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Restoring Reputational Rights Through a Government Publication of a Declaration of Innocence

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ABSTRACT

In a society that has become increasingly interconnected through advancements in technology, the stigmatizing consequences of a false criminal accusation or conviction can be devastating. Ironically, unlike the technological advancements society has experienced, the ability to protect one's reputation from such harm requires using the same limited remedies that existed decades ago. With few effective remedies available, those who have been falsely accused or convicted of a crime are without adequate ways to restore their reputations. To fill this remedial void, the federal government should create a forum whereby an individual's innocence might be published as government speech. This approach incorporates the idea of protecting reputation through a declaration of innocence but differs in that this proposal seeks to incorporate the same technologies that have created societal interconnectedness to pronounce such innocence forcefully throughout society. This pronouncement will fill a void in reputational remedies by directly confronting and remedying the stigmatization such accusations and convictions create.

This comment advocates the development of a declaration of innocence in the defamation context in order for the declaration to be transferred into the criminal law arena as a remedy for falsely accused or convicted plaintiffs to be declared innocent. This comment further endorses the idea of publicizing individual declarations of innocence on a government website, which declarations thereby become government speech. The government's declaration of innocence publication has the powerful potential to restore reputational rights for accused or convicted of crimes. The tools to enable the development of this remedy are already in existence. This publication could create the necessary procedural foundation on which to emphasize the benefits of a substantive reputation right under the Due Process Clause that might be adopted to protect the reputational rights of the entire citizenry of this country.

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I. INTRODUCTION

The nightmare that would become musician Conor Oberst's reality began with an online article's comments section titled: *It Happened to Me: I Dated a Famous Rock Star & All I Got Was Punched in the*

Face.[1] In spite of the fact that the comment was from an anonymous poster and had been removed shortly after the posting, the allegations of Oberst having raped a 16-year-old had already rapidly spread throughout the internet.[2] Regardless of the fact that Oberst was a supporter of feminist issues himself,[3] some media outlets immediately gifted credibility to the rape claim.[4] Others offered support to the accuser even when faced with evidence of deceptive behavior on her part.[5] Many continued to redistribute the information—some notwithstanding reservations—because "th[e] [story], in particular, ha[d] virtually no middle ground to it."[6] Others, including the domestic advocacy group Right to Speak Out, called on Oberst to drop his pursuit of the only legal remedy he had to clear his reputation—filing a libel suit against the young woman.[7] In addition to the aforementioned lack of

1. Alan Duke, *Woman Recants Conor Oberst Rape Story: 'I Made Up Those Lies*,' CNN (July 14, 2014, 8:16 PM), http://www.cnn.com/2014/07/14/showbiz/conor-oberst-rape-recanted/.

2. Brenna Ehrlich, *Conor Oberst Responds to the Woman Who Falsely Accused Him of Rape*, MTV (July 16, 2014), http://www.mtv.com/news/1870160/conor-oberst-accepts-rape-accuser-apology/; *see* Jessica Testa, *Conor Oberst Accused of Raping Teenager 10 Years Ago, Denies Allegations*, BUZZFEED NEWS (Jan. 7, 2014, 4:38 PM), https://www.buzzfeednews.com/article/jtes/conor-oberst-responds-to-rape-allegations-left-by-anonymous (explaining specifically how the information spread despite a deleted Tumblr post from the individual claiming to be the xoJane commenter).

3. Cathy Young, *Crying Rape*, SLATE (Sept. 18, 2014, 8:07 PM), http://www.slate.com/articles/double_x/doublex/2014/09/false_rape_accusations_why_must_be_pretend_they_never_happen.html.

4. S.W. Kiley, *Why I Believe Conor Oberst's Anonymous Rape Accuser*, FRISKY (Jan. 8, 2014, 2:00 PM), http://www.thefrisky.com/2014-01-08/why-i-believe-conor-obersts-anonymous-rape-accuser/ (basing her belief on the fact that "something very similar to these alleged accusations happened to me").

5. Tracie Egan Morrissey, *Rape, Lies and the Internet: The Story of Conor Oberst and His Accuser*, JEZEBEL (Feb. 28, 2014, 2:45 PM), http://jezebel.com/rape-lies-and-the-internet-the-story-of-conor-oberst-1531785539 ("[S]he has a history of 'catfishing'—posing as a boy online, even passing herself off as a cancer patient. And while none of that has *anything* to do with rape allegations, Oberst's legal team is making use of these details in order to tear down both Faircloth and [her story].").

6. Tom Breihan, *Conor Oberst Responds to Anonymous Rape Allegations*, STEREOGUM (Jan. 7, 2014, 11:56 AM), http://www.stereogum.com/1620632/conor-oberst-responds-to-anonymous-rape-allegations/news/ (arguing, as justification for deciding that this claim has no middle ground, the fact that both sides will likely not be able to prove their positions, even though this is true of most accusations).

7. Marc Hogan, *Conor Oberst Urged to Drop Libel Suit Against Alleged Rape Victim*, SPIN (Feb. 24, 2014), http://www.spin.com/2014/02/conor-oberst-urged-drop-lawsuit-rape-right-speak-out/; *see* Phoenix Tso, *Conor Oberst Asked to Drop Lawsuit Against Rape Accuser*, JEZEBEL (Feb. 24, 2014, 2:50 PM), http://jezebel.com/conor-oberst-asked-to-drop-lawsuit-against-rape-accuser-1529854774 (reasoning that Right to Speak Out's support of the alleged victim might be due to the fact that the victim has been an avid fan and to defend against the "classic move" of accused rapists of highlighting and casting doubt on the fact that the reporting

support, Oberst had to bear the brunt of misinformation being circulated about him.[8] He also sustained damage to his career.[9] Oberst even received criticism for how he handled the false accusation,[10] along with further criticism even after the woman admitted to the lie.[11] Notwithstanding the fact that Oberst could have continued with the libel suit after the accuser's recantation, he chose instead to issue a public statement forgiving the woman.[12]

If the U.S. Supreme Court had held that one has a substantive due process right to reputation—as it almost did[13]—Conor Oberst might have more successfully remedied the fallout of his false accusation because he would have had a constitutional right to protect his reputation. Instead, the consequence of the U.S. Supreme Court's decision to not protect reputation outright, when technology has made it easier to damage reputation through false accusations, is that there are only a few available remedies to restore reputation.[14]

Compounding the reputation problem is the reality of society's inability—or unwillingness—to accurately gauge the false accusation percentages for various crimes.[15] Looking at Oberst's example, numerous studies attempt to discern the false accusation percentage from all

is so far removed from the alleged incident).

8. Chris Martins, *Conor Oberst Not Dropped by Label over Rape Accusation, Says Publicist*, SPIN (July 8, 2014), http://www.spin.com/2014/07/conor-oberst-dropped-by-label-rape-accusation-lawsuit/.

9. CoS Staff, *Conor Oberst Responds to Anonymous Rape Allegations*, CONSEQUENCE OF SOUND (Jan. 7, 2014, 2:43 PM), http://consequenceofsound.net/2014/01/conor-oberst-responds-to-anonymous-rape-allegation/ (indicating that a producer had already decided to scrap its upcoming editorial on Oberst's band).

10. *See* Tso, *supra* note 7.

11. Chris Osternorf, *How Conor Oberst Became an Accidental MRA Icon*, DAILY DOT, http://www.dailydot.com/via/how-conor-oberst-became-mra-icon/ (Dec. 11, 2015, 7:47 AM) (explaining how, amongst other things, Oberst should have handled things differently so as to not perpetuate the myth that men are the victims of false accusations—despite the fact that Oberst was a victim of a false accusation).

12. Caroline Pate, *Why Conor Oberst's Forgiveness is Important*, BUSTLE (July 22, 2014), https://www.bustle.com/articles/32748-why-conor-obersts-forgiveness-is-important.

13. *See infra* Part V.

14. *See* David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. C.R.-C.L. L. REV. 261, 263 (2010) [hereinafter Ardia, *Reputation in a Networked World*] ("While the way we use reputation has evolved—and is evolving—along with our communication, political, and social systems, defamation law remains distressingly out of step with our increasingly networked society.").

15. *See, e.g.*, Richard A. Leo & Jon B. Gould, *Studying Wrongful Convictions: Learning from Social Science*, 7 OHIO ST. J. CRIM. L. 7, 10 (2009) ("Yet for all the attention that academe has given to wrongful convictions, there has been relatively little dialogue on this topic between criminal law or procedure scholars and criminologists or social scientists.").

rape reports, with the results entirely across the spectrum.[16] While the rape studies do not provide a collective answer to the false accusation percentage question, the collective spectrum of results proves this important insight: that the false accusation and conviction rate is unknown.[17] This is true for other crimes as well, as the same mechanisms at work in a rape investigation are employed in other crimes.[18] The combination of the technological abilities and ease by which one can falsely accuse, the lack of constitutional protections for one's reputation, and the knowledge that the false accusation percentage is unknown suggests it might be reckless to continue as it is without a remedy to restore reputation.[19]

This comment suggests the adoption of federal declarations of innocence for those who have been accused or convicted of a crime despite being innocent. This declaration, however, standing alone, is simply not enough to counter the stigma one encounters when wrongfully accused or convicted of a crime. Therefore, to help de-stigmatize these individuals, the federal government should adopt a program utilizing the government speech doctrine to publicize these individuals' declarations of innocence for those wrongfully accused or convicted of a crime. This federal government publication would add a dominant voice to the speech marketplace to counterbalance the stigmatization to which these individuals were exposed, with states encouraged to follow suit. The publication of a declaration of innocence is a preferable remedy to other approaches as it should not interfere with (neither

16. *See, e.g.*, Edward Greer, *The Truth Behind Legal Dominance Feminism's "Two Percent False Rape Claim" Figure*, 33 LOY. L.A. L. REV. 947, 949 (2000) (suggesting that as many as a quarter of men accused of rape may be innocent); Aya Gruber, *Rape Law Revisited*, 13 OHIO ST. J. CRIM. L. 279, 279 (2016) ("There is a distinct lack of evidence that rape or campus rape has become more frequent in the last decades."); Philip N.S. Rumney, *False Allegations of Rape*, 65 CAMBRIDGE L.J. 128, 136–37 (2006) (compiling the statistics from twenty reports found the percentage of false accusations to range anywhere between 1.5% to 90%).

17. *See, e.g.*, Rumney, *supra* note 16, at 129 ("It is perhaps surprising, therefore, that while the issue of false allegations appears significant in the treatment of rape by the criminal justice system, there has been little detailed attention given to the reliability of the evidence on the prevalence of false allegations.").

