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# California Civil Code Section 48a: Should the Judge or the Jury Determine Whether a Retraction Is Published in a Manner Which Is Substantially As Conspicuous As the Original Article

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**California Civil Code Section 48a:  
Should the Judge or the Jury Determine  
Whether a Retraction is Published in a  
Manner Which is “Substantially as  
Conspicuous” as the Original Article?**

*Sooner or later everybody will know the dirty little secret of American Journalism, that the reports are wrong. Because sooner or later everybody will have been involved in something that has been reported. Whenever you see a news story you were part of, it is always wrong. It may be a rather unimportant error, but it can also be an important one.*

-Frank Mankiewicz<sup>1</sup>

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Errors are inherent in the publication and broadcast of news. Many mistakes are so trivial that they are never discovered, even by active participants in the particular news event. While some mistakes are discovered, these errors may be so inconsequential that those detecting the mistake do not feel the need to actively solicit a correction or clarification from the media. In certain instances, an erroneous publication or broadcast may be significant enough to cause grievous harm to an individual. If such an error is determined to be libelous, the publisher may be forced to pay for its mistake in the form of damages to the injured party.<sup>2</sup> However, the common law and, more recently, statutes have afforded errant publishers a partial or complete shield from liability for the publication of defamatory statements.<sup>3</sup>

California, like several other states, provides a statutory means by which a publisher of allegedly defamatory material can diminish a significant portion of its potential liability.<sup>4</sup> California's retraction<sup>5</sup> statute, Civil Code section 48a, requires both parties to

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2. W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 842-43 (5th ed. 1984) [hereinafter PROSSER & KEETON]. The measure and categories of damages recoverable are tempered by constitutional privileges accorded specified defamation defendants. See *infra* note 40 (discussing the allocation of damages in defamation suits in light of constitutional precedent).

3. See *infra* notes 28-41 and accompanying text (discussing the opportunity to mitigate damages accorded a publisher of a defamatory statement under the common law and state retraction statutes).

4. See CAL. CIV. CODE § 48a (West 1984) (enabling a publisher to escape liability for all but special damages if specified statutory procedures are followed). See *infra* notes 55-70 and accompanying text (detailing the language and requirements of California Civil Code section 48a). See also *infra* note 35 (listing the states with retraction statutes).

5. California Civil Code section 48a uses the word "correction" instead of retraction; however, subsequent judicial interpretations of section 48a have referred to the statute's "retraction requirement." Comment, *What is a "Newspaper" under California's Retraction Statute? Enquiring Minds Want to Know*, 10 COMM. & ENT. L.J. 801 n.29 (1988). Since the courts tend to use the words "correction" and "retraction" interchangeably, this Comment will do the same. Despite the substantive similarity between the two words, each word's psychological impact on the media is very

a defamation suit, the publisher and the injured plaintiff, to perform certain tasks in order to receive statutory protection.<sup>6</sup> In general, section 48a promotes dispute resolution by requiring the defamed party to serve a demand for retraction and the publisher to print a retraction.<sup>7</sup>

Section 48a's mechanisms are set in motion by the publication or broadcast of statements which an individual believes to be defamatory.<sup>8</sup> In response to the allegedly libelous remarks, the

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different. As the counsel to the California Newspaper Publishers Association, Joseph T. Franke, explained:

'Retraction' to a journalist has the ring of recantation--of the pressures imposed on Joan of Arc and Galileo. While a "retraction," like a recantation, suggests the coerced denial or abandonment of one's principled beliefs, 'correction' does not. The operative word in California's statute on the subject is 'correction.' Purging your usage of the more emotional term is the first step to a sane policy.

Iowa Libel Research Project, *supra* note 1, at 43 (citing to Franke, *Reporting at Risk: Recognizing and Avoiding Liability for Libel and Invasion of Privacy* (unpublished manuscript) (1985)).

6. See *infra* notes 55-70 and accompanying text (discussing the statutory requirements that section 48a places on both the publisher and the plaintiff).

7. See CAL. CIV. CODE § 48a(1)-(2) (West 1985).

8. In order to achieve a better understanding of section 48a, the following example of an allegedly defamatory article is provided. On October 24, 1980, the *San Diego Evening Tribune* published the following article:

*Commentary*

THE MESSY NEWTON-CARSON FEUD: SINGER MAY BE INVITING SUIT.

By [Reporter]

Bouquets, Brickbats and other pertinent scraps from the cluttered note book of your friendly neighborhood TV critic:

Wayne Newton, the slimy Las Vegas singer, may be playing with fire when he implies that Johnny Carson could be trying to smear him with mafia-oriented innuendo.

In a recent report by correspondent Ira Silverman on "NBC Nightly News," Newton was accused of having a cozy relationship with reputed mobster Guido Penosi. The Ross-Silverman story said Newton sought Penosi's "assistance" in buying the scandal-scarred Aladdin Hotel in Vegas for \$85 million. The sale went through and, according to NBC, the New York Mafia family of Carlo Gambino became a silent partner in the deal.

An angry Newton denies the charges, admitting only that he went to Penosi for help when Newton's 4-year-old daughter had become the target of unspecified threats. He's talking about suing NBC for "slander, defamation of character and everything else." And he calls the Ross-Silverman report "the most blatant abuse of national press I have ever seen." But Newton, whose voice finally changed about 10 years ago, may have stubbed his toe by uttering Johnny Carson's name. According to Newton, Carson probably had something to do with the NBC report.

That's nonsense, of course. It's true that Carson once wanted to buy the Aladdin and that he was muscled aside by Newton's investment group. It's also true that Johnny pokes a lot of fun at Newton during his "Tonight Show" monologues.

prospective plaintiff may request that the publisher retract the statements.<sup>9</sup> The demand for retraction, which usually takes the form of a letter, is a means by which an allegedly defamed party can make a formal objection to the publisher of the defamatory language.<sup>10</sup> This demand must specify the statements which are believed to be libelous, as well as request the publisher of such material to make public amends for its libel.<sup>11</sup> Once the publisher

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However, to link Carson's professional and personal distaste for Newton with a straight news report that's admittedly damaging to the singer's image is pretty stupid. Reliable sources say if Newton opens his trap once more about this absurd "Carson connection, he'll wind up on the receiving end of a lawsuit.

Complaint, Carson Wayne Newton v. NBC, et al, U.S.D.C., District of Nevada, #CV-LV '81-180 HEC, exhibit J (1981) [hereinafter Complaint].

9. CAL. CIV. CODE § 48a(1) (West 1984). See *infra* notes 57-63 and accompanying text (discussing a plaintiff's duty to demand a retraction under California Civil Code section 48a).

10. See *infra* notes 11, 61, 157 (giving examples of the form and content of demands for retractions from litigated cases).

11. CAL. CIV. CODE § 48a(1) (West 1984). The following is an example of how a demand for retraction is tailored to the allegedly defamatory language within the article in question. In reply to the previously reproduced article, attorneys for Wayne Newton served the following demand:

[To: *San Diego Evening Tribune*]

November 7, 1980

Re: *Demand for Publication of Correction*

Gentlemen:

On or about October 24, 1980, the San Diego Evening Tribune published an article concerning our client Wayne Newton, entitled "The messy Newton-Carson feud: Singer may be inviting suit," [sic] a copy of which is attached hereto. Said story was and is untrue and libelous in that said publication, among other things:

1. Describes Wayne Newton as "slimy" and, in the context of the article, clearly alleges, asserts, and/or implies that Mr. Newton is a man of ill-repute and has business and personal relationships with the "Mob" or "Mafia;" and
2. Describes Mr. Newton as "stupid" in connection with certain statements regarding Johnny Carson.

This publication has caused and will continue to cause Mr. Newton significant injury on both a personal and business level. Therefore, *demand is hereby made, pursuant to law including, but not limited to, California [Civil] Code Section 48a, that you immediately publish a correction of said article in substantially as conspicuous a manner as was the above-stated article*, and that in the article of correction, you state:

1. That Wayne Newton is not "slimy," is not a man of ill-repute, and that he does not have either a business or personal relationship with the "Mob" or "Mafia;" and
2. That Wayne Newton is not stupid insofar as he claims involvement by Mr. Carson in the so-called NBC report.

This notice and demand is being served upon you within twenty days of knowledge of said publication.

[signed: attorneys for Wayne Newton]

has received a demand for retraction, the publisher usually investigates the veracity of its allegedly defamatory publication, and then decides whether or not it is appropriate to issue a retraction.<sup>12</sup> If issued, the retraction, which can take the form of a newspaper article or radio broadcast, depending on the publisher's medium of communication, enables the publisher to publicly admit that it made a mistake, or that it did not intend to defame the injured party.<sup>13</sup>

When complied with, the statutory requirements governing demands and retractions may prove beneficial to all parties. Retractions vindicate injured parties, and facilitate the recapture of the parties' prior reputation because a reader of a retraction is likely to have also read the allegedly libelous publication.<sup>14</sup> The publisher, although admitting error, is able to significantly diminish the scope of its liability in the event that the injured party decides to commence a defamation suit.<sup>15</sup>

Despite the relatively straight-forward wording of section 48a, many defamation actions involve a dispute regarding a party's failure to comply with the rules governing demand and retraction.<sup>16</sup> This Comment will illustrate how one "simple" mechanism of California's retraction statute is subject to wide-ranging and complex interpretation.

A source of considerable controversy under section 48a is whether a retraction, if printed or broadcast, appears in

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Complaint, *supra* note 8, at exhibit J (emphasis added). No retractions were published by the time the complaint was filed. *Id.* at para. 17. See *infra* notes 60-61 and accompanying text (discussing the extent of the demand specificity requirements). See also *infra* notes 151-170 and accompanying text (discussing the holding in *Gomes v. Fried*, 136 Cal. App. 3d 924, 186 Cal. Rptr. 605 (1982), which states that the judge is allocated the task of determining whether or not the demand meets the rigors of section 48a).

12. See *infra* notes 64-70 and accompanying text (describing the responses of a publisher to the receipt of a demand for retraction).

13. See *infra* notes 87, 126, 137 and accompanying text (describing and giving examples of retractions).

14. Magnetti, "In The End, Truth Will Out". . . Or Will It, 52 MO. L. REV. 299, 346-47 (1987).

15. See CAL. CIV. CODE § 48a(1) (West 1984) (stating that a properly published retraction excuses a publisher from all but special damages).

16. See *infra* notes 71-170 and accompanying text (discussing the controversies arising under section 48a as found in several reported cases).

“substantially as conspicuous a manner” as the original defamatory statements.<sup>17</sup> Since the publication of a conspicuous retraction can shield a publisher from a significant portion of liability,<sup>18</sup> both parties to a libel suit have a profound incentive to litigate the issue of compliance with this aspect of section 48a. While the importance of conformity with section 48a’s conspicuousness standard is undisputed, a debate exists over whether the judge or the jury should apply this standard to the facts of a particular case.<sup>19</sup> The Sixth and Second California Appellate districts have held that the question of conspicuousness is one of fact for the jury;<sup>20</sup> however, there is no controlling statewide authority because the California Supreme Court has not ruled on this issue. In support of their holdings, the two appellate courts have traced the development of California retraction law and determined that a jury-based approach corresponds with the limited past precedents. Despite the holdings of these two California districts, several noteworthy arguments can be advanced in support of the proposition that the judge should decide the conspicuousness issue as a matter of law. These contentions include: the traditional role of the judge as interpreter of documents,<sup>21</sup> out of state authority empowering the judge to decide the conspicuousness

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17. See *infra* notes 76-143 and accompanying text (explaining the conspicuousness standard as well as the analysis under the standard).

18. See *infra* notes 65-69 and accompanying text (examining the extent to which a publisher may limit its liability when a retraction is published in as “substantially as conspicuous a manner” as the original defamatory statements).

19. See *infra* notes 76-297 and accompanying text (analyzing the arguments advanced for and against a judge or jury-based decision under section 48a).

20. See *Pierce v. San Jose Mercury News*, 214 Cal. App. 3d 1626, 263 Cal. Rptr. 410 (1990); *Twin Coast Newspapers v. Superior Court*, 208 Cal. App. 3d 656, 256 Cal. Rptr. 310 (1989) (holding that whether or not a retraction is published in substantially as conspicuous a manner as the defamatory article is a question of fact for the jury to decide). See also *infra* notes 79-142 and accompanying text (discussing the reasons underlying the holdings in *Twin Coast* and *Pierce*).

21. See *infra* notes 188-198 and accompanying text (analogizing the roles of a judge when deciding on the sufficiency of a demand for retraction, as well as whether an article complies with California Civil Code section 47(d)’s fair and true report privilege, to the role of a judge under section 48a).



issue,<sup>22</sup> analogies to the judge's duties under commercial law,<sup>23</sup> and public policy considerations.<sup>24</sup>

This Comment will discuss California's retraction statute, Civil Code section 48a, and assess whether the conspicuousness of a retraction should be decided by a jury as a matter of fact or by a judge as a matter of law. Part I provides a brief overview of the common law approach to retractions as well as the basic components of retraction statutes in other states.<sup>25</sup> Part II analyzes and critically assesses the reasoning behind California appellate court decisions which hold that the conspicuousness of a retraction is a matter of fact for the jury.<sup>26</sup> Finally, Part III considers issues not discussed by the California courts which tend to bolster the conclusion that the conspicuousness of the retraction should be a matter of law for the judge.<sup>27</sup>

## I. COMMON LAW AND STATUTORY DEVELOPMENT

Retractions are as old as the law of defamation. With its roots in early common law, the form and impact of a retraction has undergone dramatic changes in its progression towards its present form. While this Comment will discuss the modern statutory approach to retractions, an understanding of the usage of the retraction at common law is helpful.

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22. See *infra* notes 201-221 and accompanying text (discussing Michigan and Minnesota case law on the conspicuousness question).

23. See *infra* notes 231-254 and accompanying text (explaining the power of a judge to determine whether language is conspicuous under the Uniform Commercial Code and comparing this power with a judge's role under section 48a).

24. See *infra* notes 268-297 and accompanying text (discussing public policy reasons in favor of a judge-based determination of conspicuousness in light of studies regarding the relative biases of judges and juries).

25. See *infra* notes 28-34 and accompanying text (discussing retractions under the common law and the statutes of other jurisdictions).

26. See *infra* notes 79-131, 142 and accompanying text (discussing the legal precedents cited to support the holdings in *Pierce v. San Jose Mercury News*, 214 Cal. App. 3d 1626, 263 Cal. Rptr. 410 (1990), and *Twin Coast Newspapers v. Superior Court*, 208 Cal. App. 3d 656, 256 Cal. Rptr. 310 (1989)).

27. See *infra* notes 268-297 and accompanying text (concluding that the at law approach maximizes freedom of speech while enabling a fair adjudication of retraction issues).

A. *The Common Law Approach*

At common law, retraction was a method used by a defendant to mitigate damages resulting from a defamatory publication.<sup>28</sup> While no legal duty to retract was imposed upon the publisher,<sup>29</sup> damages could be reduced when the publisher issued a full and prompt retraction.<sup>30</sup> The sufficiency of the retraction was judged in light of what a reasonable person would deem satisfactory under the circumstances of the case.<sup>31</sup> The presence or absence of a retraction was also used as evidence of malice, a prerequisite to the recovery of punitive damages in a defamation action.<sup>32</sup> The extent of mitigation achieved, if any, was an issue to be determined by the trier of fact.<sup>33</sup> Under modern law, the impact of a retraction on a defamation suit is frequently determined by statute.<sup>34</sup>

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28. KEETON ET AL., *supra* note 2, at 845-46 (5th ed. 1984). See also Murasky, *Avoidable Consequences In Defamation: The Common-Law Duty To Request A Retraction*, 40 RUTGERS L. REV. 167 (1987) (calling for a return to common law principles which allowed a retraction to be used to extinguish or mitigate damage claims).

29. *Turner v. Hearst*, 115 Cal. 394, 403 (1896). See *infra* notes 85-93 and accompanying text (discussing the facts and holding of *Turner v. Hearst*).

30. *Turner*, 115 Cal. at 402. The retraction had to be issued immediately to the extent that it was explicitly linked to the defamatory remarks, or else the level of mitigation would diminish. PROSSER & KEETON, *supra* note 2, at 845-846 (citing *Linney v. Maton*, 13 Tex. 449 (1855); *Trabue v. Mays*, 33 Ky. (3 Dana) 138 (1835)).

31. *Turner*, 115 Cal. at 404 (1896).

32. *Id.* at 401-02.

33. *Id.* at 402-04.

34. PROSSER & KEETON, *supra* note 2, at 846.

B. The Modern Statutory Approach

Currently, thirty-two states have some form of retraction statute.<sup>35</sup> Even though these statutes vary, there are several basic components common to most retraction statutes.<sup>36</sup> Like the common law of retractions, most retraction statutes allow for mitigation of damages, with the extent of reduction varying from state to state.<sup>37</sup> Upon publication of a sufficient retraction, some states limit the plaintiff's recovery to special damages<sup>38</sup> or actual

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35. SANFORD, LIBEL AND PRIVACY app. B (2nd ed. 1991). See ALA. CODE §§ 6-5-184 to -186 (Supp. 1991); ARIZ. REV. STAT. ANN. §§ 12-653.01-05 (1992); CAL. CIV. CODE § 48a (West 1984); CONN. GEN. STAT. § 52-237 (1991); FLA. STAT. §§ 770.01-02 (1986); GA. CODE § 51-5-11 (1982 & Supp. 1991); IDAHO CODE § 6-712 (1990); IND. CODE ANN. §§ 34-4-14-1, -15-1 (West 1983); IOWA CODE §§ 659.2-.3 (1987); KY. REV. STAT. ANN. §§ 411.051-.062 (Banks-Baldwin 1991); ME. REV. STAT. ANN. tit. 14, § 153 (Supp. 1991); MASS. GEN. LAWS ANN. ch. 231, § 93 (West 1985); MICH. COMP. LAWS § 600.2911(2)(b) (West Supp. 1992); MINN. STAT. § 548.06 (1988); MISS. CODE ANN. § 95-1-5 (1973); MONT. CODE ANN. §§ 27-1-818 to -1-821 (1991); NEB. REV. STAT. § 25-840.01 (1989); NEV. REV. STAT. §§ 41.331-338 (1991); N.J. STAT. ANN. § 2A:43-2 (West 1987); N.C. GEN. STAT. §§ 99-2 (1991); N.D. CENT. CODE § 14-02-08 (1991); OHIO REV. CODE ANN. §§ 2739.13-.18, 2739.99 (1981); OKLA. STAT. tit. 12, § 1446a (West 1980); OR. REV. STAT. §§ 30.155-.175 (1988); S.D. CODIFIED LAWS ANN. §§ 20-11-7 to -11-8 (Michie 1987); TENN. CODE ANN. § 29-24-103 (1980); TEX. REV. CIV. STAT. ANN. art. 5431 (Vernon 1958); UTAH CODE ANN. §§ 45-2-1, 45-2-1.5 (1988); VA. CODE §§ 58.1-46 to -48 (1980); WASH. REV. CODE § 9.58.040 (West 1988); W. VA. CODE § 57-2-4 (1966); WIS. STAT. 895.05(2) (West 1985). See SANFORD, *supra*, at app. B (reprinting the full text of the above listed retraction statutes).

36. Magnetti, *supra* note 14, at 346.

37. SANFORD, *supra* note 35, at 593.

38. See NEV. REV. STAT. § 41.336 (1991), N.D. CENT. CODE § 14-02-08 (1991), WIS. STAT. ANN. § 895.05 (West 1983) (stating that a statutorily sufficient retraction alleviates a publisher from liability for all but special damages). California defines "special damages" within the language of its own retraction statute. CAL. CIV. CODE § 48a(4)(b) (West 1984). See *infra* note 54 (listing the full text of California Civil Code section 48a, including the definition of special damages). Under section 48a, it is almost impossible for a public figure plaintiff to prove special damages. Grillo v. Smith 144 Cal. App. 3d 868, 873 n.2, 193 Cal. Rptr. 414, 417 n.2 (1983). Black's Law Dictionary, defines special damages as:

Those which are the actual, but not the necessary, result of the injury complained of, and which in fact follow it as a natural and proximate consequence in the particular case, that is, by reason of special circumstances or conditions. [cite omitted] Such are damages which do not arise from the wrongful act itself, but depend on circumstances peculiar to the infliction of each respective injury.

