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Reputation, Compensation, and Proof

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REPUTATION, COMPENSATION, AND PROOF

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I. INTRODUCTION

The genius of modern tort law is its emphasis on injury. Early tort law was an adjunct of criminal law and focused not on injury, but on wrong. If a court awarded damages, the damages were only incidental to the criminal prosecution of the perpetrator.[1] Gradually, the focus of tort law shifted from wrong to injury, so that tort law is no longer primarily a scheme for punishing wrongs, but "a body of law which is directed toward the compensation of individuals . . . for losses which they have suffered."[2]

This focus on injury, rather than on wrong, has made possible the vast extension of tort liability that has occurred during the last generation. The most notable example is the field of products liability, in which injury is now compensable without proof of wrong in any but the most technical sense.[3]

The focus on injury is apparent in practice as well as in theory. Today's tort lawyer is likely to begin his assessment of a potential case not with theories of liability, but with damages. The lawyer knows that unless the injury is severe, the dispute probably will not become a case at all because of the high cost of litigation. Unless the damages are substantial, therefore, the lawyer usually will not reach the liability question. Consequently, modern tort law redresses only the most serious injuries. The rest are handled by insurance adjusters, self help, or small claims courts—mechanisms in

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1. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 8-9 (4th ed. 1971).

2. *Id.* § 1, at 6.

3. *See* Coleman, *The Morality of Strict Tort Liability*, 18 WM. & MARY L. REV. 259 (1976); Nickel, *Justice in Compensation*, 18 WM. & MARY L. REV. 379 (1976).

which tort doctrine plays only a supporting role.

Conversely, if the injury is severe, the lawyer recognizes that liability rules may be expanded to provide a remedy where none existed before. Thus, if damages are substantial, the attorney may pursue the case despite unfavorable liability rules. In either event, practical considerations direct the lawyer's first inquiries toward the nature of the injury.

This redirection of tort law from wrong to injury has bypassed defamation. Today, defamation is the only tort that allows substantial recovery without proof of injury. As Dean McCormick stated:

> [T]he plaintiff is relieved from the necessity of producing any proof whatsoever that he has been injured. From the fact of the publication of the defamatory matter by the defendant, damage to the plaintiff is said to be "presumed," and the jury, without any further data, is at liberty to assess substantial damages, upon the assumption that the plaintiff's reputation has been injured and his feelings wounded.[4]

The presumption of harm often is assumed to be relevant only in per se cases, but that assumption is not true; in the absence of a statutory limitation, presumed damages are potentially available in every libel or slander case. The "special harm" that must be shown in the non-per se cases is a threshold that must be met, not a limitation on recovery. In those cases, the plaintiff has no cause of action without proof of special damage. Once the plaintiff proves special damage, however, he is entitled not only to those damages, but to presumed damages as well.[5]

As Justice Powell said in *Gertz v. Robert Welch, Inc.*,[6] the presumed damage rule makes defamation an oddity of tort law. Trespass law permits presumed damages, for example, but the modern rule seems to be that the plaintiff may recover only nominal damages unless he proves that the trespass caused actual harm.[7] The

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4. McCormick, *The Measure of Damages for Defamation*, 12 N.C.L. REV. 120, 127 (1934).

5. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 621 comment a (1976); *see also* W. PROSSER, *supra* note 1, § 112, at 761.

6. 418 U.S. 323, 349 (1974).

7. *See* RESTATEMENT (SECOND) OF TORTS § 163 comment e (1976); W. PROSSER, *supra* note 1, § 13, at 66.

same is true of most constitutional torts. Courts also have employed something similar to the presumption of harm in cases involving the unconstitutional denial of the right to vote.[8] The United States Supreme Court, however, has refused to adopt a general rule presuming harm in civil rights cases.[9] Thus, a plaintiff who is deprived of procedural due process is entitled only to nominal damages unless he proves that he has suffered actual injury.[10] In contrast, the presumed damages in defamation cases are not limited to nominal sums, and awards are often substantial.

The thesis of this Article is that compensating individuals for actual harm to reputation is the only legitimate purpose of defamation law today. Proof of such harm, therefore, should be required in every libel or slander case. By actual harm, I mean provable injury to reputation. Nonpecuniary reputational losses would qualify, but mental anguish alone would not.

II. Consequences of Presuming Harm

A number of evils flow from the anomaly of presumed damages. First, although labelled "compensatory," recovery is not limited to compensation. Juries usually are instructed that their awards of presumed damages must be commensurate with the actual injuries sustained.[11] Giving a jury guidance as to what that amount should be is impossible, however, because the law provides no criteria. Judges cannot give meaningful instructions when the substantive law concedes that "[t]here is no legal measure of damages in actions for these wrongs. The amount which the injured party ought to recover is referred to the sound discretion of the jury."[12] As a result, the process of fixing an amount of presumed damages is in-

8. *See* Lane v. Wilson, 307 U.S. 268 (1939); Nixon v. Herndon, 273 U.S. 536 (1927); Giles v. Harris, 189 U.S. 475 (1903).

9. *See* Carey v. Piphus, 435 U.S. 247 (1978) (rejecting the argument that harm should be presumed by analogy to defamation).

10. *Id.* For criticism of this result, see Note, *Damage Awards for Constitutional Torts: A Reconsideration after* Carey v. Piphus, 93 Harv. L. Rev. 966 (1980).

11. In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), for example, the trial judge had given this written instruction: "I charge you, gentlemen of the jury, that compensatory damages, if awarded at all, must be fixed at such a figure as the jury dispassionately and according to the evidence in this case finds to be commensurate with the injury actually sustained by the plaintiff." Petition for certiorari at 98.

12. 4 J. Sutherland, A Treatise on the Law of Damages § 1206 (4th ed. 1916).

herently irrational. As McCormick said, "damages in defamation cases are measurable by no standard which different men can use with like results."[13]

Second, in the absence of comprehensible criteria, juries may be tempted to consider impermissible factors, such as the defendant's wealth or unpopularity. "[T]he doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact."[14] In this respect, presumed damages may be more pernicious than punitive damages. The latter at least are recognized as being noncompensatory and are recoverable in most states only upon a showing of egregious behavior by the defendant. Moreover, by virtue of being segregated from the rest of the damage award, punitive damages can be supervised by trial and appellate courts. In contrast, punishment in the guise of presumed compensatory damages is entirely subterranean and, therefore, difficult to identify and control.

Third, courts have created convoluted theories to avoid the doctrine of presumed harm. "Courts are totally accustomed to the otherwise universal rule that one of the plaintiff's burdens is the obligation to show that he was hurt by what the defendant did. The judges instinctively shy away from the idea of any substantial award unsupported by evidence."[15] Consequently, for centuries, judges have invented ways to avoid the presumed damage rule. An obvious—and odious—example is the doctrine of libel per quod. This doctrine serves only one purpose: to prevent the award of presumed damages. In states that recognize this Gothic doctrine[16], a plaintiff must prove special damage unless the statement at issue is libelous per se.

The legitimacy of the libel per quod doctrine was the subject of the famous debate between Dean Prosser and Laurence Eldredge. Eldredge argued that harm was presumed in all libel cases.[17] Prosser argued that harm was presumed only if the publication was

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13. C. McCORMICK, HANDBOOK OF THE LAW OF DAMAGES § 120 (1935).

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

15. Murnaghan, *From Figment to Fiction to Philosophy—The Requirement of Proof of Damages in Libel Actions*, 22 CATH. U.L. REV. 1, 27 (1972) (footnote omitted).

16. *See* R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 346 (1980).

