Constitutionalizing Mandatory Retraction in Defamation Law

Elad Peled

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Constitutionalizing Mandatory Retraction in Defamation Law

by

ELAD PELED* 

I. Introduction .................................................................................................................. 34

II. Trying to Define the Existing Law ........................................................................... 37
   A. General .................................................................................................................... 37
   B. The Intended Applicability of Tornillo to Mandatory Retraction ...................... 40
   C. Right of Reply v. Mandatory Retraction ......................................................... 42

III. Why Mandatory Retraction Cannot Be Deemed Constitutional ......................... 44
   A. The Constitutional Right Not to Speak .............................................................. 44
   B. The Constitutional Protection of the Freedom of the Press .............................. 46
      1. The Constitutionalization of Defamation Law ............................................. 46
      2. Protection of the Editorial Autonomy ......................................................... 47

IV. Arguments Favoring the Legitimization of Mandatory Retraction ....................... 49
   A. Enhancing Public Figures’ Right of Reputation ............................................... 49
   B. Increasing the Quality of Self-Governance ..................................................... 54

V. Constitutionalizing Mandatory Retraction .............................................................. 57
   A. The Proposal ........................................................................................................ 58
      1. Substantive-Law Duty or Judicial Remedy? .................................................. 59
      2. Applicability to Different Kinds of Media ..................................................... 61
      3. Further Technicalities ...................................................................................... 63
   B. Constitutional Analysis: General ...................................................................... 64
      1. Compelling Interest ......................................................................................... 64
      2. The Least Restrictive Measure ....................................................................... 65
   C. Mandatory Retraction and the Rule against Compelled Speech ...................... 68
      1. Compelled Statement of Opinion and Compelled Statement of Fact ............. 68

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I. Introduction

"Sorry seems to be the hardest word," said Elton John. And if it is hard enough to admit one's mistakes in front of a single person, as Sir Elton tried to do but was unable to, it must be immeasurably harder to do so in front of dozens of millions of people. Hence, it is no wonder that the press is often reluctant to publicize the fact that a story it had previously published on a person has turned out to be false. This understandable human behavior of the flesh-and-blood people who form the abstract entity called "the press" gives no comfort, however, to a defamed person whose reputation is unjustly destroyed. Should a publisher, therefore, be obliged to state publicly that a report he had made is false? May he be forced to?

A retraction is a withdrawal of the defamatory charge, or at least part of it, by the speaker (as opposed to only stating that the victim denies it). Retraction, it has been argued, is a highly efficient way to settle disputes between the media and the subjects of false defamatory reports, which is preferable to the remedy most commonly used in tort law, namely, a damages award. This is so mainly because such a solution avoids the oft debated theoretical problem of the incommensurability of noneconomic losses, such as reputational harm, to money. On the more practical side, the retraction's advantage over damages may be attributed to the fact that defamation litigation is distinguishable from other kinds of tort

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actions, mainly personal injury, in two aspects. First, though bodily harm such as a disease, a cut off organ or a handicap cannot be truly measured in monetary terms, the law has developed methods to translate it into several defined damage categories, some of which are fairly quantifiable, such as medical expenses, and impairment of earning capacity. In contrast, it is hard to think of parallel efficient techniques of measuring reputational harm, because it is usually confined to the realm of people's minds and often has no concrete identifiable consequences in the objective reality. Second, this problematic “trade-off” of a concrete damage for a sum of money is less inevitable in libel law. Precisely the fact that the damage is not physical is what makes it more reversible. A retraction, if it reaches a big enough audience, is arguably the best device for restoring the victim's reputation; it is certainly more effective in this respect than money compensation. Therefore, it has a chance of getting closer than any other remedy in nearly any other tort action to accomplishing the utopian goal of “restitutio in integrum” (complete restitution).

The concept of retraction is not meaningless in the American defamation law. At common law, voluntary retraction could be taken into account by the jury as a consideration for reducing the damages. It has also been recognized as evidence of an absence of malice. Additionally, nowadays defamation statues in more than half of the states prescribe that a retraction properly performed by the publisher bars the victim from suing or from recovering certain types of damages (e.g., general or punitive). Yet, the traditional approach of


4. An exception might be when a person loses her job as a result of a defamatory publication.


6. Vindication of the Reputation of a Public Official, 80 HARV. L. REV. 1730, 1739 (1967) [hereinafter Vindication of Reputation]; THE ANNENBERG WASHINGTON PROGRAM PROPOSAL FOR THE REFORM OF LIBEL LAW, Preamble, and analysis of Section 3 (1988) (the text of the proposal may be found in 2 SMOLLA, supra note 1, at pp. 9-70 - 9-91) [hereinafter THE ANNENBERG PROPOSAL].

7. 2 SMOLLA, supra note 1, at 9-49.


the Anglo-American courts, recognizing damage awards as the principal remedy for plaintiffs, has not changed. Despite the fact that the "carrot and stick" provided by the said retraction statutes may influence the publishers' discretion and provide them with substantial incentives to retract, the choice is still theirs to make. The aim of these statutes is, essentially, to protect their interests by allowing them to evade the risk of monetary liability.

The analysis of a rule that obliges publishers to retract false statements under certain circumstances is inherently different. The crucial question raised by the issue of mandatory retraction, which is absent (or at least almost absent) from the discussion of voluntary retraction, is whether such a norm would coincide with the concepts of the freedom of speech and the freedom of the press that are firmly protected by the First Amendment of the United States Constitution.

One could say that mandatory retraction has been almost entirely off the agenda of the American law. Only rarely has the desirability of a mandatory retraction rule been recognized or even considered. Because those courts that have dealt with that issue have concluded that there is no such norm in the existing law, none of them has examined in ratio decidendi its potential constitutionality. The references to this topic in the legal literature have also been quite scarce. It seems that at least following the 1974 Supreme Court decision in *Miami Herald v. Tornillo*,¹⁰ which handled the related issue of the right of reply, there has been a common belief, an axiom perhaps, that should mandatory retraction ever be put on the table, it would surely be invalidated. While there are some good reasons for drawing this conclusion, as will be explained below, this article wishes to question the correctness of the mentioned assumption and to argue that under certain circumstances, and when it takes a certain form, mandatory retraction could be compatible with the First Amendment.

The article will refer only to a case in which the defamed person is a public figure and the publisher belongs to the media, a situation in which the balance between the right of reputation and the freedom of expression is most saliently in favor of the latter. In light of this speech-protective approach that significantly harms reputation, which goes back to the *New York Times v. Sullivan* decision,¹¹ enhancing the

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protection of reputation is mostly important in that realm.\textsuperscript{12} It is the public plaintiff's lack of a real chance of recovering damages that calls upon considering the adoption of a mandatory retraction rule. As private plaintiffs not subject to \textit{Sullivan} are generally better situated, this argument loses its relevance in their case. Furthermore, the societal interest of ensuring the accuracy of the information available in the public domain is at its peak when public figures are concerned, while it is less crucial with regard to private people. Hence, the case of a private plaintiff involves different considerations, which exceed the scope of this research.

The first section of this article shall examine whether mandatory retraction is recognized as unconstitutional under the positive law. As the law does not provide a decisive answer to this question, the second and third sections will proceed to analyze the various considerations pertinent to the potential constitutionality of such a rule. The fourth section shall then try to portray, in light of the preceding discussion, the guidelines for shaping a mandatory retraction settlement that might coincide with the existing First Amendment doctrine. Given the weight of the arguments in favor of mandatory retraction, this article will assert that drafting such a rule is not only plausible but is also desirable. Thus, the article's operative proposal will be empowering the courts to grant a new remedy in libel actions, namely, a declaratory relief stating that the falsity of the defaming publication has been established by clear and convincing proof, accompanied by an injunction ordering the defendant to report on that decision in a prominent manner. Such a remedy would be granted irrespectively of the defendant's state of mind prior to the publication.

\section*{II. Trying to Define the Existing Law}

\textbf{A. General}

The question of the constitutionality of mandatory retraction has seldom been directly addressed by the courts. The reason is simply that there has probably never been such a rule in the American law. On several occasions, courts refused to recognize the existence of an

\footnote{12. While the suitability of mandatory retraction to various specific kinds of media will be discussed separately, this article does not wish to articulate an exhaustive definition of the term "media." Rather, it asserts that the application of mandatory retraction should be considered in respect of any means of communications that is, or that will be, subjected by the courts to the \textit{Sullivan} ruling.}
independent cause of action for failure to retract in state laws. In two of these decisions, the courts noted that retraction is not mandatory in any American jurisdiction; this contention finds support also in the legal literature. Hence, the discussion of the constitutionality of mandatory retraction is currently entirely theoretical.

The closest analogy to our context can be drawn from the discussion regarding a "right of reply" to a defamatory publication. The two issues arguably raise a similar constitutional problem, namely, the intrusion into the editorial autonomy of the press. Under both a right of reply and mandatory retraction rules, a newspaper, for example, would be compelled to include in one of its issues a publication of certain substance; in the former case it would be a response written by the defamed person, whereas in the latter it would be a correcting report on behalf of the newspaper itself.

The constitutionality of a right of reply statute has been the subject of the cornerstone Tornillo ruling. In that case, the Supreme Court examined a Florida statute which provided that if a candidate for nomination or election is assailed by a newspaper, the candidate has the right to demand that the newspaper print, free of cost, any reply she may make to the charges. The reply must appear in as conspicuous a place as the charges which prompted the reply. Failure to comply with the statute constituted a misdemeanor. The Florida Supreme Court's holding that the statute did not violate constitutional guarantees was reversed by the United States Supreme Court. The Court held that the statute constituted a grave interference with the newspapers' editorial autonomy protected by the First Amendment.

Arguably, a rather easy way may be found to circumvent Tornillo and legitimize mandatory retraction and even a right a reply in many contexts, by asserting that the ruling is only applicable to the print media. Support for this view may be implied primarily by the Supreme Court decision in Red Lion Broadcasting Co. v. FCC. At
stake there was the “fairness doctrine” applied to the broadcast media by the Federal Communications Commission by virtue of the Communications Act, which empowers it to allocate communications frequencies, license broadcasters and monitor their activities. The fairness doctrine provides, *inter alia*, that a person or a group whose honesty or character is attacked during a broadcast about a controversial issue of public importance is allowed to respond over the broadcasting station (“the personal attack rule”). Upholding the FCC regulations, the Court reasoned that they were not inconsistent with the First Amendment goal of preserving “an uninhibited marketplace of ideas in which truth will ultimately prevail.”

Interestingly enough, the *Tornillo* decision, which came only five years later, did not even cite *Red Lion*. That omission, which no one contends to be accidental, opened the door to extensive discussion as to the relationship between the two decisions. A common opinion is that the *Tornillo* ruling, as aforementioned, was limited to print media. Its lack of reference to *Red Lion* was attributed to “the Court’s continuing recognition of the distinction between the two media, which is primarily manifested in the unique responsibilities of broadcasters as public trustees.” The accepted need for a government role in the allocation of broadcast frequencies, it is asserted, has no analogue in the newspaper industry. On the other hand, it is hard to find in *Tornillo* any support for the contention that the Court wished to limit its ruling to the print media. Thus, Professor Benno Schmidt argued that despite the inherent differences between the print and the broadcast media that must influence the implementation of the norms, *Tornillo’s* underlying principles have force in the law of broadcasting as well.

This article will assume that *Red Lion* is not good law anymore, and will not rely on it in an attempt to legitimize mandatory retraction with regard to the broadcast media. The fairness doctrine, as it is commonly thought, is nowadays under a “constitutional

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This situation is attributable, apart from the *Tornillo* decision itself, to the penetrating public and academic criticism that the doctrine has been subject to, focusing to a great extent on the fact that it provides an administrative body appointed by politicians with wide discretionary powers to regulate speech. As a consequence of the critique, the FCC has essentially abandoned the doctrine. Furthermore, in 2000 a D.C. Circuit Court ordered the FCC to repeal the personal attack rule. Hence, since the status of *Red Lion* is unclear, to say the least, the starting point to the discussion should be the least favorable to this article's thesis, namely, that *Tornillo* applies to all media.

However, the contention that *Tornillo* controls the issue of mandatory retraction at all, with regard to any kind of media, is questionable. A deep inquiry into the *Tornillo* decision, the particular facts of that case, and its surrounding circumstances, as well as an assessment of the dissimilarities between a right of reply and mandatory retraction, may lead to the conclusion that *Tornillo* does not preclude the possibility of enacting mandatory retraction statutes.