BLACK'S LAW DICTIONARY 392 (5th ed. 1990). See Comment, *Libel Per Se: Necessity of Alleging and Proving Special Damages in Libel Suits*, 14 CAL. L. REV. 61 (1925) (discussing early common law treatment of damages in libel and slander actions with emphasis on libel per se and special damages).

damages,<sup>39</sup> while other states merely prohibit punitive damages.<sup>40</sup>

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39. See MASS. ANN. LAWS ch. 231, § 93 (Michie/Law. Co-op 1985) (limiting the plaintiffs' recovery to actual damages upon a sufficient retraction). Black's Law Dictionary defines actual damages as:

Real, substantial and just damages, or the amount awarded to a complainant in compensation for his actual and real loss or injury, as opposed on the one hand to 'nominal' damages, and on the other to 'exemplary' or 'punitive' damages. Synonymous with 'compensatory damages' and with 'general damages.'

BLACK'S LAW DICTIONARY 390 (6th ed. 1990).

40. ALA. CODE § 6-5-185 - 186 (Supp. 1991); CONN. GEN. STAT. § 52-237 (West 1991). See Sanford, *supra* note 35, at 593-95 (2nd ed. 1991) (discussing the differing levels of mitigation allowed by state retraction statutes). Some states have retraction statutes which limit punitive damages only in cases where the defendant published the defamatory article as a result of a good faith mistake. *Id.* These statutes have been made obsolete by the United States Supreme Court's decision in *Gertz v. Robert Welch*, 418 U.S. 323 (1974). *Id.* The *Gertz* court held that, in a matter of public interest, punitive damages could not be awarded unless it was proven that the defendant knew of the statement's falsity or acted with reckless disregard for the truth. *Gertz v. Robert Welch*, 418 U.S. 323, 349 (1974). See generally *Gertz*, *Gertz on Gertz: Reflections on the Landmark Libel Case*, 21 TRIAL 66 (Oct. 1985) (evaluating the *Gertz* ruling from the perspective of a practicing trial lawyer and giving litigation advice to defamation attorneys); Couzzi, *Private Lives and Public Concerns: the Decade Since Gertz v. Robert Welch, Inc.*, 51 BROOKLYN L. REV. 425 (1985) (analyzing state courts' application of a post-*Gertz* negligence standard and advocating adoption of the approach specified in the RESTATEMENT OF TORTS (SECOND) section 580B Comment h) (1965); Smith, *The Rising Tide of Libel Litigation: Implications of the Gertz Negligence Rule*, 44 MONT. L. REV. 71 (1983) (arguing that the vagueness of the *Gertz* negligence standard has caused an increase in lawsuits and fostered media self-censorship); LaRue, *Living with Gertz: a Practical Look at Constitutional Libel Standards*, 67 VA. L. REV. 287 (1981) (explaining the practical problems of applying *Gertz's* constitutional standards to state tort law claims); Comment, *Defamation and State Constitutions: the Search for a State Law Based Standard After Gertz*, 19 WILLAMETTE L. REV. 665 (1983) (analyzing the application of *Gertz* in light of state constitutional provisions and using the Oregon constitution to frame a model state approach to *Gertz*); McNulty, *The Gertz Fault Standard and the Common Law of Defamation: an Argument for Predictability of Result and Certainty of Expectation*, 35 DRAKE L. REV. 51 (1986) (examining *Gertz* in light of *Dun & Bradstreet v. Greenmoss Builders* and contending that the *Dun & Bradstreet* decision failed to establish a rule of broad applicability which was needed to clarify *Gertz*); Comment, *Accommodation of Reputational Interests and Free Press: a Call for a Strict Interpretation of Gertz*, 11 FORDHAM URB. L.J. 401 (1982/1983) (examining the development of constitutional defamation law and arguing that the current state of the law is deferent to the media's interests at the expense of the individual's reputation); Collins & Drushal, *Reaction of the State Courts to Gertz v. Robert Welch*, 28 CASE W. RES. L. REV. 306 (1978) (analyzing state courts' interpretation of the *Gertz* standard and emphasizing state' handling of questions left open after *Gertz*); Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch*, 54 TEX. L. REV. 199 (1976) (addressing criticisms of the *Gertz* decision and concluding that *Gertz* strikes a proper balance between free speech and reputational interests); Brosnahan, *From Times v. Sullivan to Gertz v. Welch, Inc: Ten Years of Balancing Libel Law and the First Amendment*, 26 HASTINGS L.J. 777 (1975) (tracing the development of constitutional decisions regarding defamation while emphasizing *Gertz's* effect on the holding in *New York Times v. Sullivan*). The United States Supreme Court limited the applicability of the *Gertz* punitive damages rule to defamatory statements involving matters of public concern in *Dun & Bradstreet v. Greenmoss Builders*. 105 S. Ct. 2939 (1985). The Court summarized the public concern test in the following broad language: "Whether

In some jurisdictions, a plaintiff's demand for retraction is a condition precedent to the recovery of punitive damages, whereas other states completely prohibit an action for defamation unless a retraction demand is tendered.<sup>41</sup>

The scope and coverage of retraction statutes also varies. Some statutes are applicable only to newspapers, while others include radio and television broadcasts.<sup>42</sup> Most retraction statutes require a plaintiff to request a retraction, and the defendant to publish a retraction within specified time periods.<sup>43</sup> The form of the

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... speech addresses a matter of public concern must be determined by content, form, and context ... as revealed by the whole record." *Id.* at 2949 (quoting *Connick v. Meyers*, 461 U.S. 138, 147-48 (1983)). Thus, under *Dun & Bradstreet*, state statutes which permit a retraction to bar recovery of punitive damages only when the defendant has committed a good faith mistake would not be obsolete if the mistake did not involve a "matter of public concern." See SMOLLA, *THE LAW OF DEAFAMATION* §§ 3.02-05 (5th ed. 1992) [hereinafter *LAW OF DEAFAMATION*] (summarizing the *Dun & Bradstreet* decision and its impact on the *Gertz* punitive damages rule as well as the media/non-media distinction in defamation cases); Smolla, *Dun & Bradstreet*, Hepps, and Liberty Lobby: *a new analytic Primer on the future course of Defamation*, 75 *GEO. L.J.* 1519, 1535-48 (1987) (articulating the holding in *Dun & Bradstreet* in light of current constitutional doctrine and probable future changes in the law); Lewis, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., Philadelphia Newspapers v. Hepps, and Speech on Matters of Public Concern: New Directions in First Amendment Defamation Law*, 20 *IND. L. REV.* 767, 768-78, 782-92 (1987) (discussing the *Dun & Bradstreet* and the difficulty faced by lower courts when assessing whether something is a matter of public concern); Drechsel, *Defining "Public Concern" In Defamation Cases Since Dun & Bradstreet v. Greenmoss Builders*, 43 *FED. COMM. L.J.* 1 (1990) (analyzing lower court decisions employing the *Dun & Bradstreet* "public concern" standard and arguing that the *Dun & Bradstreet* decision has not yet narrowed the first amendment protection accorded the media as originally feared); Estlund, *Speech On Matters Of Public Concern: The Perils Of An Emerging First Amendment Category*, 59 *GEO. WASH. L. REV.* 1 (1990) (analyzing the origin and extent of the public concern tests enumerated in the United States Supreme Court decisions of *Dun & Bradstreet* and *Connick v. Meyers* and arguing that the emergence of the public concern test may undermine first amendment protection); Comment, *Dun & Bradstreet v. Greenmoss: Cutting Away the Protective Mantle of Gertz*, 37 *HASTINGS L. J.* 1171, 1180-96 (1986) (criticizing the uncertain definition of public concern enunciated in *Dun & Bradstreet* and recommending a return to the *Gertz* standard for all actions brought by private figure plaintiffs); Comment, *The Evolution of a Public Issue: New York Times Through Greenmoss*, 57 *U. COLO. L. REV.* 773, 785-91 (1986) (criticizing the holding in *Dun & Bradstreet* because it lays the foundation for a return to pre-*New York Times v. Sullivan* defamation analysis). Other state statutes provide that a retraction is merely evidence to be used by the jury to mitigate damages, which is a codification of the common law principle. SANFORD, *supra* note 35, at 592.

41. *Id.* at 594-95.

42. *Id.* at 595-96. Several states impose special requirements when the defamation concerns a candidate for public office. *Id.*

43. *Id.* at 594. Depending on the jurisdiction, the defendant may have between seventy-two hours and three weeks to publish a retraction. *Id.* See ARIZ. REV. STAT. ANN. § 12-653.02 (1992), IDAHO CODE § 6-712 (1990), NEB. REV. STAT. § 25-840.01 (1989) (providing that a retraction must be published within three weeks); ALA. CODE § 6-5-185 (1977), N.C. GEN. STAT. § 99-2(a) (1991),

published or broadcast retraction is subject to various sufficiency requirements. Some states impose specific form requirements, such as size and language, while others, like California, merely set a basic standard from which the retraction is to be judged.<sup>44</sup>

### C. The California Retraction Statute

The development of California Civil Code section 48a can be divided into three overlapping stages. The first stage is the legislature's enactment of section 48a, which provided the rough framework for today's law.<sup>45</sup> The emergence of the "substantially as conspicuous" language in the 1945 amendment to the retraction statute, which serves as the basis for this Comment's analysis, comprises the second stage in the development of section 48a.<sup>46</sup> The final interval of section 48a's evolution has been shaped by

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TENN. CODE ANN. § 29-24-103(b)(1) (1980) (stating that the retraction must be published within ten days); NEV. REV. STAT. § 41.337 (1991) (stating that a retraction must be published within 20 days); GA. CODE ANN. § 51-5-11 (Supp. 1991) (stating that a retraction must be published within 7 days). Some states reject specific time frames for a retraction to be printed in favor of a standard which requires publication within a "reasonable time." SANFORD, *supra* note 35, at 596-97. See CONN. GEN. STAT. ANN. § 52-237 (West 1991), ME. REV. STAT. ANN. tit. 14, § 153 (West 1980 & Supp. 1991), MASS. ANN. LAWS ch. 231, § 93 (Michie/Law. Co-op 1985) (requiring that the publisher issue a retraction within a reasonable time after receiving notice from the allegedly defamed plaintiff). Montana's correction statute designates one week as being a statutorily reasonable time for the correction to be issued. MONT. CODE ANN. § 27-1-819 (1990).

44. SANFORD, *supra* note 35, at 596-97 (2nd ed. 1991). Some statutes require that the retraction meet certain type size guidelines. *Id.* For example, Minnesota's retraction statute requires that the newspaper publish the correction under the heading "retraction," which must be printed in at least 18 point type, and on the same page that the allegedly defamatory article originally appeared. MINN. STAT. ANN. § 548.06 (West 1988). See also OKLA. STAT. ANN. tit. 12, §1446a-1446b (West 1980) (providing the same type size and placement requirements as found in Minnesota); MICH. COMP. LAWS ANN. § 600.2911(2)(b) (West 1986 & Supp. 1992) (specifying that the retraction must be published in the same type size and editions as the original article). A retraction statute may roughly outline what the publisher must say in regard to the allegedly defamatory remarks. SANFORD, *supra* note 35, at 596. Oregon Revised Statute § 30.165(3) states: "The correction or retraction shall consist of a statement by the publisher substantially to the effect that the defamatory statements previously made are not factually supported and that the publisher regrets the original publication thereof." OR. REV. STAT. § 30.165 (1988). See also *infra* notes 55-70 and accompanying text (discussing the standard set forth in California's retraction statute).

45. See *infra* notes 48-54 and accompanying text (printing and discussing the scope of the 1931 version of section 48a).

46. See *infra* notes 55-70 and accompanying text (explaining the language and scope of the modern version of section 48a).

judicial decisions which have limited the scope of section 48a's applicability.<sup>47</sup>

*1. The Early Development of Civil Code § 48a*

In 1931, California's first retraction statute, which applied only to newspapers, was added to the Civil Code.<sup>48</sup> Section 48a made the amount of recovery of damages in defamation actions contingent on certain actions by both the plaintiff and the defendant newspaper.<sup>49</sup> In a lawsuit where the defamatory publication was proved to be the result of misinformation or mistake, the plaintiff's recovery was limited to actual damages unless a demand for retraction was tendered and rejected.<sup>50</sup> The demand had to be served on the publisher at its place of business and was required to specify the statements alleged to be libelous.<sup>51</sup> Once served, the publisher had two weeks to publish a retraction or correction "in as conspicuous a place or type" as the original article appeared.<sup>52</sup> If a proper retraction was published and the defendant proved that the initial defamatory article was published due to a good faith

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47. See *infra* notes 71-75 and accompanying text (discussing the holding in *Burnett v. National Enquirer*).

48. 1931 Cal. Stat. ch. 1018, section 1, at 2034 (enacting CAL. CIV. CODE section 48a). The statute read:

48a. In any action for damages for the publication of a libel in a newspaper, if the defendant can show that such libelous matter was published through misinformation or mistake, the plaintiff shall recover no more than actual damages, unless a retraction be demanded and refused as hereinafter provided. Plaintiff shall serve upon the publisher at the place of publication a notice specifying the statements claimed to be libelous, and requesting that the same be withdrawn.

If a retraction or correction thereof be not published in as *conspicuous a place and type* in said newspaper as were the statements complained of, in a regular issue thereof published within two weeks after such service, plaintiff may allege such notice, demand, and failure to retract in his complaint and may recover both actual, special and exemplary damages if his cause of action be maintained. If such retraction be so published, he may still recover such actual, special, and exemplary damages, unless the defendant shall show that the libelous publication was made in good faith, without malice, and under a mistake as to the facts.

*Id.* (emphasis added).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

mistake as to the facts, the plaintiff's recovery was limited to actual damages.<sup>53</sup> In 1945, section 48a was amended to its present form.<sup>54</sup>

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53. *Id.*

54. 1945 Cal. Stat. ch. 1489, section 5, at 2763-64 (amending CAL. CIV. CODE section 48a).

Section 48a of the Civil Code reads, in its entirety, as follows:

§ 48a Libel in newspaper; slander by radio broadcast

1. SPECIAL DAMAGES NOTICE AND DEMAND FOR CORRECTION. In any action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, plaintiff shall recover no more than special damages unless a correction be demanded and be not published or broadcast, as hereinafter provided. Plaintiff shall serve upon the publisher, at the place of publication or broadcaster at the place of broadcast, a written notice specifying the statements claimed to be libelous and demanding that the same be corrected. Said notice and demand must be served within 20 days after knowledge of the publication or broadcast of the statements claimed to be libelous.

2. GENERAL, SPECIAL AND EXEMPLARY DAMAGES. If a correction be demanded within said period and be not published or broadcast in *substantially as conspicuous a manner* in said newspaper or on said broadcasting station as were the statements claimed to be libelous, in a regular issue thereof published or broadcast within three weeks after such service, plaintiff, if he pleads and proves such notice, demand and failure to correct, and if his cause of action be maintained, may recover general, special and exemplary damages; provided that no exemplary damages may be recovered unless the plaintiff shall prove that defendant made the publication or broadcast with actual malice and then only in the discretion of the court or jury, and actual malice shall not be inferred or presumed from the publication or broadcast.

3. CORRECTION PRIOR TO DEMAND. A correction published or broadcast in *substantially as conspicuous a manner* in said newspaper or on said broadcasting station as the statements claimed in the complaint to be libelous, prior to receipt of a demand therefor, shall be of the same force and effect as though such correction had been published or broadcast within three weeks after a demand therefor.

4. DEFINITIONS. As used herein, the terms "general damages," "special damages," "exemplary damages" and "actual malice," are defined as follows:

(a) "General damages" are damages for loss of reputation, shame, mortification and hurt feelings;

(b) "Special damages" are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other;

(c) "Exemplary damages" are damages which may in the discretion of the court or jury be recovered in addition to general and special damages for the sake of example and by way of punishing a defendant who has made the publication or broadcast with actual malice;

(d) "Actual malice" is that state of mind arising from hatred or ill will toward the plaintiff; provided, however, that such a state of mind occasioned by a good faith belief on the part of the defendant in the truth of the libelous publication or broadcast at the time it is published or broadcast shall not constitute actual malice.

*Id.* (emphasis added). See Reuben, *Use Of The California Correction Statute In Defense Of Media And Entertainment Clients: Pitfalls and Problems*, 19 BEVERLY HILLS B. J. 170 (1985) (explaining



2. "Substantially as Conspicuous"

As revised, section 48a broadens the scope and impact of a retraction and specifies several form and substance requirements absent in the original law.<sup>55</sup> To keep pace with the technology of the time, the retraction statute was expanded to include radio broadcasts as well as newspaper articles.<sup>56</sup> Under the current version of section 48a, in an action for defamation a plaintiff must serve upon the defendant a demand for correction within twenty days from the discovery of the allegedly defamatory remarks.<sup>57</sup> A plaintiff who fails to make a timely request for correction will be limited to recovery of only special damages.<sup>58</sup> Since special damages are hard to prove, and amount to a very small percentage of overall libel damages, plaintiffs suing for solely monetary gain

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the mechanics and practical uses of Section 48a in the defense of media clients).

55. See Comment, *Libel & Slander*, 19 S. CAL. L. REV. 119, 124-26 (1945) (comparing the 1931 and 1945 versions of California Civil Code section 48a in anticipation of potential constitutional challenges). The constitutionality of section 48a's limitation of damages, as amended, was upheld by the California Supreme Court in an opinion by Justice Traynor. *Werner v. Southern California Associated Newspapers*, 35 Cal. 2d 121, 216 P.2d 825 (1950). The *Werner* court held that California Constitution article I, § 9, which stated that individuals are responsible for their abuse of freedom of speech, "does not confer upon a defamed person a right to remedy of damages." *Id.* at 124, 216 P.2d at 827. The *Werner* court rejected the appellant's federal due process claim by concluding that limitation of a plaintiff's damages was a constitutionally permissible objective. *Id.* at 125-26, 216 P.2d at 828. The court made note of two of the legislature's policy goals:

There are at least two bases on which the Legislature could reasonably conclude that the retraction provisions of section 48a provide a reasonable substitute for general damages in actions for defamation against newspapers and radio stations, namely, the danger of excessive recoveries of general damages in libel actions and the public interest in the free dissemination of news.

*Id.* at 126, 216 P.2d at 828. See Simon, *Libel: Retraction: Effect of Recent California Legislation*, 38 CALIF. L. REV. 951 (1950) (critiquing California's retraction statute in light of the constitutional challenge of *Werner v. Southern California Associated Newspapers* and practical problems of the statute's application); Note, *Libel and Slander: Mitigation of Damages--Constitutionality and Scope of Newspaper Libel Retraction Statute*, 2 HASTINGS L. J. 75 (1951) (describing the impact of *Werner* on section 48a and suggesting that the statute be re-amended to conform to the 1931 version).

56. CAL. CIV. CODE § 48a(1) (West 1984).

57. *Id.*

58. *Id.* See *id.* § 48a(4)(b) (West 1984) (definition of special damages). See also *supra* note 59 and accompanying text (describing the difficulties of recovering special damages in a libel suit).

will have little incentive to do so when limited to special damages.<sup>59</sup> The demand for correction must be in writing, and must specify the allegedly libelous statements which are sought to be corrected.<sup>60</sup> If the demand does not specifically request a retraction in accordance with the requirements of section 48a, the plaintiff's recovery may be limited to special damages.<sup>61</sup> The sufficiency of the demand for retraction is decided by the judge as a matter of law.<sup>62</sup> Service of the demand must be to the publisher or broadcaster at the place of publication or broadcast.<sup>63</sup> Upon

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59. SMOLLA, *SUING THE PRESS* 108 (1986) [hereinafter *SUING THE PRESS*]. Despite the proof difficulties, certain types of libel actions are well-suited to recover special damages. *Id.* For example, the false and defamatory statement that a doctor is a "quack" may hurt the doctor's medical practice and facilitate the recovery of special damages. *Id.* Evidence of emotional distress and psychic injury may be utilized to prove special damages when others' awareness of defamatory remarks has impacted the plaintiff's business income. *O'Hara v. Storer Communications, Inc.*, 231 Cal. App. 3d 1101, 1113-16, 282 Cal. Rptr. 712, 719-21 (1991).