17. Eldredge, *The Spurious Rule of Libel Per Quod*, 79 HARV. L. REV. 733 (1966).

libelous on its face or fell into one of the categories of slander per se.[18] Francis Murnaghan's observation about the debate was correct: in the heat of battle, both Prosser and Eldredge failed to see that the real problem was the presumed harm doctrine itself, and that the controversy over the role of libel per quod was only a symptom of judicial hostility to the underlying presumption.[19]

The doctrine of slander per se is another judicial contortion. To limit the action for slander, courts label certain categories of speech as "slander per se." Courts presume that statements within these categories cause harm. Other slanders are actionable only upon proof of special harm.[20] Indeed, the distinction between libel and slander, which makes little sense in an era when spoken defamation can reach millions via the electronic media, would be meaningless except that presumed damages are the rule in libel cases and the exception in slander cases.

Fourth, the doctrine of presumed harm forces us to begin the analysis of every defamation case with an abstraction: are the words used the kind that would tend to harm reputation? Whether the defendant's words actually did harm the plaintiff's reputation is not controlling. Thus, we must speculate about whether the allegedly libelous statement is of a kind that would tend to harm reputation. "To be defamatory, it is not necessary that the communication actually cause harm to another's reputation or deter third persons from associating or dealing with him. Its character depends upon its general tendency to have such an effect."[21] Like most abstractions, this leads to higher levels of abstraction, such as whether the segment of the community that would find the statement defamatory constitutes a "respectable" or "right-thinking" minority.[22]

Once a court starts down a path that has nothing to do with the facts of the case, further excursions are inevitable. Some courts, for example, ask whether the statement was capable of an innocent meaning. If it was, those courts hold the statement not actionable,

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18. Prosser, *More Libel Per Quod*, 79 HARV. L. REV. 1629, 1630 (1966).
19. Murnaghan, *supra* note 15, at 7.
20. *See* RESTATEMENT (SECOND) OF TORTS §§ 570-574 (1976).
21. *Id.* § 559 comment d.
22. *See* RESTATEMENT (SECOND) OF TORTS § 559 comment e (1976); W. PROSSER, *supra* note 1, § 111, at 743-44.

no matter how the statement actually was understood.[23] On the theory that everyone makes an occasional mistake, other courts arbitrarily assume that a statement asserting a single act of misconduct or negligence by a business or professional person is not defamatory.[24]

Abolishing the presumption of harm would not eliminate all of these problems. Courts still would have to determine whether a statement is defamatory. Otherwise, defamation would be subsumed entirely by the tort of injurious falsehood, and good reasons probably exist for maintaining the separate torts.[25] But beginning the inquiry with the usual tort question, whether the plaintiff has been harmed by the defendant's conduct, at least would have the virtue of focusing attention on the facts of the case.

Fifth, the presumed harm doctrine diminishes judges' control over the size of jury verdicts. With no criteria by which different people can reach similar results, and no legal measure of damages,[26] courts have difficulty finding that a particular award is excessive. Courts can do little more than articulate some reformulation of Chancellor Kent's classic dictum:

> The damages . . . must be so excessive as to strike mankind, at first blush, as being beyond all measure, unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice, or corruption. In short, the damages must be flagrantly outrageous and extravagant, or the court cannot undertake to draw the line; for they have no standard by which to ascertain the excess.[27]

Remittitur, the device by which courts normally control excessive verdicts, "is palpably a very inexact control since the judges themselves are without any measuring stick for determining whether a

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23. *See, e.g.*, Chapski v. Copley Press, 92 Ill. 2d 344, 442 N.E.2d 195 (1982); Walker v. Kansas City Star Co., 406 S.W.2d 44 (Mo. 1966).

24. *See, e.g.*, Twiggar v. Ossining Printing & Publishing Co., 161 A.D. 718, 146 N.Y.S. 529 (1914), *appeal dismissed*, 220 N.Y. 716, 116 N.E. 1080 (1917).

25. Actions for injurious falsehood typically impose on plaintiffs burdens that are even greater than the burdens that defamation plaintiffs bear, such as the burden of proving that the defendant's conduct was not privileged. *See* Prosser, *Injurious Falsehood: The Basis of Liability*, 59 COLUM. L. REV. 425 (1959).

26. *See supra* text accompanying notes 11-13.

27. Coleman v. Southwick, 9 Johns. 44, 52 (N.Y. 1812).

verdict is excessive where the rule is that the plaintiff need not introduce evidence of the harm he has suffered."[28]

Sixth, the enterprise of compensating a loss that may not have occurred has generated some mystifying rules of evidence. The presumption of harm is not the only source of questionable rules of evidence, of course, but it does seem to foster them. Some courts, for example, have treated the presumption of harm as conclusive, giving the plaintiff a cause of action even if the defendant proves that the plaintiff has suffered no harm; the defendant's evidence is admissible only in mitigation.[29] Thus, proof that no one believed the defamatory statement would not destroy the cause of action.[30]

This conclusive presumption had a corollary: because harm to the plaintiff was presumed, courts also assumed that the plaintiff had a good reputation before the defamation. Unless the defendant attacked the presumption by offering to show that the plaintiff's reputation was bad, the plaintiff was not allowed to show that his reputation was good.[31] Amazingly, courts disagreed about whether a plaintiff could show that the defamation had caused his friends and family to shun him. Some courts rejected this testimony on the ground that the jury could judge the likely effect of the defamation from the nature of the accusation.[32] Other courts held that the plaintiff was not compelled to rely on the presumption of harm, but could give direct proof of the effects of the defamation.[33]

Most of this nonsense is probably obsolete now. In several recent

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28. Murnaghan, *supra* note 15, at 29 n.100. *See also* Note, *Libel and the Corporate Plaintiff*, 69 COLUM. L. REV. 1496, 1510 (1969) ("[P]resumptive damages have permitted juries to make outrageous awards, against which remittitur is but an ineffective check.").

29. *See, e.g.*, Stidham v. Wachtel, 41 Del. 327, 21 A.2d 282 (1941); Murnaghan, *supra* note 15, at 13; *Developments in the Law—Defamation*, 69 HARV. L. REV. 875, 887 (1956) [hereinafter cited as *Developments*].

30. *See, e.g.*, Dall v. Time, Inc., 252 A.D. 636, 300 N.Y.S. 680 (1937); *Developments*, *supra* note 29, at 883.

31. *See, e.g.*, Kovacs v. Mayoras, 175 Mich. 582, 141 N.W. 662 (1913); McCormick, *supra* note 4, at 130. There were at least two exceptions to this corollary. If the defamation related to the plaintiff's business or profession, he was allowed to show that his business or professional reputation was good. *See, e.g.*, Draper v. Hellman Commercial Trust & Sav. Bank, 203 Cal. 26, 263 P. 240 (1948). Moreover, the plaintiff in all cases could prove his general social and financial status. *See, e.g.*, Bingham v. Gaynor, 135 A.D. 426, 119 N.Y.S. 1010 (1909); *see also* McCormick, *supra* note 4, at 129-30.

32. *See, e.g.*, Sheftall v. Central of Ga. Ry., 123 Ga. 589, 51 S.E. 646 (1905).

33. *See* McCormick, *supra* note 4, at 133 n.50.

decisions, courts have held that the plaintiff had no cause of action, even for statements defamatory on their face, because the plaintiff's reputation was so bad that it could not be harmed further. On this ground, courts rejected libel claims by an habitual criminal[34] and by the convicted murderer of Dr. Martin Luther King, Jr.[35] These courts obviously are not treating the presumption of harm as conclusive. Professor Dobbs states that a plaintiff now may prove his good reputation,[36] and that the plaintiff's evidence that the statement seemed to cause his associates to shun him is no longer excludable on the ground that those facts are presumed.[37]

At least two other evidentiary marvels, however, remain intact. One rule precludes a defendant from showing that the libel was already in circulation.[38] Logically, this evidence should be admissible in mitigation to show that the defendant did not cause all of the plaintiff's damage. The evidence apparently continues to be excluded, however, on the theory that segregating the harm from different sources is too difficult. The other rule is that evidence of the defendant's good faith is admissible in mitigation.[39] How the defendant's motivation could affect the amount of the plaintiff's damage is unclear. Perhaps the rule is a tacit admission that presumed damages actually may be awarded to punish the defendant.[40]

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34. Cardillo v. Doubleday & Co., 518 F.2d 638 (2d Cir. 1975).

