IMPORTING GERMAN DEFAMATION PRINCIPLES: A CONSTITUTIONAL RIGHT OF REPLY

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I. INTRODUCTION

In the realm of defamation and media access law, United States jurisprudence is an international outlier. If these areas of law are meant to balance the interests of the press with the interests of individuals, U.S. law has certainly weighted the scales quite favorably to the press. Court decisions, like *New York Times v. Sullivan*, *Miami Herald Publishing Co. v. Tornillo*, and *Gertz v. Welch*, have restricted an American individual's ability to defend herself against a press whose editorial discretion has been left mostly unbridled. This state of affairs might be even more troubling today considering that some scholars view the press as becoming more powerful than it was when the Supreme Court decided these cases.[1]

This unbalanced legal landscape is not found in most other countries. Germany, for example, treats all defamation plaintiffs equally regarding the applicable burden of proof.[2] This sharply contrasts against the American *New York Times* rule, which demands an extremely high standard of proof for defamation plaintiffs regarded as "public officials"[3] or "public figures."[4] Also, the German Constitution places a positive duty on the state to protect an individual's right to personality and human dignity—including protection against the nation's press.[5] The U.S. Constitution, on the other hand, does not con-

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1. *See, e.g.*, Jerome A. Barron, *Rights of Access and Reply to the Media in the United States Today*, 25 COMM. & L. 1, 2 (2003).

2. *See* BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Jan. 2, 2002, BUNDESGESETZBLATT [BGBL. I] § 823, para. 1 (Ger.), *available at* http://www.gesetze-im-internet.de/englisch_bgb/german_civil_code.pdf; *see also* Alexander Bruns, *Access to Media Sources in Defamation Litigation in the United States and Germany*, 10 DUKE J. COMP. & INT'L L. 283, 285-86 (2000).

3. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

4. Curtis Publ'g Co. v. Butts, 388 U.S. 130, 152-55 (1967) (extending the *New York Times* rule to encompass those considered "public figures").

5. Kyu Ho Youm, *The Right of Reply and Freedom of the Press: An International and Comparative Perspective*, 76 GEO. WASH. L. REV. 1017, 1037-38 (2008); *see also* David Abraham, *The German Duality of State and Society*, 4 CARDOZO J. INT'L & COMP. L. 345

template so-called "positive rights,"[6] and it does not specifically enumerate rights of personality or individual dignity as being protected. Also, as part of fulfilling the state's positive duty, German law provides "right-of-reply" statutes that provide individuals with a mechanism to reply to factual statements promulgated by the media.[7] In essence, these right-of-reply statutes give individuals opportunities to provide their side of the story, at least where only factual statements are concerned.[8] On the other side of the Atlantic, the American *Miami Herald Publishing Co. v. Tornillo* decision has precluded right-of-reply statutes.[9]

In this Note, I would like to advocate some type of mechanism in which American law can more equally balance the respective interests in this area. Assuming that Germany's system strikes a better balance in the defamation context, how can American defamation law become more balanced without seriously undermining the rationales underlying the relevant Supreme Court decisions? I will suggest a hybrid right of reply that takes aspects from both American and German law. The type of right-of-reply statute that I advocate will contradict aspects of the U.S. Supreme Court jurisprudence—most specifically, the *Tornillo* decision. Indeed, for the advocated hybrid to be implemented, *Tornillo* would have to be overturned at least partially. However, I will attempt to show that a properly curtailed right of reply actually fits very well within U.S. constitutional values, and, at the very least, one of *Tornillo*'s two rationales will not suffer from the implementation of a hybrid right of reply.

In Part II, I will briefly describe and compare the American and German legal systems of defamation and right of reply. In Part III, I will describe the various policy rationales underlying the major U.S. decisions in these areas. These rationales will be examined with an eye toward illuminating precisely what the Supreme Court is worried about in the context of defamation and right of reply. In Part IV, I will attempt to flesh out what a hybrid right of reply might look like in the United States, and I will analyze the proposed hybrid right in light of the Supreme Court's reasoning in this area and the historical rationales underlying the First Amendment. I seek to show that a properly curtailed right of reply can and should be found constitutionally permissible.

(1996) (discussing the positive and negative rights encompassed in the German Constitution, and contrasting against the American Constitution's focus on negative rights).

6. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 204 (1989) (Brennan, J., dissenting).

7. Stephen Gardbaum, *A Reply to* The Right of Reply, 76 GEO. WASH. L. REV. 1065, 1065 (2008); Youm, *supra* note 5, at 1037-43.

8. Youm, *supra* note 5, at 1039-40.

9. 418 U.S. 241 (1974).

II. THE U.S. AND GERMAN DEFAMATION AND REPLY SYSTEMS

Before specifically focusing our attention on each country's respective defamation and right-of-reply regimes, it is important to keep these two fundamental differences between U.S. and German constitutional law in mind: (1) the United States has adopted the state action doctrine, and (2) German constitutional law incorporates the idea of positive rights.

First, in the United States, only the state can violate an individual's constitutional rights.[10] Therefore, in any U.S. constitutional claim, a plaintiff must first prove the threshold requirement of a "state action."[11] If the wrongdoer is a public actor, then a constitutional claim may lie; however, no constitutional claim can exist where the wrongdoer is a private actor.[12] "State action generally arises out of a person's acting on behalf of the government or performance of a duty that is traditionally carried out by the state."[13] A state action is not required for constitutional claims in Germany, where both private actors and public actors can commit constitutional violations.[14]

Second, Germany recognizes "positive" rights,[15] unlike the United States, which only recognizes "negative" rights.[16] Generally, a positive right is a right requiring the state to perform some action; a negative right, on the other hand, is only a right to be free from certain types of government action.[17]

It is important to keep these two fundamental distinctions in mind as we focus on the American and German defamation and right-of-reply regimes specifically. These two differences are constantly at play in the backdrop of each country's defamation and right-of-reply systems.

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10. *See* John Fee, *The Formal State Action Doctrine and Free Speech Analysis*, 83 N.C.L. REV. 569, 575 (2005).

11. *Id.*

12. *See* Julie K. Brown, Note, *Less Is More: Decluttering the State Action Doctrine*, 73 MO. L. REV. 561, 562-63 (2008). The only exception to the state action doctrine is the Thirteenth Amendment prohibition against slavery. U.S. CONST. amend. XIII; Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L. REV. 1379, 1388 (2006).

13. Brown, *supra* note 12, at 564 & n.28 (citing Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991)).

14. *See* Pawel Lutomski, *Private Citizens and Public Discourse: Defamation Law as a Limit to the Right of Free Expression in the U.S. and Germany*, 24 GER. STUD. REV. 571, 576 (2001).

15. *See* Abraham, *supra* note 5, at 345-50.

16. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 204 (1989) (Brennan, J., dissenting) (noting that the Court based its decision on the "absence of positive rights in the Constitution").

17. Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 864 (2001).

Turning to defamation and right of reply, the first major distinction between the United States and Germany stems from the rights that are textually enumerated in each country's constitution and the resulting weight that is given to certain values. The two countries' constitutions are similar in that both documents enumerate rights of free speech and press. The First Amendment states: "Congress shall make no law . . . abridging the freedom of speech, or of the press[.]"[18] Likewise, the Basic Law for the Federal Republic of Germany ("Basic Law"), Germany's constitutional document, has similar provisions. Article 5(1) of the Basic Law states: "Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures . . . . Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship."[19] Therefore, both countries are dedicated to preserving freedoms of speech and press.

However, unlike the textually unqualified First Amendment provisions, the Basic Law makes it clear that the freedoms of speech and press are not absolute. Article 5(2) of the Basic Law states: "These rights shall find their limits in the provisions of general laws . . . and in the right of personal honour."[20]

Additionally, the Basic Law enumerates certain rights that are not specifically found in the U.S. Constitution. Two provisions are relevant. First, Article 2(1) guarantees to individuals the right to freely develop their personalities.[21] Second, and more fundamentally, Article 1(1) proclaims: "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."[22]

Interestingly, the latter two provisions in Articles 1 and 2 have had more of an effect on German defamation doctrine than the "personal honor" limitation on free speech and press found in Article 5(2).[23] From an outsider's point of view, the personal honor limitation might appear to be more relevant. Textually, the limitation directly qualifies the freedom of speech and press values found in Article 5(1). Also, intuitively, the personal honor limitation seems directly on point when considering the rights implicated by defamation. However, during German doctrinal development, the personal honor limitation yielded in importance to the individual's right to freely develop

18. U.S. CONST. amend. I.

19. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I art. 5(1) (Ger.), *translated in* DEUTSCHER BUNDESTAG, BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY (Christian Tomuschat & Donald P. Kommers trans., 2010).