60. CAL. CIV. CODE § 48a(1) (West 1984).

61. *Farr v. Bramblet*, 132 Cal. App. 2d 36, 44, 281 P.2d 372, 377 (1955). The *Farr* court found the following demand insufficient for purposes of section 48a:

[C]onsequently an opportunity will be afforded and demand is made upon you individually and as a member of the Bramblet Committee that you or your representative meet in our office before five P.M. today November 3rd to arrange full details of immediate and satisfactory and full retraction of these false and libelous statements. Failing this, immediate proceedings will be initiated.

*Id.* at 40, 281 P.2d at 375. The defendant in *Farr* did not attend the meeting and legal action was instituted the day after the telegram was received. *Id.* The court held that the plaintiff's summons of the defendant to a meeting as well as the institution of legal action before the three weeks allowed for a retraction under the statute made it reasonable for the defendant to believe that "no demand under section 48a was intended." *Id.* at 44, 281 P.2d at 377. In *Harris v. Curtis Publishing*, the court found the following demand inadequate under section 48a:

No mere retraction, therefore, for a statement of this kind could possibly atone for the outrage committed by such unwarranted publication. I am instructed by Mr. Harris to say that unless proper and substantial compensation is made by you, that he will appeal to the courts for satisfaction and vindication.

49 Cal. App. 2d 340, 354, 121 P.2d 761, 768-69 (1942). The *Harris* case was decided under 1931 Cal. Stat. ch. 1098, section 1, at 2034. *See supra* note 48 (printing the 1931 version of California Civil Code § 48a).

62. *See Gomes v. Fried*, 136 Cal. App. 3d 924, 935-36, 186 Cal. Rptr. 605, 611-12 (1982) (holding that the presence of undisputed facts and public policy considerations dictate that the judge should determine the sufficiency of a demand for retraction). *See infra* notes 151-70 and accompanying text (discussing the facts and full implications of the *Gomes* decision).

63. CAL. CIV. CODE § 48a(1) (West 1984).

receipt of the demand, the publisher has three weeks to publish a retraction.<sup>64</sup>

Under the amended section 48a, the retraction must be published or broadcast in “*substantially as conspicuous a manner*” as were the original defamatory remarks.<sup>65</sup> As under the original version, the revised retraction statute is silent in regard to whether the judge or jury should decide the conspicuousness issue.<sup>66</sup> The retraction must also appear in a regular edition or scheduled broadcast.<sup>67</sup> A newspaper or radio station which makes an insufficient retraction or fails to retract at all may be liable for special, general, and exemplary damages.<sup>68</sup> Furthermore, an evasive and incomplete retraction may be considered by the jury as evidence supporting an award of punitive damages.<sup>69</sup> The burdens of pleading and proof are allocated to the plaintiff in regard to notice, demand, and failure to correct.<sup>70</sup>

### 3. Section 48a's Limited Applicability: the Impact of *Burnett v. National Enquirer*

Section 48a specifically refers to newspapers and radio stations, and California courts have narrowly interpreted this section to exclude all magazines.<sup>71</sup> In *Carol Burnett v. National Enquirer*,<sup>72</sup>

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64. *Id.* § 48a(2) (West 1984). A newspaper or radio station may preemptively retract a statement absent a demand, and such retraction, if sufficient, will be accorded with the same weight as if it were requested. *Id.* § 48a(3) (West 1984).

65. *Id.* § 48a(1) (West 1984). The addition of “substantially as conspicuous” replaced the “in as conspicuous a place or type” language of the original version of section 48a. 1931 Cal. Stat. ch. 1018, section 1, at 2034. *See supra* notes 55-75 and accompanying text (stating the rest of the statutory requirements of section 48a).

66. CAL. CIV. CODE § 48a (West 1984).

67. *Id.*

68. *Id.* § 48a(2) (West 1984). General damages are the major component of jury awards in defamation suits. *SUING THE PRESS*, *supra* note 59, at 108. *See* CAL. CIV. CODE § 48a(4)(a) (West 1984) (defining of general damages); § 48a(c) (West 1984) (defining of exemplary damages).

69. *Burnett v. National Enquirer*, 144 Cal. App. 3d 991, 1012, 193 Cal. Rptr. 206, 219 (1983).

70. CAL. CIV. CODE § 48a(2) (West 1984).

71. *Burnett*, 144 Cal. App. 3d at 1002-04, 193 Cal. Rptr. at 211-13. *See Comment, What is a “Newspaper” Under California’s Retraction Statute? Enquiring Minds Want to Know*, 10 HASTINGS COMM/ENT L. J. 795 (1988) (discussing the problems associated with California courts’ interpretation of “newspaper” under section 48a and proposing a new and more definite standard); Schwarzbach, *Shouldn’t California’s Retraction Statute Protect Magazines Too?*, 18 SW. U.L. REV.

the California Court of Appeal for the Second District held that the *National Enquirer* was not a newspaper within the meaning of section 48a, and, therefore, could not claim the protection of the retraction statute.<sup>73</sup> After stating that the type of information printed in the *Enquirer* made it far less subject to the time and accuracy constraints, such as daily deadlines and late-breaking news that are inherent to the publication of newspapers, the California court allowed recovery of punitive damages despite a retraction.<sup>74</sup> According to one commentator, section 48a's exclusion of magazines may violate the Equal Protection clause of the Fourteenth Amendment, although no recent case has challenged the retraction statute's constitutionality.<sup>75</sup>

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197, 203-11 (1989) (examining California cases holding that section 48a does not apply to magazines and recommending that the California legislature amend section 48a to include magazines); *SUING THE PRESS*, *supra* note 59, at 100-17 (discussing the trial and facts of *Burnett* as well as its legal significance). See also *O'Hara*, 231 Cal. App. 3d at 1111, 282 Cal. Rptr. at 718 (applying section 48a's limitation to special damages as a result of a plaintiff's failure to make a sufficient demand for correction regarding a television broadcast).

72. 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983).

73. *Id.*

74. *Id.* at 1004, 193 Cal. Rptr. at 213. After reviewing previous California authority, the Court of Appeals concluded:

[W]hat emerges as the view from the authorities discussed is the proposition that the protection afforded by the statute is limited 'to those who engage in the immediate dissemination of news on the ground that the Legislature could reasonably conclude that such enterprises cannot always check their sources for accuracy and their stories for inadvertent publication errors.

*Id.* (citing *Field Research Corp. v. Superior Court*, 71 Cal. 2d 110, 114, 453 P.2d 747, 77 Cal. Rptr. 243 (1969)). The necessity to publish news while it is fresh constrains a daily newspaper's ability to verify the accuracy of all information before the publication deadline.

*Id.* at 1001, 193 Cal. Rptr. at 211. The *National Enquirer*, which has a one to three week lead time for its articles, does not endure the same time constraints and, hence, is not accorded protection by section 48a. *Id.* at 1000, 193 Cal. Rptr. at 210. See *id.* at 1000 n.3, 193 Cal. Rptr. at 210 n.3 (defining lead time as distinguished from deadline). Even if the *Burnett* court applied section 48a to the *National Enquirer*, it is doubtful that the tabloid would have been able to limit its liability for punitive damages. The court ruled that the *Enquirer's* retraction "was evasive, incomplete and by any standard, legally insufficient." *Id.* at 1012, 193 Cal. Rptr. at 219.

75. LAW OF DEFAMATION § 9.12[2][a] (1992). The argument is that once a state enacts a retraction statute, the state has an obligation under the first amendment to treat all components of the media equally and without regard to content, unless a compelling state interest justifies preferential treatment to certain types of media formats. *Id.* It would be difficult to find a compelling interest in differentiating newspapers and radio stations from magazines as a class because some magazines face significant deadline pressures and publish "hot news" whereas some newspapers and broadcasters are faced with relatively low deadline pressure for the bulk of their news output. *Id.* Early equal protection attacks against section 48a have failed; however, the intervening expansion of equal

Before considering the allocation of decision-making powers under the retraction statute, it would be helpful to understand how conspicuousness issues arise in a defamation action. A hypothetical best illustrates this process.

Assume that on Friday, June 5, 1992 the *Metropolitan Free Press* published an article in its evening edition accusing a local tavern owner, Johnny Future, of being involved in an international white slavery ring. The article was printed on page three of the front section under the headline, in eighteen point type, "WHITE SLAVERY RING BUSTED." The sub-headline, in 14 point type, read "Local Impresario May Face Indictment." The article stated, in part, that reliable sources had indicated that Johnny Future utilized the white slavery ring to provide cocktail waitresses and busboys for his nightclub. Upon reading the article, Future contacted his attorney, who, two days later, served a demand for retraction on the *Free Press's* publisher. After investigation, the publisher determined the accusations to be false, and printed a retraction. On Wednesday, June 11, 1992, a retraction was published in the evening edition of the *Free Press* which unequivocally cleared Future of any involvement in the white slavery syndicate. The retraction appeared on the back page of the front section under the headline, in 18 point type, "SETTING THE RECORD STRAIGHT." The sub-headline read, in 12 point type, "Bar Owner Exonerated."

Unsatisfied with the retraction, Future filed suit for defamation of character claiming general and exemplary damages. In response, the *Free Press* filed for summary judgment arguing that since it printed a retraction in compliance with section 48a, Future is barred from recovering all but special damages. Since Future did not plead special damages, the *Free Press* seeks dismissal of the claim. Future then avers that given the fact that the retraction was printed on a different page, with a different headline, and on a different day of the week than the original defamatory article, the retraction

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protection and first amendment law may make California's correction statute more at risk. *Id.* at n.155. See *supra* note 55 (discussing the unsuccessful constitutional attack against section 48a in *Werner v. Southern California Associated Newspapers*, 35 Cal. 2d 121, 216 P.2d 825 (1950)).

was not printed in “as substantially as conspicuous a manner,” and, therefore, the *Free Press* is not entitled to statutory protection.

It is at precisely this point in the litigation process that this Comment will focus. Should the judge in the hypothetical case of *Future v. Metropolitan Free Press* assess compliance with the conspicuousness standard in light of the undisputed facts encompassing the article and subsequent retraction? Or, should the judge deny the summary judgment motion and allow the jury to decide whether the *Free Press* retraction met statutory muster?

## II. CASE LAW ADDRESSING WHETHER A JUDGE OR JURY SHOULD DETERMINE THE CONSPICUOUSNESS OF A RETRACTION

While section 48a enumerates specific guidelines that a plaintiff and defendant in a defamation action must follow, the statute is silent in at least one crucial area. California’s retraction statute requires a retraction to be published in “substantially as conspicuous a manner” as the defamatory article,<sup>76</sup> but it fails to give any guidance concerning the appropriate decision maker under this standard. The judiciary has attempted to fill in the statutory silence, and two California courts of appeal have ruled that the issue of whether a retraction was published in substantially as conspicuous a manner as the original is a question of fact for the jury to decide.<sup>77</sup> These courts have arrived at their conclusion based on an analysis of past judicial interpretations of section 48a, as well as the role of the judge in other areas of defamation law.<sup>78</sup>

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76. CAL. CIV. CODE § 48a(2) (West 1984).

77. See *infra* notes 100-143 and accompanying text (discussing the holding in *Twin Coast* and *Pierce*).

78. See *infra* notes 109-131, 140-142 and accompanying text (explaining and analyzing the rationales underlying the decisions in *Twin Coast* and *Pierce*).

A. *Conspicuousness as a Question of Fact for the Jury*

“The precedents are sparse.”<sup>79</sup> Justice Fukuto’s statement in *Twin Coast v. Superior Court*<sup>80</sup> illustrates the quandary faced by California courts when deciding whether conspicuousness should be a matter of law for the judge, or a matter of fact for the jury. Confronted with little guidance within California law, parties on both sides of this issue have been forced to cite to out of state authority and to draw analogies from other areas of defamation law to support their conclusions.<sup>81</sup> This section will discuss the reasons advanced to support the jury’s determination of conspicuousness as enumerated in the two most recent California appellate court opinions on this topic, *Twin Coast Newspapers v. Superior Court*<sup>82</sup> and *Pierce v. San Jose Mercury News*.<sup>83</sup> The California Supreme Court issued its only decision on the determination of a retraction’s sufficiency in *Turner v. Hearst*,<sup>84</sup> a case decided in 1896.

1. *Turner v. Hearst*

In *Turner*, the *San Francisco Examiner* mistakenly implicated the plaintiff as being involved in fraudulent activities.<sup>85</sup> Following notice of its error, the newspaper published a retraction.<sup>86</sup> At trial, the *Examiner* claimed the existence of the retraction should be a

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79. *Twin Coast*, 208 Cal. App. 3d at 659, 256 Cal. Rptr. at 311 (1989).

80. 208 Cal. App. 3d 656, 256 Cal. Rptr. 310 (1989).

81. *Pierce*, 214 Cal. App. 3d at 1630-34, 263 Cal. Rptr. at 413-15 (1990); *Twin Coast*, 208 Cal. App. 3d at 659-62, 256 Cal. Rptr. at 311-13 (1989).

82. 208 Cal. App. 3d 656, 256 Cal. Rptr. 310 (1989).

83. 214 Cal. App. 3d 1626, 263 Cal. Rptr 410 (1989).

84. 115 Cal. 394 (1896).

85. *Id.* at 397-98. The person actually engaged in fraudulent activities was John H. Thomas. *Id.* at 398. The reporter for the *San Francisco Examiner* transposed the names of Turner and John Thomas in an attempt to “boil it down” an article printed the previous day in the *San Francisco Post*. *Id.* at 398. In reality, Turner was suing Thomas for fraud and false pretenses. *Id.* at 397.

86. *Id.* at 398. The record is unclear as to whether or not the retraction was published before or after Turner initiated a lawsuit. *Id.* at 397-98.

mitigating factor in assessing the plaintiff's damages.<sup>87</sup> While affirming the common law notion that a retraction may be used to mitigate damages,<sup>88</sup> the court held that the determination of a retraction's sufficiency is uniquely a question of fact which lies within the province of the jury.<sup>89</sup>

Despite the fact that *Turner* is the highest authority on the retraction issue, its holding does not restrict lower California courts in determining the sufficiency of a retraction under section 48a.<sup>90</sup> *Turner* was decided under a common law scheme, where the jury was first charged with assessing the total harm to the plaintiff, then determining the degree of mitigation caused by the retraction.<sup>91</sup> Unlike *Turner*, a substantially as conspicuous retraction under section 48a removes from the jury's consideration the issues of general and exemplary damages.<sup>92</sup> Therefore, since section 48a fundamentally alters the role of the jury to the extent that its discretion is limited, the *Turner* decision does not control modern retraction procedure.<sup>93</sup>

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87. *Id.* at 398. The retraction, which was printed almost two months after the libelous article, stated:

It will thus be seen that we have unintentionally done Mr. Turner a great injustice, but one which is likely to happen with the most carefully guarded attention to the news columns of a busy morning paper. Such mistakes are always to be regretted, as is this, and call for ample and prompt explanations, which we are always prepared to make. In this case we should have been pleased to have set the matter-Mr. Turner and our own mistake-right at an earlier day had the matter been sooner called to our attention.

*Id.*

88. *See id.* at 402-04. *See supra* notes 28-51 and accompanying text (discussing the common law use of a retraction to mitigate damages).

89. *Turner*, 115 Cal. at 402-03. The court did not elaborate on why the analysis of a retraction's sufficiency is uniquely for the jury to decide. To be sufficient to claim mitigation of damages, the court held that the retraction had to be "fully, fairly, and promptly made, and is such as an impartial person would consider reasonable and satisfactory under the circumstances of the case." *Id.* at 404.

90. *Twin Coast*, 208 Cal. App. 3d at 660, 256 Cal. Rptr. at 311-12.

91. *Id.* at 659-60, 256 Cal. Rptr. at 311-12. *See Turner*, 115 Cal. at 403-4 (stating that publication of a retraction may be presented to the jury for mitigation purposes).

92. CAL. CIV. CODE § 48a(1)-(2) (West 1984).

93. *Twin Coast*, 208 Cal. App. 3d at 660, 256 Cal. Rptr. at 312. The court characterized the dissimilarities between the *Turner* and modern statutory approach:

This pronouncement is not controlling, however, for the 'sufficiency' of a retraction had a different meaning at that time. The rule was that a retraction could be considered in mitigation of damages (see 115 Cal. at p. 402, 47 P. at 129), and thus a jury in every case involving a retraction was required to evaluate the extent to which the initial harm



2. *The Impact of Section 48a on the Conspicuousness Issue*

Since the adoption of section 48a in 1931, a few courts have endeavored to interpret the statute's conspicuousness standard.<sup>94</sup> The following three subsections analyze three significant interpretations of section 48a, and each interpretation's impact on the current state of the law in regard to the relative roles of judge and jury.

a. *Behrendt v. Times-Mirror*

The first case considering the conspicuousness issue under section 48a was *Behrendt v. Times-Mirror*.<sup>95</sup> *Behrendt* was another case of mistaken identity where the *Los Angeles Times* inadvertently implicated a doctor as being a narcotics thief and addict.<sup>96</sup> The newspaper printed a voluntary retraction, and later followed it with a second retraction in response to the plaintiff's demand.<sup>97</sup> The plaintiff brought a successful action for libel, and, on appeal, the newspaper contested the trial court's instruction which charged the jury with the determination of the conspicuousness of the retraction, and argued that the court was the proper decision-maker.<sup>98</sup> Holding that the retraction's sufficiency entailed the comparison of numerous factual variables, such as headlines, article location and type size, the Court of Appeal for

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to the plaintiff's reputation was undone by the retraction.

With the enactment of section 48a in 1931, retractions assumed an additional significance: publication of a retraction meeting the statutory standard eliminates liability for specified types of damages.

*Id.* at 660, 256 Cal. Rptr. at 311-12. See CAL. CIV. CODE § 48a(1)-(2) (West 1984) (stating that a jury may only consider special damages if a statutorily proper correction is made).

94. See *infra* notes 85-111, 132-142 and accompanying text (discussing California courts interpretation of the conspicuous standard under both the 1931 and 1945 versions of section 48a).

95. 30 Cal. App. 2d 77, 85 P.2d 949 (1938).

96. *Id.* at 80-83, 85 P.2d at 950-51.

97. *Id.* at 82, 85 P.2d at 951. The voluntary retraction included a statement of the reasons for the mistake in identity and was accompanied by a picture of the plaintiff. *Id.*

98. *Id.* at 88, 85 P.2d at 954.

the Second District upheld the trial court's instruction, ruling that the jury should determine the conspicuousness of retractions.<sup>99</sup>

*b. Twin Coast Newspapers v. Superior Court*

In *Twin Coast Newspapers v. Superior Court*,<sup>100</sup> the Court of Appeal for the Second District relied on the precedent set forth in *Behrendt*.<sup>101</sup> In *Twin Coast*, the *Long Beach Press-Telegram* reported on a brutal attack against a six year-old child and the murder of her mother.<sup>102</sup> The article, which appeared on the front page, mistakenly implicated the plaintiff's daughter as being arrested and booked on charges of murder.<sup>103</sup> In response to a demand for retraction,<sup>104</sup> the newspaper issued retractions on two separate dates and also issued an "editor's note" explaining the newspaper's mistake.<sup>105</sup>

Following the first printed retraction, a defamation suit was filed against Twin Coast newspapers, owners of the *Long Beach Press-Telegram*.<sup>106</sup> The newspaper appealed from the denial of summary judgment on the ground that the court was the proper decision-maker to gauge the sufficiency of the retraction.<sup>107</sup>

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99. *Id.* at 88-89, 85 P.2d at 954. The court explained that there were several variables to be considered by the jury when comparing the retraction to the defamatory article, including the relative locations of the retractions and the defamatory articles, the headline language and positioning, and the use of boldface type. *Id.* at 88, 85 P.2d at 954.

100. 208 Cal. App. 3d 656, 256 Cal. Rptr. 310 (1989).

101. *Id.* at 660-61, 256 Cal. Rptr. at 312.

102. *Id.* at 658-60, 256 Cal. Rptr. at 310-11.

103. *Id.* at 659, 256 Cal. Rptr. at 311. The article was published in both editions of the *Long Beach Press-Telegram* on August 20, 1987. *Id.* The headline read "6-year-old girl survives torching, mother killed," and the sub-headline stated "McKinney preschool employee, man are booked for murder." *Id.*

104. The demand for retraction was tendered on the day that the article was published. *Id.* at 659, 256 Cal. Rptr. at 311.