18. *See, e.g.*, Justin Nix & Justin T. Pickett, *Third-Person Perceptions, Hostile Media Effects, and Policing: Developing a Theoretical Framework for Assessing the Ferguson Effect*, 51 J. CRIM. JUST. 24 (2017); Danielle M. Loney & Brian L. Cutler, *Coercive Interrogation of Eyewitnesses Can Produce False Accusations*, 31 J. POLICE & CRIM. PSYCHOL. 29 (2016); Deborah S. Wright, Robert A. Nash & Kimberly A. Wade, *Encouraging Eyewitnesses to Falsely Corroborate Allegations: Effects of Rapport-Building and Incriminating Evidence*, 21 PSYCHOL., CRIME & L. 648 (2015).

19. *See* Frederick Lawrence, *Declaring Innocence: Use of Declaratory Judgments to Vindicate the Wrongly Convicte*d, 18 BOS. U. PUB. INT. L.J. 391, 397–401 (2009).

should it discourage) those who have valid accusations from coming forward. Coming full circle, the federal government publication of a declaration of innocence would perform procedurally what the U.S. Supreme Court rejected substantively—implementing a procedure to repair reputation for those accused or convicted of crime despite their innocence.

Part II of this comment outlines the current remedies available to those who have been falsely accused or convicted of a crime, concluding that each remedy is insufficient to eliminate stigma. This part will also argue the need for another remedy: one that is broader in the population it covers and more expansive in the harms it remedies. Part III introduces the declaration of innocence, advocating its improvement compared to current remedies by covering more individuals while also targeting the stigma society imparts on those falsely accused or convicted. Part IV proposes the adoption of a government speech forum to publicize the declarations of innocence. This part will also introduce the government speech doctrine and analyze this proposal under the *Walker* test to determine whether this proposal meets judicial scrutiny to be enacted as government speech. Part V introduces the U.S. Supreme Court's near incorporation of the right to reputation under the due process clause, its reversal of policy, and its more recent subtle references to reputation as a substantive liberty right. This part also suggests that an individual plaintiff, with the correct incentives and end-goal, can initiate this procedure that would (1) put protections in place for reputation's protection and (2) would potentially initiate reputation's inclusion as a recognized right under the Constitution.

II. Currently Available Remedies are Insufficient to Repair Damaged Reputation

Even though the U.S. criminal justice system is designed with a procedural safeguard (proof beyond a reasonable doubt) to protect the innocent,[20] unknown numbers of people are not protected by this standard when falsely accused or convicted.[21] Mirroring the civil system, the remedies for those who have been wrongly convicted—to say nothing of those only wrongfully accused[22]—have been limited to

20. *See id.* at 392.

21. *See* THE INNOCENCE PROJECT, https://www.innocenceproject.org/ (last visited Oct. 10, 2018).

22. *See* CAL. PENAL CODE § 851.8 (West 2016) (describing the statutory procedures by

monetary damages.[23] Exonerees, depending on the jurisdiction of conviction, will have, at the most, three available remedial paths: (1) statutory compensation, (2) "private bill" compensation, and (3) tort and civil right compensation—each with its own set of problems.[24] Amid the problems of the compensatory remedies for those wrongfully convicted is these remedies' under-inclusive ability to address stigma.[25] The remainder of this section will evaluate each of the available remedies, beginning with the least effective option for a plaintiff, concluding that criminal stigma persists despite the availability of these remedial options.

A. Tort and Civil Rights Claims

The least-effective remedial avenues for a wrongful conviction are tort or civil rights claims.[26] A tort claim might arise, for example, under a malicious prosecution theory, using the common law to prove the necessary statutory elements.[27] A civil rights claim can also be based on the same malicious prosecution theory if there is any constitutional claim on which to base it.[28] As an illustration, to make out a claim for malicious prosecution under the common law, the plaintiff must prove: (a) the defendant initiated or procured the proceeding, (b) without probable cause, (c) primarily for a purpose other than to bring the offender to justice, and (d) the proceeding must have terminated in favor

which one might be able to obtain a declaration of factual innocence despite an arrest).

23. *See* Lawrence, *supra* note 19, at 393.

24. *Id.* at 395 ("All three means of compensating wrongly accused or convicted persons requires the exonerated plaintiff to overcome substantial procedural hurdles.").

25. *See* Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297, 1299 (2000) ("[A] factually innocent defendant confronts the problem of being publicly accused by the government of criminal behavior with no real prospect of ever being officially vindicated. An innocent suspect may have the charges dismissed or may be acquitted, but the sequela of an indictment may leave the defendant's reputation, personal relationships, and ability to earn a living so badly damaged that he may never be able to return to the life he knew before being accused.").

26. *See* Adele Bernhard, *A Short Overview of the Statutory Remedies for the Wrongly Convicted: What Works, What Doesn't and Why*, 18 BOS. U. PUB. INT. L.J. 403, 407 (2009) [hereinafter Bernhard, *Statutory Remedies*] (describing the story of plaintiff David who, although wrongfully convicted, could not sue under a civil rights claim).

27. *See* Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 86 (1999) [hereinafter Bernhard, *When Justice Fails*].

28. *See* Michael Avery, *Obstacles to Litigating Civil Claims for Wrongful Conviction: An Overview*, 18 BOS. U. PUB. INT. L.J. 439, 441 (2009) (listing civil rights causes of actions that one wrongfully convicted might be able to base a claim upon).

of the accused.[29] A lack of any one of these elements will prohibit the claim's success. And considering how easily the defendant in this cause of action would be able to establish probable cause, most of these claims will not succeed.[30]

The primary difficulty of any tort or civil rights claim is that of immunity: shielding the judiciary, prosecution, police, and witnesses from their errors in the course of the prosecution.[31] This immunity inhibits the plaintiff from proving the necessary negligence of the person or organization responsible for the tort (as it is usually one of the four above examples that are shielded), further reducing the odds of the tort or civil rights claim succeeding.[32] Additional difficulties include meeting the statute of limitations deadlines associated with the claim.[33] Even more, these claims cannot mitigate the reality that many false convictions happen without an intentional flaw in the prosecution.[34] While the *beyond a reasonable doubt* standard used in all criminal proceedings is the highest standard of proof available, it is not failproof.[35] Understanding this inherent shortcoming of the criminal justice system provides incentive to restore those injured from its influence with a remedy independent of the need for a specific tort or civil rights claim.

B. Private Bills as a Remedy

Some states allow for their legislature to provide monetary compensation through a "private bill"[36] or "moral obligation bill"[37] to a specific individual. These bills are drawn up by the legislature to compensate an individual harmed by the state, including an individual who

29. RESTATEMENT (SECOND) OF TORTS § 653 (AM. LAW INST. 1977).

30. *See, e.g.*, Max Minzner, *Putting Probability Back into Probable Cause*, 87 TEX. L. REV. 913, 915 (2009) ("What role should . . . historic success rates play in the probable-cause analysis? The answer under present law is none at all. Law enforcement's history of prior success is irrelevant."); *see also* Avery, *supra* note 28, at 442 ("In a wrongful conviction case, there may be sufficient evidence to provide probable cause for an arrest or prosecution, even though the defendant is eventually shown to be innocent.").

31. *See* Bernhard, *When Justice Fails*, *supra* note 27, at 87.

32. *Id.* at 86.

33. *Id.* at 87.

34. *Id.* at 86.

35. *See* Lawrence, *supra* note 19, at 393.

36. *See id.* at 394.

37. *See* Bernhard, *When Justice Fails*, *supra* note 27, at 93.

the state may have mistakenly prosecuted, leading to a wrongful conviction.[38] This remedy, however, is undesirable because it necessitates the use of the political system to provide the remedy—not a legal right.[39] This makes the outcome of any attempted remedial solicitation of the legislature unknowable, no matter what facts are presented to the political body.[40] Furthermore, the political system is not equipped with tools to shift through a fact-finding endeavor—like cross-examination in the judicial system—making this remedy susceptible to abuse.[41] And unlike a legal right, a private bill requires sufficient political support, which is more likely in situations involving high-profile plaintiffs.[42] Perhaps it is for the above reasons that the use of a private bill is constitutionally forbidden in some states.[43]

C. Statutorily Created Compensation Remedies Fall Short of What Is Needed

Currently, the best remedy for those seeking wrongful conviction compensation are state "compensation" or "indemnification" statutes.[44] As a statutory right,[45] these statutes seek to balance the twin goals of compensating all those who are truly innocent while weeding out meritless claims.[46] To do so, the plaintiff need not prove causal harm attributable to an organization or individual, or negotiate with the legislature; instead, these statutes provide compensation to the individual if the plaintiff meets specific statutory criteria.[47] The criteria

38. *Id.*

39. *Id.* at 94; *see also* Bernhard, *Statutory Remedies*, *supra* note 26, at 408 ("The private bill is not a perfect solution because it's an award granted through the political system, not a right recognized by the legal process.").

40. *See* Bernhard, *When Justice Fails*, *supra* note 27, at 93.

41. *See* Bernhard, *Statutory Remedies*, *supra* note 26, at 408 ("Moreover, because there is no fact-finding mechanism in the political process, there is no way to know, when the private bill is introduced, whether the person on whose behalf the bill has been introduced is really innocent.").

42. *See* Bernhard, *When Justice Fails*, *supra* note 27, at 94.

43. *See, e.g.*, N.J. CONST. art. IV, § 7, para. 9; ORE. CONST. art. IV, § 24 ("Provision may be made by general law, for bringing suit against the State, as to all liabilities originating after, or existing at the time of the adoption of this Constitution; but no special act authorizeing [sic] such suit to be brought, or making compensation to any person claiming damages against the State, shall ever be passed.").

44. *See* Lawrence, *supra* note 19, at 392–95.

45. *See id.* at 394 ("Compensation statutes are codified provisions that specifically grant monetary compensation to people wrongly convicted and incarcerated.").

46. *See* Bernhard, *When Justice Fails*, *supra* note 27, at 101.

47. *Id.* at 101–02.

universal to most compensation statutes require the plaintiff to verify that there was a criminal conviction, prove the fact that prison time was served as a result, and produce sufficient evidence proving actual innocence.[48] Interestingly, while the intent of these statutes is to provide monetary remedies, some states have also incorporated other program benefits into their compensatory calculus to facilitate the exoneree's transition back into society.[49] As of 2018, the federal government, District of Columbia, and thirty-two states have adopted a compensation statute.[50]

Notwithstanding the positive effects of statutory compensation remedies, numerous problems still exist. In some jurisdictions, meeting the necessary burden of proof to qualify for the remedy can prove difficult, as each jurisdiction has its own specific criteria that must be met.[51] To illustrate, the burden of proof spectrum has at its extreme some states requiring "actual innocence";[52] other states in the middle of the spectrum require proof by "clear and convincing evidence";[53] fewer require a finding of innocence by a "preponderance of the evidence."[54] In the states requiring actual innocence, often, anything short of DNA evidence will be insufficient to qualify for the statutory remedy—severely limiting those who would benefit from the statute.[55] Despite the difficult procedural burdens in some states, unfortunately, other U.S. citizens may have it worse; there are currently eighteen states that do not provide any statutory compensation remedy for those wrongfully convicted.[56]

48. *Id.*

49. *See, e.g.*, H.B. 5933, Ct. Gen. Assemb., Feb. 2008 Sess. (Ct. 2008) (state may offer job training, counseling, and tuition for a state school).