20. *Id.* art. 5(2).

21. *Id.* art. 2(1).

22. *Id.* art. 1.

23. Lutomski, *supra* note 14, at 582.

his personality.[24] Thus, in German defamation law, protection of the personality right is the focus.

The Basic Law's additional constitutional provisions effectively create a more balanced approach to defamation litigation in Germany than in America. American defamation litigation presumes that freedom of speech is the more important value when compared to the reputational interests of the individual.[25] In the United States, freedom of speech is a constitutional guarantee, whereas defamation is a state law tort issue that usually involves disputes between private parties and no state action.[26] German defamation litigation, on the other hand, involves two separate but equal constitutional values—freedom of speech and freedom to develop one's personality.[27] Instead of preemptively preferring the free speech value, a German court will engage in an ad hoc balancing of the rights implicated on both sides.[28] "Thus the American principle of priority contrasts with the German principle of balancing."[29] Also, since Germany has no state action doctrine,[30] the fact that defamation defendants are usually private actors does not bar constitutional analysis of their actions.

The second major distinction between U.S. and German defamation law is the American "actual malice" standard established by the Supreme Court in *New York Times Co. v. Sullivan*.[31] This decision established a heightened standard of proof based on the identity of the defamation plaintiff.[32] If a defamation plaintiff is a "public official," she must show that the defendant made the defamatory statement with "actual malice."[33] The Court defined a statement made with actual malice as one made "with knowledge that it was false or with reckless disregard of whether it was false or not."[34] The Court

24. *Id.*

25. *Id.* at 576.

26. The fact that defamation lawsuits almost always involve nongovernment private actors most likely is due to the nature of the tort itself. However, another reason state action is not usually at issue in defamation suits is that, at common law, many state actors enjoy privileges against defamation actions for statements made in their official capacities. These privileges are available in varying degrees to legislators, judicial actors, and high ranking executive officials. *See, e.g.*, James O. Vaughn, Note, *Privileged Statements by Public Officers as Infringements of Discharged Public Employees' Liberty Interests*, 54 CHI.-KENT L. REV. 255, 255 (1977).

27. Lutomski, *supra* note 14, at 576.

28. *Id.*

29. *Id.*

30. *See* Danwood Mzikenge Chirwa, *The Horizontal Application of Constitutional Rights in a Comparative Perspective*, 10(2) L., DEMOCRACY & DEV. 21, 22 (2006) (explaining how German constitutional law has a place in the "private sphere").

31. 376 U.S. 254, 279-84 (1964).

32. *Id.* at 279-80.

33. *Id.*

34. *Id.*

reasoned that any lesser standard of liability in public official cases could curtail criticism of government officials.[35] The First Amendment requires such a standard in these cases because "debate on public issues should be uninhibited, robust, and wide-open,"[36] and a lesser standard of liability might result in self-censorship.[37]

A subsequent case, *Curtis Publishing Co. v. Butts*, expanded the actual malice doctrine to include "public figures."[38] After this case, the *New York Times* rule would not only apply to public officials but also to any plaintiffs classified as public figures. Generally, a public figure can be any individual "involved in issues in which the public has a justified and important interest."[39] The Court in *Gertz v. Robert Welch, Inc.*, explained that any individuals "who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures."[40] Thus, celebrities are generally considered public figures.[41]

Therefore in the United States, the identity of the plaintiff determines which standard will apply to the intent element of a defamation claim. If the plaintiff is a public official or public figure, she must show the defendant's actual malice in making the defamatory statement.[42] If the plaintiff is a private individual, she may prevail by merely showing the defendant's negligence in making the defamatory statement.[43] Of course, as in all defamation litigation, both classes of plaintiffs must also prove the falsity and defamatory nature of the statement at issue.[44] The obvious result is that public figures are less able to defend their reputational interests against defamatory attacks. As explained above, in U.S. jurisprudence, this sacrifice is meant to ensure freedom of expression as guaranteed by the First Amendment.

The distinction between public figures and private individuals, and the actual malice standard and negligence standard, respectively, are hallmarks of American defamation law. However, most coun-

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35. *Id.* at 278-79.

36. *Id.* at 270.

37. *Id.* at 278-79.

38. 388 U.S. 130, 153-55 (1967).

39. *Id.* at 134.

40. 418 U.S. 323, 342 (1974).

41. Alan Kaminsky, *Defamation Law: Once a Public Figure Always a Public Figure?*, 10 HOFSTRA L. REV. 803, 803 n.3 (citing Carson v. Allied News Co., 529 F.2d 206, 209-10 (7th Cir. 1976); Cepeda v. Cowles Magazines & Broadcasting, Inc., 392 F.2d 417, 419 (9th Cir. 1968)).

42. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

43. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347-48, 350 (1974).

44. *See, e.g.*, David A. Anderson, *Rethinking Defamation*, 48 ARIZ L. REV. 1047, 1050 & n.28 (2006) (citing Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 770 (1986)).

tries, including Germany, do not use such a doctrine.[45] Under Article 2(1) of the Basic Law, "*Every person* shall have the right to free development of his personality . . . ."[46] Thus, in German defamation law, no distinction exists based solely on the plaintiff's identity. The same intent standard applies to every plaintiff's case. In Germany, a potential defamation plaintiff, regardless of social status, may state a claim for damages under Section 823 of the Bürgerliches Gesetzbuch, Germany's Civil Code, when an individual intentionally or negligently violates the plaintiff's personality rights under the Basic Law.[47]

However, German press defendants can assert a so-called "public interest defense."[48] The press is allowed to report on an individual's misconduct even if that misconduct has not been absolutely proven.[49] However, the media must make it clear that an investigation is still underway.[50] Finally, the press must base such stories on reliable sources and verify the information.[51]

This defense is similar to the *New York Times* rule in that the plaintiff's notoriety is relevant. "The more a person is part of public life (and tolerates this), the more criticism he has to put up with."[52] However, this defense differs considerably from the *New York Times* rule in that the press is expected to perform an investigation.[53] Thus, even with public-figure plaintiffs, the applicable standard in Germany still appears more like negligence, not actual malice. Thus, German defamation law is much more protective of public figures' reputational interests than American law.

The final major distinction between U.S. and German defamation law is the right of reply. In Germany, the details of the right are

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45. Although still used by a minority of the world, the actual malice standard might actually be gaining some momentum as an American legal export to other countries such as the Philippines. For a full discussion, see Kyu Ho Youm, *"Actual Malice" in U.S. Defamation Law: The Minority of One Doctrine in the World?*, 4 J. INT'L MEDIA & ENT. L. 1 (2011).

46. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I art. 2(1) (Ger.), *translated in* DEUTSCHER BUNDESTAG, BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY (Christian Tomuschat & Donald P. Kommers trans., 2010).

47. BGB § 823, para. 1 (Ger.), *available at* http://www.gesetze-im-internet.de/englisch_bgb/german_civil_code.pdf; *see also* Bruns, *supra* note 2, at 285-86.

48. TAYLORWESSING, DEFAMATION AND PRIVACY LAW AND PROCEDURE IN ENGLAND, GERMANY AND FRANCE 7 (2006).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*; *see also* Bruns, *supra* note 2, at 286. In American defamation law, under the Supreme Court's interpretation of the *New York Times* rule, the failure of the press to perform an investigation does not rise to the level of actual malice. *See, e.g.*, Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 84-85 (1967).

found in each individual state's press laws;[54] however, the German right of reply is not merely a statutory creature. Right-of-reply statutes are not only permissible under the Basic Law, but the Basic Law actually requires their existence.[55] The protection of personality rights required by the Basic Law imposes a positive duty on the German states to enact right-of-reply statutes.[56] The right-of-reply statutes outline for the press their responsibilities under the Basic Law.[57] In Germany, protecting individuals from defamation was the primary purpose for establishing the right-of-reply statutes.[58]

The key elements of each German reply law are very similar.[59] Any person or organization affected by a press statement can request a reply.[60] If the request is proper, the publisher of the original statement must publish the reply, and the publisher must provide the reply with a similar type of coverage as the original statement.[61] For example, under the Hamburg Press Law, a news periodical must publish the reply in the same section and in the same type as that of the original, challenged story.[62] The broadcasting press, such as radio and television news, must broadcast the requested reply in a similar time slot and to the same receiving area.[63]

However, to balance free speech and press principles with personality rights, the right of reply is limited in certain ways. The most important limitation hinges on the distinction between factual statements and statements of opinion; a reply must be limited to factual statements made by the press.[64] Any statements of opinion made by the publisher are privileged, and no reply is available relating to those opinions.[65] In addition, the length of any reply must not exceed

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54. Kyu Ho Youm, *Right of Reply Under Korean Press Law: A Statutory and Judicial Perspective*, 41 AM. J. COMP. L. 49, 57 (1993).