35. Ray v. Time, Inc., 452 F. Supp. 618 (W.D. Tenn. 1976), *aff'd mem.*, 582 F.2d 1280 (6th Cir. 1978); *see also* Turner v. Harcourt, Brace, Jovanovich, 5 Media L. Rep. (BNA) 1437 (W.D. Ky. 1979); Logan v. District of Columbia, 447 F. Supp. 1328 (D.D.C. 1978).

36. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 516 (1973).

37. *Id.* at 515.

38. *See, e.g.*, Gray v. Brooklyn Union Publishing Co., 35 A.D. 286, 55 N.Y.S. 35 (1898). In *Gray*, the plaintiff was accused of having bought another woman's husband for $25. The defendant sought to introduce evidence that the same accusation had been published in other New York newspapers. The Appellate Division held that the evidence was not admissible for any purpose. *See generally* D. DOBBS, *supra* note 36, at 517. *But see* Hartmann v. American News Co., 171 F.2d 581, 585 (7th Cir. 1948), *cert. denied*, 337 U.S. 907 (1949); Dacey v. Connecticut Bar Ass'n, 170 Conn. 520, 533-34, 368 A.2d 125, 132-33 (1976); Warren v. Pulitzer Publishing Co., 336 Mo. 184, 212, 78 S.W.2d 404, 420 (1934); Holway v. World Publishing Co., 171 Okla. 306, 312-13, 44 P.2d 881, 889 (1935).

39. *See* Conroy v. Fall River Herald News Co., 306 Mass. 488, 28 N.E.2d 729 (1940); *see also* R. SACK, *supra* note 16, at 360.

40. A line of Michigan cases blurs the distinction between compensatory and punitive damages by stating that "only exemplary damages which are compensatory in nature are

Finally, presumed harm permits recoveries that are not necessarily related to the legitimate interests of defamation law. According to Justice Harlan, "the legitimate function of libel law must be understood as that of compensating individuals for actual, measurable harm caused by the conduct of others."[41] The doctrine of presumed harm misses the mark in two ways. First, the doctrine permits recovery when no injury to reputation has occurred. Second, when injury to reputation has occurred, the doctrine permits awards unrelated to the magnitude of the injury.

Some of the most celebrated defamation cases involved plaintiffs who won substantial awards even though they probably suffered no significant injury to reputation. The plaintiff in *New York Times Co. v. Sullivan*,[42] for example, was a segregationist politician in Alabama in the early 1960's who was awarded $500,000 for a publication that had accused him of violating the civil rights of black and northern demonstrators. As Justice Black observed, "this record lends support to an inference that instead of being damaged Commissioner Sullivan's political, social, and financial prestige has likely been enhanced by the Times' publication."[43] Elmer Gertz won $100,000 in compensatory damages and $300,000 in punitive damages for the John Birch Society's publication of charges that he was a "Leninist" and "Communist-fronter" with a criminal record.[44] Gertz, a prominent civil liberties lawyer, might have been harmed more if the Birch Society had praised him. Nevertheless, the court awarded damages despite Gertz's failure to show that his reputation as a lawyer had been tarnished.

The first amendment implications of potentially substantial awards to individuals whose reputations have not been injured are serious.

The largely uncontrolled discretion of juries to award damages

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allowable." Ray v. City of Detroit, 67 Mich. App. 702, 704, 242 N.W.2d 494, 495 (1976). *See also* Long v. Tribune Printing Co., 107 Mich. 207, 65 N.W. 108 (1895); Pettengill v. Booth Newspapers, 88 Mich. App. 587, 278 N.W.2d 682 (1979). These cases suggest that the egregiousness of the defendant's conduct is relevant to the plaintiff's award for mental anguish.

41. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 66 (1971) (Harlan, J., dissenting).

42. 376 U.S. 254 (1964).

43. *Id.* at 294 (Black, J., concurring).

44. Gertz v. Robert Welch, Inc., 680 F.2d 527, 531 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 1233 (1983).

> where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.[45]

III. Actual Injury

The Supreme Court's answer to the anomaly of presumed damages was to "restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury."[46] The solution has not worked for two reasons. First, the Court prohibited presumed damages only when liability was based on something less than reckless disregard. As a result, presumed damages remain available for public officials and public figures—who always must prove reckless disregard[47]—and for any private plaintiff able to meet the reckless disregard test. Meeting that test may not be as difficult as we once assumed. For example, after going to the Supreme Court to avoid having to prove reckless disregard, Elmer Gertz met the test on remand in order to qualify for presumed and punitive damages.[48]

Second, the Court's solution failed because the Court defined "actual injury" to include not only impairment of reputation, but also "personal humiliation, and mental anguish and suffering."[49] Thus, a plaintiff who cannot prove harm to his reputation still can recover damages if he can prove mental anguish. The expansiveness of this actual injury standard was compounded by the Court's statement that "there need be no evidence which assigns an actual dollar value to the injury."[50] The actual injury requirement of *Gertz* still would have been useful if the Court had interpreted the

45. *Gertz*, 418 U.S. at 349.
46. *Id.*
47. *Id.* at 342-43.
48. 680 F.2d at 531-34.
49. 418 U.S. at 350.
50. *Id.*

requirement as allowing damages for mental anguish only parasitically.[51] The logic of *Gertz*—that only the states' substantial interest in protecting reputation could justify the speech-inhibiting effects of libel law—suggested that interpretation.

At the first opportunity, however, the Court explained that actual injury could mean emotional injury alone. In *Time, Inc. v. Firestone*,[52] the plaintiff withdrew her claim for harm to reputation before trial. The defendant then argued that the actual injury requirement precluded recovery. The Court rejected the argument summarily, stating:

> Florida has obviously decided to permit recovery for other injuries without regard to measuring the effect the falsehood may have had upon a plaintiff's reputation. This does not transform the action into something other than an action for defamation as that term is meant in *Gertz*. In that opinion we made it clear that States could base awards on elements other than injury to reputation, specifically listing "personal humiliation, and mental anguish and suffering" as examples of injuries which might be compensated consistently with the Constitution upon a showing of fault.[53]

Mrs. Firestone had produced evidence that the publication made her anxious and concerned, and that she feared her young son might be affected adversely by the defamatory falsehood when he grew older. Her $100,000 verdict, therefore, was compatible with the Court's actual injury requirement.[54]

That requirement, as defined in *Gertz* and interpreted in *Firestone*, is not a significant obstacle to recovering damages. Any plaintiff who can persuade a jury that a defamation caused him anguish apparently can satisfy the standard. Indeed, as Professor Ashdown has commented,[55] the net effect of *Gertz* and *Firestone* may have been to increase, rather than decrease, the likelihood of gratuitous awards of compensatory damages. The Court's actual

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51. *See infra* notes 78-80 and accompanying text.

52. 424 U.S. 448 (1976).

53. *Id.* at 460.

54. *See id.* at 461. Florida continues to adhere to this view of actual injury. *See* Miami Herald Publishing Co. v. Ane, 423 So. 2d 376 (Fla. Dist. Ct. App. 1982).

55. Ashdown, Gertz *and* Firestone: *A Study in Constitutional Policy-Making*, 61 MINN. L. REV. 645, 670-71 (1977).

injury standard is an invitation to the states to convert the tort of defamation from its common law purpose of protecting reputation into a new remedy for mental distress.[56] Obviously, *Gertz* did not eliminate the presumed harm problem.

The solution is to abolish the doctrine of presumed harm. Like other tort actions, defamation actions should require competent proof of injury. The plaintiff should be required to demonstrate harm to reputation. Once actual harm to reputation is shown, the states should be free to award damages for emotional injuries, such as humiliation and mental anguish, just as they do when a physical injury has been proved. If a plaintiff suffers no demonstrable harm to his reputation, however, he should have no cause of action for defamation. The jury should be required to separate its award for harm to reputation from its award for emotional injury. Trial courts should strike any award that is not supported by competent evidence.