105. *Id.* at 659, 256 Cal. Rptr. at 311. The retractions were printed in both editions of the newspaper on August 21 and September 10, 1987. *Id.* The editor's note was in response to a letter to the editor and was printed on September 7, 1987. *Id.* The *Long Beach Press-Telegram* further conceded its errant reporting in a September 4, 1987 news article discussing the plaintiff's filing of a libel suit. *Id.*

106. *Id.*

107. *Id.* In the alternative, the defendant contended that even if the sufficiency was a question for the jury, no issue of a material fact existed, and summary judgment was appropriate. *Id.*

Notwithstanding the fact that *Behrendt* was decided under the 1931 version of section 48a,<sup>108</sup> the *Twin Coast* court held that the change in statutory language from “as conspicuous a place and type” to “substantially as conspicuous a manner” was not fundamental enough to disturb *Behrendt*’s holding that the jury should decide the issue of conspicuousness.<sup>109</sup>

Despite finding *Behrendt* controlling, the *Twin Coast* court felt compelled to look to other jurisdictions to bolster its decision.<sup>110</sup> The court cited several cases from other states and from federal courts which held that the sufficiency of the retraction was a question for the jury.<sup>111</sup>

One of the cases cited by the *Twin Coast* court was *Sargent v. National Broadcasting Company*,<sup>112</sup> where a federal court briefly addressed the issue of retraction sufficiency.<sup>113</sup> The defamation action stemmed from remarks made regarding the plaintiff during an NBC program, which was broadcast on both radio and television.<sup>114</sup> The defendant moved to dismiss the action on the

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108. See *supra* notes 48-54 and accompanying text (discussing the 1931 version of California Civil Code section 48a).

109. *Twin Coast* at 660-61, 256 Cal. Rptr. at 312. The primary impact of the 1945 amendment to section 48a was the elimination of the good faith mistake requirement. See *supra* note 48 (providing the full text of the 1931 version of section 48a, including the good faith requirement). *Twin Coast* 208 Cal. App. 3d at 660, 256 Cal. Rptr. at 312. This change has no relevance to the issue of the conspicuousness of the retraction. *Id.*

110. *Id.* at 661, 256 Cal. Rptr. at 312-13.

111. *Twin Coast*, 208 Cal. App. 3d at 661, 256 Cal. Rptr. at 312-13. See *Sargent v. National Broadcasting Company*, 136 F. Supp. 560, 565 (1955) (interpreting section 48a as requiring the jury to decide whether a retraction was conspicuous); *Nevada Independent Broadcasting Corp. v. Allen*, 99 Nev. 404, 405, 664 P.2d 337, 345 (1983) (holding that under a similar Nevada law the question of a retraction’s conspicuousness was to be decided by the jury); *Brogan v. Passaic Daily News*, 22 N.J. 139, 123 A.2d 473, 478 (1956); *Knoxville Publishing Co. v. Taylor* 31 Tenn. App. 368, 215 S.W.2d 27, 30 (1948); *Lawrence v. Herald Publishing Co.* 158 Mich. 459, 122 N.W. 1084, 1086 (1909) (holding that the sufficiency of a retraction is to be decided by the jury); *Rudin v. Dow Jones & Co.*, 510 F. Supp. 210, 217 (1981) (stating in dictum that there is support for a jury-based approach to conspicuous determinations under section 48a).

112. 136 F. Supp. 560 (N.D. Cal. 1955).

113. *Id.* at 565. The federal court interpreted California law without making a binding determination of whether California or New York substantive law would govern the dispute. *Id.* at 564.

114. *Id.* at 562. The NBC program was entitled “American Forum” and originally aired on August 8, 1954. *Id.* The alleged defamatory remarks were made by Congressman Wayne L. Hays during a moderated discussion on the topic “Should Foundations Be Entitled To Tax Exemption. *Id.* The plaintiff alleged that the Congressman’s remarks were defamatory to the extent that they

grounds that the demand for retraction was insufficient and, in the alternative, that it issued a sufficient retraction.<sup>115</sup> In ruling on the defendant's motion, the court stated that the question of whether the correction was sufficient under section 48a was a question of fact for the jury.<sup>116</sup>

The *Twin Coast* court next cited two other decisions which briefly ruled on the issue of who is the proper decision-maker regarding the conspicuousness of the retraction.<sup>117</sup> In *Nevada Independent Broadcasting Corp. v. Allen*,<sup>118</sup> the plaintiff sued a television station over allegedly defamatory remarks directed toward him during a political debate.<sup>119</sup> The plaintiff and his agent made demands for retraction in person and in writing, and when the defendant's subsequent retraction did not satisfy the plaintiff, a libel action was filed.<sup>120</sup> The Nevada Supreme Court, in refusing to overturn the trial verdict, held that the sufficiency of both the demand for retraction and retraction are factual issues for the determination of the jury.<sup>121</sup>

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portrayed him as engaging in unethical behavior and impropriety. *Id.* at 564.

115. *Id.* at 564. The complaint and answer were in conflict as to whether a demand for retraction was served, and if a retraction was in fact published. *Id.* The appellate court found that the plaintiff demanded a retraction which substantially complied with section 48a, but did not rule on whether a sufficient retraction was broadcast. *Id.* at 565.

116. *Id.* at 565 (citing *Scott v. Times-Mirror*, 181 Cal. 345, 184 P. 672 (1919)). Since the *Scott* decision was decided prior to the enactment of section 48a, its precedential value is diminished for the same reasons that the precedential value of *Turner v. Hearst* is diminished. See *supra* notes 90-93 and accompanying text (stating that the *Turner* common law approach is not binding precedent for analysis of conspicuousness under section 48a).

117. *Twin Coast*, 208 Cal. App. 3d at 661, 256 Cal. Rptr. at 313 (citing *Nevada Independent Broadcasting Corp. v. Allen*, 99 Nev. 404, 664 P.2d 337, 345 (1983); *Rudin v. Dow Jones*, 510 F. Supp 210, 217 (S.D.N.Y. 1981)).

118. 99 Nev. 404, 664 P.2d 337 (1983).

119. *Id.* at 408, 664 P.2d at 340-41. The allegations included charges of bouncing checks, insolvency, and dishonorable behavior. *Id.* at 408, 664 P.2d at 340-41.

120. *Id.* at 408-09, 664 P.2d at 341.

121. *Id.* at 416, 664 P.2d at 345. The jury is to decide the sufficiency issues by a preponderance of the evidence. *Id.* The Nevada Retraction statute is very similar to California's section 48a. NEV. REV. STAT. §§ 41.331-41.338 (1985) The Nevada statute reads, in relevant part, as follows:

§ 41.336 SPECIAL DAMAGES; NOTICE AND DEMAND FOR CORRECTION.

1. In any action for damages for the publication of a libel in a newspaper, or of a slander by radio or television broadcast, the plaintiff may recover no more than special damages unless a correction is demanded by the plaintiff and not published or broadcast.

2. A demand for correction shall be in writing and shall be served upon the newspaper or broadcaster at its place of business. Such demand shall specify the

The *Twin Coast* court also cited the United States District Court for the Southern District of New York's interpretation of section 48a in *Rudin v. Dow Jones & Company*.<sup>122</sup> In that case, *Barron's Business and Financial Weekly* published an article regarding the questionable purchase by Frank Sinatra, and associates, of stock in the Great Lakes Dredge and Dock Company.<sup>123</sup> In response to the column, Milton A. Rudin, an associate of Sinatra, wrote an open letter to *Barron's* defending the investment, and *Barron's* published the letter under the caption "SINATRA'S MOUTHPIECE."<sup>124</sup> Finding the caption libelous, Rudin demanded a retraction,<sup>125</sup> and *Barron's* subsequently issued a retraction.<sup>126</sup> Nevertheless, Rudin brought an action for defamation in federal district court.<sup>127</sup> Dow Jones, the owner of *Barron's*, moved to dismiss the case arguing,

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statements claimed to be libelous or slanderous and shall demand a correction.

3. Such demand for correction must be served within 90 days after the plaintiff has knowledge of the publication or broadcast of the statements claimed to be libelous or slanderous.

§ 41.337 GENERAL, SPECIAL AND EXEMPLARY DAMAGES

If a correction is demanded as provided in NRS 41.336 and is not published or broadcast within 20 days in substantially as conspicuous a manner in the newspaper or by the broadcaster as the statements claimed to be libelous or slanderous, the plaintiff may plead and prove such demand and failure to correct and may recover general and special damages. In addition, the plaintiff may recover exemplary damages if he can prove that the defendant published or broadcast the statement with actual malice. Actual malice shall not be presumed or inferred from the publication or broadcast.

*Id.* (emphasis added). *See id.* §§ 41.332-335 (1985) (specifying Nevada definitions of actual malice, exemplary damages, general damages, and special damages, for purposes of the retraction statute).

122. 510 F. Supp. 210 (S.D.N.Y. 1981).

123. *Id.* at 211-12. The article appeared in *Barron's* regular column entitled "Up & Down Wall Street" and was published on page 37 of the November 27, 1978 issue. *Id.* The article questioned why Rudin and Sinatra, investors in casinos and hotels, would invest in a dredge and dock company. *Id.*

124. *Id.* at 212. The letter was published in the "Barron's Mailbag" section and was published on January 15, 1979. *Id.* "SINATRA'S MOUTHPIECE" was printed above the letter in all capitals and typeface slightly larger than that of the letter. *Id.*

125. *Id.* at 212. The retraction demand was sent via telegram on January 16, 1979, one day following publication of Rudin's letter. *Id.* The demand for retraction alleged that the caption "SINATRA'S MOUTHPIECE" maligned his professional character and competency. *Id.*

126. *Id.* at 212. The retraction was printed as an editorial note at the beginning of the "Barron's Mailbag," the same column that the allegedly defamatory caption appeared, on January 22, 1979. *Id.* The retraction stated: "Milton Rudin, an attorney who represents Frank Sinatra, has objected to our referring to him as 'Sinatra's Mouthpiece' in last week's Mailbag column. We meant to cast no aspersions on Mr. Rudin. Our dictionary defines 'mouthpiece' as 'spokesman.'" *Id.*

127. *Id.* at 210.

in part, that the retraction was conspicuous, and that the issue of conspicuousness of the retraction should be decided by the judge as a matter of law.<sup>128</sup> While not deciding who should resolve the issue of a retraction's sufficiency,<sup>129</sup> the court in *Rudin* stated in dictum that "there is some support" for the proposition that the sufficiency of a retraction is a question for the jury.<sup>130</sup> Without divulging any rationale for the alleged support, the *Rudin* court remanded the case on grounds independent from the sufficiency issue.<sup>131</sup>

c. *Pierce v. San Jose Mercury News*

The most recent California decision to consider the determination of conspicuousness under section 48a was the Sixth Appellate District case of *Pierce v. San Jose Mercury News*.<sup>132</sup> The *San Jose Mercury News* published an article reporting the findings of the Santa Clara Police Department's Internal Affairs Unit investigation into alleged misconduct by members of the elite undercover Specific Crime Action Team (SCAT).<sup>133</sup> The article

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128. *Id.* at 216-17. The other main contention of the motion to dismiss was that the expression "mouthpiece" was not capable of conveying a defamatory meaning. *Id.* at 213-16. The court held that "mouthpiece" was reasonably susceptible to both innocent and defamatory meanings, thus rejecting Dow Jones' contention. *Id.* at 216.

129. The court found the record insufficient to render a holding as to whether California or New York Law applied, and it therefore rejected the motion to dismiss. *Id.* at 216-17.

130. *Id.* at 217 (citing the holding in *Behrendt v. Times-Mirror*, 30 Cal. App. 2d 77, 85 P.2d 949 (1939)). See *supra* notes 95-99 and accompanying text (discussing the facts, holding, and rationale of the court in *Behrendt*). The court did not address the conspicuousness issue, instead focusing on the impact of the language of the retraction: "In addition, there is some support for Rudin's argument that the question of whether Dow's retraction was fair and complete rather than snide and insincere, as Rudin contends, is for the jury to decide." *Rudin*, 510 F. Supp. at 217.

131. *Id.* The case was remanded to determine whether or not the defendant published a newspaper or magazine for purposes of section 48a's applicability. *Id.*

132. 214 Cal. App. 3d 1626, 263 Cal. Rptr. 410 (1989).

133. *Id.* at 1628, 263 Cal. Rptr. at 411-12. The article was published in both morning and afternoon editions of the *San Jose Mercury News* on November 30, 1984. *Id.* at 1628-29, 263 Cal. Rptr. at 412. In the morning edition, the article appeared on the bottom right hand corner of the front page under the headline "Santa Clara Cops Accused in Drug, Expense Probe." *Id.* at 1628, 263 Cal. Rptr. at 412. The afternoon edition placed the article at the top of the front page under the "large bold" headline "Santa Clara Cops Accused: Drug Use, Expenses Probed." *Id.* at 1629, 263 Cal. Rptr. at 412.

stated that the Internal Affairs investigation, which probed accusations of alcohol and drug abuse, misappropriation of funds, and the negligent discharge of weapons, had resulted in disciplinary actions by the police department against SCAT officers.<sup>134</sup> The plaintiff, Loren Pierce, was mistakenly named in the article as being one of three police captains to receive an official reprimand for his involvement in the alleged SCAT impropriety.<sup>135</sup> Following complaints regarding the article's veracity, the *Mercury News* published an article discussing the police department's reaction the next day.<sup>136</sup> The *Mercury News* published a retraction approximately three weeks after the allegedly defamatory article was printed.<sup>137</sup>

Despite the retraction, Pierce filed suit against the *Mercury News*, claiming libel and intentional infliction of emotional distress.<sup>138</sup> After discovery determined that the plaintiff suffered no special damages, the defendant moved for, and was granted summary judgment, on the grounds that the *Mercury News'* compliance with section 48a foreclosed any further recovery.<sup>139</sup> The appellate court reversed in part, holding that it was improper

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134. *Id.* at 1628, 263 Cal. Rptr. at 411-12.

135. *Id.* at 1628-29, 263 Cal. Rptr. at 412. The plaintiff was the first of nine officers listed in the article as receiving punishment. *Id.* at 1629, 263 Cal. Rptr. at 412. While the plaintiff did not receive an official letter of reprimand, the Internal Affairs investigation concluded that Pierce's supervision of the SCAT unit was inadequate. *Id.*

136. *Id.* The article, which appeared on December 1, 1984, was printed under the headline "Police Officials Dispute Extent of Misconduct." *Id.*

137. *Id.* at 1629-30, 263 Cal. Rptr. at 412. The retraction, which appeared on December 25, 1984, was printed in the *Mercury News* column normally reserved for retractions under the headline "Setting the Record Straight." *Id.* The retraction, which ran on page two of the paper, read:

A November 30 Mercury News article inaccurately reported two disciplinary actions resulting from an internal investigation in the Santa Clara Police Department. The errors resulted from inaccurate information supplied by a source familiar with the case and from the department's refusal to disclose specific disciplinary actions. [New Paragraph] Capt. Loren Pierce did not receive a letter of reprimand and was not disciplined . . .

*Id.* There was a dispute as to whether a demand for retraction was served upon the *Mercury News* in compliance with section 48a. *Id.* at 1629 n.2, 263 Cal. Rptr. at 412 n.2. The *Mercury News* filed a declaration stating that it never received a demand, and the plaintiff was unable to produce postal records to substantiate the demand's service. *Id.*

138. *Id.* at 1630, 263 Cal. Rptr. at 421-13.

139. *Id.* at 1630, 263 Cal. Rptr. at 413. See CAL. CIV. CODE § 48a(1) (West 1984) (stating that a plaintiff can recover no more than special damages if a newspaper publishes a retraction in compliance with the statute).

for the trial court to assess the *Mercury News*' compliance with section 48a as a matter of law.<sup>140</sup> The *Pierce* court ruled that the interpretation of "substantially as conspicuous" under section 48a is an issue of fact to be determined by the trier of fact, not the judge.<sup>141</sup>

The court in *Pierce* cited the *Twin Coast* opinion, and relied almost exclusively on the same precedents and analysis as employed in that case by the Second District Court of Appeal.<sup>142</sup> In essence, the *Pierce* decision did little more than reaffirm past precedent.

The opinions in *Twin Coast* and *Pierce* both address some of the arguments and case authority advanced by the defendant newspapers in support of the "at law" approach to a conspicuousness determination.<sup>143</sup> These cases can be used as the foundation for an analysis of the reasons in support of an "at law" approach to the conspicuousness issue as well as California courts' response to arguments favoring such an approach.

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140. *Pierce*, 214 Cal. App. 3d at 1630-33, 263 Cal. Rptr. at 413-15.

141. *Id.* at 1631, 263 Cal. Rptr. at 413-14. In *Twin Coast*, the court, despite holding that conspicuousness was for the jury to decide, granted summary judgment because it found that no reasonable juror could find that the printed retraction was not substantially as conspicuous as the original article. *Twin Coast*, 208 Cal. App. 3d at 662-63, 256 Cal. Rptr. at 310. Unlike *Twin Coast*, the court in *Pierce* found a triable issue of fact as to conspicuousness. *Pierce*, 214 Cal. App. 3d at 1633, 263 Cal. Rptr. at 415. The court contrasted the allegedly defamatory original article with the publication:

In the present case, in contrast, the retraction had no headline other than the usual "Setting the Record Straight," and it was found on the bottom of page two in a holiday edition of the paper. The defamatory statement, on the other hand, appeared in the lead story in the afternoon edition. It was headlined "Cops Accused," and in the second sentence mentioned a captain. Of the nine "cops accused," *Pierce* was named first. This is simply not the case in which no reasonable juror could find a retraction insufficient under the statutory standard. Accordingly, the question should have been submitted to the jury for its consideration.

*Id.*

142. *Id.* at 1630-33, 263 Cal. Rptr. at 413-15. In fact, all of the *Pierce* court's support for the jury's determination of the retraction's compliance with section 48a is derived by citing to direct quotations from *Twin Coast*. *Id.* at 1631-33, 263 Cal. Rptr. at 413-15. The court reviewed the analysis employed by *Twin Coast* to interpret the decisions in *Turner* and *Behrendt*. *Id.* at 1631-33, 263 Cal. Rptr. at 413-14. See *supra* notes 109-131 and *infra* notes 145-150, 177-178 and accompanying text (discussing the reasoning and bases for the holding in *Twin Coast*).

143. See *Twin Coast*, 208 Cal. App. 3d at 661-62, 256 Cal. Rptr. at 312-13; *Pierce*, 214 Cal. App. 3d at 1632-33, 263 Cal. Rptr. at 414 (addressing some of the arguments in favor of an at law approach to conspicuous determinations under section 48a).



*B. Conspicuousness as a Question for the Judge to Decide as a Matter of Law*

Although the courts in *Twin Coast* and *Pierce* did not explicitly recapitulate the reasons offered by the defendants, on appeal, in support of an at law approach to conspicuousness interpretations, the substance of the defendant's arguments can be discerned. The next sections will formulate the defendant's arguments based on the authority cited by the courts in *Twin Coast* and *Pierce*.<sup>144</sup> The arguments in favor of an at law approach will be derived from comparing the judge's role in other areas of California defamation law as well as from other state's retraction statutes.

*1. Analogizing the Capacity of the Judge to Make Decisions in Other Areas of Defamation Law to the Conspicuousness Determination*

Proponents of an at law approach are able to utilize the role of the judge in other aspects of defamation law to bolster their view. The following sections will consider the judicial duties to evaluate the demand for retraction and the fair and true report privilege and discuss how these roles tend to support a judge-based determination of conspicuousness under section 48a. Initially, this Comment will address the judicial province of document interpretation and its impact on section 48a.