### B. The Intended Applicability of Tornillo to Mandatory Retraction

An attempt to determine whether *Tornillo* applies to mandatory retraction ought to begin, naturally, by examining the decision itself. Though the majority’s opinion does not refer expressly to the said question, an important insight is to be found in the concurring opinion. Justice Brennan, joined by Justice Rehnquist, concurred with Justice Burger, who delivered the opinion of the Court, only insofar as the opinion applied to right of reply statutes. The decision, as they understood it, "implies no view upon the constitutionality of 'retraction' statutes affording plaintiffs able to prove defamatory falsehoods a statutory action to require publication of a retraction."

There is no indication that the majority accepted the interpretation of their own opinion proposed by Justices Brennan and Rehnquist. A plain reading of the majority opinion seems to suggest that it intended to create an absolute First Amendment rule prohibiting compelled publications of any kind. Nevertheless, the fact that the majority refrained from addressing the issue of retraction

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could imply that they wished to leave it unresolved. The difficulty of fully understanding the Court's position stems also from the fact that the decision provides theoretical analysis at a very abstract and general level and is rather concise, which has subjected it to academic criticism. In fact, even some of its defenders do not disagree that the decision is uniquely laconic, although they claim that its lack of a thorough discussion demonstrates the obviousness of the case's outcome in the Court's view.

The vagueness of *Tornillo* in respect of its intended applicability opened the door to various speculations. The attorney and scholar Floyd Abrams, for example, believed that the Court's strong emphasis on the risks of judicial dictation of what may be published makes it unlikely that it did not intend for the decision to apply to mandatory retraction. On the other hand, opposing views have been voiced. The constitutionality of mandatory retraction was discussed in dictum by the District Court for the Eastern District of Pennsylvania in *Coughlin v. Westinghouse Broadcasting and Cable*. In his decision, Judge Pollak attached weight to Justice Brennan's remark in *Tornillo*: "This careful reservation by the author of *New York Times v. Sullivan*, leads me to conclude that the constitutionality of retraction statutes is an entirely open issue, not prejudiced by the determination in *Miami* at all. My view of the matter is that a carefully crafted retraction statute could well be constitutional." Support for this stand is also found in the legal literature. It was contended that an interpretation of *Tornillo* which makes compulsory access only presumptively unconstitutional could permit retraction statutes to be upheld if the important state interest in promoting the vindication of personal reputation were deemed sufficiently compelling. A similar view was expressed by Schmidt. The explanation provided by him of *Tornillo*'s seemingly absolutist language is that the Court intended to establish—in this first case involving access to a newspaper—a general principle that the First Amendment contains a guarantee for publisher autonomy that is infringed upon by access obligations; the task of defining the scope of the protection and determining whether

35. Id. at 489.
it could be surmounted by particular social objectives was left for later cases.\(^{37}\) Thus, he asserted, specific access guarantees, designed to implement particular and weighty social objectives with the least possible jeopardy to editorial autonomy, may be upheld.\(^{38}\)

Schmidt supplements his positivistic discussion of *Tornillo* with a quasi-realistic analysis, offering a unique perspective of the decision and the occurrences behind its scenes that might explain the supposedly broad scope of its holding. He first notes that the Florida courts had completely ignored the facts of the case and had considered only the constitutionality of the statute in the most abstract and sweeping terms. Consequently, the type of analysis made by the Supreme Court was similar. The lack of appraisal of the concrete facts prevented the possibility of producing a judgment based on narrower grounds.\(^{39}\) Schmidt adds that due to the fact that the plaintiff was represented by the leading academic proponent of imposing access obligations on the media—Professor Jerome Barron—the case “took on the dimensions of a wholesale test of Barron’s access theories.”\(^{40}\) Another factor which played a role, according to Schmidt, was the severe time pressure under which the Court was placed. The Miami Herald appeal was filed very close to the end of the Court’s term, and in addition to the usual end-of-season rush, the Court was pressured by the upcoming appeal of President Nixon in the Watergate tapes case. It is also for this reason, it is alleged, that the Court chose to address the problem of access in a general and truncated fashion.\(^{41}\) Although these anecdotes are far from being decisive, and arguably reflect an uncommon method of legal analysis, they may serve as a modest support for the view that *Tornillo* is to be construed more narrowly than its literal reading would suggest.

**C. Right of Reply v. Mandatory Retraction**

While the foregoing observations, which purport to trace the general conceptions underlying *Tornillo*, are helpful for our purposes, it would be of greater importance to conduct a comparison of a right of reply and mandatory retraction from a constitutional perspective, in order to determine whether the *Tornillo* decision controls the latter issue. That comparison should not be only at the abstract level. The

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37. SCHMIDT, supra note 25, at 233.
38. Id. at 235.
39. Id. at 220.
40. Id.
41. Id. at 235.
Tornillo decision, as aforementioned, does not portray as clear, comprehensive and thoroughly reasoned access theory as perhaps it should have. Hence, in order to better understand the decision’s rationales and examine them in the context of mandatory retraction, the analysis should not refer only to a hypothetical right of reply norm, but ought to focus particularly on the Florida right of reply statute that was invalidated.

According to the Court of Appeals for the Third Circuit in Kramer v. Thompson, in dictum, “[a] “right of reply” differs from a mandatory retraction in that the former merely requires the defamer to provide space for a reply, whereas the latter requires the defamer to mouth or pen the words the plaintiff would have him say. As such, the unconstitutionality of compelled retraction would seem to follow *a fortiori* from the Court’s declaration that Florida’s ‘right of reply’ statute is unconstitutional.”43 Similarly, Professor Zechariah Chafee argued that an editor’s objection to including the victim’s side of the story, subject to restrictions of quantity and quality, is likely to be less serious than in the case of mandatory retraction.44

While mandatory retraction could indeed be regarded, from this point of view, as more injurious to publishers than the Florida right of reply, from other aspects the opposite is true.

First, and most importantly, according to the invalidated Florida statute, failure to provide a right of reply under the prescribed circumstances constituted a criminal offense. This highly radical feature of the statute must have played an important if not a decisive role in the Court’s holding. Should it be removed from a proposed settlement of mandatory retraction, as this article outlines below, our evaluation of such proposal should substantially differ.

Second, obliging a publisher to provide a “stage” for outsiders who are not employed by him could give rise to problems that do not occur in mandatory retraction. Thus, a right of reply may be abused by the subject of a report to present her version of the story in an extremely one-sided way and even to fiercely defame the publisher, and all this while using the latter’s resources. Moreover, a public figure given such a right would find it hard to resist the temptation to insert additional contents into her reply, including a presentation of

42. Kramer v. Thompson, 947 F.2d 666 (3rd Cir. 1991).
43. *Id.* at 681.
44. ZECHARIAH CHAFEE, JR., GOVERNMENT AND MASS COMMUNICATIONS 176 (1965).
her agenda and self-praising irrelevant to the issue of the initial report.

Third, the Florida cause of action was not contingent upon the communication of false defamatory content but only upon a personal attack. The victim’s right of reply, so it seems, was not confined to rebutting asserted facts but also enabled her to express her views in response to statements of pure opinion assailing her. As a large number of politicians are being criticized by the various media on any given day, the burden imposed on publishers by a Florida-style right of reply statute would be very heavy. In contrast, mandatory retraction, by definition, assumes the existence of defamatory falsehood and kicks in only where a factual correction is needed.

It should be noted, finally, that although the concern mentioned in Kramer about compelling a publisher to express statements he disagrees with is genuine, it may be resolved. This article will attempt to do so within the discussion of the guidelines for constitutionalizing mandatory retraction.

To sum up, it cannot be said that the invalidation of the Florida statute’s right of reply necessarily implies the unconstitutionality of mandatory retraction, in view of the inherent differences between the two norms and the particular facts of the Tornillo case. Since the law does not provide any authoritative answer to the question of the constitutionality of mandatory retraction, this article shall now go on to examine the various legal and policy considerations affecting it.

III. Why Mandatory Retraction Cannot Be Deemed Constitutional

It seems reasonable to assume that most American lawyers, judges and legal scholars would instinctively reject the notion of mandatory retraction based on two main grounds: the first is the constitutional right enjoyed by all people and legal entities to refrain from making any expression against their will, and the second is the particular First Amendment protection granted to the press against state intervention.

A. The Constitutional Right Not to Speak

Contemporary First Amendment doctrine treats content-based regulation of speech as presumptively invalid, subjecting it to the
“strict scrutiny” test, and thus placing a high burden on the government to justify it.47 Since any form of compelled expression on a particular subject constitutes a content-based regulation, the consistent approach of the Supreme Court has been that one has a constitutional right to decide what not to say and not to express.

Few examples of the cases handling this issue would suffice in order to get a good grasp of the Court’s attitude. In the famous case of West Virginia State Board of Education v. Barnette,48 the majority opinion of the Supreme Court held unconstitutional a regulation compelling a flag salute and pledge in public schools. In Wooley v. Maynard,49 the Court invalidated a statute prohibiting car owners to cover a motto expressing an ideology that was printed on state issued license plates. In Pacific Gas & Electric Co. v. Public Utilities Commission of California,50 it was decided that a company may not be forced by the state to insert in its monthly bills to its customers political manifestos of a group whose views were opposed to its own. In Riley v. National Federation of the Blind of North Carolina,51 the majority opinion of the Supreme Court invalidated an act that, inter alia, required professional fundraisers to disclose to potential donors the percentage of their gross receipts turned over to charities. In McIntyre v. Ohio Elections Commission,52 a statute proscribing distribution of campaign literature without disclosing the identity of its author was invalidated. Finally, in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,53 the Supreme Court reversed a Massachusetts state court decision that obliged the organizers of a parade to allow a group expressing a message that was not their own to participate in that parade.

The problem of mandatory retraction seems to fall squarely into the discussed category. Compelling a publisher to make a statement of specific content, according to which his previous report has turned out to be false, is arguably a clear infringement of his constitutional right not to speak.

50. 475 U.S. 1 (1986).
B. The Constitutional Protection of the Freedom of the Press

While the rule against compelled speech is enjoyed by everyone, the discussion of mandatory retraction is invariably influenced to an even greater extent by the specific protection granted by the First Amendment to the press and the jurisprudence that evolved around it.

1. The Constitutionalization of Defamation Law

There is little need to elaborate much on how high a status the concept of a free press enjoys in the American law. The Supreme Court has been extremely reluctant, especially in the last few decades, to accept state interferences with the work of the press. The significance attributed by the American law to maintaining the press free in order for it to play its role as the "watchdog of democracy" cannot be exaggerated. Of special importance to our context is the fact that libel law, which up until 1964 had been a sterile territory of private law, has since been subject to constitutional restraints. In the Sullivan decision the Court held that the interest in enhancing an "uninhibited, robust, and wide-open" debate on public issues, which the First Amendment primarily protects, must be considered within defamation law. Hence, the Court set a high threshold for imposing liability on a media defendant who had falsely defamed a public figure: proving the defendant's actual malice, meaning, his knowledge, or reckless disregard, of the falsity.

The Court in Sullivan placed much emphasis in its analysis on the "chilling effect", i.e., the danger that imposing civil liability on the press for every erroneous factual assertion would lead it to use self-censorship. "Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court." The Court further noted that as errors of fact are inevitable in free debate, they must be protected if

54. This is true for federal and state interventions alike, as it is well established that the First Amendment applies also to the states by virtue of the Fourteenth Amendment's due process clause. Whitney v. California, 274 U.S. 357, 373 (1927).
56. The principle was originally applied in Sullivan to public officials, but was later expanded to include also public figures. Curtis Publ'g Co. v. Butts, Ass'n Press v. Walker, 388 U.S. 130 (1967); Gertz v. Robert Welch Inc., 418 U.S. 323 (1974).
57. Sullivan, 376 U.S. at 279-80.
58. Id. at 279.
the freedom of expression is to have the “breathing space” it needs to survive.\textsuperscript{59}

2. \textit{Protection of the Editorial Autonomy}

While the strong protection granted to the press within the scope of libel law leads to a general assumption that any new obligation imposed on it would be looked upon with significant suspicion, a deeper inquiry into the essence of that protection would provide even greater support to the conclusion that mandatory retraction is constitutionally problematic.