Rules requiring proof of harm to reputation already have been adopted in New York, Kansas, and Arkansas, at least in private plaintiff cases.[57] The Kansas Supreme Court, after reviewing the common law basis for defamation, said that

> damage to one's reputation is the essence and gravamen of an action for defamation. Unless injury to reputation is shown, plaintiff has not established a valid claim for defamation, by either libel or slander, under our law.
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> . . . We agree with the New York rule that the plaintiff in an action for defamation must first offer proof of harm to reputation; any claim for mental anguish is "parasitic," and compensable only after damage to reputation has been established.[58]

The Arkansas Supreme Court reached the same result on first amendment grounds:

> The law of defamation has always attempted to balance the tension between the individual's right to protect his reputation and

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56. *Id.*

57. *See* Little Rock Newspapers v. Dodrill, 281 Ark. 25, 660 S.W.2d 936 (1983); Gobin v. Globe Publishing Co., 232 Kan. 1, 649 P.2d 1239 (1982); France v. St. Clare's Hosp. & Health Center, 82 A.D.2d 1, 441 N.Y.S.2d 79 (1981); Salomone v. MacMillan Publishing Co., 77 A.D.2d 501, 429 N.Y.S.2d 441 (1980).

58. 232 Kan. at 6-7, 649 P.2d at 1243-44.

> the right of free speech. To totally change the character of defamation to allow recovery when there has been no loss of the former right, would be an unjustified infringement on the First Amendment.[59]

I am not suggesting a return to the common law notion of special damages. Special harm is sometimes viewed as the alternative to presumed harm, but it is not. As it has evolved in defamation law, the doctrine of special harm is as crabbed as the doctrine of presumed harm is expansive.

The doctrine of special harm is the descendant of the temporal harm concept that the common law courts used in the sixteenth century to wrest jurisdiction from the ecclesiastical courts in some slander cases. When the common law judges discovered that there was more slander in the world than they had bargained for, they turned the harm requirement around and used it to screen out cases by holding that the plaintiff had failed to plead or prove the requisite kind of harm.[60]

Modern definitions of special harm usually sound fairly sensible. The *Restatement (Second) of Torts*, for example, describes special harm as "the loss of something having economic or pecuniary value."[61] As actually applied, however, the special harm idea has been anything but sensible. Courts have rejected evidence that the plaintiff has suffered physical illness,[62] that friends and associates

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59. 281 Ark. at ___, 660 S.W.2d at 936.

In Hearst Corp. v. Hughes, 297 Md. 112, 466 A.2d 486 (1983), the Maryland Court of Appeals reached the opposite conclusion, accepting the Florida position that emotional distress alone is enough to justify recovery. The majority advanced the reasons typically offered in defense of presumed damage: harm to reputation is difficult to prove, and the inference that publication of a defamatory statement is likely to cause anguish is reasonable. *Id.* at 129-30, 466 A.2d at 495. The majority observed that the *Restatement (Second) of Torts* and other authorities still permit awards of nominal damages without proof of harm to reputation, and concluded that awards for proven mental distress *a fortiori* would be appropriate. *Id.* at 128, 466 A.2d at 494. In dissent, Judge Davidson noted that the only real authority for the majority's premise was the *Restatement*, and that another section of the *Restatement* expresses doubt about whether nominal damages are recoverable under *Gertz* without proof of harm to reputation. *Id.* at 138, 466 A.2d at 499 (Davidson, J., dissenting). *See also* International Bhd. of Elec. Workers, Local 1805 v. Mayo, 281 Md. 475, 379 A.2d 1223 (1977).

60. *See* Veeder, *History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 555-58 (1903).

61. RESTATEMENT (SECOND) OF TORTS § 575 comment b (1976).

62. *See, e.g.*, Scott v. Harrison, 215 N.C. 427, 2 S.E.2d 1 (1939).

have been alienated, and that the plaintiff has been turned out of her home by her husband.[63] In one recent case, a plaintiff who proved that his wife left him because of the alleged defamation not only failed to show special damages, but actually proved his opponent's argument for summary judgment. Because the plaintiff's evidence showed that his wife was a net financial burden, the court held as a matter of law that the plaintiff had suffered no special harm.[64]

Professor Ashdown has urged that all recoveries be limited by the common law special damage rule.[65] If that rule meant simply "pecuniary loss," as he suggests, I would agree. Because "special damage" has acquired its own peculiar meaning, however, I believe that term should be discarded and the new term, "actual injury," should be used.

This proposal, although consistent with *Gertz*, is inconsistent with *Firestone*. Under an actual injury standard, the court would have dismissed Mrs. Firestone's case when she waived any claim of harm to reputation.[66] As a general proposition, a state should be free to compensate nonreputational injuries and to call the cause of action by any name it chooses. *Firestone*, of course, does not require the states to allow recoveries for purely emotional injuries in defamation actions; it merely holds that the constitution does not prohibit them from doing so. As a matter of tort law, therefore, my proposal is not inconsistent with *Firestone*. For several reasons, however, I go further: as a matter of constitutional law, the states should not be allowed to recognize a cause of action for mental suffering under the guise of defamation.

First, most states already have several bodies of law that compensate persons for mental suffering. Most notable are the tort actions of assault and intentional infliction of emotional distress. Each of these actions has its own requirements and restrictions. Both require more than mere negligence and are limited to distress caused by certain egregious behavior, such as an act creating an imminent apprehension of harm or "extreme and outrageous con-

63. *See* McCormick, *supra* note 4, at 124-25.

64. Sauerhoff v. Hearst Corp., 388 F. Supp. 117, 122-25 (D. Md. 1974), *vacated on other grounds*, 538 F.2d 588 (4th Cir. 1976).

65. Ashdown, *supra* note 56, at 670.

66. *See supra* text accompanying notes 52-55.

duct."[67] Those limitations presumably reflect a judgment about the types of mental distress that the law should compensate.[68] To make the same injuries compensable under the rules of defamation circumvents the rules developed for these other tort actions and abandons their underlying policies.

Of course, the law often permits under one name what it prohibits under another. Whether this is desirable ordinarily is not a matter of constitutional concern. In defamation cases, however, courts must look behind the label because not every state interest justifies the same level of interference with first amendment freedoms. *Gertz* began with the proposition that the common law rules of defamation permitted unconstitutional infringements of freedom of speech and the press.[69] The Court could have forbidden the states from imposing liability, but declined to do so "in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation."[70] The Court reached the accommodation chosen in *Gertz* only after an extended discussion of the importance of reputation and of the various ways in which the reputational interests of private persons may differ from those of public officials and public figures.[71] *Gertz* thus represents a judgment about the appropriate balance to be struck between first amendment and reputational interests.

The same balance would not necessarily be appropriate if the state interest were mental distress, rather than reputation.[72] States undoubtedly may adopt tort rules designed to protect nonreputational interests.[73] When those interests are weighed against first amendment interests, however, they should be required to stand on their own merits rather than masquerade as reputational interests.

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67. *See* RESTATEMENT (SECOND) OF TORTS §§ 21, 46 (1965).

68. *See* Hearst Corp. v. Hughes, 297 Md. 112, 145-46, 466 A.2d 486, 502-03 (1983) (Davidson, J., dissenting).

69. *See* 418 U.S. at 340.

70. *Id.* at 348-49.

71. *See id.* at 342-45.

72. *Cf.* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (the state's interest in protecting a plaintiff's privacy could not justify imposing liability for the truthful publication of information from public judicial records).

73. *See, e.g.*, Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).

