed to intervene because of their opinions about the Unification Church. Cooper v. Molko, 512 F. Supp. 563 (N.D. Cal. 1981).

A section 1983 freedom of the press action was brought by the Gannett Satellite Information Network, Inc., which attempted to place newspaper vending machines in a commuter train station owned and operated by the state of Massachusetts. The Metropolitan Transportation Authority (MTA) refused to allow Gannett to distribute their newspapers. A subsequent suit by Gannett prompted a federal court in 1984 to find that a commuter train station is an appropriate forum in which to distribute newspapers, and that Gannett had a constitutional right to install newspaper vending machines at the station. Gannett Satellite Information Network, Inc. v. Metropolitan Transp. Auth., 745 F.2d 767 (2d Cir. 1984).

The publishers of two newspapers brought a section 1983 action against the Attorney General of Alabama in 1973 seeking to have a state statute declared unconstitutional. Lewis v. Baxley, 368 F. Supp. 768 (M.D. Ala. 1973). The statute required the press to disclose their economic interests prior to being allowed admittance to galleries, press rooms, committee meetings, and the like. The Alabama district court ruled that the press had a limited first amendment right of reasonable access to go where the public in general may go, as well as access to certain items of news. Id. at 777.

172. S. Nahmod, supra note 154, at 65.


174. Hampton v. City of Chicago, 484 F.2d 602, 609 (7th Cir. 1973).

175. S. Nahmod, supra note 154, at 229-30.
law. A two-pronged test has been designed to determine whether the defendant acted in good faith: the defendant must have acted sincerely, without malice, and in the belief that his or her actions were proper; and the defendant must not have acted in ignorance of or with disregard for settled principles of constitutional law. Moreover, the good faith immunity is restricted to acts or duties within the scope of the official’s power or normal exercise of duties. Absolute immunity exists for state legislators, judges, and prosecutors who have acted “in a field where legislators traditionally have power to act.”

3. Using the Combined Tort

Attorneys confronted with a libel suit initiated by a public official against the media claimant for commenting on the official’s conduct should consider filing a combined action based on abuse of process and 42 U.S.C. § 1983. This combined tort should be filed as a counterclaim, alleging that damages resulted from the public official’s actions in filing suit. In addition, the counterclaim should maintain that the plaintiff’s willful and improper purpose was to intentionally hamper the media’s first amendment right of freedom of the press. Indeed, as is well demonstrated by case law, it was not the intent of the first amendment that the media should have to pay attorneys’ fees in order to comment freely on issues of public concern.

A cause of action based solely on either abuse of process or 42 U.S.C. § 1983 might be sufficient to render a judgment for the media. However, the likelihood of success is stronger if both torts are set forth in one complaint. For the combined torts to be effective, the media must allege that particular coercive acts were undertaken by the public official after process was served. Coercive acts, such as filing a barrage of motions solely for the purpose of inducing a settlement, may be sufficient to establish abuse of process. Furthermore, such acts would strengthen the showing required by section 1983

178. Smith, 485 F.2d at 342.
181. See supra notes 19-37 and accompanying text.
183. Id.
that the claimant was deprived of a federally created right: in this instance, freedom of the press.

VI. CONCLUSION

Twenty-six years ago, the Supreme Court cautioned that:

The vigorous criticism by press and citizen[s] of the conduct of the government of the day by the officials of the day will soon yield to silence if officials in control of government agencies, instead of answering criticisms, can resort to friendly juries to forestall criticism of their official conduct.\footnote{184}

In order to fulfill the dual intent of the first amendment’s freedom of the press clause, the press must be unshackled from the burden of meritless libel litigation. Public officials must not be allowed to intimidate the press by threatening to initiate frivolous libel actions. Failure to protect and nurture the fundamental free press principles set forth by the Framers of the Constitution will reduce the press to a mere conduit for government-approved propaganda.

\textit{Laura B. Choper}