A common approach to the Press Clause, best articulated by Justice Potter Stewart, contends that its purpose is to protect the institutional autonomy of the press, thus creating a fourth, non-official branch of government that would function as an additional check on the three official ones.\textsuperscript{60} One practical meaning of this idea is that the press must be allowed to be an active, independent, and non-neutral participant in the political sphere. With that notion in mind, the Court in \textit{Sullivan} stated that the debate generated by the press “may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”\textsuperscript{61} It was also held in another media defamation case that a “slashing and one-sided” expression falls within the First Amendment protection.\textsuperscript{62} Moreover, arguably, even the mere selection of contents to be published reflects specific decisions about their value or veracity, and thus constitutes in itself a protected communicative expression.\textsuperscript{63}

A necessary component of the First Amendment doctrine, under this view, is guaranteeing the editorial autonomy of the press. Thus, it is contended that when a publisher, be it a newspaper or a television station, exercises his editorial judgment, he is protected from any intervention, including in the form of a requirement to publish additional information for purposes of balance or fairness.\textsuperscript{64} In the words of Professor Lucas Powe, “[t]he synergy of text, purpose, history, and ongoing tradition have combined to validate an absolute right of press autonomy from government in decisions about what

\begin{itemize}
\item \textsuperscript{59} \textit{Id.} at 271-72.
\item \textsuperscript{60} Potter Stewart, \textit{Or of the Press}, 26 HASTINGS L.J. 631, 633-34 (1975).
\item \textsuperscript{61} \textit{Sullivan}, 376 U.S. at 270.
\item \textsuperscript{62} Hustler Magazine v. Falwell, 485 U.S. 46, 54 (1988).
\item \textsuperscript{64} \textit{Id.} at 822.
\end{itemize}
and what not to publish." The inability of the government to dictate publication, he argues, is one of the crucial factors that enable the press to perform its Fourth Estate role. Powe further asserts that the editorial autonomy is indivisible; if the editor does not have the final say in every aspect of it, it does not exist. Therefore, in his view, its protection must be absolute, as any minor erosion in the press autonomy would eliminate the traditional barrier against governmental intervention and create a slippery slope.

Powe refers in particular to the right of reply, claiming that it "does not make more information available to the newspaper's readers; rather, it makes different information available . . . Under the Florida statute, and under most likely proposals, a reply must be as prominent as the original story . . . Thus a right of reply will have the effect of suppressing other items—probably other current affairs topics—that an editor would otherwise have included."

Some of these mentioned notions are reflected prominently in the Supreme Court's decision in Tornillo. The Court noted that,

the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.

Furthermore, the penalty resulting from compelled publications, according to the Court in Tornillo, is also exacted in terms of the cost in printing and composing time and materials. Apart from the instant harm, the Court's analysis continued, compelled publications could also have a chilling effect on the media's future behavior. As the Court reasoned, "editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced."

65. Powe, supra note 32, at 283.
66. Id. at 285. See also Bezanson, supra note 63, at 760.
67. Powe, supra note 32, at 277, 283.
68. Id. at 276.
70. Id. at 256.
71. Id. at 257.
The considerations detailed above—the intervention in the editorial decisions of what to publish, and what not to publish, the interference with the ability of the press to have complete control over the messages it wishes to convey, the chilling effect, and the economic costs—which were raised in most cases in relation to the right of reply, are highly relevant to the issue of mandatory retraction as well. It may also be added, specifically in the context of mandatory retraction, that reporting a publisher's professional mistakes could injure his reputation. Hence, there might be a reluctance to publish controversial statements about public figures which could lead to demands for retraction. That alleged tendency could be furthered by the financial effect that arguably accompanies the embarrassment in such a case, as a retraction might render a publisher unreliable, and harm him in the market. In sum, although the contention made by one commentator that a right of reply and mandatory retraction are comparable to compelled press publications praising the government in totalitarian countries seems utterly exaggerated and misplaced, the mentioned factors indeed have the potential of derogating the freedom of the press should mandatory retraction be recognized.

IV. Arguments Favoring the Legitimization of Mandatory Retraction

Without prejudicing the immeasurable importance of the freedom of speech and the freedom of the press in a democratic society, as explained in the previous section, one must never forget that the defamation equation has another side. The following section will discuss two considerations that may lead to the conclusion that there is a strong interest in trying to legitimize mandatory retraction in certain cases.

A. Enhancing Public Figures' Right of Reputation

The Supreme Court has stated that “[t]he right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any

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72. Vindication of Reputation, supra note 6, at 1742.
74. Abrams, supra note 33, at 368.
decent system of ordered liberty.76 This rhetoric does not reflect faithfully the legal reality. Following Sullivan, American law provides little protection for reputation of public figures. Most victims of false defamation among this group cannot meet the demanding actual malice requirement, and thus remain without remedy.77 The Sullivan rule also makes litigation lengthy and expensive due to the complexity of establishing actual malice, thereby deterring falsely defamed individuals to an even greater extent from seeking damages. Hence, the balance between the right of reputation and the freedom of the press has been significantly disrupted in favor of the latter.78

The Supreme Court, in Sullivan and other decisions to follow, did not ignore the harm that would be caused to defamed persons by the newly created libel regime, but confronted it using two main rationalizations. These arguments, however, are not fully convincing.

First, the Court contended that an individual who decides to seek governmental office, as well as a person otherwise classified as a public figure, knowingly runs the risk of being exposed to closer public scrutiny than other people.79 Yet, that idea hardly compels the conclusion that the public figure must be left without remedy when that “scrutiny” takes the form of defamatory falsehood.80 Moreover, the category of public figure is by no means limited to those who seek

77. This fact is also attributable to subsequent decisions in which the Supreme Court expanded the protection granted to media defendants by the Sullivan rule. For instance, in Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984), the Court held that an appellate court should review a jury’s finding of actual malice. In addition, the common law rule as to the burden of proof was substituted by the principle that a public figure plaintiff must establish the falsity of the speech before recovering damages from a media defendant. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986). Finally, the Court ruled in Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989) that actual malice must be shown by “clear and convincing proof.” Id. at 659.
80. Anderson, supra note 78, at 527.
positions or wish to engage in activities that would inherently put them in the spotlight. For example, police officers are almost invariably classified as public officials, no matter how low their rank; public school teachers may be regarded as public figures, at least under certain circumstances, and quite absurdly, in one case even a physician was considered a public figure, by virtue of the very journalistic reports that handled the alleged medical malpractice in the institute where she was working.

Second, the Court argued that public figures have greater access than most private citizens to the media, which can be used by them as self-help in order to protect their reputations. As Schmidt noted, "[i]n the critical effort to accommodate competing values of freedom of the press and protection of individual reputation, the Supreme Court has tended to view defamation law and access (either by right or as a practical matter) as a complex equilibrium. The more access, the less need for defamation remedies."  

The assumption of access, however, has been harshly criticized. Justice Brennan wrote that "[d]enials, retractions, and corrections are not 'hot' news, and rarely receive the prominence of the original story." He therefore concluded that the Court's "unproved, and highly improbable" assumption as to the effectiveness of self-help "seems too insubstantial a reed on which to rest a constitutional distinction." Similar doubts were expressed by Professor Harry Kalven, according to whom "[f]or centuries it has been the experience of Anglo-American law that the truth never catches up with the lie, and it is because it does not that there has been a law of

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85. SCHMIDT, supra note 25, at 81. It should be mentioned that at least in one instance the Supreme Court expressed, in dicta, sympathy toward access rights in libel law, stating that "[i]f the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern". Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 47 (1971). Interestingly, the Tornillo Court cited that statement, but refrained from confronting it directly. Miami Herald v. Tornillo, 418 U.S. 241, 252 (1974).  
defamation." Thus, he resists the idea that the constitutional theory can be based on the assurance that counterarguments will take the sting out of the falsehoods. With regard to certain groups of people which were included by the ruling in the public official and public figure categories, at least in certain circumstances, such as junior police officers, public school teachers, and physicians, the assumption of access seems even more dubious.

It may be claimed that the reality has changed since Justice Brennan and Professor Kalven wrote the words quoted above, mainly in light of one specific development—the Internet. Arguably, public figures can nowadays use this forum to present their versions with regard to the allegations against them, thus eliminating the injustice caused by the law. However, the effect of communications conveyed to the public through the web seems weak in comparison with those made by the traditional media, for several reasons.

First, although the aggregate extent of the use of the Internet is in constant increase, it seems that the vast exposure to the mass media of almost the entire Western population still outweighs the popularity of news websites, forums, and blogs. Even in those cases in which information of public importance is first revealed on the Internet, only following its dissemination by the traditional mass media does it reach the wide public. If one assumes, as Justice Brennan did, that denials of defamatory charges do not raise much interest on the part of the press, there is little reason to believe that it would follow-up replies published on the Internet in a more extensive manner.

Second, the nature of the discussed medium is highly decentralized. The number of Internet sources from which information can be retrieved is immense, and the amount of data available in cyberspace is almost imperceivable. Therefore, the effect of any publication on the Internet, even on the most popular websites, cannot match that of a report on a nation-wide television network or in a leading newspaper. The same may arguably be said also with regard to smaller media. Despite the large number of television stations and newspapers throughout the United States that are local or niche-specific, it is still incomparable to the number of websites and forums.

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88. Id.
89. Actually, one might guess that at least some of the most popular news websites are operated by the major newspapers and television stations themselves.
Third, and most importantly, on many occasions, in order to retrieve from the Internet information about a certain topic, one has to conduct an active, target-oriented search. A surfer who is not interested in looking for a public figure's response to a report defaming her will probably not run across such a response. In contrast, reading a newspaper and watching a television newscast are much more passive activities, as the audience is exposed to contents selected, edited and communicated to it by others. Therefore, any publication in these media is likely to have greater exposure and effect. While a report included in a certain newscast will be seen by all of its viewers, only a portion of them—presumably not a large one—will get to read a response published by the subject of the story on the Internet.

A final assertion that supposedly underrates the reputational damage caused by false publications, is that such harm may be undone by market mechanisms. Meaning, the falsity of erroneous stories is likely to be exposed by media other than the original publisher, driven by their interest in competition. But that consideration should also be given limited weight.

First, it cannot be assumed that competing media will always be willing to bear the cost of conducting an extensive investigation in order to refute a defaming report. This is so especially since, as Justice Brennan contended, vindicating publications tend to raise less public attention. Therefore, even if journalists often feel urged to doubt the accuracy of their colleagues' stories, the fact that the publishers might have somewhat low financial incentives to conduct such investigations could cause many reports to remain unquestioned.

Second, arguably owners of mass media may sometimes choose not to attack certain publications of one another. That concern is increased by the fact that the control over communication is centralized in the hands of a relatively small group which owns and operates the mass media. The combination of the two aforementioned factors leads to the conclusion that the legal policy should not be based on the hope that false defaming publications will always, or even often, be rebutted.

Third, no one guarantees that the refuting report, if one is published, would bear similar prominence to that of the original story.

90. Rosenbloom, 403 U.S. at 46.
91. See Hulme, supra note 3, at 394 n.101; Vindication of Reputation, supra note 6, at 1732.
And even if it would, the chances of its reaching the same audience are doubtful. One can assume that many media consumers tend to be "loyal" to one certain publication, or to a limited number of publications, at least during a given period of time. Hence, in the described scenario, the extent of exposure to the correction, among the regular audience of the defaming publisher, is expected to be significantly lower in comparison to the original report. Indeed, the second report would necessarily reach other audiences, but the interest of the victim in vindicating her reputation naturally relates mainly or exclusively to the former group.

Accordingly, in the existing law, the fact that a defaming publication has been claimed to be false by another publisher—as opposed to being retracted by the same publisher—may never serve to bar a damages suit or to limit the recoverable damages a priori, and it seems that that factor is very seldom considered also as mitigating the damage. It follows that the underlying assumption of the law is that such publications do not cure the reputational harm.93

In sum, the situation caused by Sullivan is very problematic; the strong skepticism regarding the effectiveness of self-help is justified, and it is also doubtful whether the market forces can come to the rescue. If the Sullivan rule is to maintain its status, then the equilibrium of interests implied by the Supreme Court requires the enhancement of access rights to compensate for the denial of damages in most cases. The need to promote the ability of defamation victims to vindicate their reputation should therefore be treated more seriously.

B. Increasing the Quality of Self-Governance

The negative consequences of disseminating false information about public figures are not confined to individual harm. The approach favoring the restriction of civil liability for such publications to a minimum, which is derived from First Amendment considerations, seems to harm a crucial societal interest protected by the First Amendment itself.

