INTRODUCTION

The restoration of a damaged reputation may be of greater importance to the person who has been defamed than the recovery of damages. The immediate objective of many, if not most, defamation plaintiffs is not to win monetary relief, but to set the record straight.1 Such reputational concerns are of particular importance to individuals defamed in connection with public or political activities.2

Traditionally, the law has played an important role in the vindication of reputation. The mere prosecution of a civil defamation action has assisted plaintiffs in legitimizing their claims of falsity.3 In essence, the defamation action has provided the plaintiff with credibility and with a forum for communicating with the community. Constitutional limitations on the defamation torts,4 however, have

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1. R. BEZANSON, G. CRANBERG & J. SOLOSKI, LIBEL LAW AND THE PRESS 28 (1987). Working as a part of the Iowa Libel Research Project, the authors gathered empirical information by surveying 164 libel plaintiffs and 61 media defendants and analyzing reported defamation cases between 1974 and 1984. "Even those plaintiffs who reported that the alleged libel caused them financial harm said they were more interested in obtaining a retraction, correction, or apology from the media than they were in obtaining money." Id. The same study found that when potential plaintiffs contacted media publishers, more than 78% of the time they requested a retraction, correction or apology. Damages were requested less than one percent of the time. Id. at 26.

Thirty percent of plaintiffs responding to the survey indicated that they ultimately brought suit to restore reputation. Another 19% brought suit to deter further publication. Thus, even by the time the matter had progressed to litigation, nearly one-half of all plaintiffs sued to restore reputation or to protect their reputation from further injury. Only about 22% were then motivated by the recovery of monetary damages. Id. at 79. See also L. ELDRIDGE, THE LAW OF DEFAMATION 4-5 (1978).

2. R. BEZANSON, supra note 1, at 80. "Plaintiffs suing on the basis of statements about their public and political activities do so for reputation-related reasons more than two-thirds of the time, and sue to obtain money damages in only 11 percent of the cases." Id.

3. Id. at 88, 162, 181. "[T]he objectives of restoring reputation and punishing the media were largely served by the very act of commencing the libel suit itself." Id. at 94.

denied this important part of the vindication process to many injured parties.\(^5\) In particular, public figures and officials whose principal concern is most likely to be the restoration of reputation have been left with no recourse to the law for vindication in the absence of constitutional actual malice.

Given the current scheme of constitutional limitations on the traditional damages action, various statutory reforms have been suggested to develop a new legal mechanism that would permit the object of a defamatory publication to set the record straight.\(^6\) Typically these proposals would allow the object of a defamatory statement to elect between a traditional action for damages subject to the constitutional fault requirements or an action for a declaratory judgment as to whether the publication was false and defamatory. Any claim for damages would be barred upon the filing of a declaratory action.\(^7\) Proponents argue that since the threat of a damages award would be ages to actual damages in the absence of actual malice and holding that states must require proof of at least some degree of fault on the part of defendant in private figure plaintiff cases); St. Amant v. Thompson, 390 U.S. 727 (1968) (interpreting actual malice to be a subjective standard); Curtis Publishing Co. v. Butts, 388 U.S. 130, 162-64 (1967) (plurality) (Warren, C.J., concurring) (discussing the requirement of actual malice to cases involving public figure plaintiffs); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (allowing damages to a public official plaintiff only upon proof that defendant published with actual malice, i.e., actual knowledge of falsity or reckless disregard of the truth).


6. See e.g., PROPOSAL FOR THE REFORM OF LIBEL LAW, REPORT OF THE LIBEL REFORM PROJECT OF THE ANNENBERG WASHINGTON PROGRAM (1988) [hereinafter the ANNENBERG PROPOSAL]; Franklin, A Declaratory Judgment Alternative to Current Libel Law, 74 CALIF. L. REV. 809, 812-31 (1986) (comparing alternative proposals for plaintiff redress with other legislative proposals). See supra note 5 and accompanying text; H.R. 2846, 99th Cong., 1st Sess. (1985). See also Gertz, 418 U.S. at 368 n.3 (Brennan, J. dissenting). “Although it may be that questions could be raised concerning the constitutionality of such statutes, certainly nothing I have said today . . . should be read to imply that a private plaintiff, unable to prove fault, must inevitably be denied the opportunity to secure a judgment upon the truth or falsity of statements published about him.” Id.

7. The following chart compares selected features of three of the leading declaratory action proposals:
removed, the declaratory action would pass first amendment scrutiny without any required showing of fault. The principal difference between the various proposals is that some versions would permit only the plaintiff to elect the declaratory action, while others would permit the defendant to convert a damages action into a declaratory action.

By providing a declaration of falsity without any showing of fault, the declaratory action is designed to provide a verdict on that

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<td>Franklin Proposal</td>
<td>Precludes Declaratory Action</td>
<td>Plaintiff Only</td>
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<td>H.R. 2846</td>
<td>May prevent Award of Attorney Fees vs. Defendant</td>
<td>Plaintiff or Defendant (applies only to public plaintiffs &amp; media defs.)</td>
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8. See Barrett, 74 CALIF. L. REV. at 863; Franklin, 74 CALIF. L. REV. at 820. See also Gertz, 418 U.S. at 363 n.2 (Brennan, J., dissenting). By providing a declaratory action that could be pursued in lieu of an action for damages, the proposals discussed in this Article differ substantially from the draft Uniform Defamation Act proposed for discussion at the July 1990 meeting of the National Conference of Commissioners on Uniform State Laws. The draft Uniform Defamation Act attempts to further vindication by creating a bifurcated trial with the first stage “limited to the issues of publication, defamation, reputational harm, and the falsity of the published fact.” Proposed UNIFORM DEFAMATION ACT § 3-102(b) (1990). Unlike the declaratory actions, which would end with a determination on the issue of falsity, the proposed Uniform Defamation Act provides for an action that would continue with a second stage to resolve issues of privilege, fault and damages. At the end of the first stage, a defendant could avoid punitive damages and a subsequent award of attorney’s fees by offering to retract and pay plaintiff’s costs and fees to that point. The defendant, however, would remain potentially liable for compensatory damages. See DEFAMATION ACT, NAT’L CONF. OF COM’RS ON UNIF. STATE LAWS (Discussion Draft July 1990).


11. In addition to eliminating any requirement of fault in the declaratory action,
issue even when an action for damages would be constitutionally impermissible. The purpose of the declaration would be to assist the plaintiff in vindicating reputation. Recognizing that vindication of reputation generally is a desirable social objective, it is tempting to pursue any proposal that might assist effectively in that process. The proposed statutory actions, however, cannot be considered simply as stripped-down versions of the existing libel or slander tort with the constitutionally offensive threat of damages removed. The statutes would change fundamentally the role of the court in the vindication process and alter traditional notions of the judicial function.