*a. California Evidence Code Section 310(a): Interpretation of a Written Instrument*

In *Twin Coast* and *Pierce*, both the *San Jose Mercury News* and the *Long Beach Press-Telegram*, respectively, argued that the judge should decide whether the retraction is published in substantially as conspicuous a manner because such a determination is analogous

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144. See *infra* notes 145-297 and accompanying text (discussing the arguments in favor of an at law approach).

to the interpretation of a written instrument.<sup>145</sup> Under California Evidence Code Section 310(a), the interpretation of a written instrument<sup>146</sup> is a question of law for the court to decide.<sup>147</sup> The courts in *Twin Coast* and *Pierce* acknowledged this rule of evidence, yet concluded that it was inapplicable to the determination of conspicuousness.<sup>148</sup> In arriving at their holdings, both courts of appeal cited two examples of document interpretation from the defamation context, under which a judge is granted decision making power: the analyses of the sufficiency of a demand for retraction, and whether the fair and true report privilege is applicable.<sup>149</sup> The *Twin Coast* court utilized these examples of document interpretation to address the issue of whether a retraction's conspicuousness is interpretive and within the decision-making province of the judge. After giving a brief description of the two methods of interpretation, the court in *Twin Coast*, without any comparative analysis of the conspicuousness determination under section 48a, tersely concluded that a conspicuousness analysis did not constitute a document interpretation.<sup>150</sup> The following sections list the two examples of document interpretation used by the courts of appeal and analyze their distinction, if any, from a conspicuousness inquiry.

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145. *Twin Coast*, at 662, 256 Cal. Rptr. at 313. *Pierce*, at 1632, 263 Cal. Rptr. at 414.

146. Written instrument is defined as "something reduced to writing as a means of evidence, and as the means of giving formal expression to some act or contract. BLACK'S LAW DICTIONARY 1612 (6th ed. 1990).

147. CAL. EVID. CODE § 310(a) (West Supp. 1991). Section 310(a) reads:

§ 310 QUESTIONS OF LAW FOR THE COURT

(a) All questions of law (including but not limited to *questions concerning the construction of statutes and other writings*, the admissibility of evidence, and other rules of evidence) are to be decided by the court. Determination of issues of fact preliminary to the admission of evidence are to be decided by the court as provided in Article 2 (commencing with Section 400) of Chapter 4.

*Id.* (emphasis added).

148. *Twin Coast*, 208 Cal. App. 3d at 662, 256 Cal. Rptr. at 313; *Pierce*, 214 Cal. App. 3d at 1632, 263 Cal. Rptr. at 414-15.

149. *Twin Coast*, 208 Cal. App. 3d at 662, 256 Cal. Rptr. at 313.

150. *Id.* at 662, 256 Cal. Rptr. at 313. After listing both examples, the court concluded: "In contrast, the question of conspicuousness of a retraction is not one of interpretation." *Id.*

*i. The Sufficiency of a Demand for Retraction: The Twin Coast Court's Example of Gomes v. Fried*

The determination of whether a demand for retraction is sufficient was proffered by the *Twin Coast* court as the first example of judicial document interpretation for comparison.<sup>151</sup> California Civil Code section 48a(1) requires, in part, that the demand for correction specify the allegedly libelous statements and demand that such statements be corrected.<sup>152</sup> In *Gomes v. Fried*,<sup>153</sup> the Court of Appeal for the First District concluded that whether or not the plaintiff met the statutory criteria for a demand was interpretative and, thus, a question of law for the court to decide.<sup>154</sup> This decision is consistent with Evidence Code section 310(a)'s requirement that all questions of document construction are for the court to decide.<sup>155</sup>

In *Gomes*, the *Friday Observer*, a paper published by the defendant, ran a column, accompanied by photographs, that contained both praise and criticism of the San Leandro Police Department, including the plaintiff, Officer George Gomes.<sup>156</sup>

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151. *Id.* at 662, 256 Cal. Rptr. at 313.

152. CAL. CIV. CODE § 48a(1) (West 1984). *See supra* note 54 (providing the full text of the retraction statute).

153. 136 Cal. App. 3d 924, 186 Cal. Rptr. 605 (1982)

154. *Id.* at 936, 186 Cal. Rptr. at 611-12.

155. *See supra* notes 145-150 and accompanying text (discussing California Evidence Code section 310(a)).

156. *Gomes*, 136 Cal. App. 3d at 928-31, 186 Cal. Rptr. at 607-08. The article, which was published in the February 6-12, 1974 issue of the *Observer*, was printed under the title "HOW GOOD ARE THE SAN LEANDRO POLICE?, An Observer Editorial Comment by Ad Fried." *Id.* at 928, 186 Cal. Rptr. at 607. A key to the libel suit were the remarks made in regard to the behavior of officer Gomes and another officer during a traffic stop of the author. *Id.* at 928-31, 186 Cal. Rptr. at 607-08. Mr. Fried was stopped for double-parking his car on a quiet residential street. *Id.* at 929-30, 186 Cal. Rptr. at 608. On the front page was a picture of the plaintiff sitting with his head tilted in his squad car, with the following caption: "OFFICER GOMES car shown in the center of lightly traveled Bristol Avenue (Sunday Afternoon) prowling for traffic violations. *His head tilted may suggest something.*" *Id.* at 928, 186 Cal. Rptr. at 607 (emphasis in original). Appearing on page two was another photograph of Officer Gomes with the caption:

OFFICER GOMES writes a double parking citation on the seldom Sunday traveled residential street (Bristol) while his squad car illegally is more than 40 inches from the curb, permitting the dark shadows (formed at 12:30 p.m., right after noontime), to emphasize the disparity from the legal parking distance of over a foot and one half. Neither he nor, a fellow officer, would permit a citizen's arrest of the other.

Prior to filing a libel suit, the plaintiff served a demand for retraction on the defendant, who did not publish a retraction.<sup>157</sup> At the ensuing libel trial, the plaintiff won a judgment from which the defendant appealed.<sup>158</sup> The defendant based his appeal on the theory that the plaintiff should be unable to recover general and punitive damages because the demand for retraction did not meet the specificity requirements of section 48a.<sup>159</sup> In granting the defendant's appeal, the appellate court ruled that the determination of whether a plaintiff's demand for retraction meets the rigors of section 48a is a question of law for the court to decide.<sup>160</sup>

The *Gomes* court gave two reasons for its at law holding.<sup>161</sup> First, since there was no dispute as to the contents of either the demand or the original article, the judge should make the

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*Id.* at 930 n.1, 186 Cal. Rptr. at 608 n.1.

157. *Id.* at 931, 186 Cal. Rptr. at 608. The demand was served on the defendant on or about February 22, 1974, and stated, in pertinent part:

In his article, Mr. Fried *directly accuses officers Gomes and Alves of 'conduct unbecoming officers' and 'failure to perform their duty', both of which are offenses for which Alves and Gomes may be subject to dismissal from the police department, and both of which they, under the circumstances alleged by Mr. Fried in his article, amount to violations of sections of the California Penal Code.* In addition to the *direct imputation of criminal acts* by Alves and Gomes as set forth in the article, by implication and innuendo, *the article attributes to Alves and Gomes, among other San Leandro police officers, 'the use of excessive force during arrest', 'ganging up of police cars,' and unspecified violations of the law, including violations of the civil rights of citizens.* Naturally, *any imputation of such acts to officers Alves and Gomes has a direct, damaging effect upon them in their chosen profession, that of police officers, and the allegations are completely unfounded and untrue, and Mr. Fried knew them to be unfounded and untrue at the time he made them.*

*Id.* at 936-37, 186 Cal. Rptr. at 612 (emphasis in original). Receiving no retraction, the plaintiff filed suit on October 4, 1974. *Id.* at 931, 186 Cal. Rptr. at 608.

158. *Id.* at 928, 186 Cal. Rptr. at 607.

159. *Id.*

160. *Id.* at 936, 186 Cal. Rptr. at 611-12. After empowering the judiciary to assess a demand for retraction's sufficiency, the court ruled that the plaintiff failed to meet the statutory requirements, and could not recover general damages. *Id.* at 938, 186 Cal. Rptr. at 613. The demand's insufficiency was predicated on the demand's omission of the front page photograph and its caption, which were adjudicated to be the article's only defamatory excerpts. *Id.* The remainder of the plaintiff's recovery was denied due to a quantum of proof issue unrelated to the sufficiency of the demand under section 48a. *Id.* at 938-41, 186 Cal. Rptr. at 613-15.

161. *Id.* at 936-39, 186 Cal. Rptr. at 611-13.

sufficiency determination on the basis of these undisputed facts.<sup>162</sup> Second, when analyzing the specificity of the demand, the judge must compare the contentions in the retraction request with the allegedly defamatory article.<sup>163</sup>

The *Gomes* court concluded that the judge should determine the sufficiency of the demand for retraction as a matter of law.<sup>164</sup> In evaluating the rationale behind this decision, it is apparent that the conspicuousness analysis is, arguably, analogous to the specificity determination. If the inquiry into conspicuousness is comparable to the demand analysis, then the decision maker's role under section 48a is interpretive, and, thus, a question of law for the court under California Evidence Code section 310(a).<sup>165</sup>

Media defendants, such as those in *Twin Coast* and *Pierce*, may advance several reasons to liken the conspicuousness analysis to the determination of a demand's sufficiency. First, the facts in both scenarios are undisputed. The existence and content of the original article and the printed retraction are readily and independently verifiable, and are almost always stipulated to in a defamation suit. Second, both types of analysis involve the comparison of two documents to each other.<sup>166</sup> While the focus of a court's inquiry

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162. *Id.* at 936, 186 Cal. Rptr. at 612. The court cited the cases of *Molina v. Retail Clerks Unions*, 111 Cal. App. 3d 872, 168 Cal. Rptr. 906 (1980) and *Panopulos v. Maderis*, 47 Cal. 2d 337, 303 P.2d 738 (1956), to support its holding as to the adjudication of undisputed facts. *Id.* See *Panopulos*, 47 Cal. 2d at 341, 303 P.2d at 741 (holding that when the facts underlying a contention newly made on appeal are undisputed and no separate showing could be made at trial, the appellate court can decide the issue as a matter of law); *Molina*, 111 Cal. App. 3d at 878, 168 Cal. Rptr. at 909 (holding that when an argument's underlying facts are uncontested, the court can assess the argument as a question of law).

163. *Gomes*, 136 Cal. App. 3d at 938, 186 Cal. Rptr. at 613. The court explained that its method of inquiry in entailed deciding whether the defendants could have reasonably understood, from reading the demand for retraction, that a retraction of the photograph and caption were to be included as part of any published retraction. *Id.*

164. *Id.* at 936, 186 Cal. Rptr. 611-12. See *supra* notes 153-170 and accompanying text (explaining the holding in *Gomes*).

165. See *supra* notes 146-147 and accompanying text (explaining that California Evidence Code section 310(a) allocates the construction of written documents to the judge).

166. When determining the sufficiency of a demand for retraction, the judge is to analyze the specificity of the demand for retraction in light of the allegedly defamatory publication. *Gomes*, 136 Cal. App. 3d at 938, 186 Cal. Rptr. at 613. An analysis of conspicuousness entails comparing the location, type size, and edition of the allegedly defamatory original with the subsequently published retraction. *Twin Coast*, 208 Cal. App. 3d at 662-63, 256 Cal. Rptr. at 313-14; *Pierce*, 214 Cal. App. 3d at 1633, 263 Cal. Rptr. at 415.

in each analysis is somewhat different, both demand and conspicuousness determinations require the judge to make interpretive decisions as to the contents and impact of several different documents.<sup>167</sup> To that extent, it can be argued that the determination of conspicuousness is sufficiently interpretative to bring it under the guise of California Evidence Code section 310(a).<sup>168</sup>

The second basis which the *Gomes* court used to justify having the judge make the conspicuousness decision was the public policy considerations underlying the adoption of section 48a.<sup>169</sup> While public policy rationales may be used to support a judiciary-based determination of conspicuousness,<sup>170</sup> the considerations underlying the demand specificity requirements are not particularly supportive of such an endeavor.

*ii. California Civil Code Section 47(4): Fair and True Report of An Official Government Proceeding*

California Civil Code section 47 enumerates five privileges that a media defendant may assert to avoid liability for the publication of otherwise defamatory material.<sup>171</sup> Section 47(d) protects the

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167. Under section 48a, the decision maker must analyze the retraction in light of the original defamatory article. CAL. CIV. CODE § 48a (West 1984). The judge considers such factors as placement, headline, and type size. *See supra* note 99 and accompanying text (describing the methods employed to determine whether or not a retraction is substantially as conspicuous as the defamatory article). The procedure for analyzing a demand involves the comparison of the contentions enumerated in the retraction request with the allegedly defamatory publication. *Gomes*, 136 Cal. App. 3d at 938, 186 Cal. Rptr. at 613.

168. *See supra* notes 145-150 and accompanying text (discussing California Evidence Code § 310(a) and its use as precedent by the courts in *Pierce* and *Twin Coast*).

169. *Gomes*, 136 Cal. App. 3d at 936-38, 186 Cal. Rptr. at 612-13. The legislature's main objective in enacting the demand specificity requirement was to expedite the publisher's investigation into potential errors so that a timely retraction could be printed and liability avoided. *Id.* at 937, 186 Cal. Rptr. at 612 (citing *Kapellas v. Kofman*, 1 Cal. 3d 20, 30-31, 81 Cal. Rptr. 360, 459 P.2d 912, 917-18, 81 Cal. Rptr. 360, 365-66 (1969)).

170. *See infra* notes 268-297 and accompanying text (explaining the public policies underlying the enactment of section 48a and arguing that these rationales necessitate an at law approach to the conspicuousness question).

171. CAL. CIV. CODE § 47 (Deering Supp. 1991). In 1990, California Civil Code § 47 was amended and the subsections were redesignated from (1)-(5) to (a) to (e). 1990 Cal. Stat. Ch. 1491, § 1 at 4-5 (amending CAL. CIV. CODE § 47). Since the substantive portions of each privilege have

remained constant, the alphabetical designations will be used in order to reflect the current statute. For example, in the following discussion, all references to section 47(4) will be enumerated as section 47(d), unless the reference to section 47(4) appears in the title of a law journal article. California Civil Code § 47 reads, in its entirety:

§ 47. Privileged communication or broadcast

A Privileged publication or broadcast is one made:

(a) In the proper discharge of an official duty.

(b) In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure, except as follows:

(1) An allegation or averment contained in any pleading or affidavit filed in an action for marital dissolution or legal separation made of or concerning a person by or against whom no affirmative relief is prayed in the action shall not be a privileged publication or broadcast as to the person making the allegation or averment within the meaning of this section unless the pleading is verified or affidavit sworn to, and is being made without malice, by one having reasonable and probable cause for believing the truth of the allegation or averment and unless the allegation or averment is material and relevant to the issues in the action.

(2) This subdivision does not make privileged any communication made in furtherance of an act of intentional destruction or alteration of physical evidence undertaken for the purpose of depriving any party to litigation of the use of that evidence, whether or not the content of the communication is the subject of subsequent publication or broadcast which is privileged pursuant to this section. As used in this paragraph, "physical evidence" means evidence specified in Section 250 of the Evidence Code or evidence that is property of any type specified in section 2031 of the Code of Civil Procedure.

(c) In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information.

(d) By a fair and true report in a public journal, of (1) a judicial, (2) legislative, or (3) other public official proceeding, or (4) of anything said in the course thereof, or (5) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant has been issued.

(e) By a fair and true report of (1) the proceedings of a public meeting, if the meeting was awfully convened for a lawful purpose and open to the public, or (2) the publication of the matter complained of was for the public benefit.

CAL. CIV. CODE § 47 (West Supp. 1992) (emphasis added). For a discussion of the privileges accorded under section 47(b) for statements made during an official proceeding, see Comment, *Absolute Privilege and California Civil Code Section 47(2): A Need For Consistency*, 14 PAC. L.J. 105 (1982) (discussing the privilege for defamatory statements made in judicial proceedings in light of policy considerations and other extrinsic influences impacting judicial construction of California Civil Code section 47(b)); Comment, *It Is Time To End The Lawyer's Immunity From Countersuit*, 35 UCLA L. REV. 99, 111-20 (1987) (considering lawyers immunity from liability for statements made in the course of litigation and explaining how judicial decisions may narrow the scope of lawyer's liability); Comment, *Defamatory Statements Made By Witness At Legislative Investigation*, 15 S. CAL. L. REV. 276 (1926) (arguing that California Civil Code section 47(b) should be interpreted as a qualified privilege which balances society's interest in free disclosure with individuals' reputational interests); Comment, *Absolute Privilege in California: The Scope of Civil*

publisher of a "fair and true report" of an official proceeding from liability.<sup>172</sup> This privilege enables a newspaper to report on public proceedings, such as those occurring in the legislature and the courts,<sup>173</sup> without having to independently verify the veracity of

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*Code Section 47(2)*, 7 U.S.F. L. REV. 176 (1972) (discussing the purpose, legislative history, and judicial interpretation of California Civil Code section 47(2)); Comment, *California Civil Code Section 47(2): Do Remedies Exist For Those Injured By the Privilege?*, 18 SW. U.L. REV. 127 (1988) (analyzing the decision in *Rens v. Woods*, 193 Cal. App. 3d 1134, 238 Cal. Rptr. 618 (1987), in light of the underlying purposes of California Civil Code section 47(b)); Note, *Williams v. Taylor: Communications to Police With Absolute Immunity: Revenge Courtesy of California Civil Code Section 47(2) (Absolute Privilege For Complaints Made to Law Enforcement Officers)*, 18 U. WEST L.A. L. REV. 51 (1986) (arguing that communications between a complaining witness and the police should be afforded a qualified privilege instead of an absolute privilege so as to avoid shielding malicious witnesses from liability). For a discussion of the privilege enumerated in section 47(c), see Note, *Defining California Civil Code Section 47(3): the Resurgence of Self-Governance*, 39 STAN. L. REV. 1201 (1987) (advocating a public interest extension to section 47(c) because this expanded privilege conforms with first amendment interests in promoting citizen involvement in government); Comment, *California Civil Code Section 47(3): Should There Be a Public Interest Privilege in California?*, 20 LOY. L.A. L. REV. 1559 (1987) (arguing that California Civil Code section 47(c) should be definitively interpreted by California courts as a qualified privilege for the media to report on matters of public interest); *Browne & Sachs, The End of Libel in Labor Law Cases*, 62 A.B.A. J. 456 (1976) (discussing the Supreme Court's decisions in *NLRB v. Gissel*, 395 U.S. 575 (1969) and *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264 (1974) and their impact on immunity from defamation suit in labor related cases).

172. CAL. CIV. CODE § 47(d) (West Supp. 1991). See Note, *When Truth and Accuracy Diverge: The Fair Report of a Dated Proceeding*, 34 STAN. L. REV. 1041 (1982) (discussing the privilege of fair report as it applies to accounts of proceedings not altered by intervening events as well as reports of "dated proceedings," and arguing that the courts should extend the same privilege to current and dated proceedings unless the publisher acted recklessly in not checking the facts of the dated proceeding); Comment, *Price v. Viking Penguin, Inc.: The Neutral Reportage Privilege and Robust, Wide Open Debate*, 75 MINN. L. REV. 157, 161-64 (1990) (explaining the fair report privilege and discussing the legal theories underlying this privilege); Bloom, *The Press and the Law: Some Issues In Defamation Litigation Involving Media Coverage Of Legal Affairs And Proceedings*, 43 SW. L.J. 1011, 1047-50 (1990) (considering the courts' application of the fair report privilege and their emphasis on fairness and a layman's standard); Note, *Fair Report Privilege—Does The Self-Report Exception Apply When a Newspaper Defendant Fairly Reports Statements Made By a Witness During Its Own Litigation?*, 18 N.M. L. REV. 223 (1988) (discussing the case law development of the fair report privilege as well as the reasons for allowing a newspaper to escape liability under the self-report privilege); Comment, *Reports Upon Public Proceedings and Documents: Absolutely Protected By Constitutional Privilege*, 1985 U. ILL. L. REV. 1059 (1985) (discussing the impact of *New York Times v. Sullivan* and its progeny on the scope of the fair report privilege); Comment, *Neutral Reportage: The Case For A Statutory Privilege*, 86 NW. U.L. REV. 417, 422-25 (1992) (explaining how the common law privilege of fair report has been used to justify the creation of a neutral reportage privilege).