55. *See id.* at 56; Bruns, *supra* note 2, at 291; Gardbaum, *supra* note 7, at 1065.

56. *See* Gardbaum, *supra* note 7, at 1065; Youm, *supra* note 54, at 56-57.

57. Youm, *supra* note 54, at 57.

58. *See id.* Some American scholars, most notably Jerome A. Barron, have advocated right-of-reply statutes as a way to provide the American individual greater public access to the American media. *See* Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1672-73 (1967) [hereinafter Barron, *Access to the Press*]; *see also* Jerome A. Barron, *Access to the Media—A Contemporary Appraisal*, 35 HOFSTRA L. REV. 937, 938 (2007) [hereinafter Barron, *Access to the Media*]. However, the German right-of-reply statutes have protection from defamation as their main purpose, not public access. *See* Youm, *supra* note 54, at 57.

59. Youm, *supra* note 54, at 57.

60. *Id.* at 58.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 57-58.

65. *Id.* at 58.

the original, challenged statement, and the reply's content cannot be defamatory.[66]

Interestingly, one possible limitation is noticeably absent from the German reply statutes. Considerations of truth and falsity are irrelevant as to whether a reply is proper. A reply can be made without proving either the falsity of the original statement or the truth of the reply.[67] As long as the reply only concerns factual statements, German law gives an individual the chance to provide her version of the facts in her own words. In this way, the right-of-reply statutes protect an individual's personality rights by providing a speedy remedy.[68] The individual can reply against press allegations without having to prove falsity in a protracted legal proceeding. Therefore, even though protection from defamation is the primary purpose of the right of reply, an individual, in theory, could reply to a statement that is not actually false and therefore would not satisfy the falsity element of a litigated defamation claim. Given this dissonance, it is not surprising that the German press has challenged the statutes as overly broad.[69]

Notwithstanding, the German press has had difficulty challenging the constitutionality of right-of-reply statutes. In one challenge regarding the Hamburg Press Law, the German Constitutional Court balanced freedom of press with the right to personality and held that the reply provisions did not limit freedom of press in a disproportionate manner.[70] According to Professor Kyu Ho Youm's analysis of the case, the court felt that the right of reply was sufficiently limited for three reasons.[71] First, only a person who was an object of a news story could exert the right.[72] Second, the statute's fact-opinion distinction sufficiently protected freedom of expression.[73] Third, replies are qualified by the subject matter and scope of the challenged publication.[74]

The press also argued that the Hamburg Press Law was not sufficiently limited because it required no proof of the original statement's falsity.[75] The court found no merit in this objection because limiting the right of reply in this way would interfere with the state's duty to

66. *Id.*
67. Bruns, *supra* note 2, at 291; Youm, *supra* note 5, at 1042.
68. Bruns, *supra* note 2, at 291.
69. Youm, *supra* note 5, at 1040-42.
70. *Id.*
71. *Id.* at 1041-42.
72. *Id.*
73. *See id.* at 1042.
74. *Id.*
75. *Id.*

protect the right of personality.[76] The right of reply is a very useful tool in protecting personality rights because it offers a quick response.[77] If the party seeking reply had to prove falsity, the statute's usefulness would deteriorate.[78]

Comparatively, American jurisprudence has treated right-of-reply statutes much more negatively. In *Miami Herald Publishing Co. v. Tornillo*, the Supreme Court held that a Florida right-of-reply statute was unconstitutional.[79] The Court felt that the Florida right-of-reply statute interfered too much with the freedom of press, and that such right-of-reply statutes might encourage press self-censorship in an unconstitutional manner.[80] Notably, the *Tornillo* decision did not expressly deal with all possible types of right-of-reply statutes.[81] The Florida statute categorically offered a reply to all press criticism—encompassing attacks on either "personal character or official record"—of an electoral candidate.[82] Also, the Florida statute imposed criminal misdemeanor penalties on any publication refusing to publish such a reply.[83] Thus, the statute was arguably even broader and harsher than the German right-of-reply statutes, which at least differentiate between factual statements and statements of opinion. Theoretically, the constitutionality of narrower reply options may still be an open question.[84]

III. THE RATIONALES AND CONCERNS SHAPING THE AMERICAN SYSTEM

Defamation law inherently requires a conflict between free speech and press principles. Through defamation law, the state imposes penalties on people for the content of their speech.[85] Given this type of restriction, it is not surprising that the Supreme Court has had difficulty trying to reconcile defamation law with the First Amendment. What exactly is the Supreme Court worried about? In examining the relevant cases, one main concern becomes especially evident—defamation law's potential chilling effect on press publications. The concern is that fears of defamation liability will cause publica-

76. *Id.*

77. *See id.*

78. *See id.*

79. 418 U.S. 241 (1974).

80. *Id.* at 257-58.

81. *See id.*; William J. Speranza, Comment, *Reply and Retraction in Actions Against the Press for Defamation: The Effect of* Tornillo *and* Gertz, 43 FORDHAM L. REV. 223, 233 (1974).

82. *Tornillo*, 418 U.S. at 244; Speranza, *supra* note 81, at 233.

83. *Tornillo*, 418 U.S. at 244.

84. Barron, *supra* note 1, at 5; Speranza, *supra* note 81, at 233.

85. R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992).

tions to think twice about printing certain stories. Committing to the idea that public debate should be "wide-open,"[86] the Court has noted that, unless certain defamation protections are provided, the press will censor itself in a way that has negative effects on public debate.[87]

At American common law, defamation encompassed two torts: libel and slander.[88] Defendants were liable for libel if their defamatory statements were made in writing, and defendants were liable for slander if their defamatory statements were made orally.[89] A plaintiff could succeed on a defamation claim if she established two elements.[90] First, the defendant had to communicate the statement at issue to a third person—someone other than the plaintiff.[91] Second, the statement had to be defamatory.[92] A statement was defamatory if it tended " 'to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.' "[93] At common law, no fault element existed.[94] Defamation was a strict liability tort; however, if the defendant could prove the truth of her statement, she would escape liability.[95] Truth was an absolute defense.[96]

Also, at common law, the distinction between libel and slander became important in the realm of remedies. If the defamation was libel, the plaintiff could recover presumed damages without having to prove actual harm.[97] If the defamation was slander, the plaintiff could only attain presumed damages in certain limited instances.[98] Otherwise, the plaintiff had to prove "special damage" in a slander case.[99] These general rules represented the key points of state defamation doctrine until 1964, when the Supreme Court issued *New York Times Co. v. Sullivan.*

In *New York Times*, the Supreme Court entered the stage and made its first attempt to grapple with the tensions inherent between

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86. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

87. *Id.* at 278-79; *see* Jeffrey A. Plunkett, Comment, *The Constitutional Law of Defamation: Are All Speakers Protected Equally?*, 44 OHIO ST. L.J. 149, 184 (1983).

88. Plunkett, *supra* note 87, at 151.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 559 (1977)).

94. *See id.* at 152.

95. *Id.*

96. *Id.*

97. *Id.* at 151-52.