This Article examines how the law can assist effectively in the process of vindicating a person's reputation. It concludes that, while greater access to the law as a means of vindicating reputation may be needed, the declaratory judgment proposals are conceptually flawed and should be rejected in favor of other reforms to the existing defamation torts.

**VINDICATION AS A POLICY OBJECTIVE**

**THE NATURE OF THE INJURY AND OF ITS VINDICATION**

Reputation is a relational interest between two or more individuals. As one individual acquires information regarding another, the individual acquiring the information forms an opinion as to the moral, physical or social character of the other person. Whether or not the opinion accurately reflects the character of the other person, it forms a part of that person's reputation within the community.

Information regarding an individual may be obtained primarily from direct experience with that individual or secondarily from other members of the community who possess information about the individual. Since opinions as to an individual's character, i.e., an individual's reputation, may be based entirely upon secondary information, a person's reputation may develop and extend far beyond the social group with whom that person has direct contact.

As new information about an individual is acquired, it may alter an opinion already held by the person acquiring the information or it may create an opinion, or reputation, where none previously existed. As an opinion is formed or altered regarding a person with whom the recipient directly interacts, the nature of their relationship may be

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the Annenberg Proposal would eliminate conditional common-law privileges in such actions. Annenberg Proposal, supra note 6, at 17.

12. See Franklin, 74 CALIF. L. REV. at 810-11.

13. See Doe d. Pedwick v. Wittcomb, 5 Eng. L. and Eq. Rep. 487 (Ct. Exch. 1851) (stating that “[r]eputation is thinking; I repute a man to be good or bad; that is, I think him to be so.”). Id. at 489.
altered accordingly. The recipient of information is likely to become more or less inclusive of the other in his affairs, depending upon whether the new information is viewed as positive or negative.

A person need not have direct interaction, however, with the individual about whom an opinion is formed. For example, a person living in New York may read of a public official who embezzles public funds in another state. Although there is no direct interaction between the two persons, the New Yorker is still likely to form an opinion that the embezzler is untrustworthy. The information has then either created a negative reputation or, perhaps, injured a previously favorable public image.14

A reputation or public image has long been recognized as bearing certain unmistakeable property attributes, causing it to be characterized as an intangible asset capable of valuation.15 Unlike most property, however, a reputation is not transferable and cannot be separated from one individual and appropriated intact for another's use.16 Accordingly, any injury to reputation is destructive in nature, and no asset is appropriated by the wrongdoer that is recoverable through execution upon a judgment. Nor can a new reputation be purchased with the proceeds of compensation paid for a reputation destroyed.

Reconstruction of the damaged reputation by removing the blemish offers the only means by which the injured property interest of the plaintiff can be restored. Full vindication of the property interest occurs only when the false information is so thoroughly discredited that it no longer plays any part in the formulation of opinion regarding the character of the defamed party. Only at that point will the injured party be restored fully to prior status in the minds of those members of the community who have formed an opinion as to his character.17

In addition to the property aspects of reputation, a dignity interest of the plaintiff also may be injured by defamatory publications.18

17. This, of course, assumes that it is possible to completely vindicate an injured reputation. It is more likely that reputation will only rarely, if ever, be vindicated fully. See infra note 28.
The mere publication of false and defamatory information is said to be an affront to plaintiff's dignity and to afford plaintiff less respect than is deserved.\textsuperscript{19} Whether or not plaintiff suffers the loss of a valuable property asset, the publication suggests that plaintiff is unworthy of the same respect as before and may cause plaintiff to suffer from the wrongful stigma of being a societal outcast.\textsuperscript{20}

Like other aspects of reputation, this dignity interest of the plaintiff protected by defamation law is a relational concept. Dignity is protected only to the extent that society's perception of the plaintiff is altered and the plaintiff experiences a loss of respect within the community.\textsuperscript{21} A private apology by the offending publisher is not sufficient to alter public opinions and, therefore, serves little to rectify the harm to dignity suffered by the defamed party.\textsuperscript{22}

Likewise, a judgment of the court will not entirely remove the damaging stigma. The stigma is removed and the dignity interest of the plaintiff is restored only when the defamed party's position in society is reaffirmed. A judgment that a defendant's conduct was inappropriate may assist in that reaffirmation process.\textsuperscript{23} However, full reaffirmation occurs only when the entire community again affords plaintiff the proper respect.\textsuperscript{24} As with the property aspects of reputation, therefore, complete vindication of the dignity interest is achieved only when those holding opinions as to the character of the injured party no longer give any credence to the false and defamatory publication.\textsuperscript{25}

\begin{itemize}
\item \textsuperscript{19} See Post, 74 Calif. L. Rev. at 707-19.
\item \textsuperscript{20} This is related to, but distinguishable from, the societal function of enforcing rules of civility. See Post, 74 Calif. L. Rev. at 713.
\item \textsuperscript{21} This does not mean that a defamation plaintiff at common law cannot recover damages for injuries such as mental distress. The plaintiff, however, should be required to prove that the distress was caused by a change in the community's treatment of the plaintiff as a consequence of the alleged defamation. See Anderson, 25 WM. & MARY L. Rev. at 771-73. See also W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts § 116A, at 844 (5th ed. 1984).
\item \textsuperscript{22} See R. Bezanson, supra note 1, at 258 (Table 6). When asked what the media could have done after publication, less than two per cent suggested that an apology would have been sufficient. A published retraction or correction was desired by 71\%.\textsuperscript{Id.}
\item \textsuperscript{23} See Post, 74 Calif. L. Rev. at 712-13.
\item \textsuperscript{24} Id.
\item \textsuperscript{25} Professor Robert Post characterizes a judgment for plaintiff in a libel action as a reaffirmation by society that plaintiff is worthy of respect. See Post, 74 Calif. L. Rev. at 713. A verdict for plaintiff, however, does not necessarily declare plaintiff to be worthy of respect. It may find simply that the particular conduct of the defendant toward the plaintiff was improper. For instance, if it is falsely alleged that a priest stole money from an alms box, the priest may be entitled to a favorable verdict even though it is proven that for other reasons he is not worthy of respect. See, Restatement (Second) of Torts § 581A comment f (1976). "It is not enough [to prove] some other substantially different kind of misconduct even though it is equally or more rep-
THE SOCIAL DESIRABILITY OF VINDICATION

Broader societal reasons, beyond the individual interests of the parties, may justify a procedure to vindicate reputation. A community adheres to certain rules of civility which define acceptable behavior by its members. When a breach of established norms poses a threat to the community’s status quo, society may respond with an appropriate sanction against the violator. The community relies on accurate communication to notify its members effectively of the violation and sanction.