> Negligent infliction of mental distress by publishing a falsehood may well be a tort, but it is not the tort of defamation. Defamation is injury to reputation. If the essence of the law of defamation is to be preserved in the wake of the Court's destruction of the conclusive presumption of injury, a defamation plaintiff must first prove impairment of reputation before he is entitled to recover for personal humiliation and mental anguish and suffering.[74]

Second, treating emotional injuries as parasitic helps to ensure that an injury exists. Tort law historically has refused to compensate emotional injuries alone, in part because of the inability to determine objectively whether the injuries have occurred.[75] Allowing recovery for pain and suffering or for fright only after proof of some tangible injury is a means, however imperfect, of separating the injured from the merely greedy. Although the exceptions may be about to swallow this rule,[76] tort law still exhibits considerable uneasiness about compensating purely emotional injuries.[77]

Third, emotional injuries always have been regarded as parasitic to the defamation claim. Prosser noted that "[d]efamation is not concerned with the plaintiff's own humiliation, wrath or sorrow, except as an element of 'parasitic' damages attached to an independent cause of action."[78] The *Restatement (Second) of Torts* maintains that liability for emotional distress exists only if the plaintiff would have an independent claim for harm to reputation.[79] The *Restatement* view assumes the availability of the presumed harm doctrine, allowing the plaintiff to receive damages for emotional injury automatically in per se cases, but the insistence that the claim depends on the existence of harm to reputation is clear. The New York Court of Appeals explained the reason for

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74. Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1438-39 (1975) (footnotes omitted).

75. *See* Annot., 64 A.L.R.2d 100 (1959). Even in an intentional tort, the plaintiff must prove substantial other damages before the court may award damages for emotional distress. *See, e.g.*, Anderson v. Continental Ins. Co., 85 Wis. 2d 675, 694, 271 N.W.2d 368, 378 (1978).

76. *See, e.g.*, Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

77. *See, e.g.*, Womack v. Eldridge, 215 Va. 338, 210 S.E.2d 145 (1974) (requiring clear and convincing proof of the emotional injury).

78. W. PROSSER, *supra* note 1, § 111, at 737.

79. RESTATEMENT (SECOND) OF TORTS § 623 comment a, illustration 1 (1976).

this rule over a century ago:

> It would be highly impolitic to hold all language, wounding the feelings and affecting unfavorably the health and ability to labor, of another, a ground of action; for that would be to make the right of action depend often upon whether the sensibilities of a person spoken of are easily excited or otherwise; his strength of mind to disregard abusive, insulting remarks concerning him; and his physical strength and ability to bear them.[80]

Fourth, allowing recovery for mental anguish alone would make the actual injury requirement ineffectual. A defamation plaintiff always can argue that the statement caused him anguish. A rule that requires actual injury, but allows the plaintiff to satisfy it by showing emotional harm alone, does nothing more than prescribe a litany for the plaintiff to recite. Such a rule would give the courts little power to weed out undeserving claims. Thus, however theoretically desirable recovery for mental distress alone might be, pragmatism counsels against it.

Some contend that damages should never be recoverable for mental anguish. Anthony Lewis, for example, argues that permitting recovery for mental anguish "would allow juries to speculate at large and in effect bring back presumed damages."[81] Permitting recovery for mental anguish certainly allows juries to speculate, and makes controlling the size of verdicts more difficult, but it does not bring back presumed damages. The central vice of the presumed damage doctrine is that it permits recovery without proof of any injury. My proposal requires proof of some harm to reputation in every case. Thus, even if the proposal failed to control the size of verdicts, it still would serve an important function by screening out cases in which no proof of any injury to reputation exists. I believe it also would help to control the size of verdicts, however, by requiring the judge and jury to focus their attention on the affects of the defamation. If experience proves that

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80. Terwilliger v. Wands, 17 N.Y. 54, 60 (1858). *Contra* Modisette & Adams v. Lorenze, 163 La. 505, 112 So. 397 (1927) (affirming $500 libel award to plaintiff whose reputation was not injured, but who suffered humiliation and outrage).

81. Lewis, New York Times v. Sullivan *Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 83 COLUM. L. REV. 603, 615 (1983).

even parasitic awards for mental suffering produce excessive verdicts, then it will be time to prohibit them altogether.

IV. Proving Harm

The usual justification for presumed damages is that "damage to reputation is recurringly difficult to prove."[82] As Prosser said, "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact."[83] If judges believe there are many cases of serious but unproveable harm to reputation, they are not likely to abandon the presumed harm rule. The remainder of this Article, therefore, explores the difficulties of proving harm to reputation.

The presumed harm doctrine obscures three different sets of problems. The first involve difficulties in proving that harm to reputation has occurred; the second involve difficulties in quantifying the loss. Although not mutually exclusive, these categories are not identical. The quantification problems tend to be similar to the difficulties encountered throughout tort law when courts seek to place a monetary value on a nonpecuniary injury. Estimating the impact of a defamatory statement probably is not inherently more difficult than placing a value on a loss of consortium. But problems related to the existence of injury tend to be peculiar to defamation, or at least to the nonphysical torts. Determining whether a plaintiff has been harmed by the imputation of racist actions, for example, is not a process that finds ready analogies in other areas of the law.

The third set of problems is related to causation. The presumed harm rule is also a presumed causation rule. The rule relieves the plaintiff not only of the need to prove his injury and the extent of his damages, but also of the need to show that his harm was caused by the defendant. The presumption of causation was so strong at common law that it not only relieved the plaintiff of the need to establish causation and to negate the existence of other

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82. *Gertz*, 418 U.S. at 394 (White, J., dissenting).

83. W. Prosser, *supra* note 1, § 112, at 765. *See also* 1 F. Harper & F. James, The Law of Torts § 5.30, at 468 (1956) ("Libel and slander work their evil in ways that are invidious and subtle.").

possible causes of injury, but it even prevented the defendant from introducing evidence of alternative theories of causation. This fact is clear from the rule that a defendant was precluded from showing that a defamatory falsehood was already in circulation.[84] If the presumed damage doctrine is abolished, new problems of causation will arise.[85]

The presumed harm doctrine obscures several different types of harm. I have already identified two broad categories: the relational injuries—that is, harm to reputation; and the internal injuries, such as mental distress and humiliation. The relational injuries include at least four distinct types of reputational harm. First, the defamation may interfere with the plaintiff's existing relations with third persons. If his family ostracizes him, his friends shun him, his acquaintances ridicule him, his employer fires him, or his customers desert him, he has suffered an injury to existing social, business, or family relations.

Second, the plaintiff may suffer an interference with future relations. The plaintiff's friends, family, and business associates may stand by him, but people who do not know him may be less skeptical of the defamation and may decide not to associate with him. This plaintiff loses the benefit of future business and social relationships.

Third, the defamation may destroy a favorable public image. The first two types of harm are true relational injuries,[86] resulting from damage to actual human relationships. The third type of injury, however, occurs despite the absence of any relationship. It is easiest to see in public figure cases.

In the case of General William Westmoreland,[87] for example, the

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84. *See supra* note 38 and accompanying text.

85. *See infra* text accompanying notes 101-103.

86. The concept of relational injuries, distinct from injuries to property and person, was one of the most important analytical advances in tort law in this century. It was the creation of my beloved teacher and friend, the late Dean Leon Green. *See, e.g.*, Green, *Relational Interests*, 29 ILL. L. REV. 460 (1934); Green, *The Right to Communicate*, 35 N.Y.U. L. REV. 903 (1960).

87. General Westmoreland, commander of the U.S. Army in Vietnam, is suing CBS over a 1982 documentary entitled "The Uncounted Enemy: A Vietnam Deception." He contends that the film libelously accused him of conspiring to misrepresent the strength of enemy forces. The case has not come to trial, and only preliminary skirmishes have reached the official reports. *See* Westmoreland v. CBS, Inc., 10 MEDIA L. REP. (BNA) 1215 (S.D.N.Y.

publication that he considers defamatory may or may not harm his existing or future relations. His friends, family, military associates, and other personal acquaintances probably will not change their attitudes toward him because of the alleged defamation. Due to his age and retirement from the military, Westmoreland probably would not have developed as many new personal relationships as a younger person would, even without the alleged defamation. Even if he does not suffer any signficant harm to existing or future personal relationships, however, Westmoreland may suffer harm to his public image. To a person of Westmoreland's station in life, his place in history may be as important to him as his personal relationships. He has spent a lifetime cultivating a positive image as a brave soldier and trustworthy leader. This image has little to do with actual personal relationships. It rests primarily on the image of him that the mass media have created in the public mind. Public image bears little relation to the interests envisioned by the courts when defamation law was evolving. In that era, reputation represented the esteem a person earned, through the daily conduct of his affairs, in the eyes of those who knew him; the public image interest is a creature of mass communications.