98. *Id.*

99. *Id.* at 152 & n.29 (internal quotation marks omitted).

defamation law and the First Amendment.[100] Faced with a libel suit filed by an elected official against the New York Times for reporting inaccurate descriptions of the official's actions,[101] the Supreme Court held that a public official could not succeed on her claim, unless she could prove "that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[102]

The Court's main concern was self-censorship. The Court stated that the First Amendment " 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' "[103] Echoing the classic marketplace-of-ideas rationale, the Court quoted Judge Learned Hand, stating that the First Amendment " 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.' "[104] Presented with the argument that the statements at issue were false and thus should not be constitutionally protected, the Court countered by explaining "[t]hat erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.' "[105] Thus, the Court interpreted the First Amendment as requiring "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[106]

Fearing that the press might be reluctant to report on important public issues if doing so could expose them to steep liability, and that this self-censorship would stifle "uninhibited, robust, and wide-open"[107] debate, the Court adopted the "actual malice" standard for plaintiffs classed as public officials.[108] Hoping to remove any chilling effect that might exist for fear of reporting on public officials, the Court made it exceedingly difficult for public officials to recover in defamation actions.

Under the same rationale, three years later in *Curtis Publishing Co. v. Butts*, the Court extended the "actual malice" standard to include public figures.[109] Focusing on the similarities shared between

100. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

101. *Id.* at 256-58.

102. *Id.* at 279-80.

103. *Id.* at 269 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

104. *Id.* at 270 (quoting United States v. Assoc'd Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

105. *Id.* at 271-72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

106. *Id.* at 270.

107. *Id.*

108. *See id.* at 279-80.

109. 388 U.S. 130 (1967).

public officials and public figures, the Court decided that the same constitutional safeguards should apply to both classes.[110] Chief Justice Warren's concurrence, which would eventually be the most influential opinion from the case,[111] reasoned that public figures "are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large."[112]

The Court also mentioned that public figures, like public officials, voluntarily imputed themselves into the public sphere.[113] Also, public figures, unlike private individuals, could easily attain access to the media to provide their own comments on allegations made against them.[114] Through such access, public figures could " 'expose through discussion the falsehood and fallacies' of the defamatory statements."[115] These two rationales would become even more important in subsequent cases.

The Court's next installment, *Rosenbloom v. Metromedia, Inc.*,[116] pushed the *New York Times* rule even further—so far, in fact, that the Court overturned the decision relatively quickly.[117] In *Rosenbloom*, the plaintiff was a *private* individual.[118] Rosenbloom was a distributor of adult magazines who had been arrested for possession of obscene materials.[119] In his defamation case, Rosenbloom sued a radio station that had broadcast a story about his arrest.[120] The issue before the Court was whether the "actual malice" standard should apply in the case.[121]

The *Rosenbloom* plurality held that the "actual malice" standard was constitutionally mandated in this type of situation.[122] In deciding the issue, the plurality focused on the public's interest in being informed about important issues.[123] Even though Rosenbloom was a private individual, the public had an interest in being informed about

110. *Id.* at 154-55.

111. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 336 (1974).

112. *Curtis Publishing*, 388 U.S. at 164 (Warren, C.J., concurring).

113. *See id.* at 155 (majority opinion).

114. *See id.*

115. *Id.* (quoting Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., dissenting)).

116. 403 U.S. 29 (1971) (plurality opinion).

117. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), *abrogating Rosenbloom*, 403 U.S. 29.

118. *Rosenbloom*, 403 U.S. at 31-32.

119. *Id.* at 32-33.

120. *Id.* at 33-35.

121. *Id.* at 30-32.

122. *Id.* at 52.

123. *Id.* at 43.

his arrest.[124] Thus, *Rosenbloom* expanded the logic underlying *New York Times* and *Curtis Publishing*. Instead of focusing on the public's interest of freely commenting on public figures, the Court focused on the public's interest in being informed on all public matters, regardless of the people involved.[125]

Echoing *Curtis Publishing*, Rosenbloom argued that the "actual malice" standard should not apply to private individuals by distinguishing private figures from public figures in two important ways.[126] First, Rosenbloom argued that private individuals, unlike public figures, do not enjoy sufficient access to the press.[127] Therefore, private individuals have fewer opportunities to publicly present their sides of the story and need more protection than public figures.[128] In response, the plurality expressed skepticism, arguing that most public figures also cannot effectively counter defamatory statements because "[d]enials, retractions, and corrections are not 'hot' news, and rarely receive the prominence of the original story."[129] The plurality then expressed concern that defamation actions should not be the solution for such "access to press" problems.[130] According to the Court, defamation actions might present a "cure [that is] far worse than the disease."[131] Interestingly, the Court stated, "If 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."[132] At the time, many scholars thought that the plurality was actually inviting the enactment of alternative remedies, such as right of reply, to solve access problems for private persons.[133] In fact, in an accompanying footnote, the opinion even pointed out that "[s]ome States have adopted retraction statutes or right-of-reply statutes."[134]

Second, Rosenbloom argued that private individuals, unlike public figures, have not voluntarily injected themselves into the public sphere and thus should qualify for more protection.[135] The plurality

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124. *See id.*

125. *Id.* ("If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved . . . .").

126. *Id.* at 45.

127. *Id.*

128. *See id.* at 45-46.

129. *Id.* at 46.

130. *Id.* at 46-47.

131. *Id.* at 47.

132. *Id.*

133. Speranza, *supra* note 81, at 226.

134. *Rosenbloom*, 403 U.S. at 47 n.15.

135. *Id.* at 45, 47-49.

found this argument to be off the mark. The Court did not find a relationship between the First Amendment values protected by the "actual malice" standard and the means by which an individual came under public scrutiny, whether voluntary or not.[136]

By expanding the *New York Times* rationale to encompass even private individuals, and by seemingly inviting the use of alternative "access to press" remedies, *Rosenbloom* effectively set the stage for two subsequent Supreme Court cases, decided on the same day—*Gertz v. Robert Welch, Inc.*[137] and *Miami Herald Publishing Co. v. Tornillo*.[138]

Gertz involved an attorney—a private individual—suing a publisher for printing false statements concerning his supposed involvement in framing a police officer who was convicted of murder.[139] Relying on *Rosenbloom*, the Seventh Circuit applied the "actual malice" standard to Gertz's defamation claim.[140] Although Gertz was a private individual, the application was proper under *Rosenbloom* because the matter in question was an issue of public concern.[141] Obviously feeling that they had overreached in *Rosenbloom*, the Supreme Court took the *Gertz* case as an opportunity to abrogate *Rosenbloom*, clarify the rationale underlying the *New York Times* rule, and set new rules for defamation cases involving private plaintiffs.[142]

As important as the new rules regarding private plaintiffs might be, the most important step in *Gertz* was, perhaps, to clarify the underlying rationale for the "actual malice" rule.[143] While not explicitly abandoning the *Rosenbloom* rationale—which focuses on the public's right to be informed about public matters—the *Gertz* Court instead reiterated and endorsed the self-censorship rationale.[144] Relying on *New York Times*, the Court explained that the purpose of defamation fault standards, such as actual malice, is to avoid an environment where publishers engage in self-censorship for fear of defamation liability.[145] According to the Court:

> Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship. Allowing the

136. *Id.* at 47-48.
137. 418 U.S. 323 (1974).
138. 418 U.S. 241 (1974).
139. *Gertz*, 418 U.S. at 325-27.
140. *Id.* at 330-32.
141. *Id.* at 330.
142. *See id.* at 348-52.
143. *Id.* at 340-41; *see* Speranza, *supra* note 81, at 228.
144. *Gertz*, 418 U.S. at 340, 342-43, 350.
145. *Id.* at 340.

> media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties.[146]

The *Gertz* Court viewed the *New York Times* rule as an accommodation between the First Amendment interests implicated by discussion of public figures and the "*limited* state interest"[147] in protecting public figures from defamation. However, the Court found that this state interest was stronger when dealing with private individuals, and thus, that the *New York Times* rule need not apply to private plaintiffs.[148] The Court explained that "[t]he need to avoid self-censorship by the news media is . . . not the only societal value at issue."[149] Protection of private individuals is also a legitimate goal.