If communications regarding the character of a particular member of society are distorted by false accusation of a behavioral breach, the community risks the wrongful exclusion of an important and valuable talent. It, thus, becomes important for society to develop some means by which it can evaluate the accuracy of its own communications. For example, assume that a community has established that adultery is unacceptable behavior. When information is received that an individual has committed adultery, members of the community may react to protect against further such breaches or to punish the initial breach by excluding the individual from certain social contacts.

In order to protect all members of the community against this violator of its rules or to punish the violator effectively, society must communicate information regarding the breach and sanction to all members of society that might have social contact with the individual. The reliability of that communication is important. If the accusation is false, and society has provided no effective means for its correction, society may, without good reason, deny itself the association of a valuable member.

Moreover, negative, but truthful, information about an individual may not be deemed fully credible unless it is able to withstand challenge. Unless the individual who is the subject of the information is afforded an effective opportunity to respond, society is at risk, then, not only of relying upon false information on the one hand, but of discounting important true information about the character of one of its members on the other hand.

rehensible. Thus a charge of burglary against another is not justified by the finding that he has committed a murder." Id.

26. See Note, 80 HARV. L. REV. at 1730.

27. Accurate communications regarding a party’s conduct help not only in excluding a party who breaches the rules, but also in restoring the reputation of a defamed party, allowing full reacceptance into society.

28. As expressed by Justice Holmes in his dissent, “the best test of truth is the power of the thought to get itself accepted in the competition of the market.” Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
METHODS OF VINDICATION

The impact of information upon a person’s reputation depends upon the credibility accorded to that information by the person forming the opinion. False information regarding an individual, known by the recipient to be false, should have no effect upon reputation because it will not alter the opinion of the recipient. However, false information that appears credible to the recipient has an impact as great as that of truthful information, because it is believed by the recipient to be true.

Once information about an individual has been accepted as at least possibly credible,9 the recipient’s opinion regarding that individual is altered. This change in opinion, or reputation, can be counteracted only by the receipt of additional information, from a source at least equally as credible as the original source, refuting the initial information.30 When such additional corrective information is received and accepted as credible, causing the previous inconsistent information to be rejected as false, the reputation of the affected individual is vindicated.

Any effort to vindicate reputation, therefore, must focus not only on delivering truthful information to the person forming the opinion, but on establishing the credibility of that information to ensure its acceptance. There are three sources of corrective information for persons who have received prior false information. The correction may be published (i) by the same person who published the original falsehood, (ii) by the object of the defamation or (iii) by a third-party speaker.

CORRECTION BY THE ORIGINAL PUBLISHER

Presumably, a falsehood will be refuted most effectively if the original publisher later corrects it. The correction will be likely to reach essentially the same audience as the original falsehood, and, as a subsequent publication of the same speaker, it should be viewed as more credible than the earlier publication.31 The incentives of the publisher to make a correction, however, are limited. Three approaches may be used to encourage the original publisher to publish a correction. First, the law may require the publication of a reply or

29. See Anderson, 25 WM. & MARY L. REV. at 767. “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.” Id.

30. See Note, 80 HARV. L. REV. at 1739 (citing J. BENTHAM, THEORY OF LEGISLATION 291 (R. Hildreth trans. 5th ed. 1887)).

correction. Second, the law may encourage publication of a reply or correction by reducing or eliminating the publisher's legal exposure after such a publication. Third, market or ethical pressures alone may be relied upon to encourage a reply or correction.

1. Forced publication. The least desirable of these approaches is a forced publication. A primary reason for seeking a correction by the original publisher is that the audience is likely to accord higher credibility to a publisher's voluntary correction of past statements, than to the past statements now admitted by the publisher to be wrong. However, neither a forced right of reply nor a forced retraction will necessarily be deemed more credible than the original publication.

A forced right of reply is not a statement by the original publisher, but rather a statement by the object of the false publication distributed through the original publisher. As such, its credibility depends upon the credibility of the defamed party, which may or may not equal the credibility of the original publisher. A forced correction by the original publisher may be deemed no more credible. It may be perceived by the audience as simply the statement of the party claiming injury, relayed by the original publisher under the threat of legal punishment, rather than as a credible admission of error by the original publisher. Thus, both the forced reply and the forced correction are less desirable than a voluntary admission of error by the original publisher.

That forced publication may be less valuable to the vindication process than a voluntary correction by the original publisher does not mean that a forced publication is of no value. The value simply depends upon the credibility of the allegedly injured party. If the audience deems the injured party to be credible, the publication of a statement by that party could effectively disseminate corrective information to the original audience, thereby facilitating the vindication process.

Forced publication, however, presents serious constitutional problems. The Supreme Court has rejected laws mandating certain publications in unregulated media. In striking down a Florida statute in 1974 that provided political candidates with a right to reply to certain published charges in a newspaper, the Supreme Court in *Miami Herald Publishing Co. v. Tornillo*\(^{32}\) recognized strong protections against intrusion into the traditional "function of editors" to select material that goes into a newspaper.\(^{33}\)

While perhaps not absolutely foreclosing the operation of a

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33. Id. at 258.
mandatory retraction statute after a defamatory falsehood has been proven, the Court noted that "like many other virtues" press responsibility "cannot be legislated." In concurrence, Justice White described as an "elementary First Amendment proposition" the point that "government may not force a newspaper to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor."

Greater intrusion into the editorial content of broadcast programming has been permitted in the past. In Red Lion Broadcasting Co. v. F.C.C., the Court allowed the Federal Communications Commission, under a regulatory doctrine known as the "Fairness Doctrine," to require broadcasters to provide a reasonable opportunity for the presentation of contrasting views on matters of controversy. The greater intrusion was permitted largely due to a perceived lack of broadcast outlets and the need to ensure full opportunity for the dissemination of ideas.

In Tornillo, however, decided five years after Red Lion, the Court rejected arguments that the same shortage rationale should be applied to print media, and in 1985, the FCC questioned the continued viability of Red Lion's reasoning as applied even to broadcast media. Concluding that the broadcast market had changed sufficiently to render the Fairness Doctrine constitutionally suspect, the FCC noted that "we believe that the artificial mechanism of interjecting the government into an affirmative role of overseeing the content of speech is unnecessary to vindicate the interest of the public in obtaining access to the marketplace of ideas."

