AN EMPIRICAL ANALYSIS OF THE CHILLING EFFECT
Are Newspapers Affected by Liability Standards in Defamation Actions?

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Libel law in the United States has generally been a matter of state concern and part of the general body of civil law known as torts. But since 1964, libel law in the United States has come under the influence of federal constitutional law. In that year, in the landmark case of *New York Times v. Sullivan,*[1] the United States Supreme Court ruled that state laws making newspapers strictly liable for false defamatory statements were generally inconsistent with First Amendment rights of freedom of the press.

The reasoning in that case is very straightforward. The central purpose of the First Amendment is to ensure and even to promote vigorous and robust debate and comment on matters of public importance. If public officials are allowed to recover damages for any false and defamatory statement, regardless of the level of care taken, then newspapers will be discouraged, or "chilled," from printing stories on matters of public interest. The notion of the chilling effect is firmly rooted in American Constitutional Law and was expressed by Justice Brennan in *Sullivan:*

> . . . critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make statements which steer far wider of the unlawful zone.[2]

In order to moderate the chilling effect, the Supreme Court imposed a standard of proof in libel cases involving public official plaintiffs which was much higher than that used in most state courts at the time. Public officials could recover damages only if they could prove that the false and defamatory statement was made with actual malice, that is, with "knowledge that it was false or with reckless disregard of whether it was false or not."[3]

chill only the "feverish pursuit of sensation." James Cain, writing in the "At Issue" page of the *American Bar Association Journal,* argues that "rash procedures, reckless allegations and subjective viewpoints" have become matters of policy with the news media and can be traced directly to the *Sullivan* decision.[13] Cain opts for a negligence standard.

If the *Sullivan* standard were abandoned, the effects on the media and on society at large could be profound and far-reaching. Not the least of these is the effect on the media's willingness to cover and to print stories on matters of public concern. The purpose of this research is to determine the existence and magnitude of the presumed chilling effect on newspapers and the type of newspaper that would be most affected if the actual malice standard for public person plaintiffs were replaced by a negligence or a strict liability standard. As a means of answering these questions, we have surveyed newspaper editors to determine their willingness to publish potentially defamatory material under various standards of liability.

Obviously, any decision to reduce the liability standard for libel actions must be based on a number of competing factors. Society is concerned not only with encouraging public discourse but also in protecting reputation. But freedom of the press has been considered to be a transcendent value, and since *Sullivan,* the courts have attempted to tip the balance in favor of public discourse. From an economic perspective, the Constitution was interpreted in *Sullivan* and its progeny as requiring a subsidy for public discourse at the expense of reputation.[14]

We begin with a brief description of the evolution of libel law in the United States, and then describe the methodology of the study and present and analyze the findings. Finally, we offer our conclusions. Legal standards in libel actions do in fact affect editorial behavior; here the effect is not uniform: it depends on the manner in which the paper is marketed, its competitive environment, and the paper's experience with libel suits and payment of damages.

I. EVOLUTION OF LIBEL LAW IN THE U.S.

In the thirty-year period between the publication of the first and fourth editions of Prosser's monumental *Handbook of the Law of Torts,*[15] the author observed, apparently with approval, that a shift had occurred in favor of plaintiffs in *almost* every area of tort law.[16] The exception was the field of defamation law. Prosser found, as a result of the constitutional expansion of the area of privilege, "unquestionably the greatest victory won by the defendants in the modern history of the law of

torts."[17] This bold proclamation, though omitted in the recent fifth edition, revised by Professor Keeton,[18] still stands as an accurate assessment of the decreasing scope of the liability of the press for defamation actions in the past two decades.

The early standard of liability for defamation by the press in the United States was said to rest on a theory of "strict accountability for the substance of a defamatory statement."[19] Traditional arguments in support of strict liability in other fields of tort law were advanced to hold the press strictly liable for defamation. Publishers became, in effect, insurers of the reputations of those affected partly because the press was viewed as a powerful force with considerable ability to harm innocent persons. Further, it was argued that through insurance and risk spreading, the media was able to mitigate the harmful effects of the strict liability rule. As late as 1956, it appears that there existed little evidence that a strict liability standard unduly inhibited press activities.[20]

It is clear that certain common law defenses to defamation liability aided the press, and some states provided relief in the form of retraction statutes.[21] The defense of "fair comment" extended to the press with regard to defamatory remarks concerning matters of public concern. And even this limited protection was mitigated in a majority of states by the rule that only matters of comment, opinion, and criticism were covered, leaving the press vulnerable to suit for false statements of fact. The courts appeared to fear the effect on the public should candidates for office be discouraged by false statements of fact which they could not redress. In a minority of states the press was afforded a defense under the common law fair comment rule for statements of fact made for the public benefit, with an honest belief in their truth, because of the *public interest* in having a press free of fear of having to prove in court the truth of a statement made about a matter of public concern.[22]