93. Indeed, the compensation granted in that scenario could relate to the emotional distress suffered by the plaintiff following the publication, and not to the reputational harm; the former damage does not disappear retroactively, even if the reputational harm is ultimately cured. However, if contradicting publications in other media were considered effective in remedying the reputational harm, one could at least expect that they would often be raised as a mitigation argument. As aforementioned, apparently this is not the case.
The Supreme Court has stated that "speech concerning public affairs is more than self-expression; it is the essence of self-government."\(^{94}\) This notion, which tightly connects the freedom of speech and the concept of representative democracy, is deeply rooted in the American legal and political tradition. As Meiklejohn explained, "[t]he First Amendment . . . protects the freedom of those activities of thought and communication by which we 'govern' . . . . Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express."\(^{95}\) In Emerson's words, "[A]ll men [are] entitled to participate in the process of formulating the common decisions . . . . In order for the process to operate at its best, every relevant fact must be brought out, every opinion and every insight must be available for consideration."\(^{96}\) The information whose free flow is most crucial, according to this approach, concerns the actions of the government and its people.\(^{97}\)

This line of argument, which is normally raised to justify strict protection of the freedom of the press to communicate to the public facts and opinions on public affairs, may also shed light on the severe problems arising from the current libel regime. As Justice White noted, "First Amendment values are not at all served by circulating false statements of fact about public officials. On the contrary, erroneous information frustrates these values."\(^{98}\) Since, following Sullivan, in most cases the dissemination of defamatory disinformation about public figures is not recognized judicially as a wrong, "the public continue to be misinformed about public matters."\(^{99}\) This situation may bring about further substantial implications. On certain occasions, for example, false accusations could result in the public losing a valuable servant.\(^{100}\) In addition, by creating fear of false accusations for which no compensation would be granted, the Supreme Court's approach may deter good people from participation in public life.\(^{101}\) Most significantly, the persistence of

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96. Emerson, supra note 92, at 882.
98. Id.
99. Id. at 768.
100. Vindication of Reputation, supra note 6, at 1737.
101. Id.; Anderson, supra note 78, at 531.
false information in the public mind inevitably leads it to make worse decisions in the course of self-governing.

The common notion that the triumph of the truth is not to be achieved immediately but rather ultimately, and that a system of free expression rests upon subordination of current interests in favor of long-term benefits is relevant primarily to struggles of ideologies. However, it is hardly appealing when defamatory falsehoods about public officials are concerned. The realm of managing the everyday life of a state and a society is by nature highly dominated by short-term electoral considerations. Therefore, the willingness to let the falsehood prevail within its scope, if only temporarily, is highly detrimental. There is not much comfort both to the individual who had been falsely defamed and to the society that had lost an outstanding public official if the truth finally prevails after many years.

Hence, it may be argued that in order to enhance the efficiency of the political system and the quality of the electoral decision-making, it is a supreme interest for every democratic society to ensure, as much as possible, that its citizens have accurate information about those who govern them. "The theory of democracy postulates the ability of citizens to make intelligent decisions—decisions which can only be made in an environment of widespread, abundant, and accurate information. Society, therefore, has an interest in correcting defamatory misstatements about matters of public concern." If the acute need to prevent distortion of the self-government system is to be treated seriously, then some limited form of state intervention may be legitimized.

Some support for this view has been voiced in the past. As aforementioned, a similar conception led the Supreme Court to uphold the personal attack rule in *Red Lion*. In Professor Barron's opinion, since "marketplace of ideas" reality does not exist anymore, "[t]he opportunity for counterattack ought to be at the very heart of a constitutional theory . . . . If no such right is afforded or even considered, it seems meaningless to talk about vigorous public debate." Professor Owen Fiss further explains that the danger of restricting or impoverishing public debate is presented by all social institutions, private or public, and not merely by the state. In his view,

102. Emerson, *supra* note 92, at 894.
103. *Vindication of Reputation*, *supra* note 6, at 1730.
governmental regulation of speech should be tolerated since only the state has the necessary power to enhance the quality of public debate, and because its employees are more publicly accountable than any private body.  

The issue of access rights, which exceeds the scope of this research, is highly controversial. The First Amendment theory has traditionally been identified with a strong laissez-faire approach, in light of the deep suspicion toward the state that has always characterized American thinking. Indeed, the critics of the access theory may be right in their claim that a power to enhance the quality of self-governance might be abused by the state. However, while the proposals presented by Barron, Fiss and others, which include massive governmental regulation of the media and broad access rights, seem excessively intrusive, their analysis is inspirational. The right solution, therefore, could be a more modest version of these proposals. At least in the context of mandatory retraction, the concern over access rights may be diminished to a minimum if the most suitable institutions are assigned to the task, and if the means to be employed are carefully chosen.

V. Constitutionalizing Mandatory Retraction

In light of the considerations raised in the preceding discussion, it is arguably justified to oblige publishers to retract false defamatory reports. On the other hand, a mandatory retraction rule must be very limited in its scope in order to minimize the harm to the publishers' right not to speak and to their editorial autonomy. The following section will try to explain which features could make a mandatory retraction rule constitutional, and why. It shall begin by portraying the basic practical elements of a proposed legal settlement and their underlying rationales, and subsequently, discuss them in a constitutional framework. This theoretical analysis will yield further practical insights, which will be combined in the discussion.

There seems to be a general consensus that if mandatory retraction survived constitutional scrutiny, such a novel and revolutionary norm should properly originate with the state legislatures and not the courts. Hence, our effort will be to

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106. Fiss, supra note 26, at 787-94.
107. SCHMIDT, supra note 25, at 37; Diamond, supra note 3, at 293.
108. See, e.g., POWE, supra note 32, at 277.
determine the elements that such a statute must include in order to be deemed constitutional.

A. The Proposal

The core of the proposed settlement is empowering courts handling public figures' libel actions against any kind of media, upon finding that the publication in question has been proved as false by clear and convincing evidence, to grant a declaratory relief stating that the falsity has been so proved, accompanied by an injunction ordering the defendant to report on that holding. In order to prevail, the plaintiff would not have to show that the defendant had acted with actual malice prior to the publication.

Under this proposal, a claim for the said remedy may be filed independently, or together with an action for damages. In the latter case, the trial would be divided into two stages. In the first one, the court would examine whether the defaming publication is true or false. If the mentioned evidential standard were met by the plaintiff, an injunctive relief ordering the defendant to report on that finding would be issued. In the second part of the procedure the actual malice question would be discussed; if the courts find that the publication was made with knowledge or reckless disregard of its falsity, the damages the plaintiff is entitled to under *Sullivan* will be supplemented to the injunction.

The compelled publication would not, strictly speaking, constitute a withdrawal of the defamatory charge on the part of the publisher, since it is the court, and not him, that will declare the falsity of the publication. Though a statement of withdrawal on the part of the defamer is probably the best device for restoring reputation, the constitutional constraints, which will be explained below, compel the choice of the described settlement as the second-best option. In any case, as the publisher will have to inform his audience of the judicial finding, the effect of the remedy would not be very remote from that of a retraction in its regular sense; it may be defined as a "constructive retraction." For the sake of convenience, this article will refer to it as retraction.110


110 It should be noted that several proposals for establishing a procedure of a declaratory judgment regarding the falsity of libelous publications were put forward by a Congressional Bill and by various scholars and groups, mainly in the 1980s. E.g., H.R. 2846, 99th Cong.,(1985) (the Schumer Bill); Barrett, *supra* note 78; Marc A. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CAL. L. REV. 809 (1986);
Several elements of this proposal require clarification and elaboration.

1. **Substantive-Law Duty or Judicial Remedy?**

   An initial choice had to be made between two legal devices for enhancing the correction of false publications. The first is recognizing an independent substantive-law duty to retract—in the usual sense of the word—false defamatory charges, whose breach may result in an injunction, damages award or a combination of both. The second is introducing a retraction remedy—either “regular” or “constructive”—that would be given by a court following a judicial procedure that handles the liability for the original publication.

   The concurring opinion of Justices Brennan and Rehnquist in *Tornillo* seems to have preferred the second alternative. The Justices suggested that “statutes affording plaintiffs able to prove defamatory falsehoods a statutory action to require publication of a retraction” (emphasis added) could be constitutional. Professor Rodney Smolla, despite concluding ultimately that such a rule would be too draconian, also thinks that in principle “[t]he Tornillo holding did not necessarily foreclose a compulsory retraction as a post-judgment remedy after a court has determined in a full-fledged defamation suit that liability exists.” In contrast, the nature of the rule proposed by Judge Pollak in the *Coughlin* case seems different. In his view, a “continuing series of events, non-retraction, after the asserted defamer has been sufficiently educated to the falsity of what was originally published,” may be deemed actionable. The liability for such a conduct would be contingent on “a full demonstration to the defamer of the falsity of the alleged defamation,” and the remedy for it would be damages. It follows that according to Judge Pollak, the duty to retract would not stem from a judicial order but rather from the very fact that the publisher has learned of the falsity of his publication.

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Hulme, *supra* note 3; Stanley Ingber, *Defamation: A Conflict between Reason and Decency*, 65 VA. L. REV. 785, 852-53 (1979) [hereinafter Ingber, *Defamation*]; Leval, *supra* note 5; *THE ANNENBERG PROPOSAL, supra* note 6, Section 4. These attempts were not successful. This article will not elaborate on the propriety of such a remedy, since that issue has been discussed extensively before. Its focus is not on the mere issuance of a declaratory judgment but rather on the element which distinguishes the described proposal the most from the previous ones, namely, the compelled report on the verdict.

112. 2 SMOLLA, *supra* note 1, §9:92, at 9-63.
114. *Id.* at 489 (emphasis added).
The substantive law should not recognize an independent duty to retract emanating directly from a false defamatory publication followed by a retraction demand, just as the obligation to pay damages as a result of such publication arises only as a judicial remedy.\textsuperscript{115} Rather, a proper retraction regime ought to prescribe that a publisher may be obliged to retract only by virtue of a judicial order. Otherwise, severe practical and constitutional problems would emerge. Regardless of how extensively a statute attempted to clarify the conditions under which a retraction is mandatory, many factual and legal considerations would have to be taken into account before reaching a conclusion in any given case. Primarily, it must be determined that the statutory standard for establishing falsity has been met, and that such falsity substantially alters the impact of the publication on the audience's mind. These parameters require an assessment which must be performed by a court; especially in the border-line cases, it would simply be impractical to expect a publisher to recognize when a duty to retract has arisen. Moreover, in such circumstances, a publisher who knows that failure to retract may result in immense monetary liability would be likely to adopt too liberal an interpretation of the statutory provision, in order to be on the safe side and evade that risk. If that happens, legitimate points of view would be unjustly silenced and removed from the public discourse. Finally, and most importantly, the issuance of a judicial decision as a prerequisite to the retraction is necessitated by the rule against compelled speech. The reason is that, as explained below, to be compatible with the First Amendment, the subject of the compelled publication can only be the very fact that such a decision was given, as opposed to a statement on behalf of the defendant admitting that the defamatory report is false.

The traditional reluctance of the Anglo-American law to use an equitable relief when the plaintiff has an adequate remedy at law, in particular with regard to speech,\textsuperscript{116} should not undermine its appropriateness in our context.

\textit{First}, as explained earlier, the notion of granting damages for breach of a substantive-law duty to retract is highly problematic, whereas the ability to recover damages for the original publication is

\textsuperscript{115} Indeed, it could be argued that an infringement of a norm creates a conceptual \textit{substantive-law duty} to compensate the harmed person. The emphasis of this article, nevertheless, is on the practical aspect: a person is not required by law to pay damages for defamation until his liability and its scope are determined by a court, and therefore, that should be the case also with regard to a duty to retract.

\textsuperscript{116} Kramer v. Thompson, 947 F.2d 666, 679 (3d Cir. 1991).
not a sufficient solution, since it is not feasible save for the rare cases in which actual malice is established. Furthermore, as asserted below, even when damages are recoverable, the societal interest in actual correction of false defamation transcends the individual's right to be compensated with money.

Second, no analogy can be drawn from the presumption against prior restraint to an injunction ordering retraction. The reason is, simply, that while the former directly stifles speech, the latter only adds speech to the public domain. Arguably, nevertheless, the proposed settlement could indirectly chill speech. That contention will be discussed below.

2. Applicability to Different Kinds of Media

The second important issue that needs to be addressed is the applicability of the retraction remedy to different kinds of media. Various arguments may be raised in order to justify its suitability to a certain kind of media while denying it with regard to another.

On the one hand, in view of the scarcity of communications frequencies and the government's role in allocating them, licensing the broadcasters, and monitoring their activities, state intervention in the content of broadcasts is arguably more plausible than in the case of newspapers. Against this background, recall the Red Lion decision that, based on the mentioned factors, upheld the personal attack rule applied to the broadcast media. However, the conceptual dissimilarity between the two media is arguably not as important as the practical dimension of the comparison, from which the difference does not seem that great. Given the abundance of television and radio stations, and since, on the other hand, the number of newspapers is far from being infinite, it may be contended that there is no basis for distinction between print and broadcast media with regard to access rights.

On the other hand, a case may be made for favorable treatment of the broadcast media with regard to mandatory retraction. It has been asserted that while the cost to a newspaper of an additional column is negligible, the burden may be immense for a television network which must forego revenue from the sale of valuable, limited

120. See Barron, supra note 105, at 1666.
time in order to publish a retraction. Yet the strength of this argument is also doubtful. Newspapers are also distributed for the purpose of revenue and make substantial profits from inserting advertisements, which might be “sacrificed” in order to clear space for retractions.