2. Legal incentives to correct. In light of the policy and apparent constitutional flaws inherent in forced publication, drafters of the various reform proposals have opted wisely not to provide for any forced correction or retraction. Instead, the drafters seek at the outset of any dispute to encourage voluntary publication of a reply or retraction by interposing the reply or retraction as a bar to any litigation regarding the original publication. A prompt voluntary re-

34. Id. (Brennan, J., concurring).
35. Id. at 256.
36. Id. at 261 (White, J., concurring).
38. Tornillo, 418 U.S. at 254-58. An argument similar to that rejected by the Court in Tornillo had been proposed by Professor Barron in Barron, Access to the Press — A New First Amendment Right, 80 HARV. L. REV. 1641, 1651 (1967).
traction may well be the most effective way to vindicate reputation.\textsuperscript{40} However, while possibly shielding the publisher who does retract, it is questionable whether in many cases retraction statutes create any real incentive to retract.

Existing retraction statutes typically limit monetary damages if a proper retraction is published. However, as constitutional protections have limited damages actions by public officials and public figures to cases involving constitutional actual malice, publishers without such malice have had little need to invoke the protections of the retraction statute in matters involving public persons.\textsuperscript{41} Those who publish with actual malice also are unlikely to invoke the retraction statute since presumably they will have little more regard for the truth after publication than before, and, in any event, they may be excluded from statutory protections because of their actual malice.\textsuperscript{42}

It might be argued that the incentive for publishers to retract is restored under the declaratory judgment proposal by the prospect of a verdict on the truth or falsity regardless of fault. However, the practical problem remains that few statements present themselves as clearly true or false. Even a responsible publisher who remains unconvinced as to the falsity of a statement is unlikely to publish a sufficiently definite retraction to invoke the protections of the statute.

Thus, a publisher first must become convinced of the falsity to publish a sufficient retraction to foreclose the declaratory judgment action. The need for the retraction provisions of the proposed reform statutes in that situation, however, is doubtful. A responsible publisher, when convinced of falsity, would presumably publish a correction even without legal incentive. On the other hand, if the publisher has so little regard for his own reputation as a reliable source of in-

\textsuperscript{40} See Note, 80 Harv. L. Rev. at 1739. Retraction statutes seem generally to contemplate a media defendant and may be ill-suited for non-media defendants.

\textsuperscript{41} But see Note, 80 Harv. L. Rev. at 1740-42 (suggesting that a publisher will retract "out of fear that a refusal to retract in the face of persuasive evidence might influence a jury's finding on the issue of actual malice"). Such a fear may exist, but a failure to retract after publication should have no bearing on the issue of defendant's state of mind at the time of publication. See New York Times Co. v. Sullivan, 376 U.S. 254, 286 (1964) (finding that failure to retract was not evidence of actual malice on the facts of the case, although leaving open the question of whether a failure to retract ever can be evidence of actual malice).

formation that he refuses voluntarily to correct a statement after becoming convinced of its falsity, there is reason to doubt that he would be persuaded to do so merely by the risk to his reputation of an adverse judgment declaring the statement to be false.

3. Market incentives to correct. If a publisher cannot be forced to correct an error or be effectively persuaded by legal incentive, any incentive for the original publisher to correct must come from the marketplace. Business or ethical interests of the publisher may prompt a correction. There is, however, no assurance that the market will be sufficiently responsive to the publisher's actions so as to provide sufficient incentive to cause a correction of the record.

CORRECTION BY THE INJURED PARTY OR BY A THIRD PARTY

If legal and market incentives fail to provoke a correction or retraction by the original publisher, the next step is for the defamed person to seek another source for dissemination of the truth. At times, particularly when there is no media publisher, a plaintiff may be able effectively to disseminate corrective information without the assistance of others. For example, an employee may claim falsely to the employer that a second employee stole money from the first employee's desk. The accused employee may have sufficient access to the employer and sufficient credibility to set the record straight, without need for any other speaker or recourse to legal remedy.

Indeed, in a theoretically perfect world with a pure and functioning marketplace of ideas, there never would be a need for the law to provide a remedy of vindication, since under the pure theory, truth ultimately would be determined by the unregulated market. However, the world is, of course, less than theoretically perfect. Even the Supreme Court, which frequently draws upon the theory of such a market, has recognized that modern access to the market is not equal for all speakers. While each individual may speak, there is no assurance, and certainly it is unlikely, that the individual will be able to reach the same large audience that is reached by a member of the media or an individual with access to the media.

Thus, an individual who is the object of false speech may be unable without assistance to reach the same audience that received the

43. See Gertz, 418 U.S. at 344. The first remedy of any victim of defamation is self-help. Id.
45. See Gertz, 418 U.S. at 344.
initial incorrect information. Moreover, even if an appropriate audience can be reached, the plaintiff may find it difficult to establish sufficient credibility to refute effectively the initial publication. This latter problem will arise particularly when vindicating information is held by third persons who refuse voluntarily to assist plaintiff. In such cases, it may be necessary for the defamed party to rely upon statements of support by a third person in the marketplace who possesses either greater credibility or access to a larger audience.

THE ROLE OF LAW IN VINDICATING REPUTATION

When injured parties are unable to refute falsehoods effectively on their own, society may validly determine that vindication is a sufficiently desirable objective to merit some form of assistance. As already noted, such assistance may be provided to a plaintiff by making available an effective forum and the necessary tools with which to establish credibility to refute the falsehood; or assistance may be provided by designating a third-party speaker to refute the falsity.

Because a damages action for defamation has long been perceived to further the objective of vindication, it is not surprising that those seeking to facilitate the vindication process when damages are not available would continue to look first to the law to provide a mechanism to vindicate reputation. The proposed statutory action may be perceived as differing little from an existing damages action which seeks merely nominal damages. The simplicity of the proposal, however, belies more complex distinctions that exist between current law and the proposed statutory action.

First, an award of even nominal damages, or a similar authoritative mechanism, has been a critical element in the theoretical foundation of the defamation action. In the absence of any enforceable power to order compensation, vindication or punishment, the very basis for judicial action is drawn into question. Second, the proposals, if enacted, arguably do not simply preserve the traditional vindicatory function of the courts in the absence of recoverable damages. Rather, the statutory action, while allowing a party to pursue the same primary objective of vindication as in the nominal damages action, would substantially alter the method of achieving that objective.