It is the rationale underlying this minority view which prevailed as a constitutional right of the American press, providing a profound victory for defendants in an era of expanding tort plaintiffs' rights. This view led eventually to the landmark Supreme Court case of *New York Times v. Sullivan*[23] which held that the First Amendment afforded the press a limitation on liability in defamation cases. Although *Sullivan* dealt only with the public activities of an elected public official, the Court has since expanded the policies underlying the decision to govern all defamation by media defendants—in effect, constitutionalizing the common law of defamation. While *Sullivan* and its progeny have afforded considerable protection to the press, at least two former members of the Supreme Court have expressed the view that all defamation actions are incompatible with the First Amendment. Justices Black[24] and Douglas[25] would

have held that neither Congress nor the states may establish legal sanctions on free speech through the imposition of defamation laws. It is clear that, to date, the majority of the Court has rejected this view of press freedom in the area of defamation.

II. METHODOLOGY

The population of interest in this study is the general-readership, daily newspaper in the United States. A "National Libel Survey" was constructed and pretested. Based on the results of the pretest, the instrument was revised and was mailed, during January and February of 1986, to the managing editors of the 1688 U.S. daily newspapers listed in the Editor and Publisher Company's 1985 *International Year Book* (New York, 1985). The editors were first reminded of the definitions of the three standards of proof under consideration: actual malice, negligence, and strict liability. They were then presented with four scenarios, each of which described hypothetical editorial decision-making situations. All four involve public officials:

1. A political advertisement names a member of the city planning board as the "kingpin" of the local pornography business.

2. A news story describes a local City Council meeting at which the Mayor is accused of being a slumlord.

3. An editorial accuses the Chief of Police of being deceptive and of lying to the City Council.

4. A humor columnist claims that the County Administrator is such a skinflint that he is "building his own casket and digging his own grave to save on funeral expenses."

The survey instrument used in the study is reproduced in Appendix A.

Each of the editors was asked to evaluate each scenario and to indicate a relative willingness to publish on a scale from 0 (absolutely unwilling) to 10 (absolutely willing) under each of the three standards of proof. Our hypothesis was that editors would be relatively less willing to publish the same material as the standard of proof required for the plaintiff to prevail became more relaxed or less demanding. Thus, we expected that an editor would be less willing to publish the same material under negligence than under the actual malice rule, and even less willing to publish under strict liability. The editor was then asked to complete a section of

the paper's circulation characteristics, market size, competitive environment, history with libel litigation, and libel insurance status.

The scenarios, except for the first, were designed to lean in the direction of being publishable. The scenarios were reviewed by a team of attorneys who specialize in defamation litigation. The evaluations below are based in part on the responses from this panel. Scenario 1 involves the use of a highly charged word (kingpin) and a possibly gratuitous attack on a marginally public figure. It represents the use of the paper by private parties or groups for the purpose of criticism or exposure when the paper itself might not have had the desire to raise the issues on its own. There is a question as to whether the statements in the ad would be construed as opinion or fact. It is not clear that constitutional privileges or common law privileges apply.

A competitive factor may be involved in Scenario 2, since many City Council meetings are covered either by cable or local television stations, which may find a raucous meeting irresistible. Failure by print media to include a complete account of such a meeting could be damaging to the paper. Both constitutional and common law privilege are involved, since the Mayor is a public figure and the story would be a truthful and accurate reporting of a newsworthy event. In order to prevail in a libel suit, the Mayor would probably have to prove actual malice. Some states have statutes that would grant an absolute privilege in the publication of this story.

Scenario 3 involves a commentary—in this case an editorial about the police chief. Once again, both constitutional and common law privileges apply and the only question would be whether the statement that "he blatantly lies" would be considered a statement of fact or opinion. The weight of opinion of the attorneys was that Scenario 3 can safely be published, especially if the word "lies" is omitted.

Scenario 4 asks how far may humor or ridicule go in entertaining the audience of the print medium. The case law on humor has been exceedingly generous to the defendants, especially when the statement cannot reasonably be understood to be factual. The almost unanimous opinion of the legal authorities consulted was that Scenario 4 can be printed, since the likelihood of suit is low and the chance of a summary judgment for defendant is high.

Of the 1688 surveys that were mailed, 220 were returned, of which 14 could not be used because of incomplete or conflicting responses. The remaining sample of 206 represented 12.2 percent of the population.

When the survey instrument was being constructed, pretested, and modified, it was obvious that a tradeoff existed between avoidance of

ambiguity in the wording of the material and avoidance of excessive complexity and length. We struck a balance between these two competing needs that we believed would provide a high degree of clarity without undue complexity, recognizing at the same time that a few respondents might still misinterpret some of the material.