In conclusion, the mentioned factors virtually neutralize each other. In the narrow context of our discussion, the difference between the two kinds of media does not justify a material distinction. The substantive clashing values, namely, the right to reputation and the interest of maintaining an informed society on the one hand and the freedom of the press on the other, are similar in both cases. The retraction settlement should therefore apply to the print as well as to the broadcast media. Its suitability to television may be achieved, for instance, by compelling retraction in the form of a brief announcement within a newscast.

The issue of mandatory retraction should be considered in respect of another medium, namely, the Internet. Conflicting arguments may be raised in this context as well. On the one hand, as mentioned above, the highly fragmented nature of the web renders Internet publications less influential than those made by the traditional media. It could therefore be said that Internet retractions are not necessary since Internet defamatory publications are not very harmful. However, in light of the high accessibility of most websites to an immense number of people, as well as the Internet’s proven potential of serving as a forum for publications of public importance, it may well be regarded as a part of the media for defamation law purposes. The fact that online publications do not receive as extensive exposure as that of television and newspapers stories (and thus cannot be used effectively to redress defamatory charges published by these media) does not mean that they should not, in and of themselves, be considered as media publications. Thus, arguably, the Sullivan rationale may apply to online publications with a potential for reaching a substantial amount of people, as opposed to ones which are included in narrow forums with restricted membership.

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121. *Vindication of Reputation*, supra note 6, at 1742.
122. It should be emphasized that a duty to retract would not be imposed on the broadcast media by administrative intervention on the part of the FCC, but, like in the case of newspapers, only by the courts.
case, if indeed Internet defamation of public figures is to be adjudicated by the *Sullivan* standard, then it may also give rise to a duty to retract.\(^{124}\) Internet retractions are of particular importance due to the fact that this medium "perpetuates words," in the sense that it stores huge amounts of information in a highly accessible form for a potentially unlimited period of time. Hence, on the one hand, a defamatory publication on the Internet is likely to bring about enduring harm, and on the other hand, a retraction could have a long-lasting effect as it may be reachable long after it is initially published. Moreover, in this realm the availability of publishing space is probably the highest, and therefore, in that respect, compelled retraction would not be very problematic.

3. *Further Technicalities*

Finally, several technical notes are in place.

*First*, the falsity that would give rise to a retraction injunction is one that concerns the heart of the defamatory charge. Since it is established that minor inaccuracies, which do not significantly change the publication's effect on the mind of the audience in respect of the "sting" of the libel,\(^{125}\) do not entitle the plaintiff to damages, the law should prescribe the same with regard to the retraction remedy.

*Second*, a mandatory retraction rule would not necessarily preclude the existing state retraction statutes. Thus, while voluntary retraction may bar action or limit the scope of recoverable damages, failure to retract in the required form would open the door to a suit, in which one of the remedies could be an injunctive relief ordering retraction.

*Third*, the mandatory retraction provision, as well as the court order applying it, must have a clearly delineated "who, what, when, and where."\(^{126}\) Most importantly, by analogy to what is normally prescribed by the existing voluntary retraction statutes, the retraction must be given due prominence considering the character of the original report. When a newspaper is involved, the updating article should be put, as much as possible, in the same section, in a similar page and under a similarly-sized headline. A television or a radio station should broadcast the retraction in more or less the same part

\(^{124}\) The question of liability for anonymous defamatory publications on the Internet exceeds the scope of this article. At any rate, I suggest that anyone who would nowadays be held liable for such publications, be it a forum manager, a website owner, or the like, would be subject to the retraction remedy provided that its conditions are met.


\(^{126}\) *Smolla & Gaertner*, *supra* note 78, at 40.
of the newscast as the one in which the first report was aired. If the defaming report appeared on an Internet website, a retraction should be included in its contents in a prominent place (e.g., on the top of the homepage) for a sufficient amount of time as determined by the court. The underlying notion behind these guidelines is to reach, to the largest extent achievable, the same audience that was exposed to the defamatory publication.¹²⁷

B. Constitutional Analysis: General

The preliminary question to be asked within the constitutional analysis of mandatory retraction is the level of scrutiny that ought to be employed. Since a statute dictating the substance of material to be published constitutes, as aforementioned, content-based regulation of speech, it must pass the double test of strict scrutiny.

1. Compelling Interest

The first condition under strict scrutiny is establishing a compelling government interest. At the outset, it should be noted that the Supreme Court’s rulings have not identified a clear rationale as to why libel law, which constitutes content regulation of speech, is deemed constitutional at all. This general theoretical question exceeds the scope of this article. However, the existence of a justification for protecting reputation at the cost of regulating speech to a certain extent seems to be widely accepted. The extreme absolutist position, according to which defamation law must be abolished or cannot apply to public officials,¹²⁸ was never adopted by the Supreme Court. The assumption, therefore, should be that the need to protect reputation is a compelling interest. The real issue concerns the extent to which it is compelling, which in turn implicates the question of what level and methods of protection may be deemed justified under the First Amendment.

The aggregate weight of the considerations detailed above in the third section, demonstrating the severe individual and societal harms created by contemporary American defamation law, amounts to a compelling interest that justifies the adoption of a mandatory retraction rule. The proposed settlement is likely to significantly enhance public figures’ right of reputation, which is currently poorly protected. A declaratory judgment stating that the falsity of the

¹²⁷ Cf. 2 SMOLLA, supra note 1, §9:82, at 9-54.
defamation has been proved by clear and convincing evidence will represent a formal judicial vindication of the plaintiff’s reputation.\footnote{129} The prospects of a person who has been falsely defamed to obtain such vindication are high, since she would be exempted from the requirement of proving the publisher’s actual malice, which currently causes most plaintiffs to lose. Moreover, since a declaratory judgment procedure is likely to be faster than a claim for damages,\footnote{130} the vindicating decision will be issued a relatively short time after the defamation, and would thus be able to wipe out the impact of the report on the audience’s mind rather effectively. The most significant part of the remedy is the court’s power to order the defendant to report on the verdict, thereby guaranteeing its wide circulation among the audience that was exposed to the defamation.

2. \textit{The Least Restrictive Measure}

The second prong of the strict scrutiny test is the lack of a measure which produces similar results but is less detrimental to protected rights. One could think of three plausible alternatives (other than the unconstitutional right of reply) which, like mandatory retraction, purport to promote the actual vindication of reputation rather than compensate the victim with money. These options are a declaratory judgment on the falsity of the publication unaccompanied by a compelled report on the decision, a voluntary retraction, and a state-provided forum for reply.

The assessment of the declaratory judgment proposals raised previously does not preclude the constitutionality of the discussed proposal. The mere issuance of a judgment determining the falsity of the publication is not effective enough in vindicating the plaintiff’s reputation absent wide publicity; and it is questionable whether such decisions would be reported extensively.\footnote{131} Justice Brennan’s contention that “[d]enials, retractions, and corrections are not ‘hot’ news”\footnote{132} may equally apply to vindicating verdicts. Since the public generally shows the highest interest in outrages, the press tends to attach greater emphasis to sensational stories about public figures than to reports rebutting such allegations. Hence, declaratory judgments would probably be insufficiently publicized, especially in comparison with the defamatory statements preceding them.\footnote{133}

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\begin{itemize}
\item \footnotemark[129] Barrett, \textit{supra} note 78, at 870.
\item \footnotemark[130] Franklin, \textit{supra} note 110, at 830.
\item \footnotemark[131] Leval, \textit{supra} note 5, at 1299.
\item \footnotemark[133] Ingber, \textit{supra} note 3, at 835.
\end{itemize}
Significantly, the fact that these judgments will not be accompanied by immense sums of compensation would further diminish their sensational appeal. It should also be noted that defendants who are aware of the falsity of the defamation might choose not to litigate and to lose by a default judgment, in order to avoid the litigation costs and to decrease even more the public attention gained by the procedure. Finally, some argue that certain media tend not to give publicity to libel judgments entered against their competitors, driven either by professional courtesy or by fear that they will receive similar treatment. It follows from the foregoing arguments that the effectiveness of a declaratory judgment alone in restoring the plaintiff's reputation is doubtful. The chances of achieving that objective, by reaching the largest portion possible of the audience that had been exposed to the original story, are substantially higher if a report on the judgment, in the same medium and with the same prominence, is compelled.

Some proponents of the declaratory relief procedure, aware of the aforementioned problem, offer various techniques, other than mandatory report on the verdict, to handle it. One commentator, James Hulme, suggests compelling the losing defendant to circulate the judgment of falsity as extensively as was the publication of the defamatory statement. This suggestion, however, raises some major practical quandaries. For instance, it is unclear which methods are to be employed in order to efficiently circulate the judgment while raising sufficient public attention; who will monitor their implementation and how; and whether reluctance on the part of other media to publicize the judgment prominently at the expense of other newsworthy material, or to publicize it at all, may give rise to judicial injunctions against them, given the fact that they are not a party to the litigation. Another proposed solution, offered by Ingber, is ordering the defendant to choose between publishing a retraction and financing the reasonable costs of a reply which is to be published by the plaintiff elsewhere. Both options seem unsatisfactory. A "regular" retraction is constitutionally more problematic than a duty to report on the vindicating verdict, as will be explained below. The second alternative suffers from the disadvantages of the Hulme proposal, in addition to raising the problem of the possible abuse of the right of reply, discussed above in Section 1. Thus, disagreements

134. Hulme, supra note 3, at 394 n.101; Vindication of Reputation, supra note 6, at 1732.
135. Hulme, supra note 3, at 392.
136. Ingber, Defamation, supra note 110, at 852.
between the parties as to the appropriate means of publication on the one hand and the contents that may legitimately be included in the reply on the other are very likely to occur. This would almost invariably yield further litigation and make the procedure inefficient.

The second plausible alternative to mandatory retraction—voluntary retraction—is even less satisfactory. Compelling publishers to retract is undoubtedly more effective in reaching the outcome of restoring reputations than merely encouraging them to do so. Indeed, it might be argued that so long as a settlement of voluntary retraction creates sufficient incentives to retract, it may be held to achieve the same goal with less restrictive means. However, given the fact that the chances of publishers to prevail in damages libel suits are incredibly high, and despite the high litigation costs incurred by such suits, it is hard to believe that any voluntary retraction rule may ever reach that level of success. In any case, the question of the extent to which the various existing and proposed settlements of voluntary retraction indeed do manage to achieve the same goal fulfilled by mandatory retraction is a very complex one. A comprehensive examination of it must invariably involve empirical research that would try to indicate these settlements’ effectiveness. Such research entails the hard task of isolating the retraction norm’s impact on the publishers from the political reality, the public atmosphere, and the market conditions prevailing in the relevant jurisdiction, as well as any other factor that might influence the publishers’ discretion in any given case. Ultimately, this exercise is unlikely to lead to any conclusive answers upon which constitutional criteria may be based.

Finally, a state-provided forum for responses by defamed people or for publicizing libel declaratory judgments, be it in magazines, websites or city centers, is unlikely to draw public attention that would come near that of a headline in a popular newspaper or newscast. It therefore cannot be considered as a solution that may achieve the objective of mandatory retraction.

It can be concluded that neither of the aforementioned alternatives precludes the constitutionality of the proposal; the chances of mandatory retraction to undo the reputational harm caused by defamatory publications, as well as the extent to which it could do it, are generally much higher than those of any other remedy that has been thought of so far. Hence, the “least restrictive measure” test is passed. The inquiry should focus now on the question of whether the problems caused by mandatory retraction itself are bearable from a constitutional perspective. The next subsections shall therefore turn to examine the compatibility of the proposed
settlement with the rule against compelled speech and with the principles of the constitutional protection of the press.

C. Mandatory Retraction and the Rule Against Compelled Speech

1. Compelled Statement of Opinion and Compelled Statement of Fact

As indicated above, the Supreme Court has consistently prohibited the compelling of individuals, groups, and institutions to make expressions against their will. The question to be asked, however, is whether all kinds of compelled speech should be treated alike. Though the Court did not directly distinguish between various forms of forced expression, an analysis of the relevant judicial decisions leads to a negative answer of this question.

It goes without saying that forcing a person to state a certain opinion is intolerable in a democratic regime. It seems axiomatic to assert that the freedom to hold a belief, even without communicating it to others, and to refrain from expressing opinions contrary to such belief, is entitled to complete protection from state coercion. And indeed, recalling the cases referred to above in the second section, in which an "obligation to speak" was deemed unconstitutional, most of them concerned forced statements of belief. Compelling flag salute and pledge, prohibiting the covering of an ideology statement printed on license plates, obliging a company to publicize views opposing to its own, and ordering parade organizers to alter the overall message they intended to convey all involve forced expression or dissemination of opinions or ideas.