QUESTIONS OF JUSTICIABILITY AND FORM OF JUDGMENT

The function of a court is to render a judgment adjudicating the legal rights and relationships of the parties.47 To serve that role

47. See generally Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937). "The controversy must be definite and concrete, touching the legal relations of the parties hav-
when the underlying facts are in dispute, a court frequently must first make certain factual determinations, which typically are embodied in findings of fact by the court or in the verdict of a jury. The fact-finding aspect of the judicial function, however, does not mean that a matter can properly be brought before the court for that purpose alone. Unless there is some legal significance attached to the factual outcome, there is no legal determination to be made by the court and, thus, no basis for entry of a judgment.  

If the proposed statutory actions are to survive initial scrutiny, therefore, they must adjudicate some adequate legal issue. The purpose of the action cannot be simply to determine the factual issue of whether an allegedly defamatory statement was false. The action also must establish the legal consequences of the conduct proven.  

Proponents of a statutory libel action characterize the proposals as creating a declaratory judgment action, presumably because the court would declare whether defendant had published falsely and defamatorily, thereby violating plaintiff's interest in protecting reputation from false and defamatory statements. Are there, however, sufficient legal consequences of such a finding?  

A declaration is of legal consequence only if the plaintiff's asserted interest is legally protected. "A legal right is a personal interest or claim which society so far recognized as to be willing to enforce it." A matter is said to be justiciable "only where a judgment will declare a fixed legal right, and serve a useful purpose. . . . If it appears that plaintiff can have no relief against the defendant, the defendant should not be forced into litigation which can have no possible final result in favor of the plaintiff."  

Assuming that the proposed action would declare whether an interest of the plaintiff had been injured, it still is necessary to consider
the legal consequences of that determination. Is the interest one that society is willing or able to enforce or protect by law? If the proposed action would offer no legal enforcement or protection of the interest asserted, then no justiciable legal issue would be before the court. The proposed action would serve only the purpose of rendering a finding of fact as to falsity. Without legal consequence resulting from that finding, there could be no judgment, and the entire matter arguably would fall beyond the scope of the traditional judicial function of the courts.

It is not necessary that a judgment impose coercive remedies upon the parties. Indeed, it is well-accepted today that the function of a judgment is to declare the legal relationship of the parties, and that function may be fulfilled by declaratory judgment. The term "legal relationship," however, by definition, contemplates that the law ultimately can and will enforce the relationship found to exist. Thus, a declaratory verdict protects the interests of the parties by adjudicating the legal relationship of the parties in order that they may conform their future conduct accordingly. A failure by either party to conform voluntarily with the expectations associated with the relationship declared gives rise to a further action to enforce the legal obligations of the relationship already declared. In the event of such a later dispute, the declaratory verdict acts as res judicata as to the issues decided.

In contrast to the classic declaratory judgment, the proposed statutory action would not adjudicate the rights or relationships of the parties for the purpose of guiding their future conduct. It simply would declare the court's interpretation of whether a statement already published was defamatory and false. Nor could the court in this or any later action protect any asserted reputational interests of the parties by injunction or by an award of any direct remedy upon which execution could be had. Indeed, there would be no legally

52. See, e.g., Aetna Life Ins., 300 U.S. at 241; E. Borchard, supra note 48, at 12-13.
54. See Lehigh Coal & Navigation Co. v. Central R.R. of New Jersey, 33 F. Supp. 362, 365 (E.D. Pa. 1940). While another use of the declaratory judgment may be to declare legal rights of parties arising out of past conduct, such a judgment is rendered only when there is an allegation of a legal wrong. If the declaration of legal rights does not encourage the parties to resolve their dispute voluntarily, more coercive remedies are available.
55. E. Borchard, supra note 48, at 13-14.
56. See supra note 6 and accompanying text.
57. The action fails even to declare authoritatively that certain conduct is beyond the acceptable rules of civility. In the absence of any potential for coercive enforcement, any declaration of appropriate conduct would be utterly non-authoritative. See infra note 69 and accompanying text.
enforceable consequence, at all, of the court's finding. Any consequence would be imposed strictly outside the operation of the legal system. Thus, the value to a plaintiff of a determination of falsity would lie not in any sufficient legal consequence of the finding, but only in the social consequences of that finding.

Simply stated, the proposals, if enacted, would engineer a new form of judgment, designed to declare the existence, not of social misconduct enforceable by legal remedy, but of social misconduct lying beyond any remedy of the law. Upon a declaration by the court that a defendant had published falsely, it would be left to society to enforce plaintiff's reputational interests outside of the legal system by independently adjusting its opinion as to each party's character.

COMPARING THE TRADITIONAL ROLE OF LAW WITH VINDICATION UNDER THE DECLARATORY ACTION

Historically, the defamation action has played a significant role in the vindication process. Although the immediate forum of the courtroom typically contains a relatively small audience, the function and position of the court in society attract the attention of others who publish to a larger audience. Therefore, at least indirectly, courts offer plaintiffs the practical likelihood of access to a larger audience.

More significantly, the law assists the plaintiff in establishing credibility in at least three ways. First, by virtue of the respect generally accorded the court, the participants within a courtroom gain a certain degree of credibility. Second, the subpoena power of the court enables a plaintiff to gather and present evidence supporting plaintiff's credibility. Third, a judgment for the plaintiff, when ob-

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58. The object of a false and defamatory publication typically has pursued an action at common law seeking an award of damages. Even in the absence of proof of substantial actual damages, the plaintiff is able to seek nominal damages, thereby obtaining the vindicatory benefits of a lawsuit. A nominal award establishes the existence of a legally protected interest, injury to that interest, and the authority of the court to enforce that interest. The nominal amount of the award simply reflects that little actual harm was proven. See I J.G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES 31 (4th ed. 1916). If there is no actual damage proven, "the legal implication of damage remains. This requires some practical expression as the compensation for a technical injury; therefore nominal damages are given." Id. The proposed statutory action may establish an interest and injury to the interest, but it places the court in a position of being unable to protect or enforce that interest regardless of the actual harm. For further discussion regarding nominal damages, see infra notes 74-75 and accompanying text.

59. See Franklin, 74 CALIF. L. REV. at 828.

60. This view is suggested by evidence that the mere filing of an action is helpful to plaintiff. See Franklin, 74 CALIF. L. REV. at 828; R. BEZANSON, supra note 1, at 162.
tained, may be perceived as an independent affirmation of plaintiff’s credibility.

Since a judgment for the plaintiff in a defamation action now requires a finding by the court of falsity, the entry of such a judgment expresses a conclusion that sufficient evidence of falsity was presented to impose liability. The court thereby participates in the dissemination of corrective information to the public and lends its credibility as a third-party speaker to the side of the plaintiff. Empirical data, however, discounts the traditional importance to the vindication process of the court’s role as a speaker in the public debate.