The sample thus obtained was compared with the population on the basis of circulation size and regional distribution. The sample was found to be representative of the population based on these two factors using standard statistical criteria.[26] A description of the characteristics of the sample is found in Appendix B.

A question that invariably arises in this type of research is whether editors would respond to an actual change in the standard of proof in the same way that they responded to the hypothetical questions in the survey. Can editors be expected to know in advance how they would respond in the event the standard of proof were actually to change? Also, the sample was self-selected—editors chose whether they wished to respond and be included as part of the sample. Does the self-selection process itself introduce bias? Are respondents more or less likely to be chilled than nonrespondents? A related question is whether respondents would have any incentive not to accurately reveal their preferences. Editors who are particularly fearful of a libel suit may be inclined to respond and to exaggerate the chilling effect. Other editors may wish to minimize it. Several editors whom we contacted during the pretest were adamant that editorial decisions at their paper are made on the basis of newsworthiness and fairness to the subject of a news inquiry. They argued that when editors do their jobs, it is not necessary to consider the statement of proof for libel. These editors are proud that they are not chilled and may be inclined to respond. Thus, to the extent that the editors may not accurately reveal their preferences, two biases may be present. These biases are, at least to some extent, mutually offsetting.

The approach we have used to measure the chilling effect is superior to one that attempts to compare newspapers' willingness to publish over time—i.e., before and after the *Sullivan* decision was handed down. Even if the problem of obtaining data over a 22-year period could somehow be overcome, it would be virtually impossible to control for all of the other factors that influence a newspaper's decision to publish. The approach used in this study evaluates the change in willingness to publish resulting from a change in the standard of proof, holding all other factors constant.

III. FINDINGS

A summary of the responses to the four scenarios under the three standards of proof is presented in table 3.1. Willingness-to-publish responses spanned the spectrum from 0, absolutely unwilling to publish, to 10, absolutely willing to publish. A large number of the responses were clustered at or near the extremes: many newspapers were either very willing or very unwilling to publish. The editors expressed somewhat more reluctance to publish, even under the actual malice rule, then the authors had anticipated. The scenarios, with the exception of the first, were designed to lean in the direction of being publishable.

As anticipated, editors were far more reluctant to publish the anti-pornography advertisement in Scenario 1 than any of the other pieces. In written comments, some of them expressed an aversion to the use of the word "kingpin," indicating this term would invite a lawsuit. For the same reason, several of the attorneys who reviewed the scenarios at our request advised against publication of Scenario 1 as written. Moreover, the attorneys' relative ranking of the four scenarios on the basis of libel risk was close to our own ranking.

A chilling effect resulting from a reduction in the standard of proof can be observed in table 3.1. The percentage of editors absolutely willing to publish declines as the standard of proof is reduced, while the percentage absolutely unwilling to publish increases as the standard of proof declines. The magnitude of the chilling effect is not insubstantial. A change in the standard from malice to negligence reduces the percentage of editors who are absolutely willing to publish by between 9.7 percent and 16.5 percent. A change from malice to strict liability reduces the percentage by between 13.6 percent and 28.7 percent.

Data on mean changes (reductions) in willingness to publish as the standard is reduced are found in table 3.2. In Scenario 1, the mean change is greatest when willingness to publish under the higher standard of proof is equal to 10. As willingness to publish under the higher standard declines, the mean change in willingness to publish declines as well.

In Scenarios 2 through 4, the pattern is somewhat different. The mean change is relatively small when willingness to publish under the higher standard of proof is equal to 10. As willingness to publish under the higher standard declines, the mean change at first increases, but then decreases. This is the pattern predicted by several editors we contacted during the survey. They indicated that the chilling effect resulting from a reduction in the standard would be small if an editor were strongly in favor of or strongly opposed to publication under

TABLE 3.1: Willingness to Publish Under Different Scenarios and Different Liability Rules