50. *See Compensating the Wrongly Convicted*, THE INNOCENCE PROJECT, https://www.innocenceproject.org/compensating-wrongly-convicted/ (last visited Oct. 10, 2018).

51. *See* Bernhard, *When Justice Fails*, *supra* note 27, at 101–05.

52. *See, e.g.*, MO. ANN. STAT. § 650.058 (LexisNexis 2018) (limiting the remedy to those who are "actually innocent" through DNA evidence); MONT. CODE ANN. § 53-1-214 (2017) (allowing educational aid only to those whose conviction has been overturned by DNA evidence).

53. *See, e.g.*, IOWA CODE § 663A.1 (2018); OKLA. STAT. tit. 51, § 154(b)(2)(e)(2) (2018).

54. *See, e.g.*, OHIO REV. CODE ANN. § 2743.48 (LexisNexis 2018).

55. *See* MO. ANN. STAT. § 650.058 (LexisNexis 2018).

56. *See Compensating the Wrongly Convicted*, THE INNOCENCE PROJECT, https://www.innocenceproject.org/ (last visited Oct. 10, 2018) (identifying those states without a compensation statute as: Alaska, Arizona, Arkansas, Delaware, Georgia, Idaho, Indiana, Kansas, Kentucky, Nevada, New Mexico, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, and Wyoming).

Similar to the broad spectrum with the burdens of proof, the compensation awarded amongst the different jurisdictions is also very broad. Some states limit the total award of damages to an exoneree,[57] while other states limit the award only on an annual basis (but not capping the total award itself).[58] The annual award amount also varies widely from state to state, with remedies finding itself on a spectrum from the generous,[59] to the not so generous.[60]

Besides the varying burdens of proof and the various award limitations, other procedural criteria limit those who might otherwise qualify for the remedies. For example, some states require that the plaintiff receive a governor's pardon in order to qualify for the statutory remedy.[61] Requiring a pardon is problematic because it is discretionary: some governors refuse to grant pardons based on principal, others only do so on specific grounds, while others might waiver by worrying about public perception of pardoning, etc.—and all this can happen *even if* the plaintiff is found innocent.[62] Other procedural criteria enacted by some states include a requirement that the plaintiff did not plead guilty.[63] Limiting compensation to those who have not pled guilty ignores the realities of a prosecutor's charging discretion, and the serious risk of a defendant going to trial in some cases.[64] It also overlooks the fact that 40 of the current 362 DNA exonerees pled guilty to crimes they did not commit.[65]

Other procedural requirements amongst the states include the plaintiff having not done anything that "contributed to the conviction."[66] While this principle has its roots in fairness (a plaintiff should

57. *See, e.g.*, FLA. STAT. § 961.06(1)(e) (2018) (stating that the award cannot exceed two-million dollars); 705 ILL. COMP. STAT. ANN. 505/8(c) (LexisNexis 2018) (stating that the determination of awards is based on balancing total award caps versus annual caps).

58. *See, e.g.*, N.Y. CT. CL. ACT § 8-b (Consol. 2018).

59. *See id.* (New York, having no limit, can technically surpass any state's level of compensation); TENN. CODE ANN. § 9-8-108(a)(7)(A) (2018) (capping the total award at one-million dollars).

60. *See, e.g.*, WIS. STAT. § 775.05 (2018) (capping the total award at $25,000).

61. *See, e.g.*, ME. STAT. tit. 14, § 8241 (2018); MD. CODE ANN., STATE FIN. & PROC. § 10–501 (LexisNexis 2018).

62. *See* Bernhard, *When Justice Fails*, *supra* note 27, at 102.

63. *See* Bernhard, *Statutory Remedies*, *supra* note 26, at 411.

64. *See id.* ("It is unfair to disqualify those claimants who were truly innocent but may have pled guilty on counsel's advice, or because they were understandably afraid to go to trial.").

65. *DNA Exonerations in the United States*, THE INNOCENCE PROJECT, https://www.innocenceproject.org/dna- exonerations-in-the-united-states/ (last visited Oct. 22, 2018).

66. *See* Bernhard, *Statutory Remedies*, *supra* note 26, at 411.

not be compensated for a harm he helped create),[67] there are issues on the edges (e.g., interrogation techniques, etc.) that suggest this doctrine's application in the state compensation scheme is overbroad.[68] Other objections to the "contributed to the conviction" requirement include: (1) the fact that almost all defendants could have done more to prevent their conviction, (2) it punishes powerless individuals, and (3) it essentially blames the victims for the problem.[69]

D. The Current Remedies Omit Significant Items

Perhaps the most obvious omission among these current remedies—as well as California's factual innocence remedy—is a solution for the stigma associated with an accusation or wrongful conviction.[70] Stigmatization is an essential part of the criminal justice system and will be present in both accusations and convictions.[71] Under all of the theories of criminal punishment, stigmatization serves a purpose.[72] For example, with the retributivist theory, the criminal would deserve stigmatization as a means of punishment.[73] Under the deterrence theory, the threat of a strong social stigma by having witnessed the consequences of such from others, would certainly discourage the tempted from committing a contemplated crime.[74] Without a stigma attached

67. *See* Adam I. Kaplan, Note, *The Case for Comparative Fault in Compensating the Wrongfully Convicted*, 56 UCLA L. REV. 227, 251–54 (2008).

68. *See* Bernhard, *Statutory Remedies*, *supra* note 26, at 411 ("That language has been interpreted by courts to mean confessing to the crime or making an admission even when that confession or admission was elicited through extreme psychological pressure—so long as the pressure did not amount to physical abuse. In other words, if a claimant confessed to the police, even after many hours of interrogation, or even after having been subjected to trickery, in some states that claimant may be precluded from recovering damages because the confession will be construed to mean that the exoneree contributed to his own conviction.").

69. *See* Kaplan, *supra* note 67, at 255–56.

70. *See generally* CAL. PENAL CODE § 851.8 (West 2016)

71. *See* Lawrence, *supra* note 19, at 395.

72. *See id.* at 396.

73. *See id.*; *see also* SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 93 (9th ed. 2012) ("'Retributive' views (of which there are many) share an insistence that punishment be justified by the seriousness of the offense committed, rather than by the future benefits to be obtained by punishing.").

74. *See* Lawrence, *supra* note 19, at 396; *see also* KADISH ET AL., *supra* note 73, at 111 ("Few people, if any, doubt, that crime would increase, probably dramatically, if no criminal punishments were ever imposed at all. In that sense, the institution of criminal punishment surely does have a substantial deterrent effect.").

to a crime, the deterrent powers of the criminal code would be weakened.[75]

On a larger scale, stigma is also a teaching tool for all of society by emphasizing beliefs and behaviors that are unacceptable with the values of society.[76] Stigma's usefulness as a tool is evident in that it allows for variation in its dissemination, often with the amount of stigma imparted proportional to the amount of risk society deems that class of criminal to be.[77] But as stigmatization is a necessary component of the criminal justice system, it is also, unavoidably, a natural byproduct of wrongful accusations and convictions.[78] Indeed, perhaps the best evidence of stigma's success is the dominant societal belief that those charged with crimes are likely guilty of something, notwithstanding the accused's favorable outcome of adjudicative procedures.[79]

The current remedies do not address other negative ways in which false accusations or convictions might affect an innocent defendant. The stigma associated with a person might certainly taint relationships with neighbors, co-workers, and the community at large.[80] False accusations might also lead to a host of psychiatric disorders in those accused.[81] The relationships in an accused's personal or professional life might be strained, with more serious consequences evidencing themselves in custody proceedings—even if the resolution of the charge resulted in a dismissal.[82] An accusation can also affect one's employment:

75. *See* Lawrence, *supra* note 19, at 396.

76. *See id.*

77. *See* Eric J. Mitnick, *Procedural Due Process and Reputational Harm: Liberty as Self-Invention*, 43 U.C. DAVIS L. REV. 79, 124 (2009).

78. *See* Lawrence, *supra* note 19, at 397.

79. *See* Leipold, *supra* note 25, at 1304 ("If people believed that a finding of 'not guilty' was convincing evidence of innocence, presumably most of the harms associated with a criminal charge would dissolve with an acquittal. But experience suggests that they do not. There appears to be an amorphous but widespread belief that those who are charged with crimes are probably guilty of something, regardless of the outcome of the trial.").

80. *See id.* at 1305.

81. *See id.* at 1307 ("One psychiatrist, while cautioning that not all falsely arrested people suffer serious effects, nonetheless concluded that false charges and pre-trial incarceration can lead to dissociative disorders, post-traumatic stress disorders, adjustment disorders, dysthymic disorders, and generalized anxiety disorders. Another professor of psychiatry was more skeptical, concluding that many claims of psychiatric problems following a wrongful arrest are exaggerated. But despite these doubts, the professor acknowledged that many of the former suspects 'expressed great anger and resentment, some of which extended to feelings of retribution and revenge' at what had occurred, emotions the psychiatrist found quite reasonable, especially given the 'stressful, onerous, unpleasant, costly, and humiliating experience' of being put through the criminal system.").

82. *See id.* at 1308.

an employer's refusal to associate with someone with a criminal record, a defendant's failure to make bail and the corresponding loss of work, or a potential employer's inquiry into an arrest that did not lead to a conviction.[83]

The current remedies are insufficient to eliminate the stigma associated with false accusations and convictions. Understanding the powerful effects of stigma necessitates the creation of a new remedy that provides redress for those innocently burdened by stigmatization.

III. THE ADOPTION OF A DECLARATION OF INNOCENCE WILL HELP RESTORE DAMAGED REPUTATIONS

In a society where the ease of making an accusation—true or false—has been enhanced significantly,[84] and with very few ways to respond to such an accusation,[85] the necessity of a remedy to protect reputation has likely never been greater.[86] Instead of looking for a remedy from the nation's highest court to come forward or for the political branches to act, individual federal and state courts can combine the remedies already available to them to create one themselves.[87] A remedy that these courts should implement, that would enable those who have been victimized by a stigmatized reputation to obtain reputational restoration, would be a judicially created declaration of innocence.[88]

83. *See id.* at 1309–11.

84. *See* Ardia, *Reputation in a Networked World*, *supra* note 14, at 263 ("[O]ur reputations are more ephemeral because they are open to onslaughts from many more sources. Indeed, maintaining a 'good' reputation is no simple matter. The Internet is replete with anonymous and pseudonymous speech that criticizes, disparages, and defames. The old approach of sending a cease and desist letter or demanding a retraction no longer accomplishes its purpose.").

85. *See, e.g. infra* Part V.