A significant proportion of injured parties who pursue legal actions with the hope of vindicating reputation have derived vindication as much from the legal process as from the verdict or judgment. Indeed, plaintiffs often feel vindicated even when a decision ultimately is rendered for the defendant. This sense of vindication even with an adverse verdict suggests that the public attaches relatively little importance to the verdict as a voice to be considered in the vindication process. One explanation is that the public understands that the function of the verdict in the damages action is to establish legal relationships and that the existence of legal rights may depend upon factors other than an absolute finding of falsity.

The principal role of the court in the vindication process, then, has been to provide the defamation plaintiff with sufficient access to an audience and credibility to disseminate effectively the corrective

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62. See generally, R. Bezanson, supra note 1.
63. In the Iowa Libel Research Project study, nearly two-thirds of losing plaintiffs who were surveyed believed that the lawsuit served “some positive and constructive purpose unrelated to its judicial resolution.” R. Bezanson, supra note 1, at 154 (emphasis in original). Forty-one percent of those losing plaintiffs felt their reputation had been defended. Another 40% believed the lawsuit had stopped further publication. Since these plaintiffs lost the litigation, the benefit must have come from the process itself. Ten percent believed the litigation had punished the media effectively and nine percent had received support from family and friends as a result of their unsuccessful lawsuit. Id. at 154.
64. Even when falsity is in dispute, a defamation verdict in a damages action offers incomplete support for the credibility of the plaintiff. Because of the common-law presumption of falsity, when truth was placed in dispute, plaintiff, until recently, prevailed on the issue unless defendant could prove the publication to have been at least substantially true. While the public certainly may have inferred a confirmation of plaintiff’s credibility from a verdict for the plaintiff, the court’s decision was only that the defendant had not proven the accuracy of its publication. The verdict was not held out as a definitive statement by the court that the publication was in fact false. Even with the constitutional requirement today that falsity be proven, a verdict for the plaintiff in a damages action concludes only that there is sufficient evidence of falsity to justify a judgment. It is not an absolute declaration of falsity since jurors may return a favorable verdict for the plaintiff even though some reasonable doubt as to falsity still exists.
information. The role of the court as a third-party speaker, while not to be totally disregarded, has been less important. In effect, the traditional legal process has allowed injured parties to vindicate their own reputation by placing plaintiffs in a position to be heard and to have their information received with sufficient effectiveness to alter public opinion as to their character.65

It is this opportunity to vindicate one’s own reputation effectively that may now be denied by the application of constitutional limitations on the traditional damages action. The perceived shortcoming of existing law is not that it fails to assist plaintiffs in the vindication process when an action is brought. Rather, the problem is that individuals who have been wronged often are unable to pursue an action and thereby to obtain the assistance of the law. Reform, therefore, should focus first upon increasing the availability of an effective damages action within constitutional constraints before changing the role of law in the vindication process.

The proposed statutes, however, do not merely reform existing defamation torts to provide a constitutionally acceptable damages remedy to more parties. Instead, in the attempt to fashion an action that would withstand constitutional scrutiny, proponents of the various suggested reforms have eliminated any threat of a legally enforceable sanction against the defendant.66 In so doing, the proponents would significantly change the role of law in vindicating reputation, arguably to the detriment of the vindication process in two important respects.

First, besides raising the questions of justiciability and judicial function already considered,67 the elimination of damages reflects too little regard for the important role that an enforceable sanction such as damages plays in the vindication process. When accompanied by an award of damages, a judgment for the plaintiff in a libel action serves a ritual function of affirming society’s standard of acceptable conduct and confirming that a defendant’s conduct was inappropriate.68 The judgment thereby assists in the vindication of certain dignity aspects of plaintiff’s reputation. Without any such sanction, the

65. See T. Starkie, A Treatise on the Law of Slander, Libel, Scandalum Magnatum, and False Rumours 11 (1st Am. ed. 1826). “The jurisdiction of courts of law, in actions for slander, has for its immediate object the enforcing a compensation in damages for a loss sustained; but this necessarily includes a collateral means of relief, in many instances more efficacious than the principal remedy claimed, since an opportunity is afforded to the party of openly rebutting the calumny, by challenging investigation in the face of the country,— a matter frequently of more serious importance than the recovery of damages.” Id. See also supra note 63.
66. See supra note 6 and accompanying text.
67. See supra notes 47-58 and accompanying text.
68. See Post, 74 Calif. L. Rev. at 712-13.
outcome of the litigation would be, at best, ambiguous as to whether the conduct was inappropriate. A mere determination of falsity without sanction against the defendant offers no judgment by society that the conduct of the defendant was wrong. Thus, the law would be stripped of its value as a means to vindicate the dignity aspects of an individual's reputation.

Second, the declaratory approach would increase the risk that a verdict might mislead the public as to the truth and thereby actually retard the vindication process. That risk stems from the combination of two factors — first, a reliance upon the court's conclusions on the issue of falsity as the principal source of vindicatory relief and, second, the unique credibility of the court as an arbiter of disputed fact.

Whenever a judgment is entered in litigation involving contested facts, the court, as an institution, becomes a speaker in the exchange of information, expressing some conclusion as to the credibility of competing allegations of fact. Legal verdicts or findings of fact, however, serve the principal purpose of declaring whether sufficient proof of a fact has been made to establish or alter the legal rights or relationships of the parties. The verdict is a necessary incident to the performance of the judicial function, which is to render judgment on the legal rights of the parties. Thus, a civil verdict properly may be rendered against a party even when the allegations by that party are supported by a preponderance of the evidence, if the legal relief sought demands a greater level of proof, such as clear and convincing evidence. It is not the function of the civil verdict to declare with absolute certainty the truth or falsity of particular disputed facts.

As noted earlier, the principal vindicatory function of the damages action has been to provide the plaintiff with access to and credibility within a larger marketplace. With that assistance, plaintiffs have been able to disseminate corrective information and positively alter their reputations, even when an adverse verdict was rendered in the litigation. The success of plaintiffs in vindicating their reputations has not depended upon the verdict of the court.