In coming to this conclusion, the *Gertz* Court reiterated the two distinctions between public and private figures mentioned in *Curtis Publishing*—the same distinctions that were found unpersuasive in *Rosenbloom*. First, considering "self-help" to be "[t]he first remedy of any victim of defamation,"[150] the Court was much more sympathetic to the view that public figures enjoy more opportunities to rebut allegations made against them. Through the media, "[p]ublic officials and public figures . . . have a more realistic opportunity to counteract false statements than private individuals . . . ."[151] Second, the Court endorsed the view that public officials and public figures "stand in a similar position" in that they usually have voluntarily "thrust themselves to the forefront of particular public controversies."[152] According to the Court, while the media is entitled to assume that public officials and public figures have voluntarily accepted an increased risk of defamation, "[n]o such assumption is justified with respect to a private individual."[153]

In light of these two rationales, the Court found that the states' interest in protecting private individuals from defamation should weigh more heavily than that of protecting public figures.[154] While still requiring some finding of fault, the Court opened the door for states to choose a lower standard than actual malice in cases brought by private individuals.[155]

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146. *Id.*
147. *Id.* at 343 (emphasis added).
148. *Id.* at 341-43.
149. *Id.* at 341.
150. *Id.* at 344.
151. *Id.*
152. *Id.* at 345.
153. *Id.*
154. *See id.* at 345-46.
155. *See id.* at 347-48.

However, still seeking some First Amendment balance even in private-plaintiff cases, the Court placed limitations on presumed and punitive damages.[156] While private plaintiffs could prove liability by showing something less than actual malice—negligence for instance—the Court confined private plaintiffs' remedy to damages actually proven.[157] Worried about possible self-censorship if the press were confronted with presumed-damage liability, the Court disallowed states from providing presumed or punitive damages—even in private-plaintiff cases—unless the "actual malice" standard is proven.[158]

The same day the Court issued its decision in *Gertz*, it also issued *Miami Herald Publishing Co. v. Tornillo*.[159] However, before discussing the decision, it is important to briefly examine the legal thought surrounding reply remedies before and after *Rosenbloom*.

Even before *Rosenbloom*'s implied invitation, scholars had already advocated certain solutions for the problem of unequal access to the media. The seminal publication in this area was Jerome Barron's *Access to the Press—A New First Amendment Right*.[160] Barron noted that even though the First Amendment guarantees the right to expression once expression has occurred, it "is indifferent to creating opportunities for expression" to occur in the first place.[161] Barron's chief concern was that people holding views that are considered unpopular or too novel by the media cannot employ the same media channels enjoyed by others who hold orthodox ideas that can more easily attract public attention.[162] Since mass media tends to cover only expression that already captures public attention, other potentially valuable ideas are marginalized.[163] According to Barron, mass media hides behind its First Amendment privilege to cover whatever it prefers. In this way, the original rationale underlying the First Amendment—the marketplace of ideas—"has long ceased to exist."[164] If the First Amendment was meant to foster " 'a multitude of tongues,' "[165] should it not also promote an environment where everyone has an equal opportunity to disseminate their ideas?

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156. *Id.* at 347-50.

157. *Id.*

158. *Id.*

159. 418 U.S. 241 (1974).

160. *See* Barron, *Access to the Press*, *supra* note 58.

161. *Id.* at 1641.

162. *Id.* at 1646-47.

163. *See id.*

164. *Id.* at 1641-42.

165. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (quoting United States v. Assoc'd Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

In order to fully realize the First Amendment's purpose, Barron advocated ways to ensure greater access to the press—one of them being an opportunity to reply.[166] A right of reply is actually valuable to the marketplace-of-ideas rationale because it provides the public with more information and a different point of view. In focusing on defamation and the *New York Times* rule's professed purpose of assuring uninhibited debate, Barron thought that unless reply was available, the decision merely reinforced the media's ability to present only one side of a debate.[167] By adding more protection to the press without providing a right of reply, "the Court shows no corresponding concern as to whether debate will in fact be assured."[168]

After *Rosenbloom* was decided, right-of-reply advocates had a new rationale to hang their hats on. Unlike its predecessors, the *Rosenbloom* plurality focused more on the public's right to be informed about important issues.[169] Since *Rosenbloom* stressed the important role that the press plays in informing the public, right-of-reply advocates suggested that the right of reply is a more suitable remedy for defamation because, unlike awarding damages, the right of reply actually adds information to the public sphere.[170] Also, right-of-reply advocates suggested that self-censorship issues are less sensitive in the right-of-reply context, because the costs faced by the media for printing replies are far less expensive than defamation litigation and possible damages awards.[171] Finally, *Rosenbloom* implied that the right of reply might be a good solution for private individuals who, unlike their public figure counterparts, cannot obtain easy access to public channels.[172]

Confronted with these same policy arguments, the Supreme Court in *Tornillo* tackled the constitutionality of right-of-reply statutes. In this case, the Court faced a Florida statute that gave political candidates the right to demand replies from publications that had criticized them.[173] The Florida statute created a right of reply for candidates for nomination or election, giving them the ability to respond to press criticism.[174] The statute provided in pertinent part:

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166. *See* Barron, *Access to the Press*, *supra* note 58, at 1672-73; *see also* Barron, *Access to the Media*, *supra* note 58, at 938.

167. *See* Barron, *Access to the Press*, *supra* note 58, at 1657.

168. *Id.*

169. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 42-43 (1971).

170. Speranza, *supra* note 81, at 226-27.

171. *Id.* at 227.

172. *Rosenbloom*, 403 U.S. at 47 & n.15.

173. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 243-44 (1974).

174. *Id.* at 244.

> "If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, . . . such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply . . . ."[175]

Through his attorney, none other than Jerome Barron,[176] Tornillo argued that to ensure the First Amendment's goals of uninhibited debate, the government should ensure access to the press through such right-of-reply statutes.[177] Although it conceded that these concerns were valid, the Court struck down the right-of-reply statute as being adverse to the freedom of the press.[178] The Court declared the Florida right-of-reply statute unconstitutional, offering two rationales.

First, the Court once again relied on self-censorship concerns.[179] According to the Court, the right-of-reply statute imposed certain intolerable penalties on the newspaper.[180] By compelling a publication to print replies, the newspaper would suffer in terms of additional printing costs.[181] Also, and perhaps more importantly, the compelled replies would take up space that, but for the statute, the newspaper could use for articles that it preferred or thought were more important.[182] Faced with these penalties, a newspaper might refrain from publishing certain articles for fear that those articles would fall within the reach of the right-of-reply statute.[183] Thus, right-of-reply statutes could cause the same chilling effect that the *New York Times* rule was created to avoid.

However, the Court did not stop there. The Court stated:

> Even if a newspaper would face no additional costs . . . and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors.[184]

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175. Speranza, *supra* note 81, at 230 n.60 (quoting FLA. STAT. § 104.38 (repealed 1975)).

176. Barron, *supra* note 1, at 2-6 (discussing his involvement with the case).

177. *Tornillo*, 418 U.S. at 247-48.

178. *Id.* at 254-58.

179. *Id.* at 256-57.

180. *Id.*

181. *Id.* at 256.

182. *Id.* at 256-57.

183. *Id.* at 257.

184. *Id.* at 258.

Aside from self-censorship, the Court was opposed to the fact that the right-of-reply statute encroached on editorial discretion.[185] The Court did not see how *any* governmental regulation over the editorial process could pass First Amendment scrutiny.[186] In essence, the First Amendment guarantees to editors the right to choose—whether fair or unfair—what to publish and what not to publish.[187]

Although *Tornillo*'s first rationale may have left room for some sufficiently tailored right-of-reply statutes that minimize any resulting chilling effect, the Court's second rationale seems quite preclusive. Also, even though *Tornillo* involved a rather broad right-of-reply statute,[188] it is hard to see how any right-of-reply statute could pass constitutional scrutiny under *Tornillo*'s almost per se commitment to preserving editorial independence.

With *Tornillo* and *Gertz*, the Court attempted to even the playing field in defamation law; but at the end of the day, the press still came out on top. *Gertz* allowed a lesser fault standard for private individuals stating defamation claims; however, in the realm of remedies, the Court still tipped the scales in favor of the press.[189] *Gertz* also restricted a private individual's ability to recover punitive and presumed damages.[190] Under *Gertz*, unless the private plaintiff can prove actual malice, she is restricted to recovering actual damages,[191] which for a private individual is usually much lower than those of a public figure. Also, *Tornillo* refused to allow right of reply to operate as an alternative remedy.[192]

At least one Justice thought the Court was still taking its self-censorship fears too far. Justice White viewed these twin remedy restrictions, imposed on the same day, as too effective in avoiding self-censorship.[193] Concurring in *Tornillo*, Justice White agreed that right-of-reply statutes, as beneficial as they may be, faced an "insurmountable barrier" under free-press principles.[194] However, dissenting in *Gertz*, he explained his deep displeasure with the *Gertz* Court's

185. *Id.*

186. *See id.*

187. *Id.*

188. The Florida statute did not distinguish between statements of fact or opinion, did not differentiate between private individuals and public figures, and did not restrict its applicability to defamatory attacks. Speranza, *supra* note 81, at 230 n.60 (citing FLA. STAT. § 104.38 (repealed 1975)).

189. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347-50 (1974).

190. *Id.*

191. *Id.* at 348-49.

192. *Tornillo*, 418 U.S. at 256-57.

193. *See id.* at 261-62 (White, J., concurring).

194. *Id.* at 259.

restriction on presumed damages.[195] Justice White thought that, while it was unconstitutional for the government to insert replies into publications, states had still been able to protect reputational interests by allowing presumed damages—at least until *Gertz*.[196]

Was Justice White correct? Did the Court go too far when it restricted presumed damages while simultaneously restricting reply remedies? Apparently, the Supreme Court thought it did. In two cases following *Gertz*, the Court took some steps in balancing the defamation law framework. In 1985, the Court in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, allowed presumed or punitive damages in cases involving private individuals, but only if the matter at issue was not one of public concern.[197] Also, in 1990, the Court in *Milkovich v. Lorain Journal Co.*, took on the issue of whether statements of opinion were categorically exempt from defamation litigation under the First Amendment.[198] After *Gertz*, lower courts interpreted dictum from *Gertz* to mean that all statements of opinion were protected from defamation litigation.[199] The *Milkovich* decision clarified that interpretation, saying some statements that are labeled as opinion also imply underlying factual bases. The Court noted that mixed statements of opinion and fact, such as, "In my opinion John Jones is a liar," may still be actionable because that statement, even though labeled as an opinion, implies that the speaker has knowledge of certain facts.[200] The *Milkovich* Court therefore made it impossible for the press to escape liability by dressing factual statements up in the guise of opinion.

Although both *Dun & Bradstreet* and *Milkovich* balance the scales more evenly, over the last fifty years, the Supreme Court has paved a new landscape for American defamation law, indicating a willingness to tilt the legal framework more toward editorial freedom and less toward protecting individual reputational interests.[201] Overwhelmingly, the concern driving these press protections is the fear of press

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195. *See Gertz*, 418 U.S. at 371-404 (White, J., dissenting). Remember that before the *Gertz* decision, the common law allowed the plaintiff to recover without proving that the defamatory statement caused him actual damage by a loss of money, property, or anything else of value. Instead, "[d]amage is *presumed* to flow from the defamation." Nicholas J. Jollymore, Comment, *The Constitutionality of Punitive Damages in Libel Actions*, 45 FORDHAM L. REV. 1382, 1385 (1977).

196. *Tornillo*, 418 U.S. at 261-62 (White, J., concurring).

197. 472 U.S. 749, 757-61 (1985).

198. 497 U.S. 1 (1990).

199. *See id.* at 17-18.

200. *Id.* at 18-19 (internal quotation marks omitted).

201. *See* David McCraw, *The Right to Republish Libel: Neutral Reportage and the Reasonable Reader*, 25 AKRON L. REV. 335, 343 (1991) (pointing to *Rosenbloom* as the height of the Court's imbalance in this area).

self-censorship.[202] Although the Court has done its best to minimize defamation law's chilling effect, the Court has not done away with defamation liability entirely.[203] Since defamation law will always encourage some self-censorship, the Court must think that some level of chilling effect is constitutionally permissible. Returning to the issue of the right of reply, can we fashion a right of reply similar to Germany's that can fall within the range of permissibility? Putting aside *Tornillo*'s editorial discretion rationale, which concededly would have to be abrogated, I think we can.

IV. A CONSTITUTIONALLY PERMISSIBLE HYBRID RIGHT OF REPLY

Before outlining a hybrid right of reply, it is important to note how the right of reply fits into U.S. constitutional values. As examined above in Part II, the United States and other countries, like Germany, simply have different value systems as expressed through their core legal documents. Perhaps due to history, Germany has constitutionally expressed values of human dignity and rights to personality. The United States, however, does not. If the German right of reply is meant to further some value that the United States does not share, why should we not just take an expressivist view of the difference and accept that the right of reply is not a legal tool that the United States needs, given its own value system? The answer is that the right of reply offers benefits that actually comport very well with U.S. constitutional values. If we functionally view the right of reply simply as another legal tool, the United States should not shy away from such a tool if it fits within its own constitutionally expressed values—most specifically, First Amendment values of speech and press.

Therefore, we must examine the general benefits of a right of reply and how they fit within the First Amendment value system. Although the possible chilling effect of a right of reply will always be a valid concern under the First Amendment, its benefits are also rooted in fundamental First Amendment rationales.

First, in the context of defamation law, the right of reply provides an alternative defamation remedy that not only provides protection for an individual, but also provides a public benefit. Unlike damage awards that are meant to compensate the individual, a right of reply furthers the marketplace-of-ideas rationale underlying the First Amendment. A right of reply provides to the public additional information and another point of view concerning certain issues. With this additional information, public debate is enriched. Given both sides of an issue, the public may debate the issue more thoroughly. Under

202. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 340-41 (1974); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 278-80 (1964).

203. *Gertz*, 418 U.S. at 341.

the marketplace-of-ideas rationale, the search for truth is benefited by additional viewpoints.[204] Once both viewpoints have been expressed, the public can sort out the truth for themselves. The right of reply, therefore, provides a mechanism for enriching the marketplace of ideas.[205]

Additionally, other traditional First Amendment rationales are better served by having a right of reply than they are through damages awards. For instance, one traditional free-speech rationale is "individual self-fulfillment."[206] This rationale embraces self-expression as part of a fulfilled life.[207] The presumption is that people tend to be most happy when they are allowed to express themselves freely.[208] If one purpose of government is to create an environment where its citizens are able to pursue self-fulfillment, then the government should allow free expression.[209] Although the Supreme Court's discourse on this rationale is virtually nonexistent in the defamation area, a right of reply gives people an opportunity to express their side of the story, thereby furthering a self-fulfillment rationale.[210] Damages, on the other hand, might compensate some, but this compensation is different than the compensation provided by the right of reply. Damages do nothing to encourage self-fulfillment through free expression.[211] The self-fulfillment rationale is probably most analogous to Germany's reasons for providing right-of-reply statutes. In Germany, protecting the individual's dignity and his right to freely develop his personality are the core rights protected by defamation law and by the right of reply.[212] A right of reply that is rooted in the self-fulfillment rationale would seek to protect similar interests.

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204. *See, e.g.*, Marin R. Scordato & Paula A. Monopoli, *Free Speech Rationales After September 11th: The First Amendment in Post-World Trade Center America*, 13 STAN. L. & POL'Y REV. 185, 194-97 (2002).

205. *See* Barron, *Access to the Press*, *supra* note 58, at 1656-60.

206. *See, e.g.*, Steven J. Heyman, *To Drink the Cup of Fury: Funeral Picketing, Public Discourse, and the First Amendment*, 45 CONN. L. REV. 101, 138 & n.215 (2012) (citing Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95-96 (1972)).

207. *See* Scordato & Monopoli, *supra* note 204, at 193.

208. *Id.*

209. *Id.*

210. *See* Melville B. Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 657 (1975) (discussing how the First Amendment "self-fulfillment and safety valve [rationales] are . . . readily applicable to . . . outsiders who seek access" to the press using devices such as right of reply statutes).

211. *See* David S. Ardia, *Freedom of Speech, Defamation, and Injunctions*, 55 WM. & MARY L. REV. 1, 7-8, 14-18 (2013) (discussing how money damages do not adequately vindicate defamation plaintiffs).

212. Lutomski, *supra* note 14, at 582.

A third traditional First Amendment rationale is the "safety-valve" rationale. This rationale is probably the most corroded and least respected First Amendment rationale;[213] however, it is easy to see how a right of reply would further the interests protected by it. In essence, the safety-valve rationale provides that free expression has a "cathartic effect" on those who express themselves.[214] Thus, those who are distraught about certain matters can alleviate this stress by freely discussing them. It is reasoned that this free expression alleviates tension and prevents more destructive behavior.[215] Although the rationale is not nearly as influential as in the past, it is easy to see how individuals who feel slighted by a publication might benefit if a quick reply remedy is available.