173. In assessing what constitutes a "judicial proceeding" under section 47(d), courts have utilized a comparatively broad interpretation. *Cox v. Los Angeles Herald-Examiner*, 234 Cal. App. 3d 1618, 1623, 286 Cal. Rptr. 419, 423 (1991). The judicial privilege includes preliminary attorney-client discussions and interviews when such discussions are linked to a pending or anticipated legal



the statements made therein.<sup>174</sup> While the fair and true report privilege is considered absolute,<sup>175</sup> a newspaper's account of the public proceeding must accurately convey the gist or sting of the proceeding to successfully assert the privilege.<sup>176</sup>

As with the sufficiency of the demand for retraction analysis, the courts in *Twin Coast* and *Pierce* used the role of the judge in a Civil Code section 47(d) decision as an example of the interpretation of a document.<sup>177</sup> Under this statute, the judge decides whether a publication is a fair and true report when the events of the proceeding and the text of the allegedly defamatory report are not in dispute.<sup>178</sup>

Several California appellate cases give representative accounts of the methods that judges employ to arrive at a decision regarding

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action. *Id.* at 1624, 286 Cal. Rptr. at 423.

174. *McClatchy Newspapers v. Superior Court*, 189 Cal. App. 3d 961, 974, 234 Cal. Rptr. 702, 710 (1987).

175. *Id.* Section 47(d)'s privilege is not contingent on a showing of absence of malice. *Id.* A newspaper may claim statutory protection even if it has published statements known to be false, as long as it has accurately reported on the public proceeding. *Id.*

176. *Id.*; *Cox*, 234 Cal. App. 3d at 1629, 286 Cal. Rptr. at 425. A newspaper is accorded a fair degree of flexibility and literary license in determining what is a fair report, and is not obligated to publish the exact statements made. *Reader's Digest Association v. Superior Court*, 37 Cal. 3d 244, 261, 690 P.2d 610, 208 Cal. Rptr. 137 (1984). A newspaper is not accountable for all conceivable interpretations that a plaintiff might assign to its report. *Grillo v. Smith*, 144 Cal. App. 3d 868, 874, 193 Cal. Rptr. 414, 418 (1983). A fair and true report is judged by how an average reader would reasonably interpret the allegedly defamatory article. *Kilgore v. Younger*, 30 Cal. 3d 770, 777, 640 P.2d 793, 797, 180 Cal. Rptr. 657, 661 (1982).

177. *Pierce*, 214 Cal. App. 3d at 1632, 263 Cal. Rptr. at 414; *Twin Coast*, 208 Cal. App. 3d at 662, 256 Cal. Rptr. at 313. Under the Evidence Code, the construction of a document is a question of law for the judge to decide. CAL. EVID. CODE § 310(a) (West Supp. 1991). *See supra* note 147 (printing the full text of California Evidence Code section 310(a)). *See also supra* notes 160-167 and accompanying text (discussing the judge's role in document interpretation while assessing a demand for retraction).

178. *Pierce*, 214 Cal. App. 3d at 1632, 263 Cal. Rptr. at 414; *Twin Coast*, 208 Cal. App. 3d at 662, 256 Cal. Rptr. at 313. *See McClatchy Newspapers v. Superior Court*, 189 Cal. App. 3d 961, 976, 234 Cal. Rptr. 702, 711 (1987) (stating that when what has occurred in a judicial proceeding and what was reported are not in dispute, the judge decides under section 47(d) as a matter of law); *Jennings v. Telegram-Tribune Co.* 164 Cal. App. 3d 119, 126-27, 210 Cal. Rptr. 485, 488-89 (1985) (holding that when the underlying facts are not in dispute, the judge should decide at law); *Kilgore v. Younger*, 30 Cal.3d 770, 777, 640 P.2d 793, 797, 180 Cal. Rptr. 657, 661 (1982) (holding that it was proper for a judge to determine whether a newspaper's publishing of the plaintiff's name based on his implication in an official report was "fair and true").

the applicability of section 47(d)'s absolute privilege.<sup>179</sup> As noted earlier, the judge must ascertain whether the allegedly defamatory report embodies the gist or sting of the official proceeding.<sup>180</sup> In *McClatchy Newspapers v. Superior Court*,<sup>181</sup> the plaintiff sued the *Fresno Bee* claiming that an article which linked him to the "Fresno Mob" was libelous.<sup>182</sup> The newspaper asserted an absolute privilege under section 47(d), claiming that its article was a fair and true report of a deposition and an official government report.<sup>183</sup> The *Fresno Bee* sought and was granted a peremptory writ of mandate requiring the trial court to grant a motion for summary judgment under the privileges of California Civil Code sections 47(b) and 47(d).<sup>184</sup> In deciding the section 47(d) claim, the court compared the allegedly defamatory article to the official sources that served as the article's foundation.<sup>185</sup> The court in *McClatchy Newspapers* held that the *Fresno Bee* article accurately captured the gist of the reporter's deposition testimony and published a direct quote from a government report, thus entitling the newspaper to an absolute shield under the fair and true report privilege.<sup>186</sup> The use of similar methods by a judge to assess the applicability of section 47(d)'s privilege can be found in several California appellate court cases.<sup>187</sup>

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179. See *infra* notes 179-187 and accompanying text (discussing cases that explain the scope of the judge's decision-making capacity under California Civil Code Section 47(d)).

180. *Jennings*, 164 Cal. App. 3d at 126, 210 Cal. Rptr. at 488. See *supra* note 172-176 (explaining the legal standards for what constitutes a fair and true report).

181. 189 Cal. App. 3d 961, 234 Cal. Rptr. 702 (1987).

182. *Id.* at 965, 234 Cal. Rptr. at 703. The article appeared in the May 31, 1982 edition of the *Fresno Bee*. *Id.*

183. *Id.* at 974, 234 Cal. Rptr. at 710. The article cited the deposition of a reporter in an unrelated libel case who identified the plaintiff, Paul S. Mosesian, as being tied to the "Fresno Mob." *Id.* at 965, 234 Cal. Rptr. at 703. The deponent defined "Fresno Mob" as being "people who enter into conspiracies to subvert our laws." *Id.* The second mention of the plaintiff in the article was a verbatim quote from a California State Department of Justice Report (commonly known as the Gill Report) which linked the plaintiff, among others, to organized crime. *Id.* at 977, 234 Cal. Rptr. at 712.

184. *Id.*

185. *Id.* at 976, 234 Cal. Rptr. at 711.

186. *Id.* at 976-77, 234 Cal. Rptr. at 711-12.

187. In the recently decided case of *Cox v. Los Angeles Herald Examiner*, the defendant published an article which stated that the plaintiff was "implicated in the teen-age night club fire" and had "a history of arson fires at their properties." *Cox*, 234 Cal. App. 3d at 1628, 286 Cal. Rptr.

While the courts in *Twin Coast* and *Pierce* hold that analysis under section 47(d) constitutes document interpretation,<sup>188</sup> and that the determination of conspicuousness under section 48a does not,<sup>189</sup> several arguments can be advanced to illustrate the similarity between the two analyses. First, the relevant facts in issue under both sections 47(d) and 48a are undisputed. Whether or not a newspaper can claim the fair and true report privilege is based on a judge's comparison of the uncontested official proceeding records with the content of the newspaper article.<sup>190</sup> Likewise, section 48a requires the comparison of allegedly libelous statements with the published retraction in order to determine if the latter was substantially as conspicuous as the former.<sup>191</sup> Thus, under both analyses, the items used in the evaluations are undisputed documents which are verifiable by access to a public record.

Second, the determinations under sections 47(d) and 48a both require an appraisal of the relationship of one document to subsequently published articles.<sup>192</sup> In assessing these

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at 426. The defendant's article utilized an affidavit filed by a Los Angeles Fire Department arson investigator as the basis for its accusations against the plaintiff. *Id.* at 1621-22, 286 Cal. Rptr. at 421-22. After determining that section 47(d) was applicable, the court compared the article to the affidavit. *Id.* at 1628-29, 286 Cal. Rptr. at 426. While not finding the newspaper's specific allegations contained within the affidavit, the court held that the tone of the affidavit coupled with the inspector's recommendation of further investigation into the plaintiff's involvement in the fire were sufficient to support the defendant's assertion of an absolute privilege under section 48(d). *Id.* at 1628-29, 286 Cal. Rptr. at 426. In *Jennings v. Telegram-Tribune*, the court compared the plaintiff's plea of no contest to "willfully and knowingly" failing to file an income tax return with newspaper articles stating that he had plead no contest to charges of "tax evasion" and "tax fraud." *Jennings*, 164 Cal. App. 3d at 122-24, 210 Cal. Rptr. at 485-86. After comparing the official plea with the newspaper's version, the appeals court held that the trial court was correct in holding that the newspaper accurately captured the gist, which was that the plaintiff had plead no contest to serious tax crimes. *Id.* at 127, 210 Cal. Rptr. at 489. In *Kilgore v. Younger*, the California Supreme Court ruled that, after a comparison of an Attorney General's report with a newspaper article, that a newspaper was entitled to protection under section 47(d). *Kilgore*, 30 Cal. 3d. at 777, 180 Cal. Rptr. at 661.

188. *Pierce* 214 Cal. App. 3d at 1632, 263 Cal. Rptr. at 414; *Twin Coast*, 208 Cal. App. 3d at 662, 256 Cal. Rptr. at 313.

189. *Pierce*, 214 Cal. App. 3d. at 1632, 263 Cal. Rptr. 414.

190. See *supra* notes 179-187 and accompanying text (discussing the methods used by the judge to determine whether an article is a fair and true report).

191. CAL. CIV. CODE § 48a(2) (West 1985).

192. See *supra* notes 171-176, 185-187 and accompanying text (explaining the analytical process under California Civil Code sections 47(d)).

relationships, the statutes require the application of broad legal standards.<sup>193</sup> Inquiries into whether a retraction is substantially as conspicuous as the original, or whether an article captures the “gist” of a public proceeding, involve the application of a flexible standard to undisputed facts.

In their application, the legal standards of 48a and 47(d) are similar to the extent that the nature of the inquiry under both is almost the same. Under section 47(d) an article captures the gist or sting of a proceeding when the proceeding’s “very substance is accurately conveyed,” while allowing for a degree of literary license and flexibility.<sup>194</sup> “Substantially as conspicuous” means that the retraction must be published in materially or essentially the same manner as the original defamatory article.<sup>195</sup> Thus, both 47(d) and 48a require the comparison of the substantive similarity of two separate undisputed documents.

Since both the fair and true report privilege and the retraction statute involve the application of comparable legal standards to determine the legal effect of a subsequently published article, it can be argued that both sections involve document interpretation as enumerated in Evidence Code section 310(a).<sup>196</sup> If one finds section 48a analogous to 47(d), and, therefore, interpretive, then it is logical to conclude that a judge should be able to determine the conspicuousness of a retraction as a matter of law. Even though the courts deciding *Twin Coast* and *Pierce* did not find Civil Code sections 48a and 47(d) to be analogous to interpretive analyses

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193. See *supra* note 176 and accompanying text (stating that for a newspaper to claim the section 47(d) privilege, its article must capture the gist of the official proceedings). See also *supra* notes 65-69 and accompanying text (explaining that protection under section 48a is conditioned on the timely printing of a retraction in as substantially as conspicuous a manner as the allegedly libelous article).

194. *McClatchy Newspapers*, 189 Cal. App. 3d at 975-76, 234 Cal. Rptr. at 711.

195. BLACK’S LAW DICTIONARY 1428-29 (6th ed. 1990). Black’s defines “substantially” as follows: “Essentially; without material qualification; in the main; in substance; materially; in a substantial manner. About, actually, competently, and essentially.” *Id.* (citation omitted).

196. See *supra* notes 188-195 and accompanying text (comparing the analyses under sections 48a and 47(d)).

justifying judicial decision making,<sup>197</sup> other jurisdictions have allowed the judge to interpret the sufficiency of a retraction as a matter of law.<sup>198</sup>

2. *Comparison of Conspicuousness Analysis Under California Civil Code Section 48a to the Approach Employed in Other Jurisdictions*

In deciding whether the conspicuousness of a retraction was a question of law for the court or a question of fact for the jury, the courts in *Twin Coast* and *Pierce* considered out-of-state authority which held that a judge should decide the issue as a matter of law.<sup>199</sup> Although those courts rejected out-of-state approaches and adopted the California authority of *Behrendt v. Times-Mirror*<sup>200</sup> as controlling, it is helpful to consider the manner in which other states deal with conspicuousness determination.

a. *Minnesota: The Case of Gray v. Times Newspaper Co.*

In the 1898 case of *Gray v. Times Newspaper*,<sup>201</sup> the *Minneapolis Times* published an article regarding false complaints to the police in which the plaintiff, James Gray, was accused of lying about the reason that he was shot.<sup>202</sup> In response, Gray

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197. *Pierce*, 214 Cal. App. 3d at 1632, 263 Cal. Rptr. at 414; *Twin Coast*, 208 Cal. App. 3d at 662, 256 Cal. Rptr. at 313. After stating that the judge decides whether an article is a fair and true report, the court, without further analysis, concluded: "In contrast, the question of conspicuousness of a retraction is not one of interpretation." *Id.*; *Pierce*, 214 Cal. App. 3d at 1632, 263 Cal. Rptr. at 414 (quoting *Twin Coast*, 208 Cal. App. 3d at 662, 256 Cal. Rptr. at 313).

198. See *infra* notes 201-221 and accompanying text (discussing the at law approaches adopted in Michigan and Minnesota).

199. *Pierce*, 214 Cal. App. 3d at 1632, 263 Cal. Rptr. at 414; *Twin Coast*, 208 Cal. App. 3d at 661, 256 Cal. Rptr. at 313.

200. See *supra* notes 95-101 and accompanying text (discussing the holding of *Behrendt* and its subsequent adoption as precedent).

201. 77 N.W. 204 (Minn. 1898).

202. *Id.* at 205. The article was published on August 19, 1897 under the headline "Faking Hold-ups. Police have Enough to Do without This Annoyance. Two or Three Cases Where Robberies were Complained of, and Never Occurred," and, in part, read:

Fake hold-ups seem to be the regular order of the day now. The police are considerably disgusted, for, fake or no fake, they receive the usual amount of roasting from the public,

served a demand for retraction on the newspaper, which published a retraction the following day.<sup>203</sup> Although at the time, the Minnesota retraction statute did not specify any particular form for a retraction, it did require the retraction to make reference to the allegedly libelous article, and to fully and fairly retract the defamatory statements.<sup>204</sup> Similar to California's section 48a, Minnesota's law stated that the retraction was to be published "in as conspicuous a place and type as was the article complained of."<sup>205</sup>

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who argue that the policemen and detectives are not doing their full duty. Within the past few days the first fake case of note was that of a young man named Gray, who claimed to have been held up by two men on bicycles while he was riding his wheel on Lake Calhoun boulevard, shot in the arm, sandbagged, and robbed of about \$5. Gray's case bore evidence of sincerity, yet upon looking it up the police believe that no hold-up took place; their real theory being that Gray was shot in a row over a woman with whom he was bicycle-riding. Detective Hoy has a witness who claims to have seen the whole affair . . . If the department can find a way to do it, it is not improbable that some people who claim they are held up on the street and robbed, when a robbery or attempted robbery never occurred at all, may be made an example of, as a warning to others.

*Id.* (emphasis added).

203. *Id.* The retraction was published under the headline "Cry 'Fake' Too Quick. Police Discredit Stories Which They cannot Fathom," and, in pertinent part, read:

Considerable criticism has grown out of the apparent freeness with which the police cast discredit upon every unusual hold-up or robbery, and at once assume that anything which they cannot trace is fake . . . One case of this kind is the case of James E. Gray, the young man who on the night of Tuesday, Aug. 10, was held up by two men, sandbagged, shot in the arm, and robbed of some \$5 or \$6, while bicycle-riding on Calhoun boulevard. Mr. Gray is a young man, well connected and respectable . . . Mr. Gray's story of the robbery and assault, as it occurred, was published the morning after the robbery, and was soon followed by the usual innuendo, because it was the first bicycle robbery which the police had to deal with, and was a novelty, and not understood . . . A report was circulated among police that there was a woman in the case, and as Mr. Gray has many friends, not only in Minneapolis, but all over the state, the report embarrassed him considerably, inasmuch as it was without foundation. The case was one of highway robbery and assault, pure and simple.

*Id.*

204. *Id.* at 205-6. The court explained what constituted a fair retraction under the statute when it declared that: "It must, however, clearly refer to and admit the publication of the article complained of, and directly, fully, and fairly, without any uncertainty, evasion, or subterfuge, retract (that is, recall) the alleged false and defamatory statements therein." *Id.*

205. *Id.* at 206. Minnesota has amended its retraction statute since the decision in *Gray*. The current statute sets specific form requirements for the retraction. MNN. STAT. ANN. § 548.06 (West 1988). "RETRACTION" in at least 18-point type must appear above the retraction. *Id.* The retraction must be published in the "same place and same type" as the allegedly libelous article. *Id.* Despite the change in the Minnesota law, *Gray* is still relevant because it exemplifies the methodology used to interpret a retraction statute which, at the time, had a standard similar to that of California Civil

The *Gray* court held that the determination of a retraction's conformity with Minnesota's statute was a question of law for the court.<sup>206</sup> The court enumerated two reasons for this holding.<sup>207</sup> First, since the issue of whether a retraction is full and fair involves comparing and interpreting two writings, this duty was traditionally allocated to the court.<sup>208</sup> Second, the undisputed nature of the facts and the non-reliance on extrinsic evidence made interpretation of a retraction a decision within the scope of the judiciary's power.<sup>209</sup>

After deciding that the sufficiency of a retraction was for the judge to decide, the *Gray* court ruled that the *Minnesota Times* had failed to meet its statutory burden.<sup>210</sup> While the conspicuousness of the retraction was not in issue, the court found that the retraction was insufficient because it did not refer back to the libelous article, and the newspaper did not accept responsibility for the publishing of false remarks about the plaintiff.<sup>211</sup>

*Gray v. Times-Newspaper* based its holding that the judge is the appropriate decision-maker on the conspicuousness issue based on grounds directly rejected in both *Twin Coast* and *Pierce*.<sup>212</sup> All three of the courts agreed that the interpretation of documents was a question of law for the judge;<sup>213</sup> however, the two California courts held that a conspicuousness determination did not constitute document interpretation<sup>214</sup> whereas the Minnesota court found to

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Code section 48a.

206. *Gray*, 77 N.W. at 206.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* Despite failing to receive a statutory bar to damages, the faulty retraction would still be admissible to the jury as evidence of mitigation of damages. *Id.* See *supra* notes 28-34 and accompanying text (discussing the mitigation impact of a retraction at common law).

212. See *Pierce*, 214 Cal. App. 3d at 1632, 263 Cal. Rptr. 414; *Twin Coast*, 208 Cal. App. 3d at 662, 256 Cal. Rptr. at 313 (holding that the conspicuous determination under section 48a is not interpretive).

213. *Gray*, 77 N.W. at 206; *Pierce*, 214 Cal. App. 3d at 1632, 263 Cal. Rptr. at 414; *Twin Coast*, 208 Cal. Rptr. at 662, 256 Cal. Rptr. at 313.

214. *Pierce*, 214 Cal. App. 3d at 1637, 263 Cal. Rptr. at 414; *Twin Coast*, 208 Cal. App. 3d at 662, 256 Cal. Rptr. at 313.

the contrary.<sup>215</sup> At least one other jurisdiction has concurred with Minnesota's allocation of decision making powers.<sup>216</sup>

*b. Michigan: The Case of Gripman v. Kitchel*

In the 1912 case *Gripman v. Kitchel*,<sup>217</sup> a city marshal sued the local paper for libel based on a news item that accused him of a participating in a "double graft system," which caused the city to incur heavy expenses.<sup>218</sup> Despite the publication of a retraction, the marshal sued and was awarded damages.<sup>219</sup> The Michigan retraction statute specified that a retraction must be published in the same type and edition as the defamatory remarks and that it must appear in the same position as the original to the extent "practicable."<sup>220</sup> On appeal, the Michigan Supreme Court held, in summary fashion, that "the question whether it was full and complete was a question of law for the court, and not a question of fact for the jury."<sup>221</sup> While the court in *Gripman* did

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215. *Gray*, 77 N.W. at 206.

216. See *infra* notes 217-221 and accompanying text (discussing the holding in *Gripman v. Kitchel*, 138 N.W. 1041 (Mich. 1912)).