With the elimination of any legally enforceable remedy, however, the declaratory action would offer a verdict on the issue of falsity not for the purpose of establishing any legal rights or relationships, but for the sole purpose of persuading the public as to whether a particular statement is false. Since the thrust of any vindication effort is to discredit the published information, the creation of

69. This is so unless it is argued that an award of attorney's fees to the plaintiff as a prevailing party would serve this purpose.
70. See supra notes 59-65 and accompanying text.
71. See supra note 63 and accompanying text.
a verdict with a singular emphasis upon the issue of falsity would almost certainly cause that determination to become the key element of the vindication process. While the process would still provide a plaintiff with access to an audience and some credibility, the attention of the public would be fixed upon the court's ultimate conclusion as to the falsity of the alleged defamation. A plaintiff would resort to the legal system for the principal purpose of eliciting a statement by the court refuting the falsehood. Vindication, for the first time, would depend upon the plaintiff obtaining a favorable verdict.

Invoking the statements of third persons in the public debate normally is a legitimate method for a party to establish its own credibility. Reliance upon the courts to provide that third-party voice, however, presents special risks to the vindication process. Because of its singular function to provide a statement by the court on the issue of falsity, the declaratory action would emphasize the role of the court as a speaker within the marketplace through its verdict. A verdict, however, offers too rigid a mechanism to inform the public adequately as to the relative credibility of the parties. A verdict speaks only in absolute terms, finding either that a standard of proof was satisfied or that it was not. This rigidity works well when the purpose of the verdict is to declare whether particular legal rights should be recognized. The rigidity, however, does not permit a trier of fact to set forth its conclusions as to the relative credibility of the parties in a clear and meaningful way. It is simply too limited a form of expression to be properly informative.

The risk is that the public will draw improper inferences of credibility from a verdict. For example, if plaintiff P seeks a declaration that a publication by defendant D was false and defamatory, a verdict adverse to P may well be perceived by the public as an affirmation of D's credibility. In reality, the verdict may not be a finding of truth at all. It may simply reflect that P was unable to prove the falsity by clear and convincing evidence. Nevertheless, the practical impact of the public's perception of the verdict may be to establish so strongly the belief that D's statement was true, as to end further debate and make substantially more difficult, if not impossible, P's task of restoring reputation.

While such a misperception of a meaning of a verdict may occur even in a damages action, the difference between the damages action and the declaratory action is the relative significance of the verdict as

72. See supra notes 43-46 and accompanying text.
73. The proposals would require clear and convincing evidence of falsity. Thus, a verdict for the defendant would indicate that plaintiff had failed to prove falsity by clear and convincing evidence. It could not, however, further indicate whether the jury had found a preponderance of the evidence favoring plaintiff's position.
a persuasive device in the declaratory action. Courts are uniquely positioned to act as impartial arbiters of disputed facts. Because of the special respect of the public for that position, it is likely that when the attention of the public is focused upon the conclusions of the court on a disputed issue of fact as in the proposed declaratory action, the court's statements will be accorded significantly greater credibility than most, if not all, other speakers in the public debate. It is that very influence of the courts upon the marketplace that would make a declaration on the issue of falsity valuable to the prevailing party.

The effect of focusing the attention of the market upon a statement by a speaker with the peculiar status and respect of the court, however, may be to establish such a powerful voice in the market that it overwhelms and drowns out the voices of competing speakers. If the court does err or, as is perhaps more likely, if the court's verdict is misunderstood, the dominant position of the court as a speaker in the market may so distort the normal functioning of the market as to leave it without adequate corrective abilities.

Unlike the statements of other speakers corroborating the credibility of a party, the statement by a court, as interpreted by the public, would likely be accorded sufficient credibility so as to be decisive in influencing the public's opinion of a party's character. Such would be the court's influence, whether the public's understanding of the verdict was accurate or erroneous. By thrusting the court to the fore as a third-party speaker in order to vindicate reputation, the declaratory action stakes the vindication of the plaintiff's reputation upon the plaintiff being able to prove the falsity of the publication. If the plaintiff is unsuccessful, the marketplace, having focused upon the verdict as a statement on the issue of falsity, may well perceive a verdict for the defendant as a credible determination of defendant's truthfulness. The risk is that the market will then end its debate over the truth of the publication prematurely, hindering the efforts of a deserving plaintiff to disseminate corrective information to the public.

PROMOTING VINDICATION WITHIN THE JUDICIAL FUNCTION AND THE FIRST AMENDMENT

The weakness of the declaratory action approach is that the verdict serves no purpose other than to persuade the public on the issue of falsity. As such, it is likely to be perceived by the public as reflecting the absolute conclusion of the court on the subject. In contrast, a verdict in a damages action serves to establish legal liability and may be recognized as stating only the conclusion of the jury as to whether
sufficient proof was presented to alter a legal relationship. It is therefore less likely to be perceived as an absolute determination of whether a statement is false. The consequence is that a declaratory verdict is more likely to be misunderstood by the public and to mislead the marketplace.

A provision allowing an award of nominal damages to the successful plaintiff could remove at least one objectionable feature of the current proposals. The threat of even a nominal award would permit the court to act within its traditional judicial function of adjudicating the legal relationship of the parties. The important consideration is whether the existence of a nominal damages award would cause the public to perceive the action differently from a purely declaratory action. The sole purpose of the action would no longer be to influence the public debate. The action would determine whether a legal wrong had occurred and would punish that wrong at least nominally. Thus, the public may well perceive the verdict in the same light as any other damages verdict and not as an absolute determination of falsity. The risk of misleading the public would then be no greater than from a verdict under existing damages actions.

Whether the proposals ultimately offer nominal damages or only a declaration of falsity, however, a curious analytical paradox would remain. The reform would be designed to comply with existing first amendment doctrine while rejecting at least implicitly the basic justifications for much of that doctrine.

Since Gertz v. Robert Welch, Inc., the weight accorded to the interest of the state in protecting reputation has varied depending upon the familiar distinction between public and private figure plaintiffs. Justice Harlan argued in dissent in Rosenbloom v. Metromedia, Inc., that private figures are less able than public figures to secure "access to channels of communication sufficient to rebut falsehoods" concerning them. Drawing upon that distinction, Justice Powell in Gertz concluded that "[p]rivate individuals are therefore more vulnerable to injury, and the state interest in protecting them is corre-

74. A provision for nominal damages would, of course, raise the question of whether the threat of even nominal damages would unconstitutionally chill truthful speech. Arguably, the recognized chilling effect stems from the threat of substantial damage awards and that threat would be removed by a limit to nominal damages. But see Schiavone Constr. Co. v. Time, Inc., 646 F. Supp. 1511, 1519 (D.N.J. 1986), rev'd in part, aff'd in part, 847 F.2d 1069 (3d Cir. 1988) (ruling as a matter of constitutional law that nominal damages may never be recovered by a public figure).