Located at the interface between the freedom of expression and the freedom of conscience, the mentioned element took a substantial role in the Court's reasoning. Thus, for example, it held in Barnette that the flag salute regulation invaded "the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control," and noted that no government official may "force citizens to confess by word or act

137. See Emerson, supra note 92, at 919.
142. Emerson, supra note 92, at 919.
Likewise, the Hurley Court stated that a state could not compel affirmation of a belief with which the speaker disagrees.\textsuperscript{145}

Cases may be found, though, in which the Supreme Court prohibited the compelling of speech regarding facts. Thus, the statute invalidated in Riley required professional fundraisers to disclose to potential donors the percentage of their gross receipts turned over to charities,\textsuperscript{146} and in McIntyre a statute proscribing distribution of anonymous campaign literature was deemed unconstitutional.\textsuperscript{147} The Riley Court noted expressly that there is no ground to distinguish compelled statements of opinion from compelled statements of fact, as both clearly and substantially burden protected speech.\textsuperscript{148}

However, one ought to be cautious before adopting this approach in the context of defamation law.

\textit{First}, in both of the mentioned cases, the facts whose utterance was compelled by the statutes at bar related to the speaker himself, and therefore, their exposure may be seen to violate the right to privacy, be it personal or institutional. While this element was not expressly discussed by the Court, it may have influenced its decisions. An obligation to state facts relating to other people, as is the case in retraction, seems less harmful.

\textit{Second}, in Riley and McIntyre, the impact on the democratic process of the information whose disclosure the states wished to compel was rather weak and indirect. In Riley, the statutory objective was to notify a relatively small group of people—potential donors—of the policies of fundraisers, in order to enable them to make an informed decision as to their charitable donations. In McIntyre, the relevant information concerned the identity of authors of political manifestos, whereas the much more crucial interest embedded in such publications is their very being in the public domain. In contrast, the interest of ensuring the flow of accurate facts about public figures in order to shape a citizenry capable of effective self-governance is much closer to the core of the First Amendment. The balance of interests in our context therefore weighs more heavily towards validating the compelled speech.

\textit{Third}, in both cases the compelled speech was meant to serve societal interests, whereas in our context there is also an individual

\begin{itemize}
\item \textsuperscript{144} Id.
\item \textsuperscript{145} Hurley, 515 U.S. at 573.
\item \textsuperscript{147} McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).
\item \textsuperscript{148} Riley, 487 U.S. at 797-98.
\end{itemize}
right—the right of reputation—at stake; it is commonly asserted that rights are entitled to stronger protection than interests. To sum up, Justice Brennan’s statement in Riley seems too sweeping; since it is probably the particular facts of that case that were in his mind while making that statement, it might be possible to construe it more narrowly. In any case, the Court later made in Hurley a more modest remark that may coincide with the approach portrayed here, according to which the general rule against compelled speech applies also to statements of fact “subject, perhaps, to the permissive law of defamation.”

Further support for this argument may be derived from several Supreme Court decisions that did validate compelled speech. In Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, upholding the right of the state to discipline attorneys for misleading omissions in advertisements, the Court reasoned that there was no attempt to force citizens to express a belief. Furthermore, the Court emphasized that the requirement was to include in the advertisement “purely factual and uncontroversial information” about the terms under which the services will be available. Though the speech at stake there was commercial, the Court’s holding could have some relevance also in the context of political speech. One of the main rationales given by the Supreme Court for the substantially weaker protection granted to commercial expression relies not on the content or motives of such speech, but rather on the fact that its truth is more easily verifiable by its disseminator than news reporting or political commentary. The assumption underlying this analysis is that the content of political speech is often disputable; but in the rare cases in which it is not, it therefore becomes less distinct from commercial expression. As explained below, within the present proposal the compelled speech falls into this latter category.

In Turner Broadcasting System, Inc. v. FCC, one of the major rationalizations for upholding a Federal act obliging cable operators to set aside channel space in order to carry the signals of local broadcasters, was that given the nature of the cable service as a conduit for broadcast signals, there is little risk that cable viewers

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152. *Id*.
would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator. 154

Finally, in Rumsfeld v. Forum for Academic and Institutional Rights, 155 the Supreme Court unanimously validated a statute denying Federal funding to educational institutions which prevent the military from gaining access to their campuses for purposes of military recruiting in a manner that is at least equal to the access provided to any other employer. The Court recognized that the equal treatment demand could in fact oblige institutions to provide the military with recruiting assistance which includes elements of speech, if other employers receive such assistance, for instance, by sending e-mails or posting notices on bulletin boards on the military's behalf. However, the case was distinguished from the Barnette and Wooley type of compelled speech. Among other arguments, the Court stated that "[t]here is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse" 156 and that "it trivializes the freedom protected in Barnette and Wooley" to suggest that it is harmed by the statute at bar. 157 Chief Justice Roberts, writing for the Court, emphasized that allowing recruitment by no means indicates that the institutions agree with any speech by recruiters, and that they remain free to disassociate themselves from any views explicitly or implicitly expressed by the military. 158 Also worth noting is the Court's remark that compelled statements of fact are "subject to First Amendment scrutiny," 159 which seems even softer than the one mentioned above that was made by the Hurley Court.

It follows that the mere fact that speech of certain content was compelled does not automatically make it unconstitutional in the Supreme Court's view. It may further be inferred that under the Court's approach, obliging a person to state uncontroversial facts or communicate information in a manner that does not involve affirmation of belief is much less offensive than compelled speech that does concern an opinion or an idea, and therefore can be constitutionally justified by sufficiently important interests.

156. Id. at 1308.
157. Id.
158. Id. at 1310. See also PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980).
159. Rumsfeld, 126 S. Ct. at 1308.
2. Application to Mandatory Retraction

While considering how to apply the aforementioned concepts in the context of mandatory retraction, first note that a belief may be held not only concerning ideologies, but also with regard to facts. The fact-opinion relations, which raise numerous problems within defamation law that exceed the scope of this research, may be seen less as a dichotomy and more as a spectrum. The location of every statement on this spectrum depends on its level of potential verifiability. There are many “grey areas” in which, though the statement aims to depict an existing state of affairs and not merely to offer a value judgment on the reality, this state of affairs is open to dispute since no one can provide authoritative determination as to what the true facts are. An inference from the analysis of some ascertainable facts on the existence of additional facts may be seen as a kind of opinion, as it is based not on the perception of the senses but rather on the power of the intellect. Hence, obliging a person to state a fact relating to a situation or occurrence whose nature is disputable, which he believes to be untrue, may well infringe his freedom of thought. However, the further one moves from the field of ideas and opinions toward the realm of ascertainable facts, the less relevance there is to his subjective conscience and beliefs.

This last insight could bear two alternative implications on our discussion. The first possible route for constitutionalizing mandatory retraction while avoiding infringement of the defendant’s freedom of belief, is requiring the plaintiff to meet an exceptionally high standard of proof with regard to the falsity of the publication, as a precondition for obliging the defendant to admit the falsity. The standard of proof adopted by the majority of state and Federal courts in public plaintiffs’ libel claims, that of “clear and convincing evidence,”160 would not suffice. The fact that the proof of falsity seems clear and convincing to the court, does not necessarily mean that the defendant is also convinced. There could be cases in which the latter would still believe in the truth of his publication despite such judicial finding, be it in light of evidence he cannot disclose, because he has an unconventional way of thinking, or simply because the court has erred. An obligation to admit the falsity of the publication in such a case would be detrimental to his freedom of conscience. In order to

prevent this situation, a higher standard should be insisted upon: proof beyond reasonable doubt. It may be assumed that objective proof of falsity beyond reasonable doubt would provide decisive evidence as to the publisher's state of mind; if there is no reasonable way to consider the publication as true, presumably the publisher himself would recognize its falsity. A statement acknowledging the falsity in these circumstances would therefore be located at the very end of the "factual" side of the fact-opinion continuum; it would be a statement of pure fact which is essentially indisputable. Hence, an obligation to retract would arguably bring about minimal damage to the defendant's freedom of belief.

Yet, several significant difficulties arise. On the one hand, there are very few cases in which the mentioned threshold would be met. The response provided by the settlement to the societal need pointed out above would therefore be partial and insufficient. On the other hand, this approach might not always succeed in guaranteeing the defendant's interests. It is not impossible to imagine a situation in which, even though falsity is established, in the court's opinion, beyond reasonable doubt, the publisher would still believe in good faith that his report is accurate. Finally, the existence of two different standards of proof, one for the damages action and the other for the retraction suit, might yield practical problems and confusion among juries.

For these reasons, another solution should be preferred. There is something that no defendant can possibly claim to deny: it is the very fact that a court found his publication to be false. An obligation to publicize the indisputable fact that a judicial decision was issued against the defendant would not infringe upon his freedom of belief. The remedy to be adopted in order to vindicate the plaintiff's reputation should therefore be a declaratory relief stating that the falsity of the defamatory report has been properly proved, accompanied by an order to report on the decision.

Several important clarifications as to the practicality of this proposal need to be made:

1. In order to prevent subsequent disputes regarding the implementation of the judicial order, the court may dictate the wording of the compelled report. It ought to convey the essence of the judicial holding as concisely as possible. It may only relate to the falsity of the defamatory charges and not to any other element, such as the defendant's misbehavior or the plaintiff's good character.
2. The substantive question of the falsity of the publication would be adjudicated similarly to the way it is currently handled in public figures' damages actions. First, since the defendant would not be obliged to state the facts that have been proved in trial as his own expression but only to report on the decision, the standard of establishing falsity need not be exceptionally high; the regular "clear and convincing evidence" requirement, which is fairly demanding and hard to meet, could suffice. Second, the principles of dealing with the complex fact-opinion continuum within damages suits would be applicable. For instance, it was held that a statement of opinion that does not detail its underlying facts and might cause the audience to reasonably believe it is based on undisclosed defamatory facts could be regarded as a fact and subject its publisher to a damages award;¹⁶¹ it may therefore give rise also to a retraction order. The same applies to a statement of opinion based on disclosed facts that are themselves false and demeaning, which may be punished with damages under the existing law.¹⁶² Third, the press would be entitled to the fair report privilege, whose rationale is letting the public be informed of proceedings conducted by the authorities and statements made by officials regardless of their justification or merit.

3. The obligation to publicize the judicial finding of falsity by no means prohibits the publisher from insisting that his publication is true, and from explaining to his audience why he was not able to prove that allegation (for example, due to inability to expose his sources) or why the court has erred.

4. On the other hand, the fact that the publisher may only be obliged, consistent with the First Amendment, to report on the content of the verdict, does not preclude the possibility of publishing a retraction in its usual meaning if he chooses to do so following the injunction. A publisher's initial refusal to retract does not necessarily stem from a factual disagreement with the defamed person; the reason for it might be his contention that the falsehood does not relate to the "sting" of

¹⁶¹ Milkovich v. Lorain Journal Co., 497 U.S. 1, 18-19 (1990); Restatement (Second) of Torts § 566 cmt. c (1977).
¹⁶² Standing Comm. on Discipline of the United States Dist. Court for the Cent. Dist. of Cal. v. Yagman, 55 F.3d 1430, 1439 (9th Cir. 1995); Restatement (Second) of Torts § 566, cmt. c.
the publication. The court’s finding that the publication is false embodies a determination that the falsity is substantial and thus denies such assertion. In that case, if the defendant recognizes that the relevant facts are indeed untrue, he can simply state that rather than cite the verdict. Once again, he is not prevented from including his own input in the report, this time by asserting that the falsity is immaterial to the publication as a whole. Nevertheless, the retraction in such a case should be explicit rather than equivocal or hesitant, and it must expressly state that the reported facts have turned out to be false.


1. General

Settling the retraction remedy with the rule against compelled speech does not suffice in order to constitutionalize it. For that task to be completed, the First Amendment issues arising from the special status of the press, as articulated by the Supreme Court in Sullivan and in subsequent decisions, need to be discussed. As explained below, the settlement described above strikes a proper balance between the conflicting considerations at stake.

Society has an interest that opposing points of view on public affairs be circulated not only concerning ideas and beliefs, but also with regard to facts, whose very existence or nature is often disputable and open to different interpretations and evaluations. Indeed, precisely in the “grey areas” of uncertainty, an investigative press is of the greatest importance. The facts relating to the most outrageous corruption and scandals are often shrouded in doubts, especially at the stages of the initial investigation and report. Journalistic analysis and hypothesis, which are often inherently speculative, must be encouraged, as they may lead to the exposure of the truth. Thus, even claims made by the media whose probability of being accurate falls below the preponderance of the evidence—the usual standard of proof in civil litigation—ought to be heard and

163. According to Mr. George Freeman, the Assistant General Counsel of The New York Times Company, in many of the cases in which victims of defamation contend that the publications on them are false, the inaccuracies—from the newspapers’ perspective—relate to minor details and not to the core of the defamatory charges. George Freeman, Assistant Gen. Counsel of The N.Y. Times Co., N.Y.U. School of Law Debate: Freedom of the Press or License to Libel (Nov. 16, 2005).