217. 138 N.W. 1041 (Mich. 1912).

218. *Id.* After alleging graft, the article reads: "The marshal had submitted a bill to the county for the arrest of common drunks, the bill itself stating that they were taken for violation of a city ordinance, which would itself explain that the expense incurred should be met by the city." *Id.*

219. *Id.* The decision does not contain the defendant's retraction, nor does it make reference to its contents.

220. *Id.* at 1042. Michigan's retraction statute, section 10,425, Compiled Laws 1897, at the time of this action, read:

No exemplary or punitive damages shall be recovered unless the plaintiff shall before bringing suit give notice by mail or otherwise to the defendant to publish a retraction of the libel, and allow the defendant a reasonable time in which to publish such retraction, and to make amends as are reasonable and possible under the circumstances of the case; and proof of the publication or correction shall be admissible in evidence under the general issue on the question of good faith of the defendant, and in mitigation and reduction of exemplary or punitive damages: provided, that the retraction *shall be published in the same type and in the same editions of the paper as the original libel, and so far as practicable in the same position.*

*Id.* (emphasis added). Michigan has since amended its retraction statute. The amended statute requires that the retraction be published "in substantially the same position as the original libel." MICH. COMP. LAWS § 600.2911(2)(b) (West Supp. 1992).

221. *Gripman*, 138 N.W. at 1042. The court did not discuss or analyze the defendant's retraction because the plaintiff made no claim for exemplary or punitive damages. *Id.* The retraction issue was based on a trial court decision to exclude a question asked by defense counsel. *Id.*



not state the rationale for its assignment of the determination of a retraction's sufficiency to the judge, its holding adds support for an at law approach in California.

The courts in *Twin Coast* and *Pierce* addressed arguments for and against allowing the jury to decide the conspicuousness issue as a matter of law. While the two California appellate courts make reference to many of the arguments in favor of allowing the judge to decide on a retraction's conspicuousness as a matter of law, there are several credible arguments not mentioned by the *Twin Coast* and *Pierce* courts. Following are some further justifications for allowing the judge to be the decision maker under California Civil Code section 48a.

Within the *Twin Coast* and *Pierce* decisions, proponents of an at law approach to the conspicuousness determination have advanced several well-founded arguments.<sup>222</sup> Arguing under California Evidence Code section 310(a),<sup>223</sup> analogies can be made to equate the analysis of a retraction's conspicuousness under section 48a to that conducted when assessing the sufficiency of a demand for retraction,<sup>224</sup> or whether an article is a fair and true report under Civil Code section 47(d).<sup>225</sup> Further support for these comparisons can be drawn from Minnesota's<sup>226</sup> and Michigan's<sup>227</sup> adoption of an at law approach. While these arguments alone are forceful, the *Twin Coast* and *Pierce* courts' rejection of them<sup>228</sup> necessitates further inquiry into additional

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222. See *supra* notes 144-221 and accompanying text (discussing arguments in favor of a judge-based approach as deduced from the *Twin Coast* and *Pierce* cases).

223. See *supra* notes 146-197 and accompanying text (printing California Evidence Code section 310(a) and explaining its impact on analysis under section 48a).

224. See *supra* notes 153-170 and accompanying text (discussing the judge's role in determining the sufficiency of a demand for retraction in light of the decision in *Gomes v. Fried*).

225. See *supra* notes 171-198 and accompanying text (explaining the judge's interpretive role under California Civil Code section 47(d) and its similarity to an analysis under section 48a).

226. See *supra* notes 201-216 and accompanying text (discussing the interpretation of Minnesota's retraction statute in *Gray v. Times Newspaper*).

227. See *supra* notes 217-221 and accompanying text (discussing the interpretation of Michigan's retraction statute in light of *Gripman v. Kitchel*).

228. *Pierce*, 214 Cal. App. 3d at 1632-33, 263 Cal. Rptr. at 414-15; *Twin Coast*, 208 Cal. App. 3d at 661-62, 256 Cal. Rptr. at 312-13.

justifications for allowing a judge to make the conspicuousness determination.

### III. REASONS IN FAVOR OF CALIFORNIA'S ADOPTION OF AN AT LAW APPROACH TO THE DETERMINATION OF CONSPICUOUSNESS UNDER SECTION 48A

The final section of the Comment will combine legal analogy and public policy concerns together to formulate two additional reasons in favor of judge-based decision making under section 48a's conspicuousness standard. The first part will consider conspicuousness analysis under the express terms of the Uniform Commercial Code and how it compares to California Civil Code section 48a inquiries. Second, this Comment will explore the theory of the effect of jury bias on the conspicuousness decisions.

#### A. *The Judge's Power to Determine Conspicuousness under Uniform Commercial Code Section 1-201(10)*

The Uniform Commercial Code (UCC) was adopted, in part, "to simplify, clarify and modernize the law governing commercial transactions."<sup>229</sup> In 1963, the California Legislature, with some changes, adopted the UCC.<sup>230</sup>

California Commercial Code section 1201(10) defines the term "conspicuous."<sup>231</sup> The UCC states that terms are conspicuous

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229. CAL. COMM. CODE § 1102(2)(a) (West Supp. 1992). The other purposes include the promotion of uniform law among the states and to permit the expansion of commercial practices through the employment of custom, trade usage, and agreement of the parties. *Id*

230. 1963 Cal. Stats. ch. 819, § 1101 at 1849-2015 (enacting the UCC in California). Where appropriate, the California variations from the UCC will be noted. Within the UCC, definitions of commonly utilized words and phrases are specified and are to be used, subject to additional definitions within a particular UCC section. CAL. COMM. CODE § 1201 (West Supp. 1992).

231. CAL. COMM. CODE § 1201(10) (West Supp. 1992). The section reads:

(10) "Conspicuous." A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NONNEGOTIABLE BILL OF LANDING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous." *Whether a term or clause is "conspicuous" or not is for decision by the court.*

*Id.* (emphasis added).

when they appear in a form which a reasonable person would notice.<sup>232</sup> Section 1201(10) enumerates two examples of conspicuous notations as being language of comparatively larger type or contrasting color and a printed heading in capitals.<sup>233</sup> Most significantly, the UCC makes the determination of conspicuousness under the reasonableness standard a question of law for the court.<sup>234</sup>

There are no California cases explaining the methodology to be employed by a judge when making a conspicuousness determination under the UCC;<sup>235</sup> however, several states that have adopted the exact language of section 1201(10) have contemplated the judge's role.<sup>236</sup> A source of considerable litigation under the UCC revolves around exclusions or modifications of implied warranties under section 2-316.<sup>237</sup> In order to alter or exclude an implied warranty of fitness or an implied warranty of

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232. *Id.* The policy behind the reasonable person standard is that the law disfavors concealed and self-serving contract provisions, or encumbrances which are capable of deception. *Ellmer v. Delaware Mini-Computer Systems*, 665 S.W.2d 158, 160 (1983).

233. CAL. COMM. CODE § 1201(10) (West Supp. 1992).

234. *Id.*

235. One California case mentioning an interpretation under section 1201(10) holds that a warranty disclaimer printed in boldface type and oversized letters is conspicuous under the express language of section 1201(10). *A & M Produce v. FMC Corp.*, 135 Cal. App. 3d 473, 483 n.5, 186 Cal. Rptr. 114, 120 n.5 (1971).

236. *See infra* notes 237-245 and accompanying text (discussing out-of-state authority explaining the role of the judiciary under UCC section 1201(10)).

237. Section 2316(2) of the California Commercial Code reads:

(2) subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in the case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that

"There are no warranties which extend beyond the description on the face hereof."

CAL. COMM. CODE § 2316(2) (West 1964). *See* Millsbaugh & Coffinberger, *Seller's Disclaimers of Implied Warranties: The Legislatures Strike Back*, 13 U.C.C. L.J. 160, 161-68 (1980) (analyzing implied warranty disclaimers under UCC section 2-316 and state variations thereto); Tracy, *Disclaiming and Limiting Liability for Commercial Damages*, 83 COMM. L.J. 8, 11-15 (1978) (discussing the impacts of various forms of disclaimers under the UCC and giving advice on drafting successful disclaimers); Comment, *Consumer Warranty Law in California Under the Commercial Code and the Song-Beverly and Magnuson-Moss Warranty Acts*, 26 UCLA L. REV. 583 (1979) (discussing the sources of consumer frustrations with warranties as well as the interaction of the California Commercial Code with federal warranty law); Comment, *Consumer Protection: The Effect of the Song-Beverly Consumer Warranty Act*, 4 PAC. L.J. 183 (1973) (comparing warranty remedies available under the UCC to those granted under the Song Beverly Consumer Warranty act).

merchantability, the alteration or exclusion must be written in a conspicuous manner.<sup>238</sup> Applying the reasonableness standard, courts consider a plethora of criteria in arriving at a determination of conspicuousness.<sup>239</sup> These considerations include capitalization, typesize, color bordering,<sup>240</sup> proximity to boilerplate language<sup>241</sup> or the signature block,<sup>242</sup> and page placement.<sup>243</sup> In addition to analyzing the conspicuousness of warranty disclaimers under the UCC, judges also conduct similar types of conspicuousness appraisals when enforcing security transfer restrictions<sup>244</sup> as well as numerous other potential burdens on a purchaser.<sup>245</sup>

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238. CAL. COMM. CODE § 2316(2) (West 1964).

239. The standard applied to UCC section 2-316(2) is "whether a reasonable person would notice the disclaimer when its type is juxtaposed against the rest of the agreement." *Commercial Credit v. CYC Realty*, 477 N.Y.S.2d 842, 844, 102 A.D. 2d 970, 972 (1984).

240. See *Victor v. Mammana*, 101 Misc. 2d 954, 955-56 422 N.Y.S.2d 350, 351 (1979) (holding that capitalization, large print, and color contrasts are factors that courts consider in making a determination of conspicuousness under UCC section 2-316(2)). New York's version of section 2-316(2) is identical to the California Commercial Code section 2316(2). N.Y. U.C.C. LAW § 2-316(2) (Consol. 1964).

241. See *Commercial Credit Corp.*, 477 N.Y.S.2d at 844, 102 A.D. 2d at 972 (1984) (holding that the proximal relation of the disclaimer coupled with boldface print made the disclaimer conspicuous).

242. See *Elmer*, 665 S.W.2d at 160 (holding that the placing of the disclaimer notice directly above the signature block contributed to the disclaimer's conspicuousness).

243. See *Commercial Credit Corp.*, 477 N.Y.S.2d at 844, 102 A.D. 2d at 972 (holding that the disclaimer's presence on the first page of the agreement in boldface print helped make it conspicuous).

244. See *Ling v. Trinity Savings and Loan Association*, 482 S.W.2d 841, 843-44 (Texas 1972) (holding that a judge must find something on the face of a stock certificate that draws attention to transfer restrictions on the reverse in order to meet the requirements of UCC section 8-204(1)). The Texas equivalent of UCC section 8-204 is identical to the version adopted in California. TEX. BUS. & COM. CODE ANN. § 8.204(1) (Vernon 1991).

245. See CAL. COMM. CODE § 7210(2)(c) (West 1990) (stating that in order to enforce a warehouseman's lien, the notification of the lien must contain conspicuous language explaining that the goods will be sold if the debt is not satisfied); § 8407(3) (West 1990) (requiring the issuer of a certificated security to conspicuously note any adverse claims or liens against the previously uncertificated security); § 8408(9) (West 1990) (requiring that all statements of uncertificated securities bear a conspicuous warning legend explaining the legal force of the documents); § 3110 (West 1990) (stating that a document is payable to order when "exchange" or its equivalent and the name of the payee are conspicuously noted on the face of the instrument); § 5102(c) (West 1990) (stating that UCC Article 5 applies to credit that conspicuously states that it is a letter of credit or is conspicuously entitled as such); § 7203 (West 1990) (allowing a good faith purchaser for value to recover damages for misdelivery, non-delivery, or delivery of non-conforming goods unless the document of title stated conspicuously that the seller did not know whether the goods were conforming or in fact delivered); § 8103 (West 1990) (explaining that a lien on a certificated security is valid against a purchaser if the issuer's right to the lien is conspicuously noted on the certificate).

The judge's statutory authority to decide conspicuousness under the UCC further supports the argument for a similar judicial role under California Civil Code section 48a. Many parallels can be drawn between interpretation under the UCC and California's correction statute. In both instances, the determination of conspicuousness is made in order to protect the interests of an innocent party from injury. A judge considers the conspicuousness of a disclaimer so that an innocent purchaser is not duped into waiving legal rights when entering into an agreement,<sup>246</sup> whereas section 48a assures maximum protection to a defamed individual's reputation by requiring the retraction to be published in substantially as conspicuous a manner as the defamatory article.<sup>247</sup> Both plaintiffs are also in a position of relative weakness compared to the defendant. The UCC protects purchasers from deception by merchants or brokers who have, most likely, the advantage of considerable experience and knowledge.<sup>248</sup> In the instance of defamation, the publisher or broadcaster wields considerable power because the size of its audience makes it exclusively suited to restore the plaintiff's reputation via a retraction.

The method of judicial analysis under the UCC is analogous to a conspicuousness determination under section 48a. The central focus of both processes is the consideration of a specified statement in relation to the rest of the document.<sup>249</sup> The consideration of capitalization, print size, and boldface under UCC section 2-

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246. See FARNSWORTH, *CONTRACTS* 310-19 (2nd ed. 1990) (discussing disclaimers and stating that the UCC requirement of conspicuousness is an outgrowth of common law judicial protection accorded to unsophisticated parties and individuals with little bargaining power).

247. CAL. CIV. CODE § 48a(2) (West 1984). See *supra* notes 55-75 and *infra* notes 270-75 and accompanying text (discussing the requirements and policy rationales underlying California Civil Code section 48a).

248. See FARNSWORTH, *supra* note 246, at 311-19 (stating that the UCC protection of inexperienced parties from experienced offerors is an outgrowth of the traditional common law protection).

249. See *supra* note 99 and accompanying text (explaining the method of comparison between a defamatory statement and a published retraction under California Civil Code section 48a). See also *supra* notes 234-245 and accompanying text (discussing judicial application of UCC section 1-201(10) to disputes under UCC sections 2-316 and 8-204).

316<sup>250</sup> is roughly equivalent to an analysis of headline size and typesetting under California Civil Code section 48a.<sup>251</sup> An inquiry into the placement of a retraction on a given page<sup>252</sup> corresponds to the examination of conspicuousness by comparison of the proximal relation of the disclaimer to the signature block or boilerplate language.<sup>253</sup> Furthermore, placement, in terms of the overall document, is integral to both processes.<sup>254</sup>

While the Uniform Commercial Code provides an example of a legislatively sanctioned practice of judicial appraisals of conspicuousness, there exist other, more policy-oriented reasons for an at law approach to analyses under section 48a. The relative capabilities and biases of judges and juries provide a convincing argument for reversing the techniques upheld in *Twin Coast* and *Pierce*.

*B. Jury Bias: A Practical Reason for Judges to Make the Conspicuous Determination Under Section 48a*

Heretofore, this Comment has discussed the reasons for and against judicial consideration of conspicuousness under California's correction statute in light of existing legal precedent and analogy to other areas of the law. In this section, the Comment will move from the theoretical to the practical and will examine the inherent biases of juries when it comes to assessing libel claims. These prejudices, when contemplated in conjunction with the public policy reasons underlying section 48a and the reasons that most plaintiffs bring libel suits, are arguably important enough to justify

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250. See *supra* notes 239-243 and accompanying text (stating that capitalization, print size, and boldface are factors considered by the court under the UCC's conspicuousness analysis).

251. See *id.* (showing the use of type setting and headline size to determine conspicuousness under section 48a).

252. See *id.* (illustrating how the placement of a retraction on a page is a key factor in resolving conspicuousness issues).

253. See *id.* (stating that the analysis of the disclaimer's proximity to boilerplate language and the signature block are court sanctioned methods to determine conspicuousness).

254. See *id.* (showing how a comparison of the page number of the defamatory article compared to the retraction is important in the application of section 48a). See also *supra* notes 243 and accompanying text (explaining that the placement of a disclaimer on the first page may be more conspicuous than alternative page placement).

a shift away from jury decision-making on the matter of conspicuousness.

*1. Studies Show Partiality of Juries in Libel Actions*

Several statistical analyses have attempted to analyze the roles of the judge and the jury in defamation litigation.<sup>255</sup> In particular, a study conducted by Professor Marc Franklin for the *American Bar Foundation Research Journal* concluded that juries tend to favor libel plaintiffs at a significantly higher rate than judges.<sup>256</sup> Of the cases appealed, juries found for plaintiffs in ninety percent of the media libel suits considered.<sup>257</sup> Judges, on the other hand, entered judgments for the plaintiff in thirty-three percent of the media cases that were appealed.<sup>258</sup> Furthermore, when judges found in favor of the plaintiff, they granted considerably less

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255. See, e.g., Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RESEARCH J. 455 (1980) (hereinafter WINNERS AND LOSERS); IOWA LIBEL RESEARCH PROJECT, *supra* note 1, at 95-151; Franklin, *Suing Media For Libel: A Litigation Study*, 1981 AM. B. FOUND. RESEARCH J. 797 (1981) (hereinafter SUING MEDIA FOR LIBEL: A LITIGATION STUDY); LRDC *Litigation Study 9 -- Defamation Trials, Damage Awards and Appeals III: Two Year Update (1984-86)*, LRDC Bulletin no. 21 (1988); LRDC *Study 5 -- Defamation Trials, Damage Awards and Appeals: Two Year Update (1982-84)*, LRDC Bulletin no. 11 (1984); LRDC *Study 2 -- Defamation Trials and Damage Awards: Updating the Franklin Studies*, LRDC Bulletin no. 4 (Summer 1982-August 15 1982).

256. WINNERS AND LOSERS, *supra* note 255, at 473. The study reviewed all reported defamation cases decided from January 1976 to mid-June 1979. *Id.* at 459. Cases were selected exclusively from West Reporters. *Id.* at 460. In all, the study analyzed 534 cases. *Id.* at 464. Of those, 457 were appellate cases and 77 were trial court decisions. *Id.* When assessing plaintiffs' success or failure rates, only the appellate decisions are utilized. *Id.* All 534 cases are utilized when classifying libel plaintiffs and defendants and considering the types of statements prompting the libel litigation. *Id.* at 464-65. The study considered actions against both media and non-media defendants. *Id.* at 465-66. Media defendants were defined as newspapers, magazines, book publishers, and broadcasters. *Id.* at 465. Since California Civil Code section 48a applies only to newspapers and radio stations, this Comment will focus on data involving media defendants. When possible, the specific data for newspapers and radio stations will be separated from the other media defendants. Of the 165 media cases analyzed by Franklin, a newspaper was the defendant in 57 percent, or 94 cases, and radio stations were the defendants in 4 percent, or 6 cases. *Id.* at 479.

257. *Id.* at 473. The plaintiff received a verdict in its favor in 18 out of 20 jury cases considered. *Id.*

258. *Id.* Plaintiff prevailed in one out of three judge trials. *Id.* Although the number of judge trials in the sample was small, the same rough percentages were yielded in non-media cases. The plaintiff prevailed in 88 percent, or 72 of 82, non-media jury cases. *Id.* In bench trials, the plaintiff won only 43 percent, or 9 of 21, of verdicts against non-media defendants. *Id.*

damages than did the juries.<sup>259</sup> Juries also have a greater tendency to award punitive damages than do judges.<sup>260</sup> A subsequent study conducted by the Iowa Libel Research Project confirms many of Professor Franklin's findings regarding jury preferences.<sup>261</sup> This study found that plaintiffs prevailed in eighty-nine percent of the cases tried before a jury, whereas the plaintiff won only forty-five percent of bench trials.<sup>262</sup> While significant, the percentile disparity of verdicts for the plaintiff between judge and jury is not by itself dispositive of jury bias. However, the existence of bias may be inferred from analyzing the rate of reversal of jury verdicts for plaintiffs on appeal.

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259. *Id.* at 473.