75. See I J.G. SUTHERLAND, supra note 58, at 31.
77. 403 U.S. 29 (1971).
78. Id. at 70 (Harlan, J., dissenting).
spondingly greater." A second and, it was suggested, more important justification for the distinction between private and public figures was the assumption that public figures and officials voluntarily assume the "increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual."

The impetus for the reforms proposed, however, is the starkly different perception that under existing constitutional doctrine even public figures and officials are denied adequate and deserved opportunities to vindicate reputation. Implicit in that perception of injustice is a rejection of the basic justifications that have been given for recognizing relatively little state interest in protecting the reputation of public persons. Yet, the reforms proposed make no attempt to modify existing constitutional limitations on defamation actions by public persons. Instead, the proposals would eliminate damages in an effort to comply with existing first amendment doctrine.

If the source of perceived inadequacies in the existing system for

79. Gertz, 418 U.S. at 344.
80. Id. at 345.
81. It has not been resolved that the declaratory action would, in fact, adequately protect first amendment interests. As stated by Professor Franklin in his defense of statutory reform, the question is whether "even if damages are not involved, first amendment doctrine forbids entry of any judgment against media defendants without a showing of fault." Franklin, 74 CALIF. L. REV. at 820. See Smolla & Gaertner, 31 WM. & MARY L. REV. at 56-64. Professor Franklin suggests that litigation costs would decrease and be less of a deterrent with the declaratory action, since less extensive discovery would be necessary. See Franklin, 74 CALIF. L. REV. at 820 n.44. Professor Franklin dismisses the deterrent effect of defense costs by noting also that the defendant could always elect "to default and explain that behavior to the readership." Id. at 821. Default is hardly a satisfactory solution, however. If a verdict of falsity would capture the attention of the public and cause as significant an impact on public opinion as the proponents contemplate, it seems likely that the public will pay similar attention to a default, treating it as an admission of falsity by the publisher, thereby damaging the publisher's credibility. In effect, the maneuver of default would simply shift the publisher's cost from an out of pocket cost for legal defense to a reputational cost.

Any attempt to avoid negative public reaction by explaining the default, as suggested by Professor Franklin, might, unless artfully crafted, risk republishing the alleged libel, thereby creating a trap for the unwary publisher. See Orband v. Kalamazoo Telegraph Co., 170 Mich. 387, 393-94, 136 N.W. 380, 382-83 (1912) (holding that a purported apology was itself actionable). Moreover, even if it were assumed that the publisher could default and avoid loss of credibility by explaining the circumstances of the default, it must then be conceded that the plaintiff would have gained nothing by the action. The statute, therefore, would have served no effective purpose whatsoever. Indeed, by encouraging the publisher to raise the issue again, plaintiff would have only increased the damage suffered.

vindication of reputation is the weakness of the assumptions underlying existing constitutional doctrine, that problem should be addressed directly. That does not mean that constitutional protections must be compromised in any sense. Rather, it means that reform efforts should focus upon developing standards for liability under existing torts that would protect truthful speech adequately, without relying upon the strained distinctions now made between public and private plaintiffs.

One possible course of such reform may be to reconsider the principle of defamation law which now holds republishers of unprivileged information equally responsible for the truth of that information as the original source. The common-law requires a repeater of information to investigate and corroborate sources or risk liability for defamation. In considering the approach that reform efforts should follow, C. Thomas Dienes has raised an important and fundamental point that needs to be addressed. "I am increasingly coming to the conclusion... that the only proper question should be: was the statement, in fact, made by the source cited? Is it really the function of a reporter and lawyer to judge the credibility of a source and then to decide whether or not to publish?" But it may be constitutionally permissible to impose liability against persons who hold themselves out as sources of information upon a showing of lesser fault than would be required in actions against parties who act as a mere conduits of information. Reform might then focus upon distinguishing between defendants rather than plaintiffs. By protecting mere conduits from liability, at least in cases when they are not aware of a statement's falsity, the law would allow communication of information without chill, so long as the source was identified. The public would then be allowed to hear the state-

82. Dienes, 23 U. Mich. J.L. Ref. at 10 (Mr. Dienes is general counsel to U.S. News & World Rep.).

83. A thorough justification of such a reform is not attempted here. The idea is based upon the premise, however, that a threat of liability imposed upon a negligence standard is less likely to chill the original source of information, who should have first-hand knowledge of the truth, than a repeater who does not have that knowledge and might be, therefore, less certain of the truth and more susceptible to chill. It should not be overlooked that, as a publisher of a signed advertisement, the New York Times was acting essentially as a pure conduit of information in the matter that gave rise to New York Times Co. v. Sullivan. In considering a distinction between defendants for liability purposes, it would be necessary to consider whether the New York Times would have been treated differently had the newspaper been the original source of the allegedly defamatory statements.

84. A chill upon the publication of truth is most likely when a potential speaker cannot be certain of its legal position. Thus, uncertainty over whether a person is a public figure or official may now cause a publisher to approach the matter conservatively and assume the person is a private figure. Faced then with a negligence fault standard, the publisher may delay or withhold publication. The distinction between
ment and make its own assessment of the merits.\textsuperscript{85} At the same time, potential plaintiffs would have an opportunity to vindicate reputation, without regard to their public or private status, by an action against the original source who might remain liable upon some lower standard of fault, such as negligence.

CONCLUSION

Vindication of reputation is a valid individual and societal objective. One undesirable effect of applying the first amendment to limit the traditional defamation torts has been the perceived limitation upon the law as a practical mechanism to assist in the vindication process. The declaratory actions discussed in this Article have been proposed in an attempt to accommodate better both the reputational interests of defamation plaintiffs who seek vindication and the free speech interests protected by the first amendment. By eliminating any threat of damages or other legally enforceable remedy, however, the proposals have raised new questions regarding the proper judicial function of the courts. The proposals would position the courts in an unfamiliar role outside the traditional judicial function of adjudicating legal rights and relationships, with potentially detrimental consequences to the vindication process.

Without authority to award damages, the court would serve as little more than a soapbox. There would be no authoritative reaffirmation that a defendant's conduct was unacceptable, and the judgment would thus have little or no value in vindicating a plaintiff's reputational dignity interest. More significantly, the court is ill-equipped to perform the function contemplated by the proposals. A verdict cannot adequately inform the public of the relative credibility of the parties. It may, instead, only mislead an audience whose attention has been directed to the verdict as providing a determination of falsity. On balance, the potential risk of misleading the audience with a statement by an entity deemed to be as credible as the court outweighs any potential benefits to the vindication process.