86. *See* Emily Chiang, *Reviving the Declaratory Judgment: A New Path to Structural Reform*, 63 BUFF. L. REV. 549, 552 (2015) (describing the current need for a remedy that would "shift[] the emphasis away from the structural injunction and towards the need for remedies that prod the political branches to take action").

87. *See id.* at 581 ("The declaratory judgment prods those government actors to act sooner rather than later, with additional court action threatened should their solutions prove unsatisfactory to the plaintiff class.").

88. *See generally* Pierre N. Leval, *The No-Money, No-Fault Libel Suit: Keeping* Sullivan *in its Proper Place*, 101 HARV. L. REV. 1287, 1287–88 (1988).

A. A Declaration of Innocence Would Fill a Void in the Criminal Justice System

Modeled after its historical uses, the declaration of innocence would exist as a singular motion (without attachment of injunctions) to fix the specific problem of a stigmatized reputation by declaring an accused innocent.[89] Without a need to "demonstrate a lack of an adequate remedy at law or irreparable harm,"[90] this singular motion would simplify the procedural aspects compared to current declarations while also extending its benefits to more individuals.[91] The declaration of innocence could potentially incentivize the political branches to act to reputation's benefit as well.[92] The declaration of innocence would also "value[] political and judicial expediency, [promote] efficiency in the use of limited resources, and [provide a] practical impact over traditional pathways"[93] making its adoption into the judicial system anything other than an inconvenience.

The necessity of a declaration of innocence arises from an omission in the jury verdict—i.e., the jury will never make a statement that the defendant is factually innocent.[94] Consequently, according to Professor Andrew D. Leipold, a *non-guilty* verdict can mean any one of the following situations: (1) the defendant is indeed guilty but the state failed to convince all jurors beyond a reasonable doubt; (2) the evidence at trial was confusing, prohibiting any consensus by the jury as to innocence or guilt; (3) the defendant is factually guilty and the jury is convinced beyond a reasonable doubt of legal guilt, but chooses to use their power of nullification to acquit; or (4) the defendant is factually innocent, with the jurors convinced of this innocence.[95] These

89. *See* Chiang, *supra* note 86, at 573.

90. *Id.* at 574.

91. *See* Leval, *supra* note 88, at 1301 (discussing how his proposal would create a cheaper and simpler proceeding).

92. *See* Chiang, *supra* note 86, at 581 ("[T]he actual work of reforming an institution takes place only with the participation of the political branches and administrative agencies ultimately responsible for procuring funding for the institution, implementing new systems and controls, and complying with court orders or negotiated agreements. The declaratory judgment prods those government actors to act sooner rather than later, with additional court action threatened should their solutions prove unsatisfactory to the plaintiff class.").

93. *See id.* at 552.

94. *See* Leipold, *supra* note 25, at 1301 ("[F]or all official purposes, a jury verdict proclaims only one of two things: (a) the defendant is a criminal, or (b) the prosecutor failed to prove that the defendant is a criminal.").

95. *See id.* at 1302.

principles might also be presumed to apply to other adjudicative proceedings. For example, acknowledging that most criminal cases are not adjudicated through a jury trial, any dismissal of charges (e.g., dismissed through paying restitution or prosecutor discretion, etc.) are likely indistinguishable to the average layperson.[96] This inability to distinguish between the adjudicative conclusions of any given case contributes to society's blanket presumption of guilt to the accused.[97]

On the other side of the spectrum, perhaps nothing illustrates the current legal status of *reputation* better than the fact that the law has not defined *reputation*.[98] Consequently, scholars have looked to the biological sciences and social sciences for meaning;[99] others have looked to defamation law under the concepts of property, honor, and dignity;[100] while others look to reputation as being linked to privacy and individual dignity.[101] But no matter what theoretical base is applied, reputation's practical effects are intuitively known to influence one's ability to cultivate relationships, progress professionally, and influence self-perception—all worthy of defending.[102] Classically illustrating the remedial void to safeguard reputation is former Secretary of Labor Ray Donovan, who asked, after his acquittal in his 1987 grand larceny trial: "Which office do I go to get my reputation back?"[103] A declaration of innocence would provide a remedy to reobtain his reputation.

96. *See id.* at 1302–03.

97. *See id.* at 1302 ("The importance of this point cannot be overstated. Because a general verdict gives no hint of the jury's reasoning, it necessarily treats all conclusions of non-guilt in precisely the same manner."); *see id.* at 1304 ("If people believed that a finding of 'not guilty' was convincing evidence of innocence, presumably most of the harms associated with a criminal charge would dissolve with an acquittal. But experience suggests that they do not.").

98. *See* Ardia, *Reputation in a Networked World*, *supra* note 14, at 265 ("[T]he common law has not attempted to define reputation and we ultimately come away dissatisfied with how judges treat the topic.").

99. *See id.*

100. *See* Mitnick, *supra* note 77, at 101.

101. *See id.* at 106.

102. *See* Lawrence, *supra* note 19, at 396 ("It is beyond question that criminal accusations are harmful to one's reputation. Wrongly accused or convicted persons may lose credibility and trustworthiness in the eyes of their community and of the general public.").

103. Selwyn Raab, *Donovan Cleared of Fraud Charges by Jury in Bronx,* N.Y. TIMES (May 26, 1987), https://www.nytimes.com/1987/05/26/nyregion/donovan-cleared-of-fraud-charges-by-jury-in-bronx.html.

B. Basis for a Declaration of Innocence

The idea of a judicial declaration of innocence is not a new idea.[104] The idea's genesis belongs to Judge Pierre N. Leval, who suggested a "no-money, no-fault libel suit" as a method to remedy reputation without having to meet the difficult *New York Times Co. v. Sullivan* malice standard.[105] Its singular purpose would be to restore a "falsely damaged reputation."[106] Advocating for the proposal's feasibility, Judge Leval first suggested that such a declaration was already legally possible, as the malice standard announced in *Sullivan* likely applies only to plaintiffs seeking monetary damages.[107] Therefore, the malice standard could be disregarded in a no-damages libel suit like with a declaration of innocence.[108]

Second, continuing his discussion of the proposal, Judge Leval suggested that there would be advantages to both parties.[109] The plaintiff, by seeking only a declaration that the statement was false, would be relieved of the near impossible malice standard, consequently improving the odds of succeeding on the claim.[110] The defendant (the news media in his example), saved from defending the plaintiff's attack, would be able to preserve the privacy of its organization, prevent unnecessary criticism of its organization, and save money by not litigating the claim.[111] Judge Leval also suggested that some defendants might elect to not defend the suit at all, allowing the plaintiff judgment by default.[112] The standard of proof would be by a preponderance of evidence, allowing those without surefire claims an equal likelihood to succeed on their claims.[113]

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104. *See* Lawrence, *supra* note 19, at 398 ("Here, we have been discussing the stigma of the wrongfully accused or convicted. The analogous stigma from defamation was addressed by Judge Pierre Leval in his influential 1988 article in the *Harvard Law Review* proposing a no-fault, no-damages defamation suit.").

105. Leval, *supra* note 88, 1287 ("The *Sullivan* doctrine requires a plaintiff who is a public figure to prove not only that the statement was false but also that the press defendant knew it was false, or proceeded with reckless disregard of probable falsity. This element, mislabeled 'actual malice' (in fact it has little to do with malice), was predictably difficult to satisfy. In the next quarter century, few plaintiffs have succeeded.").

106. *Id.* at 1288.

107. *See id.* at 1288–91.

108. *See id.*

109. *See id.* at 1291–98.

110. *See id.* at 1291–94.

111. *See id.* at 1294–98.

112. *See id.* at 1296.

113. *See id.* at 1291–98.

Judge Leval suggested that agreement between the parties can come about simply through negotiation leading to a stipulation, as the benefits to both parties are theoretically equal.[114] The opinion of the court would be written by a judge in the case of a bench trial, or potentially a third party in the case of a jury trial (who would summarize the proceedings that the judge would then sign).[115] He also strongly discouraged the procedure being codified by statute or court rule because doing so would make the process too rigid.[116] In his view, a codified procedure was of no value unless "based on a perception of mutual advantage resulting in a negotiated agreement."[117] This flexibility of Judge Leval's proposal would both foster its development in the libel context and allow it freedom to expand into other areas of law that seek this similar remedy.

C. How the Declaration of Innocence Will Work

The declaration of innocence would apply the features explained in Judge Leval's proposal to a criminal context.[118] The fact that both declarations seek to repair reputations makes this transition possible; however, in a criminal context, the method of repairing reputation would be to find innocence.[119] The declaration of innocence in the criminal context would also provide a civil remedy whereby one could receive acknowledgment of their innocence by a preponderance of the evidence.[120] The lower standard of proof will also reduce litigation costs, enabling the remedy to be available to more individuals.[121] This type of judicial declaration would be similar to the other remedies that were covered in Part II in the sense that they both seek to repair a harm

114. *See id.* at 1298–1301.

115. *See id.* at 1300.

116. *See id.* at 1301.

117. *Id.*

118. *See* Lawrence, *supra* note 19, at 392 (highlighting that this idea has been suggested before).

119. *See id.* at 398 ("The problem of vindicating the wrongfully accused or convicted is analogous to the challenge of addressing the harm suffered by the victim of defamation.").

120. *See id.* at 399 ("The 'no-fault' standard of Judge Leval's proposal does not require a plaintiff to show malice as required by the Supreme Court in *New York Times v. Sullivan*. Rather, the plaintiff strictly has to prove that the statement was false by a preponderance of the evidence.").

121. Leval, *supra* note 88, at 1293 ("There is reason to believe that a sizeable percentage of libel plaintiffs would be interested in pursuing an action for a judgment of falsity without a claim for damages if by doing so they could escape the requirements of *Sullivan*.").

of the criminal justice system; however, this remedy would differ in that it would be far more simple to administer, theoretically cover more individuals (including those only accused of crimes), and address the specific harm of stigma.[122] The difference between this proposal and other remedies available to those who have been exonerated is that this declaration would provide a "significantly stronger vindication than that provided by a verdict of not guilty."[123]

Despite this remedy's promise, there are likely to be both micro and macro application difficulties in the implementation of a declaration of innocence. On the micro level, perhaps the greatest difficulty in transitioning the declaration of innocence from a defamation to criminal arena would be the aligned mutual incentives.[124] Would a prosecutor have sufficient incentive to participate? Perhaps the proceeding would still occur, with the result of a judgment by default if the prosecutor declines to participate.[125] The adoption, and subsequent development, of the declaration of innocence in the defamation context might help iron out these issues. If the remedy is developed and proven successful in the defamation context, its value will certainly transfer to the criminal context.

On a macro level, an adoption of a declaration of innocence would require an adjustment to the entire presumption of the criminal justice system.[126] According to Professor Givelber, adjudicative asymmetry, or the fact that within the criminal justice system guilt is frequently determined while innocence is not, has resulted in several problems: (1) the presumption of innocence remaining invisible, (2) the reinforcement of the belief that those charged with crimes are guilty, and (3) the factual weakening of the conclusion that innocent people are regularly convicted.[127] This problem is really a systemic issue, as "a claim of actual innocence requires a judgment which goes beyond that which

122. *See* Lawrence, *supra* note 19, at 397.