260. *Id.* at 477 table 10. In all the cases considered by Franklin, the plaintiff asked for punitive damages in 25 percent, or 134 cases. *Id.* at 477. Recovery of punitive damages, while low for both judge and jury media cases, was far greater in jury trials. *Id.* Of the media cases, the jury awarded punitive damages ten times whereas the judge did not award punitive damages in any case. *Id.* The small overall percentage of punitive damage recovery in media cases is most likely attributable to the Supreme Court's decision in *Gertz v. Robert Welch*, 418 U.S. 323 (1974). See *supra* note 40 (discussing the holding in *Gertz* and its impact on the award of punitive damages in media cases).

Despite the small overall percentage of cases in which punitive damages are awarded, the magnitude of these awards is enough to make them significant in any discussion of libel verdicts. Since WINNERS AND LOSERS, the number of cases awarding punitive damages as well as the average amount of punitive damage awards at trial has dramatically increased. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 6 (1983). A Libel Defense Resource Center (LDRC) study indicated that punitive damages were awarded in 30 out of 47 libel damage awards. *Id.* at 6-7 (citing LDRC Bulletin No. 4, Oct. 15 1982, at 3, 5 & table 2, 6 and table 2-B). A subsequent LDRC study found that the average award of punitive damages was close to \$8 million per punitive award. *Id.* (quoting LRDC Special Alert, July 29, 1983, at 1).

261. IOWA LIBEL RESEARCH PROJECT, *supra* note 1, at 95-151. See Soloski, *The Study and the Libel Plaintiff: Who Sues for Libel?*, 71 IOWA L. REV. 217 (1985); Cranberg, *Fanning the Fire: The Media's Role in Libel Litigation*, 71 IOWA L. REV. 221 (1985); Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226 (1985) (summarizing the findings and recommendations of the IOWA LIBEL RESEARCH PROJECT report).

262. IOWA LIBEL RESEARCH PROJECT, *supra* note 1, at 129. This data was derived from analyzing a randomly chosen group of 188 media cases which were decided between 1974 and 1984. *Id.*



Jury verdicts for plaintiffs are far more likely to be overturned on appeal than are the verdicts for plaintiffs decided by judges.<sup>263</sup> Jury awards of punitive damages were overturned in eight out of ten appeals.<sup>264</sup> Defense verdicts, however, were affirmed at a very high rate regardless of whether the judge or jury was the trier of fact.<sup>265</sup> While several factors may influence the rate of jury verdict reversal,<sup>266</sup> the discrepancy between jury verdicts for plaintiffs which were overturned, and jury verdicts for media defendants which were overturned, tends to support the theory of juror bias. Assuming that other problems intrinsic to jury verdicts remain constant, plaintiffs' verdicts awarded by juries were overturned at a high rate, around sixty percent, whereas jury verdicts for media defendants were overwhelmingly affirmed.<sup>267</sup> This data demonstrates that appellate courts were significantly more likely to find some deficiency in a jury's reasoning when the jury arrived at a verdict for the plaintiff, than when a trial court judge awarded a verdict for the plaintiff. Given the jury's propensity to find for the plaintiff and their correspondingly high rate of appellate reversal, the judge would seem to be the appropriate party to decide whether a retraction is sufficiently conspicuous under section 48a.

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263. WINNERS AND LOSERS, *supra* note 255, at 474; *id.* Table 8, 476 n.49. Overall, the media-defendant was successful in 60 percent, or 83 of 138, of appeals. *Id.* at 476. The plaintiff prevailed in only five percent, or 7 of 138, of the media appeals. *Id.* A more recent LDRC survey found that the defendant was successful in 64 percent of recently decided appeals. Smolla, *Let the Author Beware*, *supra* note 260, at 6 n.41 (citing LDRC Bulletin No. 6, Mar. 15, 1983, at 2). The Iowa researchers found that defendants win 62 percent of their appeals of plaintiffs' trial court verdicts. IOWA LIBEL RESEARCH PROJECT, *supra* note 1, at 129.

264. WINNERS AND LOSERS, *supra* note 255, at 476-77.

265. *Id.* at 476 n.49.

266. Franklin suggests that variables that are unique to jury trials, such as problems with *voir dire* and jury instructions, may contribute to a higher rate of jury verdict reversal. *Id.* at 476 n.49.

267. See *supra* notes 263-267 and accompanying text (distinguishing the relative success of defendants' and plaintiffs' appeals of unfavorable jury and judge verdicts).

## 2. The Policy Underpinnings of Section 48a

The adoption of California Civil Code section 48a represented a shift from the common law of retractions.<sup>268</sup> Unlike the common law, the retraction statute, if complied with, constitutes a complete bar to the recovery of all but special damages.<sup>269</sup> Given this break from the common law, courts have interpreted the legislature's intent when enacting section 48a.<sup>270</sup> An examination of this intent provides important insights regarding whether the judge or the jury should decide the conspicuousness of a retraction under section 48a.

In *Kapellas v. Kofman*,<sup>271</sup> the California Supreme Court held that section 48a was adopted to strengthen the media's insulation from liability for incorrect statements, and encourage a more active press.<sup>272</sup> The conditioned immunity of the correction statute was granted to furnish publishers with a chance to remedy mistakes before exposing the publishers to liability.<sup>273</sup> In *Werner v. Southern California Newspapers*<sup>274</sup> the California Supreme Court reasoned that the legislature substituted a retraction for the recovery of general damages in order to promote society's interest in the "free dissemination of news" and avoid exorbitant general damage awards.<sup>275</sup>

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268. See *supra* note 28-34 and accompanying text (discussing the common law function of retractions to mitigate damages).

269. CAL. CIV. CODE § 48a (West 1984). See *supra* note 55-70 and accompanying text (listing section 48a and explaining its impact on the recovery of damages in libel litigation).

270. Unfortunately, there are no legislative records to provide an insight into the legislature's intent when drafting California Civil Code section 48a. The committee hearings, and other debate concerning section 48a, were not recorded for the 1931 version. Comment, *What is a "Newspaper" Under California's Retraction Statute? Enquiring Minds Want to Know*, 10 COMM & ENT 795, 801 (1988). The Archives of the Secretary of State of California contains nineteen pages of materials alluded to by the governor prior to signing the 1945 amendments to section 48a. *Id.* at 801 n.34. These documents deal only with the addition of radio stations to the scope of section 48a. *Id.* Thus, our inquiry into section 48a's intent will be limited to judicial interpretations.

271. 1 Cal. 3d 20, 459 P.2d 912, 81 Cal. Rptr. 360 (1969).

272. *Id.* at 30, 459 P.2d at 917, 81 Cal. Rptr. at 365.

273. *Id.* at 31, 81 Cal. Rptr. at 366.

274. 35 Cal. 2d 121, 216 P.2d 825 (1950). See *supra* note 55 (discussing the holding and ramifications of *Werner*).

275. *Id.* at 126, 216 P.2d at 828.

The legislative purposes assigned to section 48a by California courts are similar to those enumerated by the United States Supreme Court when it extended the first amendment's coverage to libel actions in *New York Times v. Sullivan*.<sup>276</sup> In *New York Times*, Justice Brennan recognized the constitutional goal of promoting "uninhibited, robust, and wide open" debate on public issues and the media's role in furtherance of such a goal.<sup>277</sup> While dispensing with strict liability as it applied to media reporting on matters of public interest in *Gertz v. Robert Welch*,<sup>278</sup> the Supreme Court expressed its fear that punishing the media for errors may cause media self-censorship and chill the exercise of protected constitutional freedoms.<sup>279</sup> Admittedly, the Supreme Court's opinions *Gertz* and *New York Times* did not consider the possible legislative rationales underlying state retraction statutes; however, many parallels exist between the Supreme Court decisions

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276. 376 U.S. 254 (1964).

277. *Id.* at 270. A discussion of the full extent of the *New York Times* decision and its implications is beyond the scope of this Comment. Numerous legal scholars have interpreted the *New York Times* case and its progeny. See SUING THE PRESS, *supra* note 59, at 26-52 (discussing the political and legal climate at the time that the *New York Times* case was litigated and decided); *Values In Conflict: Twenty-Five Years After New York Times v. Sullivan*, *Proceedings of the First Annual Symposium of the Constitutional Law Resource Center, Drake University Law School, March 30-31, 1990* (background text and symposium transcript) (analyzing the outgrowth of the *New York Times* holding and considering proposals for libel reform); Kalven, *The New York Times Case: A Note on 'The Central Meaning of the First Amendment,'* 1964 SUP. CT. REV. 191 (1964) (discussing the impact of *New York Times v. Sullivan* on first amendment theory and doctrine as well as explaining several possible interpretations of the case's holding); Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782 (1986) (analyzing the practical and theoretical problems of the *New York Times v. Sullivan* decision and arguing that the common law of defamation better balanced individuals' reputational interests with society's desire for a free press); Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to the 'Central Meaning of the First Amendment,'* 83 COLUM. L. REV. 603 (1983) (discussing *New York Times* and proposing ways in which the judiciary could reaffirm and strengthen its holding in light of current libel law); Otley, Lewis, & Otley, *New York Times v. Sullivan: a Retrospective*, 33 DEPAUL L. REV. 741 (1984) (analyzing the *New York Times* decision in light of the civil rights movement and the case's progression to the United States Supreme Court); Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221 (1976) (tracing the development of English and American defamation law and advocating a simplification of the law of defamation as it relates to the defendant's knowledge of falsity and the distinction between the publication of defamatory facts and opinion).

278. 418 U.S. 323 (1974).

279. *Id.* at 340-41. See *supra* note 40 discussing the holding in *Gertz* and citing references analyzing its implications).

Supreme Court decisions and the judicially interpreted purposes of California Civil Code section 48a.

Both lines of cases expressed a purpose to maintain and promote a free and active press which would be uninhibited by fears of unreasonable liability and excessive damages.<sup>280</sup> This consistency with the Supreme Court, if anything, adds legitimacy to the purposes prompting the California legislature to enact section 48a.

### *3. Judge-Based Decision-Making Under Section 48a Avoids the Chilling Effect on the Press*

Allowing a jury with a pro-plaintiff predisposition to decide conspicuousness under section 48a is antithetical to the purposes underlying the retraction statute.<sup>281</sup> Since general and punitive damages comprise the preponderance of any libel recovery,<sup>282</sup> the jury's decision as to whether or not the retraction statute's requirements were fulfilled will control the very scope of the litigation.<sup>283</sup> Any actual, or even perceived bias, in the retraction statute's application is counter to section 48a's policy goals because it may contribute to media self-censorship. The theory of self-censorship is premised on the notion that newspapers, when faced with heightened potential liability, will refrain from publishing articles on topics which may subject them to such liability.<sup>284</sup> Since most news items pose little risk of liability and

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280. See *supra* notes 268-279 and accompanying text (discussing the judicial interpretations of section 48a's legislative purpose and explaining the Supreme Court's protection of the press in *New York Times* and *Gertz*).

281. See *supra* notes 271-275 and accompanying text (discussing the public policy rationales underlying the legislature's enactment of section 48a).

282. See *supra* note 68 and accompanying text (explaining that general damages comprise the overwhelming proportion of defamation awards). See also *supra* note 260 (citing an LDRC study showing that the average award of punitive damages approached approximately eight million dollars at one time).

283. A defendant who fulfills the requirements of section 48a and publishes a sufficient retraction remains liable for only special damages. CAL. CIV. CODE § 48a(1) (West 1984). See *supra* notes 58-59 and accompanying text (stating that special damages are almost impossible to prove in libel cases).

284. Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. REV. 1, 14-15 (1983).

many newspapers are monopolies in their community, a publisher is able to censor the scope of its reporting without risking the loss of advertisers or profits.<sup>285</sup> While the influence that apprehension of liability has on large newspapers is uncertain, perceived risks do seem to prompt significant self-censorship problems in small newspapers.<sup>286</sup>

Even assuming that juries are not biased against media defendants, the perception of bias in the application of section 48a is enough to cause the chilling effect and quash the correction statute's policy objectives. Believing that section 48a's conditioned immunity may be unfairly applied, a small newspaper could refrain from reporting on a "hot news" item<sup>287</sup> or pursuing investigative stories. Without a perceived ability to correct mistakes and avoid liability, newspapers will become overly cautious in attempting to prevent mistakes. The result is an overly hesitant press, which is counter to the stated policy reasons behind the legislature's adoption of section 48a.<sup>288</sup> *Werner and Kapellas* stand for the

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285. *Id.* There is no clear link between "risky" investigative reporting or articles on scandals or corruption and increased advertising and subscription rates. *Id.* at 15. While an investigative piece or similar story may result in increased daily circulation for a short time, this impact is diminished because most newspapers rely on subscriptions for the bulk of their circulation. *Id.* Despite a decrease in risks, advertisers seem just as likely to do business with a "dull or timid newspaper." *Id.* See Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422 (1975) (analyzing the effectiveness of the *New York Times* and *Gertz* in terms of preventing media self-censorship and concluding that *Gertz* did benefit the media somewhat, but the high costs of libel trials continue to cause self-censorship).

286. Franklin, *Good Names and Bad Law*, *supra* note 284, at 15-17. The difficulty in quantifying the extent of self-censorship is explained:

Libel suits or the fear of libel suits is repeatedly described as the darkest cloud hanging over investigative journalism. But the effect of the suits cannot be precisely measured. Editors and reporters interviewed said unanimously that they had never killed a news account they believed was true and important only because they feared that publication might lead to a suit.

Yet, the author also noted that "reporters or television news directors do not openly discuss the chances they do not take." On television news director is quoted as saying that reporters are asking themselves "whether it is worth it to pursue a story they know would create time-consuming legal problems."

*Id.* at 16 (quoting Friendly, *Investigative Journalism is Changing Some of Its Goals and Softening Tone*, N.Y. Times, August 23, 1983, at 8, col. 1).

287. See *supra* notes 74-75 and accompanying text (explaining that the retraction statute was meant to protect the publishers of "hot," or late-breaking, news items).

288. See *supra* notes 271-275 and accompanying text (discussing the public policy rationales underlying the legislature's enactment of section 48a).

proposition that an active press should be encouraged and that the media should be afforded the opportunity to correct mistakes without undue liability.<sup>289</sup> Furthermore, the United States Supreme Court has endorsed similar objectives when considering the application of the constitution to the law of libel.<sup>290</sup>

While the interests of the press are clearly served by adopting a judge-based analysis of conspicuousness under section 48a, the reputational interests of the plaintiff must be considered.<sup>291</sup> Taking the conspicuousness question out of the jury's hands and placing it in the judge's will not impair plaintiffs' rights. First, there is no evidence to suggest that judges carry a pro-media bias. While judges tend to rule for the defendant more than juries, the rate of appellate reversal for judge verdicts is far less than for juries.<sup>292</sup> This fact supports the belief that judges will evaluate the conspicuousness issue fairly. Second, juries will still be allowed to assess and award damages at trial. By ruling on compliance with section 48a, the judge merely decides whether or not plaintiff's recovery will be limited to special damages.<sup>293</sup> If the statutory requirements are not fulfilled, a jury can still award the full range of damages.<sup>294</sup> Third, a conspicuous retraction satisfies most plaintiffs' expectations when filing suit. A study has shown that plaintiffs' are primarily interested in restoring their reputation and that money is only a small factor in their decision to bring suit.<sup>295</sup> A retraction is a traditional means used to restore reputation.<sup>296</sup> Thus, as long as judges fairly interpret the conspicuousness of

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289. See *supra* notes 55, 271-275 and accompanying text (discussing the holdings in *Werner* and *Kapellas*).

290. See *supra* notes 276-279 and accompanying text (discussing the constitutional approach to libel issues and citing further references discussing the matter).

291. See *Gertz*, 418 U.S. at 341 (stating that the desire to avoid media self-censorship must be balanced with government's interest in protecting an individual's reputation).

292. See *supra* notes 255-267 and accompanying text (discussing the percentages of verdicts for the plaintiff by judges and juries as well as the corresponding rate of appellate reversal).

293. See CAL. CIV. CODE § 48a(2) (West 1984) (providing that a defendant's compliance with the requirements of section 48a limits the plaintiff's recovery to special damages).

294. See *id.* (providing that a jury may award general, special, and exemplary damages in the event that the requirements of section 48a are not complied with).

295. IOWA LIBEL RESEARCH PROJECT, *supra* note 1, at 80-82.

296. See *supra* notes 28-70 and accompanying text (discussing the customary uses for a retraction under the common law and modern statutes).

retractions, the immunity accorded under section 48a will not hinder plaintiffs because a proper retraction will mend their reputations, and satisfy their motivations when filing suit.

The perceived jury bias provides another reason why the judge, not the jury, should decide whether a retraction was published in a manner that is substantially as conspicuous as the original defamatory article. Courts have stressed the importance of a free press unfettered by fears of unreasonable liability, and legal scholars have described the causes and effect of the chilling effect.<sup>297</sup> To the extent that a judge-based approach preserves the plaintiff's interests while simultaneously allaying the press's fears, such an approach should be adopted in California.

### CONCLUSION

This Comment has discussed the reasons for and against allowing the jury to decide whether or not a published retraction of an allegedly defamatory statement is conspicuous under California Civil Code Section 48a. The California courts of appeal in *Pierce* and *Twin Coast* relied on sparse precedent and analogy to formulate their analysis under section 48a.<sup>298</sup> The result was the holding that the issue of a retraction's conspicuousness is one of fact for the jury to decide.<sup>299</sup> Despite the appellate courts' holdings, numerous legal and public policy contentions justify placing resolution of the conspicuousness issue in the realm of the judge.<sup>300</sup>

The analysis under section 48a constitutes the interpretation of a document, thus making it a matter of law for the court to decide under California Evidence Code section 310(a).<sup>301</sup> A comparison with two judicially acknowledged interpretation issues, the

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297. See *supra* notes 281-290 and accompanying text (explaining the chilling effect).

298. See *supra* notes 79-142 and accompanying text (discussing the basis for the holdings in *Twin Coast* and *Pierce*).

299. See *id.*

300. See *supra* notes 145-297 and accompanying text (discussing the legal and public policy arguments in favor of a judicial determination of conspicuousness under section 48a).

301. See *supra* notes 146-147 and accompanying text (discussing the judge's assigned role under CAL. EVID. CODE section 310(a)).

sufficiency of a demand for retraction<sup>302</sup> and the fair and true report privilege,<sup>303</sup> demonstrates that the processes under section 48a are, in fact, interpretive. Other jurisdictions, such as Michigan<sup>304</sup> and Minnesota,<sup>305</sup> have acknowledged the interpretive aspects of retraction analysis when they held that a retraction's sufficiency is a question of law for the judge to decide.

Further support for a judge-based approach can be found in the Uniform Commercial Code.<sup>306</sup> The UCC expressly delegates the determination of all conspicuousness issues to the judge.<sup>307</sup> A discussion of the disclaimer of implied warranties and stock transfer restrictions illustrates that the California Legislature has granted judges interpretive responsibilities similar to a conspicuousness analysis under section 48a.<sup>308</sup> Finally, the practical effect of perceived jury bias makes it imperative that California adopt a judge-based approach to section 48a.<sup>309</sup> If not, the freedom of the press and other policy goals of section 48a will continue to be impaired.

This Comment recommends that the judge should determine whether a retraction is published in a manner which is "substantially as conspicuous" as the original defamatory article. California needs a uniform rule on this issue, and the California

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302. See *supra* notes 160-163 and accompanying text (discussing the interpretive analysis conducted when the judge determines the specificity of a demand for retraction under California Civil Code section 48a).

303. See *supra* notes 177-187 and accompanying text (discussing the interpretive role of the judge when determining whether or not a news item is a fair and true report of an official proceeding under California Civil Code section 47(d)).

304. See *supra* notes 217-221 and accompanying text (discussing *Gripman v. Kitchel*).

305. See *supra* notes 201-215 and accompanying text (discussing *Gray v. Times Newspaper*).

306. See *supra* notes 231-254 and accompanying text (explaining the conspicuousness analysis under the UCC).

307. CAL. COMM. CODE § 1201(10) (West Supp. 1992).

308. See *supra* notes 246-254 and accompanying text (comparing the conspicuousness analysis under the UCC to the conspicuousness inquiry conducted pursuant to California Civil Code section 48a).

309. See *supra* notes 255-267, 281-290 and accompanying text (discussing the perceived biases of juries and the chilling effect).



Supreme Court should overturn the appellate courts' interpretations in *Twin Coast* and *Pierce* and adopt a judge-based analysis to resolve questions of conspicuousness under California Civil Code section 48a.

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