Nonetheless, public image is a valuable asset. A favorable public image enables a public figure to earn large fees for lecturing or for endorsing products. It is a source of influence in politics, entertainment, sports, religion, education, or other fields. It may be an important source of self-esteem and personal satisfaction. A person who enjoys a positive public image thus may be injured by defamation, even if there is no harm to his existing or future personal relations.

Fourth, defamation can cause harm by creating a negative public image for a person who previously had no public image at all.[88] This injury probably is rare because harm will occur only when the defamation is so memorable that the statement has a lasting impact on people who do not know the plaintiff. This injury would

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1984); Westmoreland v. CBS, Inc., 97 F.R.D. 703 (S.D.N.Y. 1983).

88. *Cf.* Keeton v. Hustler Magazine, 104 S. Ct. 1473, 1479 (1984) ("The reputation of the libel victim may suffer harm even in a state in which he has hitherto been anonymous. The communication of the libel may create a negative reputation among the residents of a jurisdiction where the plaintiff's previous reputation was, however small, at least unblemished." (footnote omitted)).

occur, for example, if an ordinary person, without a public image, were accused of an act so heinous that both the accusation and the identity of the accused stayed in the public mind. Assume, for example, that Lee Harvey Oswald did not kill John Kennedy, but was accused of having done so. Before the accusation was published, Oswald was an anonymous private person with no significant public image. The act of which he was accused, however, was so notorious that it not only would destroy existing and future relations, but also would create a lasting negative impression of Oswald in the public mind. The creation of a negative public image, therefore, probably should be treated as an independent loss. Just as General Westmoreland's positive public image is a valuable asset, so is Oswald's negative public image a financial and psychological liability.

These are four different types of harm to reputation, and there may be more. My proposal would require a plaintiff to prove one of these types of reputational harm as a prerequisite to recovery. If a plaintiff really has been injured, he should be able to produce evidence of at least one of these species of injury.

The plaintiff can prove anything that would constitute special damage under the common law. Loss of a specific job, contract, or client is demonstrable pecuniary loss that courts accept under even the narrowest definitions of special harm. The concept of actual injury, however, includes other types of demonstrable harm to existing relations that the special damage rule excludes, such as desertion by a spouse, the estrangement of a child or parent, loss of friends, or any other deterioration of an existing relationship. The relationship need not have a pecuniary value; proof that any existing relationship has been seriously disrupted should suffice.

Nor is it necessary to prove that the relationship was destroyed. Defamation often does its harm by sowing seeds of doubt, rather than by completely destroying relationships. A plaintiff's associates should be allowed to testify that doubts have been planted in their minds even though they did not believe the defamation entirely and have not terminated relations with the plaintiff.[89] Rules of evi-

89. My colleague, David Robertson, suggests the danger of a self-fulfilling prophecy here. He fears that the act of testifying under oath about doubts and suspicions concerning the plaintiff may create, deepen, or solidify those doubts. This is possible, but I do not believe it

dence should not reject the common assumption that where there is smoke, there is likely to be fire.

One justification offered for the presumption of harm is the belief that the plaintiff's witnesses will be reluctant to admit that they have been influenced by charges that the plaintiff claims are baseless.[90] This is a healthy reluctance, based on the logical inconsistency of the witness's position, and it ought to be fostered rather than ignored. Because truth is a universal defense to a defamation action, the plaintiff necessarily is denying that the statement is true. The witness, therefore, must contend either that he is not sure whether to believe the plaintiff's protestations of innocence, or that he thinks less highly of the plaintiff even though he believes the charge is false. The law should not release this witness from his conundrum. The witness may testify, defense counsel may confront him with the inconsistency, and the jury may decide what to believe. To presume that the plaintiff's associates think less highly of him even though they do not believe the accusation forecloses a legitimate factual issue.

Perhaps courts are more concerned about the opposite of the reluctant witness problem. They may fear that a plaintiff's friends will be only too eager to say whatever will help him recover. This phenomenon is not unique to defamation, however, and can be dealt with as in other contexts: by the sanctions for perjury; by cross-examination; and by allowing the jury to disbelieve the witness.

Another justification offered for the presumed harm rule is that the injury may be too subtle to prove.[91] The answer to this is simply that law has its limits. The law offers no remedy for many injuries in life. Affairs of the heart, for example, probably cause as much mental anguish as all the cognizable torts combined, yet we do not call on the law to aid the jilted lover.[92] Even with physical

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justifies continuing the presumed harm doctrine. Litigation exacts many costs from its participants. Being accused of lying about someone may be painful to the defendant, for example, and may create doubts about his integrity or competence that even a judgment in his favor would not erase. Costs such as these are real, but eliminating them is impossible.

90. *See Developments*, *supra* note 29, at 891-92.

91. *Id.* at 891.

92. When the law did make a foray into this area by recognizing causes of action for seduction and breach of promise to marry, the legislatures of several states responded with

torts, we do not feel compelled to offer a remedy if the injury is too subtle to be proved. A plaintiff may be certain that his back is injured, for example, but he can recover damages only if he can prove it.

In addition to proving the defamation's effect on specific relationships, a plaintiff should be allowed to show by circumstantial evidence that the defamation has harmed his relations generally. For this purpose, courts should admit evidence that the plaintiff has been denied membership in social or professional organizations as proof that the defamation has affected relationships with other, unspecified individuals. This evidentiary rule should extend to informal relationships so that the plaintiff's perception that he is being shunned socially also would be admissible.

Proof of harm to future relations, like loss of future earnings or future medical expenses in actions for physical torts, must be inferred. The one factor most likely to support an inference of future harm to reputation is harm to existing reputation. Conceivably, a statement causing no immediate harm might injure reputation in the future. As public attitudes or mores change, conduct that seemed acceptable at the time it was imputed to the plaintiff may become unacceptable. For example, segregationist political behavior that might have been acceptable to the Alabama public in the 1960's[93] might be unacceptable to the same constituency today. To allow recovery for that possibility in the absence of immediate harm, however, would be too speculative. The analogy to physical torts would be to allow an accident victim who has suffered no apparent injury to recover for the possibility that a symptom might appear in the future. Although the possibility of a future symptom is real, the courts do not allow such a claim in actions for physical torts and one should not be allowed in defamation actions for the same reason.

On the other hand, once a plaintiff establishes a present injury, the jury should be free to infer that additional harm will occur in the future, if the facts support that inference. Relevant facts include the permanence, prominence, and public accessibility of the

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"heart-balm" statutes barring such actions. *See* Note, *"Anti-Heart Balm" Legislation Revisited*, 56 NW. U.L. REV. 538 (1961).

93. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 295 (1964) (Black, J., concurring).

medium in which the defamation appears. Also relevant is the extent to which the plaintiff's reputation already has been vindicated. In a highly publicized case in which the defendant admits that the statement is false, for example, many people who become aware of the defamation in the future probably will also be aware of the vindication. In contrast, if the defendant insists that the statement is true, a judgment for the plaintiff will not be a full vindication of his reputation; some people still may believe that the defendant was right. In such a case, the potential for future harm is greater. Retraction is also relevant. While there is no certainty that a future reader of the defamation will see the retraction, the potential of an unretracted defamation to cause future harm is greater.