164. Cf. 2 SMOLLA, supra note 1, § 9:81, at 9-51.
should not be punished. Most courts handling libel damages suits therefore require, as aforementioned, a “clear and convincing evidence” standard of proof for falsity, in order to resolve doubts in favor of speech when the truth of a statement is difficult to ascertain conclusively.\(^{165}\)

This principle is also applicable to mandatory retraction. An authoritative judicial determination as to the falsity of a factual claim, followed by the publisher’s statement that he withdraws it, would, in effect, remove it from the public discourse. Moreover, even if the compelled publication would only include a report on the issuance of the verdict and not an actual withdrawal, the status of the defendant’s point of view in the marketplace of ideas would be diminished. So long as the probability that that statement is true is not utterly negligible, such an outcome could be detrimental to the value of maintaining an “uninhibited, robust and wide-open” public debate, in which different points of view are to be given an equal opportunity to compete. Even if assertions of fact whose probability falls below a certain level may be treated differently, a probability of slightly less than 50 percent cannot be the threshold. The risk of erroneous findings of falsity is real if the plaintiff’s burden of proof is not demanding enough. The outcome in such cases, especially if the judicial finding is to be publicized in one way or another, might be the perpetuation of falsehoods in the public domain, which would frustrate the very objective of a vindication remedy.

That consideration, however, loses its weight when the probability that the relevant factual contention is true is particularly low. Under the existing law, proof of falsity by clear and convincing evidence renders a publication insufficiently valuable for the marketplace of ideas, and exposes its publisher to immense monetary liability provided that actual malice is found. The same rationale may apply to our context and legitimize a judicial finding of falsity accompanied by an injunctive relief ordering the defendant to report it, when the falsity is proved in such a manner.\(^{166}\)

It should be emphasized that even if falsity is established according to the mentioned standard and an injunctive relief is granted, the defendant’s hypothesis would not necessarily be removed from the public discourse. The effect of the remedy would be less dramatic; it would merely function as a significant caveat with


\(^{166}\) Similarly, some of the declaratory judgment proposals required that falsity be established by clear and convincing proof. Franklin, supra note 110, at 813; THE ANNENBERG PROPOSAL, supra note 6, Section 4(d).
regard to the publication, thus bettering the plaintiff's public image that was harmed. As noted above, after informing his audience of the judicial determination, the defendant may insist that his initial report is nevertheless accurate. In this way, the interests of both parties would be protected; while ordinary people tend to attribute importance to judicial decisions and to consider them reliable, they presumably recognize that judges, let alone juries, might err, and could be persuaded that that in fact happened in a given case.

The interest of warning the public regarding assertions of fact whose falsity is so proved is most important when the subjects of such publications are public figures. Imposing the proposed rule may be viewed as complementing the *Sullivan* rule itself, as both are designed to guarantee that the public be adequately informed of public affairs. Initially, it is the defendant's interest to bring his case under *Sullivan* by asserting that he belongs to the media and that the plaintiff is a public figure. Such a claim, if accepted, provides the former with an immense procedural advantage. It seems appropriate to attach to it another corollary, namely, the application of the retraction rule when its conditions are met.

2. *Actual Malice?*

Despite having concluded that compelled publication of judicial findings of falsity under the discussed circumstances would, in principle, serve the public good, one has to address a more practical, yet constitutionally crucial question, that is, whether the imposition of such a duty must be contingent on showing of actual malice. Judge Pollak's notion as to constitutionalizing mandatory retraction, as well as a proposal raised—and rejected—by Smolla requires, as a prerequisite for recognizing that obligation, that the plaintiff meet the *Sullivan* standard. However, this condition should not be insisted upon in our context.

To begin with, in a certain sense the publisher's malice serves within the *Sullivan* rule as a moral justification for exposing him to financial sanctions. This justification is formulated to a large extent from the perspective of the balance of equities between the parties. In contrast, the retraction remedy is designed first and foremost to correct falsehoods and to reveal the truth, and not to serve as a penalty. Viewed this way, the societal need for retraction is not

168. 2 SMOLLA, supra note 1, § 9:92 at 9-64.
influenced by, and therefore should not be dependent on, the defendant’s state of mind.

More importantly, the absence of the malice standard in the proposed settlement does not stand in contradiction to the main underlying rationale of *Sullivan*. Indeed, it may well be argued that the *Sullivan* Court itself, which expressed a liberal approach clearly favoring the freedom of the press over the right to reputation, would not have approved of this proposal. Yet, it seems that the focus of the analysis should be less on the spirit of that ruling and more on its holding. In order to determine the implications of the *Sullivan* line of decisions, one needs to define precisely the danger or dangers from which the Court wished to protect the press, and the manner in which it intended to protect it.

*Sullivan*’s opening sentence and the Court’s subsequent analysis make it clear that this ruling was essentially designed to protect free debate from the stifling threat of *outsized money awards*. A similar rationale, along with the actual malice requirement, was applied in a later decision to criminal sanctions for libel which, in the Court’s view, produce a significant chilling effect. The Court’s major concern, hence, was not the mere recognition of liability, but rather the financial or criminal consequences attached to it; and it did not say, in either case, what rules it would impose on imaginative alternatives to these remedies. The proposed retraction remedy, in contrast, involves neither money liability nor criminal penalty and therefore, on its face, it is not subject automatically to the *Sullivan* analysis.

Indeed, this proposal is expected to have non-damages consequences on the press. However, in view of the following analysis of these consequences, the self-censorial impact of having to retract does not come near that of the threat of an enormous damages award or criminal liability. This analysis will take into consideration,

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169. "We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State’s power to award damages in a libel action brought by a public official against critics of his official conduct" New York Times Co. v. Sullivan, 376 U.S. 254, 256 (1964) (emphasis added).

171. *Id.* at 277-78.


174. *See Vindication of Reputation, supra* note 6, at 1742.
as one of its guiding principles, a statement made by the Pacific Gas dissenting opinion: when the chilling effect can be regarded as more “remote and speculative” than “immediate and direct,” it should not be subject to heightened First Amendment scrutiny. Though, as aforementioned, the standard of scrutiny in our context is strict scrutiny, and regardless of the propriety of the outcome reached by Justice Rehnquist in that particular case, the approach that the chilling effect of any statute should be looked at as a question of degree, seems in place. Since the protection of speech invariably harms competing interests, it is undesirable to prefer the value of free speech while scarifying those other interests whenever there is a speculative risk of a negligible chill.

Bearing this principle in mind, the following discussion will explain the aforementioned assertion while referring to various possible impacts of the proposed retraction remedy.

3. Possible Implications: Interference with the Editorial Autonomy

The instant effect of mandatory retraction concerns the core element of the editorial autonomy that the Supreme Court has been determined to protect, namely, the right of the media to express value judgments through control on the selection of material to be conveyed to the public. However, several factors make this harm insignificant.

First, as noted more than once, while reporting on the verdict it may well be possible for the publisher to argue against the judicial finding, and, a fortiori, to insist on the persuasiveness of his opinion on the subject of the report or to express his ideology in the general context of the relevant events. Hence, the proposed legal remedy may not give rise to an argument that the press is forced to act against its conscience or that it is prevented from performing its “fourth branch” role.

Second, in contrast to Powe’s assumption cited above, that replies (and similarly, retractions) will necessitate the omission of entire stories, compromises may be made. Thus, the publisher may report some of his stories slightly less lengthily than he had intended to.

176. Id.
177. POWE, supra note 32, at 276.
Third, the items that would be cut out or shortened will necessarily be the least important ones in the publisher's judgment. It should also be noted that the publisher had already expressed his view that subject matter of the compelled publication is important and newsworthy enough by initially deciding to report on the very same issue.178

Fourth, in most cases, the retraction is not likely to be long (in a newspaper or a website, in terms of words, and in television or radio in terms of time), since it is supposed to consist of mainly the mentioning of the verdict. Even in case the publisher wishes to confront the decision, the article would probably be composed of mainly a brief repeat of previous reports or analysis.

Fifth, the interference with the editorial judgment would probably be very infrequent. Many of the reports published by the press belong to those "grey areas" of uncertainty; even if they seem false, it cannot be established by clear and convincing evidence. In all of these cases, raising modest support for the accuracy of the publication would suffice in order for the defendant to evade the retraction remedy. It may also be assumed that those publications that do concern ascertainable facts are often correct, since most journalists presumably do not fail to double check reports whose accuracy is easily verifiable. Hence, there will be relatively few cases in which the high standard of proving falsity will be passed.

Finally, the quantity of compelled retractions is expected to be even lower than the number of clearly-false reports. A view claiming that any false report would expose its publisher to interference with his editorial autonomy in the form of mandatory retraction, suggests that publishers never or seldom retract false defamatory publications voluntarily. Hopefully, at least, this is not true. The proposed settlement would affect the editorial autonomy in those cases where, for one reason or another, the publisher chooses not to retract voluntarily, which presumably cover only a portion of the cases in which defamatory reports turn out to be false.

It follows from the preceding analysis that the significantly vast portion of the editorial autonomy would remain intact. While it would be subject to "technical" interferences, which are likely to be insignificant and infrequent, the substantive element of this concept, that concerns the ability of the press to be an independent player in the political sphere, would not be harmed at all. In this context, there are good reasons to disagree with Powe's "slippery slope"

178. See BEZANSON, supra note 31, at 79.
terminology, as reflected by his contention that any recognition in compelled publications in a single context would open the door to additional ones. The editorial autonomy is not and cannot be utterly absolute; what is the Sullivan rule if not a restriction on the way in which the editorial autonomy in news gathering and reporting should be exercised? Arguably, each and every restriction put on the freedom of the press to publish what it wants to and to act in the way it wishes, be it for reasons relating to defamation law, antitrust law, copyright law, national security, equal protection and so forth, might potentially lead to additional, more severe governmental interventions. However, the mentioned legal doctrines as well as other ones do indeed mandate the imposition of certain restrictions on the press, some of which are content-based. The way to prevent a "slippery slope" is to subject those restrictions to narrow and clear statutory definitions and to strict judicial oversight. Accordingly, the characteristics of this article's proposal detailed above are designed to meet these conditions.

4. Possible Implications: Additional Non-Damages Costs

Even in the absence of damages, the proposed mandatory retraction rule might bring about some financial costs to publishers. One concern might be that the litigation expenses would in fact constitute a sanction. Furthermore—and perhaps more importantly—the fear of these costs would arguably drive publishers to retract in order to avoid litigation, even when it is not justified.

However, the cost of litigation is not expected to be so high as to encourage unnecessary retractions. The high litigation expenses that often characterize defamation suits are attributable, to a large extent, to the evidential and procedural consequences of the actual malice rule, which requires a thorough scrutiny of the editorial news-gathering process and decision-making. Since this factor does not exist in a procedure designed merely to examine the truth of the publication, the litigation expenses are likely to be much lower. Though the said question is not always simple, it is an objective one,

179. POWE, supra note 32, at 277, 283.
180. See BEZANSON, supra note 31, at 75-76.
182. See Hulme, supra note 3, at 408.
and as such it is invariably much easier to handle than determining a party’s state of mind. It should also be noted that under the proposal, the defendant would not be obliged to pay the plaintiff her attorney’s fees in case the latter prevails;\textsuperscript{183} the costs incurred by such a settlement might excessively deter the press from litigating.\textsuperscript{184}

Therefore, the consequences of failure to retract voluntarily would be confined to an obligation to perform a rather similar action, supplemented by the publisher’s own litigation costs which are unlikely to constitute a deterring factor.

Indeed, the embarrassment caused by a court-compelled publication is greater than it is in the case of a voluntary retraction. However, given the fact that publishers are usually reluctant to retract,\textsuperscript{185} this factor alone does not appear to be significant enough in order to incentivize unjustified voluntary retractions. Moreover, as aforementioned, the defendant would be able to opt for a “regular” retraction without mentioning that the falsehood was established by a court; this latter fact is not of such public importance that necessitates its compelled publication, provided that the public is informed of the falsity itself.