123. *Id.* at 398.

124. *See id.* at 399 (describing why criminal prosecutors do not have the same incentives as media outlets who will not want to risk invasive discovery proceedings).

125. *See* Leval, *supra* note 88, at 1296.

126. *See* Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1396 (1997) ("We need to acknowledge that the current processes compromise the criminal justice system's ability to identify the innocent as well as the guilty, and that a serious commitment to advancing the cause of truth calls for significant sacrifices from all participants—the police, the prosecution and the judiciary as well as the defense.").

127. *See id.* at 1322–28.

official governmental bodies make, [therefore] such claims are often disputed."[128] While the tools to create the declaration of innocence already exist theoretically, the practical application of this remedy will require a much larger systemic change within various government entities. Again, the only viable solution appears to be the civil law adopting the remedy for defamation lawsuits, with subsequent development and general acceptance providing the foundation to transfer the remedy to the criminal law arena.

In summary, a declaration of innocence applied to those innocently burdened with criminal stigma will fill a large void in available remedies for such individuals. While there are some challenges to work through, encouragement for its adoption is found in the fact that a foundation for implementation already exists; specifically, the foundational legal framework for Judge Leval's declaration of innocence is already applicable to those affected by criminal stigma.[129] While both the civil and criminal remedies have difficulties, their mutual focus on protecting reputation allows for the development of a promising synergy that increases the likelihood of both remedies' adoption under the current legal framework.[130]

IV. The Government Publication of Declarations of Innocence

Today's age provides new and increasingly difficult challenges in the maintenance of one's reputation.[131] With the advent of the internet and the "networked information economy," reputation occupies a new role compared to that of past decades.[132] Paradoxically, one's reputation is more likely to endure (as information is easily stored and retrievable) while also less likely to endure (because it can be attacked from an unlimited number of other sources).[133] Consequently, what

128. *Id.* at 1323.

129. *See* Lawrence, *supra* note 19, at 399 ("The parallels of the exonerated criminal defendant and the victim of defamation are not perfect, but they are apt.").

130. *See id.* at 400 ("Thus, Judge Leval's provocative proposal in the defamation context actually has a very powerful resonance in our parallel context of those who have suffered reputational damage from erroneous accusation and prosecution.").

131. *See* Ardia, *Reputation in a Networked World*, *supra* note 14, at 262.

132. *See id.*

133. *See id.* at 262–63.

little law there is to protect reputation is unlikely to maintain reputation's protection in an increasingly networked society.[134] It might not be too late, however, to explicitly protect reputation within this modern society.

A declaration of innocence, standing alone, is not enough to remedy the stigma of a criminal accusation or conviction in a networked society.[135] Consequently, the declaration of innocence—after having been determined by an individual court—should be published by a state or federal government in its own exclusive, specific-purpose forum.[136] Here, the successful plaintiff who has received a declaration of innocence will have the option of having that declaration published by the government, thereby becoming the government's speech.[137]

This remedy would be premised on the U.S. Supreme Court's recognition of the government's ability to use its own voice in the expression of information and ideas under the government speech doctrine.[138] The government speech doctrine allows the government itself to receive the protections of the First Amendment in its expression of its viewpoints (like any citizen of the country) even if such information or ideas are adopted from private citizens.[139] The utilization benefit of this doctrine is the government's ability to promote messages unim-

134. *See id.* at 263.

135. *See* Leval, *supra* note 88, at 1299 ("An issue of concern to the plaintiff may be his inability to publicize his victory should he win the suit. Unless the suit is widely reported, plaintiff might win a verdict as to the falsity of the libel but have no way of telling the world about his vindication.").

136. *Cf. id.* ("If the agreement leaves it to defendant to report plaintiff's verdict, plaintiff may worry that he will be disadvantaged by the defendant's tone and choice of detail. Alternatively, the plaintiff might request that, if he wins, the defendant turn over a specified amount of space to him. My discussions with reporters and editors suggest that the press is highly resistant to such an agreement.").

137. *See* Mary-Rose Papandrea, *The Government Brand*, 110 NW. U.L. REV. 1195, 1198 (2016) ("It is hardly controversial that the government must speak to be effective and that it need not embrace opposing viewpoints whenever it does.").

138. *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245–53 (2015); Pleasant Grove v. Summum, 555 U.S. 460, 467–70 (2009).

139. *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 579 (1998) ("Government funding of the arts, the court explained, is both a traditional sphere of free expression, and an area in which the Government has stated its intention to encourage a diversity of views from private speakers.") (internal quotations omitted); Randall P. Bezanson, *The Government Speech Forum:* Forbes *and* Finley *and Government Speech Selection Judgments*, 83 IOWA L. REV. 953, 961 (1998) ("But the public forum analysis reflects an effort to embed doctrinal distinctions between government as speech regulator and government as speech manager—as manager of property on which speech takes place. The public forum analysis is notably not directed at government when acting as a speaker.").

peded by the necessities of providing equal access to other viewpoints on any given issue.[140]

Using the government speech doctrine, the government should create its own exclusive internet forum where those who have been declared innocent can have this information broadcast to society.[141] These internet forums would add an effective component to the declaration of innocence by utilizing the benefits of the government speech doctrine, combined with the benefits of a state or nationally-networked society, to de-stigmatize those who have faced false accusations or convictions.[142] Such a measure would do much to counter the damaging effects criminal stigma imposes on one's personal reputation.[143] Even more, classifying the declaration of innocence forum as government speech makes the forum exclusive by leaving no room for detractors who could possibly foster the same negative stigma this forum would be used to remedy.

A. The Government Speech Test

In evaluating the government publication of a declaration of innocence to determine whether the government can legally limit private speech to fulfill a legitimate government function, the *Walker* test will inevitably be used to resolve whether judicial deference will be given to the government's choice of restrictions.[144] The *Walker* test, developed by the U.S. Supreme Court in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, involves the analysis of three features to

140. *See* Bezanson, *supra* note 139, at 981 ("Because government must be able to speak, and because in doing so—in the classroom, in the meeting room, in the airport, for example—it, by definition, displaces competing speech and ideas (either at a place or for a time or in a specific instance), the First Amendment was made to bend to the necessity by recognizing places and times and programs in which government's speech can constitutionally hold a monopoly.").

141. *See* Mary Jean Dolan, *The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech*, 31 HASTINGS CONST. L.Q. 71, 74 (2004) ("In the context of special public purpose forums, the Article argues, the government speech paradigm should apply, not the limited public forum test.").

142. *Id.* at 116 ("The value of allowing viewpoint-based government speech lies in what it adds to the marketplace of ideas . . . .").

143. *Id.* at 71–72 ("In some circumstances, government makes selections among private speakers, deciding who will participate or be subsidized, and in others, government projects benefit from essential private financial support. Whether screening participants or sponsors, government seeks to select those compatible with project goals and to avoid fostering speech that divides communities, insults particular groups, or grates on public sensibilities.").

144. *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2248–53 (2015); Leslie Gielow Jacobs, *Government Identity Speech Programs: Understanding and Applying the New* Walker *Test*, 44 PEPP. L. REV. 305, 339–45 (2017).

distinguish between government speech and private speech: (1) a historical analysis test, (2) a speaker identity test, and (3) and an effectively control test.[145]

Use of the *Walker* test in this situation is appropriate (although it has been accused of being applied too broadly by courts) because it applies when the government collaborates with private speakers in efforts to adopt private speakers' messages that the government will ultimately own.[146] Here, it is not the content of the message that determines the classification of the forum, but rather how the speech restriction relates to the purpose of the forum.[147] Therefore, by limiting this forum to only declarations of innocence statements, the government would be excluding other private speakers with contrary messages, qualifying the declarations of innocence to be adopted as government speech.[148]

The fact that the declarations of innocence will be government created should not pose any constitutional restriction on the declarations use as government speech. The U.S. Supreme Court, in *Rosenberger v. Rector and Visitors of University of Virginia*, described government speech as "permitt[ing] the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message."[149] Consequently, it would be the personal decision of the successful plaintiff to allow the declaration's publication by the government (whereby the government adopts the declaration into its own speech) that would classify the speech as government speech and necessitate the *Walker* test to ascertain the appropriateness of judicial deference.

145. *See Walker*, 135 S. Ct. at 2247.

146. *See* Jacobs, *supra* note 144, at 341 ("When the government asserts that its purpose in combining with private speakers is to produce its own identity speech, then the *Walker* test applies to determine whether the attributes that justify judicial deference to the government's content control of speech selections exist.").

147. *See id.* at 342 ("It is the government's reason for restricting the content of the private expression and the role of the restriction in fulfilling a government function that distinguishes the two types of access programs.").

148. *See* Dolan, *supra* note 141, at 73 ("[Special public purpose forums] are the projects and programs where government has a subjective expressive purpose that includes particular values and is carried out through selection of private speakers.").

149. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995).

1. Test one: historical analysis test

The first part of the *Walker* test is determining whether "the history of [the manner by which the government is using private speech] . . . [shows] they long have communicated messages from the [government in this manner]."[150] In *Pleasant Grove City v. Summum*, by striking down the argument that a park was a forum for private monuments, the U.S. Supreme Court invoked a discussion of "ancient times" to limit the forum's scope to exclude the contested monument.[151] This *Summum* holding created a presumption that a government forum historically used as a traditional public forum will not be obligated to use privately donated submissions when the government seeks to craft its own message.[152]

In *Walker*, the Court highlighted the history of license plate designs being used for government speech as evidence to hold that the messages at issue were government speech.[153] The *Walker* holding created a presumption that the government's long history of using a medium for its own government speech will retain that same presumption even if the source of the government speech changes— such as when private citizens are invited to craft messages that are traditionally within the government's exclusive domain.[154] Importantly, in both of these cases, the Court made its analysis based on the type of government property on which the restriction took place.[155]

These aforementioned historical presumptions used by the U.S. Supreme Court can be applied to the factors that would exist with the government's declaration of innocence internet publication. To illustrate a history of communication using this medium: federal, state, and

150. *Walker*, 135 S. Ct. at 2248.

151. Pleasant Grove v. Summum, 555 U.S. 460, 470 (2009).

152. *See* Jacobs, *supra* note 144, at 358 ("If a government entity has been using a particular medium to operate a created forum for private speech, then its intent to use the medium in that way would presumptively continue until it engaged in sufficient affirmative actions to signal a change in its intent.").

153. *Walker*, 135 S. Ct. at 2248.

154. *See* Jacobs, *supra* note 144, at 357–58 ("The continuous and simultaneous identity messaging by the same government entity before and through the private speaker program provides support for the presumption that the government intends the inclusion of private speakers to 'add to' its own identity messaging rather than change its use of the medium to produce private speech.").