Proving damage to public image will be an unfamiliar undertaking for most lawyers, but it is not impossible. Gauging a celebrity's popularity may be a mysterious process to most people, but in the entertainment, advertising, sports, and communications industries, it is daily business practice. One who has established a valuable public image is likely to be knowledgeable about ways of demonstrating the effect of a defamatory publication on that image. Quantitative or qualitative changes in the plaintiff's fan mail would be relevant, and print and electronic clipping services can provide a sample of the media coverage of the plaintiff before and after the defamation. If the plaintiff is a performer, ratings and audience turnouts can provide a barometer of public acceptance.

If the alleged harm is the creation of a negative public image, a plaintiff should be able to prove the existence of injury through the testimony of people who had not heard of him previously, but who now hold an unfavorable impression of him. He should be able to show the extent of the injury through survey evidence showing the portion of the population that heard and remembered the defamatory statement.[94]

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94. Professor Robertson points out that this evidentiary requirement may force the plaintiff to repeat the defamation in his attempt to find witnesses and to measure the extent of the injury, thereby exacerbating his harm. But only in rare cases will the defamation be sensational enough to be remembered by strangers. A defamation plaintiff always must choose whether to suffer in silence or risk further harm to his reputation by litigating. If the initial harm is widespread, the incremental harm caused by the process of gathering evidence should be negligible. If the initial harm is not widespread, then the plaintiff can opt

If the plaintiff proves one or more of these four types of actual harm to reputation, he should then be allowed to show that the defamation caused him mental anguish. This term includes at least two distinct types of injury. The first type is the anguish that results from knowing the defamatory statement is in circulation. The plaintiff may be apprehensive about the possible effect of the statement. Just as one who believes that he is about to be struck suffers a fear that is compensable in an action for assault, the victim of defamation may fear the effects of the verbal blow.

This apprehension is not necessarily limited to immediate effects. Mrs. Firestone testified, for example, that she feared her young son would be affected adversely by the defamation on permanent record in *Time* magazine when he grew older.[95] In any defamation case, but especially in those published in sources that will continue to be publicly available, the victim may suffer anxiety about effects that may occur far in the future. Whether the apprehension relates to the immediate or distant future, this form of anxiety derives entirely from the statement's potential to harm reputation; it is not an independent injury, but the apprehension of a later independent injury.

The other type of mental anguish occurs independently of any threat to reputation. This injury is the anger, hurt, or outrage that the victim feels from the mere fact that someone would utter the defamatory words. This harm would occur even if the statement were never published to a third person. It is the type of injury that is caused by insulting words, which a few states make actionable even in the absence of publication to a third party.[96] The general rule, however, is that insults are not actionable as defamation. "Words spoken that are merely vituperative, or insulting . . . are not regarded by the common law as sufficiently substantial to be

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to minimize it by not gathering evidence.

95. Time, Inc. v. Firestone, 424 U.S. 448, 461 (1976).

96. *See, e.g.*, Fleming v. Moore, 221 Va. 884, 275 S.E.2d 632 (1981); Tweedy v. J.C. Penney Co., 216 Va. 596, 221 S.E.2d 152 (1976); Wright v. Cofield, 146 Va. 637, 131 S.E. 787 (1926). I am indebted to Professor John Donaldson of the Marshall-Wythe School of Law for bringing to my attention recent cases involving the Virginia insulting words statute, VA. CODE § 18.2-416 (1982). *See also* MISS. CODE ANN. § 95-1-1 (1972); W. VA. CODE § 61-3-33 (1977).

treated as injuries calling for redress in damages."[97] Even when an actionable defamation occurs, the common law does not compensate the plaintiff's purely internal reaction. "[T]he injury to feelings which the law of defamation recognizes is the not the suffering from the mere making of the charge, but is that suffering which is caused by other people's conduct towards [the plaintiff] in consequence of it."[98] If the gravamen of the tort of defamation is harm to reputation, then the consequential damages for emotional harm probably should be limited to those that arise from the reputational injury.[99]

A plaintiff must prove mental anguish largely through his own testimony. The plaintiff may testify about specific manifestations of his anguish, such as sleeplessness, nervousness, and depression, and his family, associates, counselors, and physicians can corroborate or rebut his testimony. He should explain why he believed the publication would make others think less highly of him because this fact often will be a key point of contention. If the defamation alleges conduct completely at odds with the plaintiff's good character, the jury may be skeptical of the plaintiff's claims that he feared he would be ruined. On the other hand, if the plaintiff's character was bad, the jury may doubt that he is as sensitive to the criticism as he claims to be. On the theory that a person of good character is more likely to suffer genuine anguish from an accusation of misconduct than a person who is guilty, the court should permit the defendant to demonstrate prior acts of misconduct by a plaintiff who seeks recovery for mental anguish.[100]

In judging the plaintiff's claim of mental anguish, the jury inevitably and properly will be influenced by the nature of the defamation itself. Response to criticism is something within the experience of all jurors. They are as qualified as anyone to determine what is hypersensitivity and what is genuine anguish. Allowing them to extrapolate from their own experience and the nature of the defamation is not the same as allowing them to presume

97. Moseley v. Moss, 47 Va. (6 Gratt.) 534, 538 (1850).

98. 1 J. WIGMORE, EVIDENCE § 209, at 704 (3d ed. 1940).

99. *See* Murnaghan, *supra* note 15, at 3 n.4; *Developments*, *supra* note 29, at 937.

100. This theory was first brought to my attention by Miss Ann Marie Reardon, a student in my seminar at the Marshall-Wythe School of Law in the fall of 1983. I am indebted to her for the insight.

mental anguish. The plaintiff must offer evidence of the existence and extent of any mental anguish, allowing the jurors to evaluate the credibility of the plaintiff and his witnesses. Permitting the jury to infer mental anguish from the evidence allows them to use their intuition and experience; instructing them to presume it counsels them to ignore those resources.

As previously discussed,[101] the presumed damage rule obviates the need to show not only damage, but also causation. Its abolition, therefore, would raise questions about proving causation as well as harm. Direct proof of a causal link between the defamation and the injury is sometimes impossible. Suppose, for example, that a businessman is defamed, is able to show that his business declined following the defamation, but is unable to show what caused the decline. Under the presumed harm rule, the causation is presumed along with the harm. The causation problem, however, does not require such a sweeping presumption. Instead, the court should allow the jury to infer causation, but only after the plaintiff has established actual injury. The plaintiff should be required to show that he was defamed, that he suffered actual injury, and that the defendant was the source of the defamatory statement.[102] The plaintiff should be required to prove the loss by direct evidence, such as sales records that document the decline. By doing so, he proves the existence of actual injury and its amount. Once the plaintiff makes that showing, the courts should allow a jury to infer causation. If there is evidence that some of the harm might have been caused by statements that are truthful or otherwise nonactionable, the jury should be instructed that the defendant is liable only for the portion of the loss allocable to the actionable statement.[103] Unlike *res ipsa loquitur*, which allows the defendant's negligence, as well as causation, to be inferred, the process described here speaks only to the issue of causation. Neither goes as far as the presumed harm doctrine, however, which obviates the need to prove the existence of injury, the extent of injury, and the causal connection.

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101. *See supra* text accompanying note 84.

102. Foreseeable repetition of the defendant's statement by others is not an independent source of injury. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 576 (1976).

103. This view is only a variation on the existing rule that partial truth may be shown in mitigation of damages. *See* McCormick, *supra* note 4, at 142.

V. Conclusion

Compensating harm to reputation was not the original purpose of slander and libel actions. The ecclesiastical courts took cognizance of slander to protect the soul of the slanderer. Slander was the cousin of blasphemy, and was proscribed for similar reasons.[104] Libel actions were created primarily as a means of protecting government from the power of the printing press.[105] Its purpose was evident from its name: libel derives from the French term for a political tract, which in turn comes from the Latin word for book.[106] Like many other torts, libel and slander actions evolved from the criminal law, when the courts began to require the defendant to compensate his victim as part of his punishment.[107]

Today, we would not tolerate libel or slander actions if either purported to serve its original purpose. We would be appalled at the idea that the state has the power to punish a speaker for the good of his soul, and we regard criticism of government as something to be nurtured, not punished. Actions for libel and slander are retained only because they now serve a more legitimate purpose—compensating individuals for injury to reputation. Requiring proof of harm would reduce defamation to this purpose. The actual injury rule would bring defamation into line with the rest of tort law, which does not purport to punish wrongdoing or regulate activity in the absence of injury.