Finally, the right of reply provides one step toward solving access-to-the-press problems, especially if provided to private individuals. Barron voices a legitimate concern that the freedom of speech has evolved to protect only already expressed speech.[216] As interpreted, the First Amendment does nothing to create an environment that encourages unexpressed speech.[217] The Supreme Court has deemed access-to-the-press concerns as legitimate, especially for private individuals.[218] *Gertz* recognized that private individuals simply do not enjoy the same press access that public figures usually do.[219] The right of reply would provide more opportunities for the private individual to be heard. Thus, Barron's access-to-the-press concerns would be slightly alleviated by implementing a right of reply.

The right of reply concords very well with freedom of speech principles expressed in the First Amendment, but how can reply also benefit freedom-of-the-press principles? One rationale for freedom of the press is the so-called "fourth estate" rationale.[220] This rationale provides that the press performs an important constitutional function in society.[221] Average individuals have neither the time nor resources to inform themselves about important issues. However, people need to be informed on important issues in order to have meaningful opinions—opinions necessary for informed debate and a free society.[222] Having a profession with the primary purpose of gathering news and

213. Scordato & Monopoli, *supra* note 204, at 199.

214. *Id.*

215. *Id.*

216. Barron, *Access to the Press*, *supra* note 58, at 1641-42.

217. *Id.*

218. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340-44 (1974); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 249-54 (1974).

219. *Gertz*, 418 U.S. at 344.

220. *See, e.g.*, Scordato & Monopoli, *supra* note 204, at 198-99.

221. *Id.*

222. *See id.*

distributing that news to the public would be most likely to solve this problem.[223] To further that purpose, the press profession needs to be autonomous.[224] The rationale posits that government intrusion into editorial discretion will dampen the effectiveness of the press in performing its function.[225] However, this a broad claim.

As evidenced in the *Tornillo* concurrence, almost all governmental intrusion into the press's right to publish as it wishes will unconstitutionally hamper the press.[226] Presumably, the Court fears that any governmental intrusion will interfere with the press's necessary function, but not all governmental intrusion into the press will necessarily hamper the effectiveness of the press's function. Perhaps the Court is worried about a slippery slope problem. How can we know when intrusion has gone too far? Instead of attempting the balance, the Court opts for unbridled editorial discretion. However, a right of reply may be the type of intrusion that strikes a proper balance. In fact, a right of reply that minimizes chilling effects can aid the press in distributing relevant information. Although the press has a large amount of resources to help it perform its constitutionally protected function, the press does not have infinite resources. A curtailed right of reply could give new information to the press that the press had overlooked, and through the published reply, it could better serve the press's function of informing the public.

A second consideration concerning the freedom of the press is worth mentioning. Some debate exists on how to interpret the Free Press Clause in relation to the Free Speech Clause.[227] Justice Stewart famously argued that the Free Press Clause should be read completely separate from the Free Speech Clause.[228] Under this interpretation, the First Amendment was meant to give special protection to the press profession that is not related to the Free Speech Clause.[229] The special protection given to the press is meant to ensure the press's function as an expert on public issues.[230] Reading the First Amendment in this manner makes freedom of the press more auton-

223. *Id.*

224. *Id.*

225. *See id.*

226. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 259 (1974) (White, J., concurring).

227. *See, e.g.*, Erik Ugland, *Newsgathering, Autonomy, and the Special-Rights Apocrypha: Supreme Court and Media Litigant Conceptions of Press Freedom*, 11 U. PA. J. CONST. L. 375, 385-87 (2009).

228. Potter Stewart, Assoc. Justice, U.S. Supreme Court, Or of the Press, Address at the Yale Law School Sesquicentennial Convocation (Nov. 2, 1974), *in* 26 HASTINGS L.J. 631, 633-34 (1975).

229. *Id.*

230. *See* Ugland, *supra* note 227, at 389-96.

omous and absolute, and in fact, Justice Stewart used the theory to explain decisions like *Tornillo*.[231] However, the other side of the debate rejects Stewart's idea and posits that the Freedom of Press Clause is intricately related to freedom of speech.[232] Therefore, according to this side of the debate, in cases involving the two clauses, the purposes of each clause must be taken into account together.

The latter approach mimics the balancing approach found in German defamation law. Viewing the two clauses as necessarily influencing each other leaves more room for balancing the interests involved. Additionally, this view would be an interpretation that could undermine *Tornillo*'s editorial-discretion rationale, leaving some room for an American right of reply. Notably, the Supreme Court has not explicitly endorsed either side of this debate. Since reply can be seen as having instrumental benefits under both clauses, a curtailed right of reply most likely is constitutionally permissible under the second interpretative style.

Keeping in mind the benefits that a right of reply would offer to First Amendment values, we must still be cautious of the Supreme Court's fears concerning chilling effects. The right of reply has benefits that better avoid the dangers underlying the chilling-effect rationale that defamation damages do not have. The right of reply, as a defamation remedy, is less expensive for defamation victims and wrongdoers. The press might prefer to face potential reply demands rather than large defamation awards. This would be especially true in the context of private individuals, where, after *Gertz* and *Dun & Bradstreet*, damage liability is easier to prove and presumed damages are easier to attain in certain cases.[233] Since the press might fear damage awards more than replies, the chilling effect will be less in the reply context. Although *Tornillo*'s concerns regarding the chilling effects of the right of reply are certainly valid, a properly curtailed right of reply might sufficiently limit such chilling effects.

To sufficiently curtail the right of reply in America, I propose a hybrid right that takes aspects of the German system and mixes them with American principles in order to lower the feared chilling effect to a constitutionally permissible level. Starting with the important aspects of German law, I think it is important that, as in Germany, a hybrid right of reply would not require an individual to

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231. Stewart, *supra* note 228, at 633-35; *see* Ugland, *supra* note 227, at 390.

232. *See, e.g.*, William W. Van Alstyne, Comment, *The Hazards to the Press of Claiming a "Preferred Position,"* 28 HASTINGS L.J. 761, 768-69 (1977); *see generally* David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77 (1975).

233. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347-48 (1974) (allowing the states to adopt lower fault standards for private defamation plaintiffs); *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 757-61 (1985) (allowing presumed damages in defamation cases involving a private plaintiff and no public concern).

demand a reply to prove truth or falsity. Such a limitation would severely limit the effectiveness of the right of reply as an alternative remedy to defamation. The right of reply works best when it is published quickly, given the short life of news stories and the public's short attention span. Also, any requirement that an individual prove either the truth of her reply or the falsity of her original statement would require the same type of expensive litigation as a normal defamation lawsuit would.

In addition, considering the *Milkovich* decision, a hybrid right of reply's constitutionality would benefit from the use of the German fact-opinion distinction. In order to best preserve freedom of expression, statements of opinion should not give rise to a right of reply. A right of reply should only arise when the individual seeks such a right regarding either factual statements or, as in *Milkovich*, solely factual aspects underlying mixed statements of fact and opinion.

Finally, like Germany's statutes, the right of reply should not be able to exceed the length of the original challenged statement. This limitation will mitigate the chilling effects of such a right. However, to maximize its effectiveness, the right of reply should be given the same column space, print type, or, in the case of a broadcast, the same time slot and receiving area as that given to the original statement at issue. Also, as in Germany, the right of reply should not be defamatory in nature for obvious reasons.

In an effort to minimize the chilling effect laid out in *Tornillo*, one aspect of the German right of reply should not be imported to an American hybrid. In Germany, any person affected by a press statement can demand a reply. Thus, in Germany, there is no distinction between the affected individual's status as a private person or a public figure. In an American right-of-reply regime, such a distinction would be proper. Supreme Court jurisprudence holds that self-censorship concerns are most acute in the context of press statements regarding public officials or public figures.[234] Given the Court's heightened concerns related to public officials and public figures, if the press had to devote publication space for public figure replies, the chilling effect would certainly be constitutionally impermissible. Also, as reasoned in *Gertz*, public figures enjoy more access to the press; therefore, public figures simply do not need a right of reply as much as private individuals do.

If the right of reply is curtailed in such a way, I argue that a private individual's demand for such a right would produce no more of a chilling effect than that which is already a product of current American defamation law. Under *Gertz* and *Dun & Bradstreet*, the press

234. *See Gertz*, 418 U.S. at 342-43.

already faces lower fault standards for potential damage liability when it publishes stories concerning private individuals.[235] Therefore, at least in states that use a negligence standard in private defamation cases, prudent editors will not run such stories unless they are reasonably sure that some non-negligent investigation occurred.[236] Thus, defamation law already produces some chilling effect when publications involve private individuals, and this chilling effect is constitutionally permissible.