Another assertion of the \textit{Tornillo} Court as to a harm caused by compelled publications—the economic cost of publishing a retraction or a reply\textsuperscript{186}—has been described as unconvincing.\textsuperscript{187} Given the financial strength that generally characterizes the media, so it was contended, the cost of space or broadcast time to publish the retraction does not present the defendant with an overwhelming

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\item \textsuperscript{183} Cf. Hulme, \textit{supra} note 3, at 411-13; \textit{THE ANNENBERG PROPOSAL}, \textit{supra} note 6, Section 10(b).
\item \textsuperscript{184} Arguably, absent a fee-shifting provision, many potential plaintiffs might refrain from suing for a non-damages remedy since it would cause them financial losses. However, several factors make that concern less troublesome. \textit{First}, the litigation is likely to be much less costly than it is presently also for plaintiffs. \textit{See} Ingber, \textit{Defamation}, \textit{supra} note 110, at 855. \textit{Second}, very often public figure plaintiffs, who are the subject of our discussion, do not have to pay attorney’s fee, as the financing comes from their private interest supporters. Barrett, \textit{supra} note 78, at 859; Leval, \textit{supra} note 5, at 1293. \textit{Third}, many lawyers handle public figure libel cases driven mainly by motives of either publicity for themselves or loyalty to the plaintiff. This may be indicated by their willingness to represent these clients on a contingent fee basis despite their low chance of recovering damages in light of \textit{Sullivan}. Leval, \textit{supra} note 5, at 1293-94. Hence, certain lawyers might agree to take such cases free of charge when a damages relief is not sought at all. \textit{Fourth}, as explained below, when actual malice is established, the retraction remedy would be applicable in addition to, and not instead of, damages. In such a case, the litigation costs would be covered by the damages award.
\item \textsuperscript{185} Leval, \textit{supra} note 5, at 1298.
\item \textsuperscript{186} \textit{Miami Herald v. Tornillo}, 418 U.S. 241, 256 (1974).
\item \textsuperscript{187} \textit{1973 Term}, \textit{supra} note 24, at 178.
\end{enumerate}
burden. This is especially true within the present proposal in light of the expected low frequency of retractions and their being relatively short. Indeed, the smaller the publisher, the more limited his resources. However, since the size invariably diminishes the scope of the investigative reports and their depth, the quantity of the retraction demands and the resources required for their performance are also likely to be lower with regard to small media.

It should also be noted that if Powe’s contention that retractions and replies deprive the public of newsworthy material is correct, then they would probably cause less financial costs, if at all. The underlying assumption of Powe’s argument is that the space or broadcast time for the compelled publication would not be created by adding pages, extending the length of the broadcast or foregoing advertisements, but rather by cutting out or shortening other stories. No direct financial effect would thus occur. It could still be argued that the profitability of the publication would decrease also in this case, due to the diminished attractiveness of its contents, but such an effect is likely to be highly indirect and insubstantial. The sales of a newspaper on a given day or the rating of a specific newscast would not be harmed even if they contain a retraction at the expense of other materials, since the consumers would not know, particularly before they decide to purchase the newspaper or to watch the newscast, how they would have looked but for the retraction. As for the long run, since, as aforementioned, the aggregate quantity of retractions is likely to be low, no identifiable influence on the overall marketability of publications may be expected.

Finally, in some respects, the press could even be economically advantaged by the proposed settlement. According to the often-cited Iowa Libel Research Project, many libel plaintiffs, particularly public figures, bring suits driven by the desire to obtain vindication and not to recover monetary damages. Many plaintiffs are therefore likely to opt for the retraction remedy while foregoing their claim for damages, in which their chances of prevailing are extremely low. Even when the plaintiff is of the opinion that proving the defendant’s actual malice is within her reach, the uncertainty of the outcome could induce her to avoid the risk of incurring the immense litigation costs. The publishers would thus be spared their own high litigation

188. Martin, supra note 73, at 310.
189. POWE, supra note 32, at 274.
190. Id. at 276.
expenses (in addition to the inconvenient scrutiny into their investigative and editorial processes they must undergo under *Sullivan*\(^{192}\)). Furthermore, in those cases where actual malice is indeed provable, the defendant would be saved from enormous monetary liability and from much greater embarrassment stemming from a finding of flawed professional conduct.

5. **Possible Implications: Long-Term Chilling Effect**

While most effects discussed so far constitute the immediate result caused by mandatory retraction in a given case, the issue that concerned the *Sullivan* Court the most was the long-term impact of libel liability on the behavior of the press. At the center of the chilling effect doctrine is the interest of enhancing journalistic reports in situations of uncertainty. Arguably, a mandatory retraction rule would deter the media from reporting controversial facts, because such reports might expose them to a duty to retract should those reports turn out to be false. However, if the frequency of mandatory retractions would indeed be low and the immediate damage caused by them would indeed be negligible, as explained above, that fear is not likely to play a major role in the editorial discretion.

The assertion regarding the lack of a significant chilling effect is not changed by the fact that a retraction may embarrass the publisher.\(^{193}\) Media outlets that are committed to investigative journalism—to whom the chilling effect discourse essentially relates—are unlikely to refrain from reporting on controversial issues out of considerations of possible harm to their reputation, since it is exactly these reports that create their reputation. Furthermore, the fear of retractions is unlikely to constitute an excessively deterring factor since sporadic retractions presumably do not affect a publisher’s market success.\(^{194}\) Since the public knows that errors are inevitable in the course of journalistic work, its appreciation of a publisher would not be lowered following a retraction. Lack of retractions on the part of a publisher is not likely to make the public believe it is immune from mistakes, but rather that it does not have sufficient integrity to admit them.\(^{195}\) Indeed, an abundance of

\(^{192}\) Leval, *supra* note 5, at 1294.

\(^{193}\) Martin, *supra* note 73, at 303.

\(^{194}\) Id. at 310-11.

\(^{195}\) See Martin, *supra* note 73, at 311. A view that retractions of erroneous publications serve the public image of the media was expressed by Mr. George Freeman, the Assistant General Counsel of The New York Times Company, within the “Freedom of the Press or License to Libel” debate. Freeman, *supra* note 163.
retractions on the part of a certain publisher may well harm its credibility; but if that publisher systematically disseminates reports whose falsity is ultimately proved by clear and convincing evidence, his loss of credibility is fairly justified.

Also the fear of frivolous suits would probably be an insignificant factor in the press’ decision-making. First, in light of the “clear and convincing proof” requirement, the plaintiff’s position in the playing field would be inferior, and therefore defamed people would not hasten to bring groundless actions. Second, the conditions before Sullivan, when plaintiffs could bring libel suits free of the constitutional obstacle and recover money damages, did not produce floods of frivolous libel litigation; hence, there is no reason to suppose there would be floods of suits for declaratory judgments which do not make plaintiffs eligible for any compensation. Third, and most importantly, the very essence of the declaratory relief procedure provides a substantial disincentive for frivolous suits, which does not exist under the current system. Since the question of the truth or falsity of the publication is nowadays rarely addressed, plaintiffs can file suits and then blame their failure to recover on the actual malice requirement. Hence, people who have been rightfully defamed, such as organized crime figures or corrupt politicians, and who do not fear the financial consequences of the litigation, might be interested in seeking partial vindication by the mere act of suing the media, without bearing the risk of a judgment confirming the truth of the charges against them. In contrast, a person who knows that the defamation published about her is accurate can only lose from filing a frivolous action for a declaratory judgment, in which it will ultimately be held expressly that she failed to prove the falsity of the publication.

To sum up, the proposed settlement does not raise a serious concern of a chilling effect, since publishers would know that their probability of having to retract is low and that the financial and non-financial costs incurred by such an obligation, should it be imposed, are likely to be insignificant. Furthermore, the harm caused, if there is any, could be balanced or mitigated by other factors. Hence, the least that can be said is that this proposal would not yield a concrete, ascertainable disadvantage to the media which would deter them.

196. Smolla & Gaertner, supra note 78, at 51.
197. See Leval, supra note 5, at 1297.
199. Barrett, supra note 78, at 862-63; Franklin, supra note 110, at 826-27; Smolla & Gaertner, supra note 78, at 53. See also Bezanson, Libel Law, supra note 191, at 230-31.
from reporting on disputable facts in the first place, any more than they are deterred now. If there remains any chill at all it would be negligible, and would be outweighed by the significant societal interests that the mandatory retraction rule is designed to enhance.

6. Mandatory Retraction When Actual Malice is Established

While the need for mandatory retraction, viewed from the perspective of the plaintiff's individual right of reputation, seems less acute in those rare cases in which damages are awarded, it is still necessitated by the compelling societal interest in promoting efficient self governance. Even when money damages are awarded, in many cases the judgment alone will not draw sufficient public notice. With the absence of wide publication, the falsehood will persist in the public mind. Due to the immeasurable importance of enabling the citizens to make intelligent decisions based on widespread, abundant and accurate information concerning public affairs and public figures, society's interest in correcting defamatory misstatements about such matters extends beyond the desire to provide relief to aggrieved individuals. “Once a defamatory falsehood has been published, the public official's reputation is restored only if those to whom the defamation was uttered are informed of the statement's falsity.” Therefore, it is appropriate to supplement the damages that the defendant would have to pay in such a case with an obligation to retract.

Examining the considerations pertinent to the defendant leads to a similar conclusion. The justification for imposing the mandatory retraction rule on publishers who act with actual malice follows a fortiori from the analysis of the cases in which they do not. It should first be noted that the effect of the compelled retraction would probably be negligible in comparison with the monetary liability imposed on the defendant in such a situation. But even if it is not negligible, it is still legitimate according to Sullivan. The moral and ethical flaw of such behavior on the part of the publisher is so severe, that there is no reason not to expose him to both remedies. As the Supreme Court indicated, punishing publishers for circulating false defamatory reports while being indifferent to the truth does not amount to a chilling effect prohibited by the First Amendment. The Court noted that “[c]alculated falsehood falls into that class of

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200. Ingber, Intangible Injuries, supra note 3, at 834.
201. Vindication of Reputation, supra note 6, at 1730-31.
202. Id. at 1739.
utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'

The aforementioned moral considerations also deny the option of exempting the defendant from the monetary sanction when a retraction is ordered. An additional, practical argument could be raised in support of that position. Making the damages and the retraction remedies cumulative rather than alternative might further reduce the risk of frivolous suits by "guilty plaintiffs." In case the remedies are alternative, such plaintiffs would be able to insist that they prefer monetary compensation over actual vindication, thereby evading judicial examination of the truth of the charges against them and blaming Sullivan for their defeat. In contrast, if the remedies may be granted cumulatively, suing for damages while foregoing the retraction action could be interpreted by the public as "pleading guilty," and since the retraction action would be very undesirable for "guilty plaintiffs," they might refrain from suing altogether.

Finally, it should be noted that though it would certainly constitute bad journalism to report on the finding of falsity while failing to mention the financial sanction imposed on the publisher, only the finding should be the subject of the mandatory publication. The reason is that the decisive factor giving rise to the monetary liability—the defendant's actual malice—is not a matter of public interest whose publication is necessary to further an important public objective.

VI. Conclusion

The publication of false defamatory statements relating to public figures, which is normally not recoverable under American libel law, causes severe harm to the victims' right to reputation and to the societal interest of shaping an informed citizenry capable of effective self-governance. Once a publisher becomes aware that a defamatory report previously made by him is false, the right thing for him to do, professionally, ethically and morally, is to inform his audience of the mistake. Hopefully, most media do so. However, since the values that a publisher might harm by choosing not to retract are so crucial, society is not bound to leave this decision to his discretion. Rather, it may recognize a norm obliging him to undo the damage, provided

that it affects to the smallest extent possible the media's freedom from compelled speech and their editorial autonomy.

This article portrays a legal settlement that could meet the said demands. It asserts that a state statute authorizing courts to issue a declaratory judgment, stating that a defamatory publication has been proved as false by clear and convincing evidence, accompanied by an injunctive relief ordering the defendant to report on that verdict, may be deemed constitutional. The proposed settlement is likely to cause publishers negligible harm at the most, and could even serve their interests in some ways. A final remark that can be added is that also the press in general might benefit from this proposal. Because truth has become almost irrelevant in libel actions, the credibility of the press has arguably decreased, since the American public has no way of discerning whether news stories that become subjects of libel suits are true or false.²⁰⁴ A shift in the focus of the judicial process toward an examination of the truthfulness of libelous publications could help to convince the public that most of the journalistic reports are true. Furthermore, the proposal is likely to induce the media to retract voluntarily more often and more prominently than they do today, upon recognizing that the publication at stake has clearly turned out to be false. A press that consistently admits its own mistakes and shows devotion in carrying out its mission of keeping the citizens informed and updated might gain greater public faith, and thus be able to perform its constitutional role more successfully.²⁰⁵ If the norm of retraction is rooted throughout the journalistic profession and accepted as a trivial standard of conduct, many journalists would be surprised to find that sorry is not such a hard word after all.

²⁰⁴ Barrett, supra note 78, at 861-62.
²⁰⁵ Cf. Anderson, supra note 78, at 535.