An actual injury rule never will satisfy those who believe that the real purpose of defamation law is to regulate the press. Some people view tort law, and particularly defamation law, an opportunity to regulate behavior.[108] Recognizing that the Supreme Court will not permit direct regulation of the accuracy, responsibility, and fairness of the press, these advocates—some of whom probably

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104. *See* Veeder, *supra* note 60, at 550-51.

105. *Id.* at 561-66.

106. *See* 6 Oxford English Dictionary 236 (1961).

107. *Id.* at 569-71.

108. *See, e.g.*, Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 40 Cornell L.Q. 581, 582 (1964); Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 Tex. L. Rev. 199, 234 (1976); Shapo, *Media Injuries to Personality: An Essay on Legal Regulation of Public Communication*, 46 Tex. L. Rev. 650, 651-58 (1968).

sit on the Court today[109]—embrace libel law as a device by which the courts can retain some control over the enormous power of the press.

For these people, confining defamation law to the compensation of actual injury is nonsense, because that is not its real purpose. And if they are right—if press regulation is a permissible purpose—then actual injury to reputation is not a logical requisite. In my view, however, the government has no business regulating press behavior in the guise of protecting individual reputation.[110]

A system that restricts recovery to actual loss will be imperfect, but so is any system that attempts to compensate human injury with money. Some deserving plaintiffs may be denied recovery because they are unable to prove that their harm is real. Other plaintiffs may be overcompensated in the imprecise process of attaching a monetary value to mental anguish and the loss of public esteem. On balance, however, requiring proof of injury offers several benefits.

First, it will enable prospective plaintiffs and their lawyers to appraise prospective claims more realistically. The potential windfall of presumed damages makes rational evaluation almost impossible. In most torts, the experienced plaintiff's lawyer can estimate with some accuracy how much a case is "worth," and can base his advice to the client and his own decision to accept the case on this estimate. The inherent unpredictability of presumed damages, however, makes rational calculation impossible in defamation cases. Limiting recovery to actual loss should make awards more predictable.

Second, the actual injury requirement will help weed out unmeritorious cases at an early stage. A plaintiff should be required to plead with particularity the kind of harm that he has suffered.[111] If he is unable to do so, he has failed to state a cause of action, and his suit should be dismissed. If a plaintiff successfully pleads ac-

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109. *See* Keeton v. Hustler Magazine, 104 S. Ct. 1473, 1479 (1984) ("False statements of fact harm both the subject of the falsehood *and* the readers of the statement. New Hampshire may rightly employ its libel laws to discourage the deception of its citizens.").

110. *See* Anderson, *A Response to Professor Robertson: The Issue Is Control of Press Power*, 54 TEX. L. REV. 271 (1976).

111. The pleading rules that apply to special damages offer a convenient analogy. *See, e.g.*, FED. R. CIV. P. 9(g); R. SACK, *supra* note 16, at 101-02.

tual injury, but there is no evidence to support it, the defendant may be entitled to summary judgment.[112] Knowledge that a court will confine any award to actual loss should facilitate settlement negotiations because both sides will have a more realistic, predictable basis for estimating the value of the claim.

Finally, if all the previous safeguards fail, appellate courts will have a record against which they can independently evaluate the award. With presumed harm, they have no basis for evaluating damages except for the nature of the defamatory statement itself.

Assigning a monetary value to loss of reputation will remain a difficult and inexact process. Requiring proof of loss introduces some new problems, such as proof of causation, that the presumed harm rule finesses. An actual injury requirement will not always put exactly the right amount of money in the right hands, but I believe it will be less imperfect than the presumed harm system.

Subjecting defamation to the same proof demands as other torts requires some demystification of reputation. Reputation is something we have all been taught to cherish, like honor and patriotism. Respect for its value is passed down to each generation by the oracles of our culture. The Old Testament teaches us that "[a] good name is rather to be chosen than great riches."[113] Shakespeare wrote:

> Good name in man and woman, dear my lord,
> Is the immediate jewel of their souls:

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112. The defendant bears the burden of showing the absence of a genuine issue of material fact, of course, but experience with the actual malice issue demonstrates that courts can use modern summary judgment practice effectively to make the plaintiff produce his evidence. When the ground for summary judgment is lack of actual malice, the defendant offers affidavits and depositions to show that he had no reason to doubt the truth of his statement. Many judges then will grant the motion unless the plaintiff shows that he has some chance of proving the contrary. Although Chief Justice Burger expressed doubt about this practice, *see* Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979), it continues to be common in both federal and state courts. *See* LIBEL DEFENSE RESOURCE CENTER, BULL. NO. 4, SUMMARY JUDGMENT IN LIBEL LITIGATION: ASSESSING THE IMPACT OF *Hutchinson v. Proxmire* 2-35 (1982); Kovner, *Motion for Summary Judgment*, in NEW YORK TIMES V. SULLIVAN: THE NEXT TWENTY YEARS 316-21 (R. Winfield ed. 1984). To initiate the same process when the ground for the motion is lack of actual injury, the defendant could produce affidavits or depositions from reputation witnesses who could testify that the plaintiff's reputation has not been harmed. If the plaintiff cannot produce summary judgment proof to the contrary, the motion should be granted.

113. *Proverbs* 22:1.

> 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.[114]

Life teaches us to be wary of those who invoke the name of honor or patriotism, however, and a bit of the same skepticism probably should attach to claims made in the name of reputation. We should remember that Shakespeare also said "[r]eputation is an idle and most false imposition, oft got without merit, and lost without deserving."[115]

Many of our ideas about reputation are products of a simpler era. When most people spent their entire lives in one community, and the community value system was narrowly drawn and widely shared, good reputation was painstakingly earned, easily lost, and not readily rebuilt. Today most of us move from one community to another, not only geographically, but also socially and professionally. Whatever reputation we have in each of those communities may be recently acquired and shallowly based.

Knowing this, those with whom we deal often decline to trust in something as ephemeral as reputation. For most of us, a lifetime of scrupulous honesty and meticulous checkbook-balancing will not enable us to cash a ten-dollar check at the grocery store without photographic identification, a personal check, and a name that does not appear on the county attorney's current list of deadbeats. In today's pluralistic society, much is tolerated and little is universally condemned. A congressman can be the subject of a sex scandal one year and win an election the next.[116] An entertainer can pursue drug abuse to the brink of death and return more popular than ever.[117] Behavior that outrages adults can make a musician

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114. W. SHAKESPEARE, THE TRAGEDIE OF OTHELLO, THE MOORE OF VENICE III:iii, at 155-161 (1602).

115. *Id.* II:iii, at 268-270.

116. *See Percy and Rep. Crane Renominated in Illinois*, N.Y. Times, Mar. 22, 1984, at 14, col. 5 (Y ed.) ("For the 47-year-old Mr. Crane, the scene at his victory party at a Danville, Ill., restaurant was a far cry from his apologetic return last summer after being censured by House colleagues for sexual relations with a 17-year-old female page.").

117. *See Pryor's Back—Twice as Funny*, TIME, Mar. 29, 1982, at 62-63.

the idol of millions of teenagers. Even if one's reputation is harmed, the victim is not condemned automatically to live out his life in disgrace. The mobility and anonymity of modern society make rehabilitation much easier.

This is not meant to denigrate the importance of reputation or the reality of its loss. It does suggest though, that before the law leaps to protect reputation it should demand the same proof of loss that is required of every other interest that tort law protects.