Given this pre-existing chilling effect, the possibility of replies demanded from private individuals will only provide the same chilling-effect levels—perhaps even lower—than those already existing from the press's usual fear of routine defamation litigation. Remember that, although sacrificing publication space is not completely without cost,[237] the costs of printing replies is probably preferred over the cost of defamation litigation and damages.[238] In this way, a right of reply that makes use of the public-private figure distinction would likely cause *Tornillo*'s rationale to lose its bite.

So, as in Germany, an American right of reply would be triggered once a publication or media broadcaster disseminated a story including factual statements about an individual.[239] An individual affected by the story would then be allowed to issue a reply demand to the media organization responsible for the story. Unlike Germany, however, the demand can only be made by an affected *private* individual. If the media refuses a demand, a speedy determination must be made on certain issues.

First, a court or agency would have to determine whether the demand was made by a private individual. Second, the determining entity would have to determine whether the press statements at issue contained any express or implied factual statements. Factual statements would be the only statements where the right of reply is applicable. Courts already have expertise in determining whether a defamation plaintiff is a private or public individual. In fact, the Court in *Gertz* explicitly recognized that courts do not have too much trouble

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235. *Id.* at 347-48 (allowing the states to adopt lower fault standards for private defamation plaintiffs); *see also Dun & Bradstreet, Inc.*, 472 U.S. at 757-61 (allowing presumed damages in defamation cases involving a private plaintiff and no public concern).

236. For examples of states adopting negligence standards in private defamation cases see, for example, *McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882, 886 (Ky. 1981) (Kentucky Constitution mandates simple negligence standard), *cert. denied*, 456 U.S. 975 (1982), and *Jacron Sales Co. v. Sindorf*, 350 A.2d 688, 697 (Md. 1976) (adopting simple negligence standard of RESTATEMENT (SECOND) OF TORTS § 580B (1975)).

237. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256-57 (1974).

238. Speranza, *supra* note 81, at 227.

239. Youm, *supra* note 54, at 58 (explaining Germany's fact-opinion distinction used in Germany's right of reply laws).

differentiating between public and private figures.[240] Also, courts have differentiated between factual statements and statements of opinion, at least since *Gertz*, and have provided more clarification on the issue after *Milkovich*.[241] Therefore, courts may be in a better situation to evaluate the issue; however, an administrative agency could also rely on court precedent and, given time, focused administrative agencies may become quicker and even more experienced than the courts in deciding these issues. Whichever would be less costly should be implemented, and this can only be decided through actual experimentation. Finally, other aspects of the demand must be analyzed, such as the length and substance of the proposed reply. These issues should not be complex and could easily be determined by either a court or an agency.

The determining entity should evaluate these issues quickly. Given that the effectiveness of the demand will wane anyway, if more evidence is needed on any issue, then the demand should fail. After a failed demand, an individual, if she so chooses, should still have the opportunity to litigate the issues further through a normal defamation suit for damages.

If the demand passes muster, however, the media entity must publish the request immediately. Also, the media entity should be forced to pay any costs that the private individual incurred in showing that the demand is proper; otherwise, news publications and broadcasters might routinely deny demands, hoping that private individuals will not pursue any legal action. Small fines might also be warranted; however, larger fines should be discouraged. Also, criminal penalties, such as the misdemeanor aspects of the Florida right-of-reply statute scrutinized in *Tornillo*, should be avoided.[242] Large fines and criminal penalties will most likely involve too much of a chilling effect and would probably be constitutionally impermissible.

To further alleviate the chilling-effect concerns in *Tornillo*, a hybrid right of reply could possibly allow members of the press to respond to a reply demand by making an affirmative showing that they did, in fact, perform a reasonable investigation before printing the factual statements at issue. Under such a provision, as long as the press could produce sufficient evidence of a reasonable investigation, it could deny publication of the reply. In theory, this would allow replies only where the press was negligent, which, in all likelihood, would lead to liability for defamation down the road. Although this

240. *Gertz*, 418 U.S. at 344-45.

241. *See supra* text accompanying notes 189-200.

242. The Florida reply statute analyzed in *Tornillo* imposed misdemeanor penalties for a publisher's noncompliance. *Tornillo*, 418 U.S. at 244.

would be beneficial under the *Tornillo* self-censorship rationale, it is easy to see the possible drawbacks.

Such a provision might eviscerate some of the benefits that the right of reply is aimed toward in the first place—mainly that a reply is timelier and less expensive than defamation litigation. Such a provision would make reply contests more complicated. What kind of evidentiary hearing would allow an analysis of this additional aspect of a right-of-reply system, that is, whether the press investigation was sufficient? Presumably, it would resemble a preliminary injunction proceeding, which must also be decided in a timely manner. Preliminary injunctions and evidentiary hearings are not unfamiliar aspects of American law, but in the context of the right of reply, they still might be too costly. Again, another option might be some type of administrative system; however, this could also be too costly. It would be an extreme drawback to any right-of-reply system if only wealthy, private individuals could successfully demand replies. Also, on the other side, if the press thought that such an evidentiary hearing was too costly, the concerns of a chilling effect expressed in *Tornillo* would come back into play. Thus, any right-of-reply review system would require delicate practical implementation. However, given the experimentation function of states under federalism principles,[243] the benefits of a right-of-reply regime might warrant state attempts to realize such a system.

Notwithstanding some concerns that may arise in practice, I believe that a sufficiently curtailed right of reply is possible. A right of reply that balances the interests of private individuals with the interests of the press could be permissible under *Tornillo*'s chilling-effect rationale. Since defamation law already tolerates some chilling effect, a right of reply for private individuals might fall within a constitutionally permissible level of self-censorship.

But how does a curtailed right of reply withstand *Tornillo*'s second rationale, editorial independence? The short answer is that it most likely does not. With the *Tornillo* Court's commitment to preserving editorial discretion, it is hard to see how any American right-of-reply regime would be permissible, unless the rationale is abrogated. However, the Court recognized the policy concerns surrounding an increasingly anti-competitive press.[244] The Court has also been sympa-

243. Traditionally, one of the benefits of federalism has been the utility of having many different states experiment with legal solutions to society's problems. Justice Brandeis was the first to expound on this benefit, stating that "one of the happy incidents of the federal system [is] that a single courageous state may . . . serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

244. *Tornillo*, 418 U.S. at 249-54.

thetic to private individuals' inability to gain access to the press.[245] Given the fact that *Tornillo* was decided in 1974 and thus, that these problems have likely exacerbated,[246] it might be time to rethink *Tornillo*'s second rationale. The law must change to keep up with the surrounding world. Given the benefits that the right of reply might offer, perhaps *Tornillo* should be reexamined. One way to reexamine *Tornillo* would be for the Court to reject Justice Stewart's autonomous interpretation of the Free Press Clause and to adopt an interpretation that necessitates a relationship between the First Amendment's Free Speech and Press Clauses.

V. CONCLUSION

From an international perspective, American defamation law strikes a relatively unusual balance between reputational interests and freedom of the press. Supreme Court jurisprudence in this area reveals one main concern—the fear of press self-censorship. This concern has caused the Supreme Court to adopt rules that make American defamation litigation difficult, which usually sacrifices individual reputation interests in favor of protecting the press. Germany's system provides an example of a different balance. Although Germany is committed to free press and free speech, it has protected individuals from defamation to a greater extent than it has protected the press. One such protection is the German right of reply.

Despite the many benefits of the right of reply, *Tornillo* has essentially precluded a right-of-reply regime in the United States. However, if American jurisprudence is mainly concerned with self-censorship, then it does not make sense to preclude a right-of-reply regime that could minimize this risk. A right-of-reply regime that incorporates the American distinction between private individuals and public figures could do just that. Since defamation law already tolerates some chilling effect, and a curtailed right of reply for private individuals would only result in an equal or lesser chilling effect, the Supreme Court should at least partially abrogate *Tornillo*, and the states should be allowed to experiment with such hybrid right-of-reply regimes.

245. *Gertz*, 418 U.S. at 340-44.

246. Barron, *supra* note 1, at 2.