155. *See Walker*, 135 S. Ct. at 2248 ("Texas, too, has selected various messages to communicate through its license plate designs."); *Summum*, 555 U.S. at 472 ("Public parks are often closely identified in the public mind with the government unit that owns the land.").

local governments all have an online presence that the majority of internet users are taking advantage of.[156] For example, in what is the most recent study on the topic, the Pew Internet & American Life Project found that eighty-two percent of internet users "looked for information or completed a transaction on a government website in the twelve months preceding this survey."[157] Of this number, forty-eight percent looked for information regarding a public policy or issue that affected either their federal, state, or local government.[158] Some twenty-three percent of internet users discussed public policies or issues online, but mostly outside of government channels.[159] Furthermore, the characteristics of government websites range from the strictly informational to the interactive (with the government soliciting public input on the development of specific initiatives), illustrating governments' evolving use of the internet as a tool for many different government endeavors.[160]

While the government's utilization of the internet does not have a *long* history or extend to *ancient times*, it has in recent time become the primary method of government communication with the public.[161] Admittedly, classifying the internet in historical terms might be difficult due to the internet's relatively recent development; however, if the government has used the internet in a specific way from its inception, like automobiles in *Walker*, perhaps that will be sufficient to attach a historical purpose to an internet forum.[162] Furthermore, while there appears to be a new interactive aspect to some government websites, it can be inferred that the government's history of its internet usage is primarily informational (as the majority of internet users access government sites for informational purposes), thereby making the govern-

156. David S. Ardia, *Government Speech and Online Forums: First Amendment Limitations on Moderating Public Discourse on Government Websites*, 2010 BYU L. REV. 1981, 1986 (2010) [hereinafter Ardia, *Government Speech and Online Forums*].

157. Aaron Smith, *Government Online: The Internet Gives Citizens New Paths to Government Services and Information*, 1 PEW INT. & AM. LIFE PROJECT 68, 2 (2010).

158. *Id.*

159. *Id.* at 2–3.

160. *See* Ardia, *Government Speech and Online Forums*, *supra* note 156, at 1986–88.

161. *See id.* at 1985 ("Throughout most of the Internet's history, government was slow to adapt to the new electronic medium as a place for public discourse. This is changing. The Internet is rapidly becoming government's primary method of communicating with the public.").

162. *See* Jacobs, *supra* note 144, at 355 ("The Court's reasoning about historical use refers to behavior of the particular governmental entity at issue and to behaviors of governments generally, across jurisdictions and over time.").

ment's publication of a declaration of innocence appropriate as such a publication would be strictly informational.[163]

Based on *Summum*, qualifying the publication of declarations of innocence as government speech would allow the government to exclude others whose message is inconsistent with the government's message.[164] Furthermore, similar to *Walker*, the government's history of using the internet for informational purposes will likely retain the same presumption even if the government incorporates private entities into their message, making a plaintiff's choice to incorporate their declaration of innocence into the forum consistent with existing government speech doctrine.[165] Therefore, this analysis suggests that the government's incorporation of a declaration of innocence into an internet forum is likely to be historically interpreted as a government speech forum.

2. Test two: speaker identity test

The second prong of the *Walker* test is the necessary qualification that the listeners "appreciate the identity of the speaker."[166] The purpose of this is to determine whether an onlooker would be able to attribute the private message as thoroughly incorporated to be the government's speech, therefore, ensuring there is a valid government purpose for it to restrict other speech.[167] This test has two components: (1) that the government ownership of the program or property be "closely associated" in the public mind with its owner,[168] and (2) that the private speech be connected with the government speech expressly enough for viewers to attribute the government owner to be the source of the expression.[169] The required "attribution" in the second prong

163. *See* Smith, *supra* note 157, at 2.

164. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 470 (2009).

165. *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2248 (2015).

166. *Walker*, 135 S. Ct. at 2247.

167. *See* Jacobs, *supra* note 144, at 361–62; *see also id.* at 362 ("Combined with adequate evidence that the government intends to transform private submissions into identity speech, the viewer-perception requirement ensures that the government could rationally believe that the communication it intends will effectively be made.").

168. *Summum*, 555 U.S. at 472.

169. *See* Jacobs, *supra* note 144, at 365 ("[I]t is the combination of the obvious identity of the owner of the property and the apparent interrelationship of the property owner with the privately contributed expression that appears on it that causes viewers to perceive the owner to

can be shown through the government's overt ownership of the property or government speech program.[170] Attribution can also be illustrated in the permanence of the private message and its linkage with the government entity, as all other speech forums have a transitory component to the messages they support.[171]

To illustrate this speaker identity test, the first part was met when the *Walker* Court indicated that "[e]ach Texas license plate is a government article serving the governmental purposes of vehicle registration and identification."[172] This satisfied the "closely associated" in the public mind with its owner component. The second part of the test was also satisfied when the Court highlighted the association of the private messages on plates with the fact that "[t]he State places the name 'TEXAS' in large letters at the top of every plate. Moreover, the State requires Texas vehicle owners to display license plates, and every Texas license plate is issued by the State."[173] The Court further acknowledged that Texas requires that the plates be returned to the state when they are to be disposed.[174] The requirements that the license plates be displayed and returned to the state (having originally been issued by the state) suggests in an apparent way the state's ownership of the license plates, meeting the requirements of the second prong.[175] Also supporting the second prong is the permanent nature of the relationship of the private message's branding with the state's name, which would not support any other type of forum analysis.[176]

For the publicizing of the declaration of innocence to meet this requirement there will have to be careful initial planning of the forum's design. First, there will need to be a *closely associated* identification

be a source of the expression. Sufficient evidence to meet the prong-two viewer-perception requirement thus must relate to both parts of the combination.").

170. *See id.* ("[A]bsent obvious and inherent qualities that associate the property or program with a particular government entity, prong two requires evidence showing affirmative government actions apparent to viewers acknowledging ownership of the property or program through which an identity speech program operates by the particular government entity doing the messaging.").

171. *See Walker*, 135 S. Ct. at 2251.

172. *Id.* at 2248.

173. *Id.*

174. *See id.*

175. *See id.*

176. *See id.* at 2251; *see also* Jacobs, *supra* note 144, at 370 ("[T]he submissions that appear on postage stamps, like license plate designs, appear both as expressive fixtures and as units in an expressive association, in ways that meaningfully distinguish the program from forums for private speech.").

between the purpose of the declaration of innocence and the government entity. Unlike the situation in *Walker*, where it is intuitively understood that a license plate is closely associated with a government purpose of registration and identification of a vehicle, a connection between the declaration of innocence and the internet forum will be more difficult. Therefore, the government purpose of the forum might need to be spelled out on each page of the website. Similarly, the website's design might incorporate a requirement of a visitor's clicking a mandatory disclaimer to enter the website. These suggestions will link the purpose of the site to the message the government is communicating. The government's purpose will need to be clear and sufficiently detailed to enable society to connect the message to the government speech. This overt communication of purpose is likely necessary because a website for such publications will be new and novel to society.

To meet the second prong of this test, the ownership of the forum will also have to be explicit and clear. Similar to how Texas stamped the state's name on every license plate, every page of the forum used for the declarations will need to have indicia linking it to a government entity. Additionally, having the site be part of a larger collection of government webpages can strengthen the connection between the message and the government. The forum will need to have non-negotiable policies that govern its conduct—e.g., who gets to get on the forum, who does not get to go on the forum, etc.—that are visible to all whom visit the site. The forum should also intend to be permanent, suggesting the government's commitment to the ownership of the message. Publication of declarations of innocence, if carefully planned, can meet the requirements to comply with the second prong of the *Walker* test.

3. Test three: the "effectively control" test

The last prong of the *Walker* test is the requirement that the government "effectively control" the message of the public speech participants.[177] Inherent in this process of control is the ultimate government objective to which "effective control" should be tailored.[178] Part of this "control" is to exercise "final approval authority" over the selections.[179]

177. *See Walker*, 135 S. Ct. at 2247.
178. *See* Jacobs, *supra* note 144, at 347.
179. *Id.*

The "final approval authority" must show some selectivity such as review procedures, identity-conforming mandates, etc.[180] The breadth of review must encompass a review of all submissions, otherwise the idea that the government intends to adopt its own message becomes impossible.[181]

In the context of the declaration of innocence, the ultimate objective is to publicly display the fact that an individual who was either falsely accused or convicted has been declared innocent. To "effectively control" the publication of this information at the federal level, a review board comprised of a cross-selection of different professionals within the criminal justice system must carefully consider all of those who apply for publication. At the very least, the review board must inquire into the circumstances of each particular declaration of innocence to make sure all procedures were followed in its creation. Any outstanding problems should be resolved before publication takes place. While the federal government should take the lead in adopting this forum, it is important to note that the states who follow suit will have differing standards in the creation of their declarations of innocence. If there is a state system that has a lower standard in approving declarations of innocence, the federal review board might require additional criteria to be met to grant publication. This type of careful review will also indirectly incentivize states to adopt better standards of review for their own declarations of innocence—and if the state chooses to do so—for their procedures to effectively control their own forum. Such a standard should be sufficient in its "effective control" of the message.

In conclusion, the *Walker*-three-part test can be met under a reasonable interpretation of the rules and its application to the circumstances of the declaration of innocence. The first *Walker* historical component may be able to be met through a showing of the government's overwhelming recent usage of the internet to convey information. Similarly, the declaration of innocence can meet the two-part second *Walker* prong by showing its "close[] associat[ion]" by clearly

180. *See id.* at 351 ("The procedures must demonstrate the government's intent to review and evaluate private submissions for the purpose of tailoring them and accepting them into the government's broadcast of identity.").

181. *See id.* ("Evidence of deep and active review includes requirements for 'design input,' 'requested modification,' levels of review, and formal approvals. Although the government's practice cannot identify content or viewpoint selection inconsistencies, evidence of failure to follow review procedures consistently can provide a check on the government's assertion that it exercises effective control of submissions.").

stating the site's purpose and government affiliation. Lastly, the *Walker* test's third prong can be met through sufficient standards to effectively control the review and selection of the published declarations of innocence. Collectively, this provides a reasonable foundation on which the publicity of the declaration of innocence can become government speech.

B. The Government Speech Doctrine to Accelerate De-Stigmatization Process

The government publication of the declaration of innocence would announce to society that the accusations or convictions that the defendant was labeled are false and that the plaintiff is legally innocent. Specifically, by having the government publish the declaration of innocence, the force of the declaration of innocence would be strengthened by the inference of government backing.[182] The publication could be effectuated in no different a manner than other forms of government publications, such as sex offender registries, child abuse registries, etc. By using an internet source to publicize an individual's declaration of innocence, the government would be utilizing the same mechanism that has accelerated the erosion of reputation in society.[183] But by changing the input of the mechanism to protect reputation, the government's publication of declarations of innocence will counter the effects of stigma as broadly and authoritatively as possible.[184] The end goal is that such an internet forum might provide for an "informal communit[y] to rapidly form and take on many of the functions traditional communities once played in managing disputes over reputation."[185]

182. *See* Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 715 (2011) ("The point cannot be overstressed: the function, and often the purpose, of government speech doctrine is to disfavor private speakers as a result of their viewpoints. No matter how one conceptualizes the limitations that government speech places on private speech—as drowning out, restraining, or compelling it—private speech that is affected will be that with which the government disagrees.").

183. *See* Ardia, *Reputation in a Networked World*, *supra* note 14, at 263.

184. *See id.* ("Indeed, many of the social norms that underlie defamation law were established when individuals were connected to a relatively small number of people defined largely by physical geography. But the Internet now connects us to hundreds of millions of people. Our existing notions of how to establish trust and maintain social ties do not always translate to this networked world.").

185. *Id.* at 328.

Having a declaration of innocence published in this specific forum would directly reinforce the presumption of innocence standard of the criminal justice system, consequently accelerating the de-stigmatization process for those accused or convicted of crime though innocent.[186] Such reinforcement is sorely needed, because current "[c]riminal accusations carry strong societal assumptions of guilt that are likely to damage any defendant's reputation despite the system's presumption of innocence."[187] As has been illustrated by the nature of the legal system and the civic limitations placed on those who have been arrested but not convicted, the presumption of innocence is very weak. For example, "[a]n arrest or charge is a 'public act' that brands the subject as a criminal in the eyes of others; it has the potential to 'disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family, and his friends."[188]

The government publication of a declaration of innocence, by reinforcing the presumption of innocence, would also likely influence other areas in need of reputational protection. For example, such reputational protection is currently needed because the stigmatization of individuals is more expansive and damaging than ever before.[189] The stigmatization expansion is due, in part, to the number of categories of stigmatization being added, including not only sex offenders, but potential gang members, child abusers, terrorists, prostitution patrons, etc.[190] These powerful forces, however, can be reversed to be used to the advantage of reputation.[191]

The expansive nature of the stigmatization is also due to the interconnectedness of society today.[192] With the advent of smartphones, social media, internet, etc., such information about an individual can be

186. *See* Lawrence, *supra* note 19, at 397.

187. *Id.* at 397.

188. Barbara E. Armacost, *Race and Reputation: The Real Legacy of* Paul v. Davis, 85 VA. L. REV. 569, 622 (1999) (citing Albright v. Oliver, 510 U.S. 266, 296 (1994) (Stevens, J., dissenting) (quoting United States v. Marion, 404 U.S. 307, 320 (1971)).

189. *See* Mitnick, *supra* note 77, at 141–42.

190. *See id.*

191. *See* Ardia, *Reputation in a Networked World*, *supra* note 14, at 264 ("Although the global communication networks that are the hallmarks of our networked society have brought new reputational challenges, they also provide novel solutions to prevent and ameliorate those harms.").

192. *See id.* at 262 ("Powerful search engines scour and index photos, videos, and text. Semantic connections link previously disparate pieces of information to individuals and to each

dispersed in a variety of ways and accessed anywhere.[193] It is simply much easier to access one's personal information in this day of age compared to any other time in our history.[194] The government publication of the declaration of innocence would use the interconnectedness of society to disperse reputational building information in numerous ways to be accessed anywhere. Such synergetic effects would build on each other, strengthening reputation slowly but consistently over time.

V. THE PAST, PRESENT, AND POTENTIAL FUTURE OF REPUTATION IN AMERICAN JURISPRUDENCE

The U.S. Supreme Court was, at one point, on the verge of recognizing reputation as a substantive liberty right under the Due Process Clause of the Fifth and Fourteenth Amendments. Instead of recognizing reputation as a liberty interest, the Court reversed its reputation jurisprudence. The declaration of innocence, however, might accomplish procedurally what the reputation doctrine might have done substantively.[195] The adoption of the declaration of innocence can provide the necessary procedural foundation on which the U.S. Supreme Court might later fully recognize reputation as a substantive due process right.[196]

A. Early U.S. Supreme Court Treatment of Reputation

The U.S. Supreme Court, in *Rosenblatt v. Baer*,[197] came as close as it ever had to making the protection of one's reputation a constitutional right.[198] Justice Stewart, in a concurring opinion, stated:

other. In the past, much personal information was publicly inaccessible because of practical impediments to its access. The Internet is largely eliminating these impediments.").

193. *See id.*

194. *See id.*

195. *See* Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 69 (2006).

196. *See id.* at 67–68 ("According to this third theory, substantive due process is informed by history, but it also includes a progressive dimension. More specifically, substantive due process protects a set of evolving national values, values that command widespread contemporary support, as evidenced by legal developments and societal understandings that may change over time.").

197. 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

198. *See* Lawrence, *supra* note 19, at 395.

> The 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 decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.[199]

Illustrative of the potential power of protecting reputation in society, the connection of reputation as a liberty interest under the Due Process Clause of the Fifth and Fourteenth Amendments was exercised in the McCarthy era.[200] In *Joint Anti-Fascist Refugee Committee v. McGrath*,[201] the plaintiffs, which included several persecuted organizations seeking declaratory and injunctive relief,[202] sued the U.S. Attorney General for designating their organization as "communist" and "subversive" under Truman's loyalty program.[203] At the heart of their complaint was their endurance of the following conditions, including:

> [m]embers and participants in its activities have 'been vilified and subjected to public shame, disgrace, ridicule and obloquy . . .' thereby inflicting upon it economic injury and discouraging participation in its activities; it has been hampered in securing meeting places; and many people have refused to take part in its fund-raising activities.[204]

Despite the decision resulting in a plurality opinion, all of the justices agreed that the government could not engage in making arbitrary designations without other justification.[205]

199. *Rosenblatt*, 383 U.S. at 92 (Stewart, J., concurring).

200. *See, e.g.*, Martin H. Redish, *Unlawful Advocacy and Free Speech Theory: Rethinking the Lessons of the McCarthy Era*, 73 U. CIN. L. REV. 9, 9 (2004) ("During that era, when the nation first began to grasp the gravity of the threat posed by the Soviet Union and the Eastern Bloc nations to our national security, both the government and private institutions imposed extensive and severe punishment on American Communists, and often on any American who at one time had been a Communist or even suspected of being a Communist and failed to repudiate those connections.").

201. 341 U.S. 123 (1951).

202. *See id.*

203. *Id.* at 125.

204. *Id.* at 131.

205. *See id.* at 126.

It can be inferred that reputation was valued as a substantive right when procedural safeguards were erected to enforce its protection.[206] This principle is illustrated in *Wisconsin v. Constantineau*,[207] where the U.S. Supreme Court was asked to look into a due process claim of a statute that required retailers to post notices of designated persons whom the government determined, based on prior conduct, could not be sold intoxicating liquors.[208] The plaintiff Constantineau—who was included in the postings—was, as a consequence of this statute, not allowed to purchase liquor for a year, while forced to endure the stigma associated with the prohibition by being publicly posted on all retail establishments selling liquor.[209] The issue, according to the Court, was "[w]hether the label or characterization given a person by 'posting,' though a mark of serious illness to some, is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard."[210] The Court sustained the existence of a substantive reputation right by concluding "that procedural due process requires that before one acting pursuant to State statute can make such a quasi-judicial determination, the individual involved must be given notice of the intent to post and an opportunity to present his side of the matter."[211]

In *Board of Regents v. Roth*,[212] the U.S. Supreme Court appeared to entrench reputation further as a substantive right by suggesting it constituted a liberty interest sufficient for procedural protection under the Due Process Clause.[213] In this case, a teacher at a state university initiated a Fourteenth Amendment challenge against the university for

206. *See* Conkle, *supra* note 195, at 69 ("[T]he Court has infused the Due Process Clause with substantive content. Focusing especially on the word 'liberty,' it has declared for itself the power to define otherwise unenumerated constitutional rights, rights that are protected from governmental deprivation, no matter the procedure.").

207. 400 U.S. 433 (1971).

208. *See id.* at 435–36.

209. *See id.* at 437 ("This appellee was not afforded a chance to defend herself. She may have been the victim of an official's caprice. Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented.")

210. *Id.* at 436.

211. *Id.*

212. 408 U.S. 564 (1972).

213. *See id.* at 572 ("In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed.").

having been given no reasons for the decision to terminate his employment for the next academic year.[214] In holding that no liberty or property interest was present in the case, the Court described its opinion of what constituted a liberty interest by stating:

> [t]he State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For *"(w)here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."*[215]

This case laid the necessary precedent for the Court—when the opportunity arose—to hold that a reputational right should be considered a fundamental right under the Due Process Clause of the Constitution.[216] This would allow for laws impacting reputation to be subjected to strict scrutiny whereby the law, to succeed, would need to be narrowly tailored to a compelling government interest.[217]

B. The U.S. Supreme Court's Abandonment of Reputation as a Protected Right

The U.S. Supreme Court, however, changed direction in its reputational rights jurisprudence with the precedent it set in *Paul v. Davis*.[218] In *Paul*, local law enforcement officials, acting without statutory authority, distributed flyers of known shoplifters to merchants around the community during the Christmas season.[219] Each flyer constituted five pages of individuals arranged alphabetically by name with a photo

214. *See id.* at 566–69.

215. *Id.* at 573 (quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) (italics added)).

216. *Id.* ("There might be cases in which a State refused to re-employ a person under such circumstances that interests in liberty would be implicated. But this is not such a case."); *See* Mitnick, *supra* note 77, at 86 ("[W]hen the Supreme Court sat in 1975 to hear arguments in *Paul v. Davis*, the law could not have been clearer: state-caused reputational injury, absent sufficient notice and an opportunity to be heard, unconstitutionally deprived the individual of the right to liberty without due process of law. Stigma alone clearly was sufficient to trigger procedural due process, the notion of an additional requirement of some more tangible loss being wholly absent from the doctrine.").

217. *See* Conkle, *supra* note 195, at 76.

218. 424 U.S. 693 (1976).

219. *See id.* at 694–95.

of the individual.[220] Plaintiff Davis, whose was included on the flyers, brought suit under the Civil Rights Act and the Fourteenth Amendment.[221] The Court declined to extend the protections of the Due Process Clause to this case, holding:

> [w]hile we have in a number of our prior cases pointed out the frequently drastic effect of the "stigma" which may result from defamation by the government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either "liberty" or "property" by itself sufficient to invoke the procedural protection of the Due Process Clause.[222]

Beginning with the *Paul v. Davis* decision, it has been the law that harm to one's reputation—standing alone—will not constitute a protected right under the procedural Due Process Clause of the Constitution.[223] The *Paul* decision ushered in the "stigma-plus" doctrine: only if a more tangible harm accompanied the reputational harm would the procedural due process doctrine apply.[224]

The *Paul v. Davis* decision has received an enormous amount of criticism, with some believing the opinion to be "among the most disingenuous opinions of the past few decades."[225] The holding that one's reputational interest is not protected within the confines of the Fourteenth Amendment is directly contradicted by the Court's opinion in *Constantineau* only five years earlier.[226] When later presented with an opportunity to ignore the *Paul* stigma-plus doctrine, the U.S. Supreme

220. *See id.* at 695.

221. *See id.* at 694.

222. *Id.* at 701.

223. *See* Mitnick, *supra* note 77, at 79.

224. *See Paul*, 424 U.S. at 712 ("Respondent in this case cannot assert denial of any right vouchsafed to him by the State and thereby protected under the Fourteenth Amendment. That being the case, petitioners' defamatory publications, however seriously they may have harmed respondent's reputation, did not deprive him of any 'liberty' or 'property' interests protected by the Due Process Clause.").

225. *See* Mitnick, *supra* note 77, at 88; *see also* Mark Tushnet, *The Constitutional Right to One's Good Name: An Examination of the Scholarship of Mr. Justice Rehnquist*, 64 KY. L.J. 753, 753 (1975) ("Perhaps the nadir in his work so far, however, is *Paul v. Davis*. His opinion for the Court is riddled with inadequate attempts to distinguish prior cases and confusions between constitutional and statutory analysis. Indeed, his characterizations of several relevant precedents is so strained that even the gentlé Justice Brennan called him a dissembler.").

226. *See* Mitnick, *supra* note 77, at 91 ("In [*Constantineau*], there had been no question that state action injurious to 'a person's good name, reputation, honor, or integrity' triggered the Due Process Clause.").

Court affirmed its holding in *Paul* by extending the stigma-plus doctrine once again.[227]

C. Glimmers of Hope in Reputation Jurisprudence

Since the Court's adoption of the stigma-plus doctrine, the U.S. Supreme Court has not completely disregarded the idea of reputation as a substantive liberty right under the Due Process Clause of the Fourteenth Amendment. The Court in *Planned Parenthood v. Casey* described liberty as encompassing:

> [M]atters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.[228]

The Court also discussed the role of liberty in *Lawrence v. Texas*, stating that "[t]he liberty of persons to choose . . . should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects."[229] The *Lawrence* Court also instituted a new method of constitutional interpretation of the Due Process Clause of the Constitution—evolving national values.[230] This interpretative method looks, in part, to current societal trends in determining substantive liberty interests under the Due Process Clause.[231] With the successful implementation of the declarations of innocence in society, this interpretative method could prove useful in extending reputational rights into a substantive liberty right under the Due Process Clause.[232]

227. Siegert v. Gilley, 500 U.S. 226 (1991).

228. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

229. Lawrence v. Texas, 539 U.S. 558, 567 (2003).

230. *See id.* at 576; *see also* Conkle, *supra* note 195, at 128.

231. *See Lawrence*, 539 U.S. at 576; *see also* Conkle, *supra* note 195, at 128.

232. *See* Conkle, *supra* note 195, at 148 ("The theory of evolving national values would countenance the notion of a living Constitution, one that protects unenumerated rights that emerge over time. The Constitution's evolving set of unenumerated rights, however, would be a product not merely of the Court's own judgment, but also of majoritarian actions that would provide the Court with an external standard of decision. This theory would permit the Court to enhance liberty and to advance a progressive understanding of the Constitution.").

D. How Publication of the Declaration of Innocence Will Revitalize Reputation on an Individual Level

The U.S. Supreme Court, in declining to protect reputation under the Due Process Clause, cited its desire to not "make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States."[233] The declaration of innocence's adoption could provide the Court a necessary safeguard to ensure that the Fourteenth Amendment does not create a cause of action for every negligent act of a state employee that results in injury.[234] This is because a declaration of innocence is, in essence, exactly the type of procedural safeguard that would be implemented had the Court held reputation to be a substantive liberty right under the Due Process Clause.[235]

Admittedly, for the declaration of innocence to become successful in the criminal context—as the concepts to be applied will be those borrowed from defamation law—it will first need to be adopted in the defamation context.[236] Momentum for this idea, based on scholarly attention, likely reached its peak in the middle 1980s,[237] also around the time the Iowa Libel Research Project found that the dominant reason most plaintiffs sued for libel was (amongst many potential reasons) to correct falsity.[238]

But many plaintiffs continued to sue for libel—despite their singular desire to correct falsity—because "[t]he very act of suit, itself, represents the only non-self-serving form of response through which plaintiffs' claims of falsity can be legitimized and vindicated through the invocation of formalized judicial scrutiny."[239] As libel law has changed in the last three decades—different laws, plaintiff types, defendant types—there is possibly an even larger void that can be filled

233. Paul v. Davis, 424 U.S. 693, 701 (1976).

234. *See* Ronald H. Surkin, *The Status of the Private Figure's Right to Protect His Reputation Under the United States Constitution*, 90 DICK. L. REV. 667, 678 (1986).

235. *See* Conkle, *supra* note 195, at 69.

236. *See* Lawrence, *supra* note 19, at 397–400.

237. *See, e.g.*, Marc A. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CALIF. L. REV. 809 (1986); David A. Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 CALIF. L. REV. 847 (1986); Anna L. Moore, Note, *Defamed Reputation: Will Declaratory Judgment Bill Provide Vindication*, 13 J. LEGIS. 72 (1986).

238. *See* Randall P. Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 233 (1985).

239. *Id.*

by a much simpler and less costly declaratory judgment remedy.[240] For example, it is known that this demand for alternative remedies—even completely new remedies—exists within the criminal realm as well.[241] Therefore, the mutual needs of both legal disciplines can multiply this inertia to create the desired remedies, and with the law already in place to allow such a remedy, all that is needed is the right plaintiff to initiate this process.

A genuine legislative effort was made in 1985 when Charles Schumer introduced a bill in the House of Representatives, H.R. 2846, that would have provided a reputational remedy under defamation law.[242] The bill sought to establish a new cause of action whereby "[a] public official or public figure who is the subject of a publication or broadcast which is published or broadcast in the print or electronic media may bring an action in any court of competent jurisdiction for a declaratory judgment that such publication or broadcast was false and defamatory."[243] Additionally, the cause of action would be configured to not require a defendant's mens rea, with the cause of action also explicitly forbidding a damages award.[244] Under Schumer's proposal—had the bill passed—the standard of proof would have been by a preponderance of evidence and would have also barred the plaintiff from bringing other claims.[245]

Waiting for the U.S. Supreme Court to hold reputation as a fundamental liberty right is not the correct approach, as it may never happen.[246] Over three decades ago it was similarly suggested that the legislature was the best hope to create a workable libel law system—time having proven that idea unrealistic.[247] As potentially half of all libel plaintiffs only seek to have a statement declared false, and with the law in place to accommodate a compensation-less reputational remedy, a

240. *See* David S. Ardia, *Freedom of Speech, Defamation, and Injunctions*, 55 WM. & MARY L. REV. 1, 9–14 (2013).

241. *See supra* Part II.

242. *See* Franklin, *supra* note 237, at 831.

243. *Id.* at 832–33.

244. *See id.* at 833.

245. *See id.*

246. *Cf. id.* at 811 ("Most current dissatisfaction with libel law is due to the failure of state courts and legislatures to . . . act within their respective domains to reduce libel law's high stakes. The Supreme Court alone cannot fine tune a system as complex as libel law.").

247. *See* Marc A. Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 5 J. MEDIA L. & PRAC. 91, 106 (1984).

willing plaintiff can become the genesis to restart the movement to recognize reputational rights.[248]

This genesis needs to occur on an individual and collective level. On an individual level, the best way to incentivize a plaintiff to jumpstart the process that will introduce this new remedy is likely that suggested by Judge Leval, where the overwhelming benefits of a simpler and less expensive negotiation influence the right defamation plaintiff who only seeks that a statement be declared false.[249] Once this happens, the declaration of innocence can more easily transfer to the criminal law arena.[250] On a collective level, other implementation inertia can come from the continued efforts of various innocence projects across the country, highlighting the fact that the criminal justice system is inherently imperfect, and that remedies should be available to those affected.[251]

Society can change, and has changed, for the better in many instances. Separate but equal was upheld in *Plessy v. Ferguson*,[252] but was overturned in *Brown v. Board of Education*.[253] Women, who were once held unfit to practice law,[254] were later allowed to enter some of the top educational and traditionally male institutions in this country,[255] and now have numerous opportunities that were once unavailable to them.[256] But these movements, and others, were accompanied—and influenced—by changes within society as well.[257] Here, initial successes with declarations of innocence can begin to recreate a foundation that can be used to justify reputational protections within the

248. *See* John Soloski, *The Study and the Libel Plaintiff: Who Sues for Libel?*, 71 IOWA L. REV. 217, 217–20 (1985) (summarizing the results of the author's study of 164 libel plaintiffs found that nearly half of the group sued only after having first contacted the media responsible for the harm).

249. *See* Leval, *supra* note 88, at 1301.

250. *See* Lawrence, *supra* note 19, at 399 ("The parallels of the exonerated criminal defendant and the victim of defamation are not perfect, but they are apt.").

251. *See* Givelber, *supra* note 126, at 1322 ("The problem is easier to identify than remedy, and veteran participants in the criminal process may prefer the current level of inaccuracy to proposed adjustments.").

252. 163 U.S. 537 (1896).

253. 347 U.S. 483 (1954).

254. *See* Bradwell v. Illinois, 83 U.S. 130 (1872).

255. *See* United States v. Virginia, 518 U.S. 515 (1996).

256. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

257. *Cf.* Conkle, *supra* note 195, at 129 ("[Decriminalization of sodomy] had broad support in contemporary American culture, including our national legal culture—support that indicated societal and legal repudiation of the history that had gone before. The states were not unanimous on this score, but one could fairly describe the states' position as a general consensus.").

criminal arena as well as other areas that impact reputation.[258] This foundational point can then lead to the recognition that reputational harm, in and of itself, is sufficiently linked to influence one's tangible interests.[259] It is the culmination of this process whereby the U.S. Supreme Court may fully recognize reputation as a substantive liberty right under the Due Process Clause.

VI. CONCLUSION

The government's declaration of innocence publication has the potential to restore reputational rights for those accused or convicted of crimes. The declaration of innocence also has the ability to enhance an individual's ability to enjoy his reputation in this society. This movement's success might also work to restore the presumption of innocence into the legal system.

The tools to restore the presumption of innocence are already in existence. All that is needed is a willing plaintiff. The declaration of innocence's adaptation from defamation law, combined with the government speech doctrine, would provide the legal route to the publication of a declaration of innocence remedy. Such publication could create the necessary procedural foundation on which to illustrate the benefits of a substantive reputation right that might be extended to protect all citizens of this country.

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258. *See id.* at 148.

259. *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 131 (1951).

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