Scenario	Liability Rule	Percentage of Papers Indicating Willingness to Publish										
		0	1	2	3	4	5	6	7	8	9	10
1	Malice	46.6	3.4	4.9	3.9	3.9	3.4	1.9	2.4	8.7	4.9	16.0
	Negligence	51.5	5.8	4.9	3.9	2.9	10.2	3.9	3.4	4.4	2.9	6.3
	Strict Liability	63.6	9.2	6.3	6.8	2.4	4.4	1.5	1.5	1.9	—	2.4
2	Malice	1.9	1.5	1.0	1.0	1.5	1.9	2.4	3.9	10.7	9.7	64.6
	Negligence	2.9	1.0	1.9	1.5	4.4	6.3	7.3	8.3	9.7	8.7	48.1
	Strict Liability	10.2	4.9	6.3	4.9	5.8	6.8	3.4	7.8	7.8	6.3	35.9
3	Malice	13.6	3.9	2.9	1.0	1.5	3.9	2.9	3.4	6.3	8.7	51.9
	Negligence	14.0	4.9	2.9	2.9	1.0	9.2	5.8	6.3	7.8	8.7	36.4
	Strict Liability	22.3	4.9	6.3	6.3	3.9	7.3	5.3	1.0	5.3	5.8	31.6
4	Malice	16.0	1.5	1.9	1.5	1.9	3.4	3.4	6.3	3.9	5.8	54.4
	Negligence	17.0	1.9	5.3	1.5	1.9	7.8	2.9	4.9	6.8	6.8	43.2
	Strict Liability	24.3	3.9	3.9	2.4	3.4	6.3	3.9	4.4	4.9	6.8	35.9

malice, while it would be much greater if the editor were initially uncertain whether to publish. The anomalous results in Scenario 1 may be related to the fact that the vast majority of editors were not in favor of publication. The relatively few who indicated they were absolutely willing to publish under the higher standard of proof may have harbored reservations, and therefore may have experienced a significant change of heart when the liability standard changed.

Data on the proportion of editors who were chilled in specific scenarios by a change in the standard appear in table 3.3 Chilling is defined as a non-zero change in willingness to publish brought about by a reduction in the standard of proof. A reduction in willingness to publish of six units along the 0 to 10 scale is equivalent to a reduction of only one unit using this definition. This proportion of editors who were chilled as a result of a change in the standard from actual malice to negligence ranges in value from 23.3 percent to 34.0 percent. The proportion chilled as a result of a change in the standard from actual malice to strict liability ranges in value from 35.9 percent to 49.5 percent. Roughly seventy percent of the papers that were chilled as a result of a change in the standard from actual malice to strict liability were also chilled when the standard changed from actual malice to negligence.[27]

What types of papers are particularly sensitive to a change in the

TABLE 3.2: Mean Change in Willingness to Publish

Scenario	Change in Liability Rule		Mean Change When Response Under i Equals				
	From (i)	To (j)	0	1–3	4–6	7–9	10
1	Malice	Negligence	0	.80	.33	2.18	2.33
	Malice	Strict Liability	0	1.28	3.37	5.55	5.73
	Negligence	Strict Liability	0	.97	3.03	3.64	3.85
2	Malice	Negligence	0	.71	.75	1.38	.70
	Malice	Strict Liability	0	1.14	2.83	3.22	2.19
	Negligence	Strict Liability	0	1.33	2.87	1.64	1.11
3	Malice	Negligence	0	.25	.71	1.42	.78
	Malice	Strict Liability	0	.63	2.06	3.55	1.97
	Negligence	Strict Liability	0	.86	2.24	2.34	.47
4	Malice	Negligence	0	.60	.72	1.15	.66
	Malice	Strict Liability	0	1.30	1.61	2.76	1.55
	Negligence	Strict Liability	0	1.06	1.88	1.76	.46

liability standard? A smaller chilling effect is expected to result from a change in the standard when a large percentage of a paper's circulation is accounted for by street and machine sales rather than carrier delivery and mail subscription. Within the sample, the percent of circulation accounted for by street and machine sales ranges in value from a low of 0 percent to a high of 85 percent. Unlike newspapers that rely on home delivery, newspapers sold principally on the street must have attention-getting front-page headlines that will capture the attention of passers-by. The content of the stories accompanying those headlines may be controversial. If the standard proof were reduced, newspapers that sell a large percentage of papers through street and machine sales would have a financial incentive to attempt to maintain this marketing strategy. The chilling effect would therefore be smaller for this type of paper.

It is possible, of course, that a paper sold primarily through home delivery may be less willing to publish controversial material, under the existing standard of malice, than one sold principally in stores, at news-stands, and by machines. If so, a reduction in the standard of proof may have a greater chilling effect in the latter case, simply because more potential exists to modify editorial policy. Home-delivered papers are already more conservative in their willingness to assume risk.

The relationship between circulation size and the chilling effect is

TABLE 3.3: Proportion of Papers Chilled by Change in Liability Rule

| Scenario | Change in Liability Rule | | Proportion of Papers Chilled |
	From	To	
1	Malice	Negligence	34.0
	Malice	Strict Liability	44.2
	Negligence	Strict Liability	35.9
2	Malice	Negligence	33.5
	Malice	Strict Liability	49.5
	Negligence	Strict Liability	44.2
3	Malice	Negligence	29.6
	Malice	Strict Liability	42.2
	Negligence	Strict Liability	37.9
4	Malice	Negligence	23.3
	Malice	Strict Liability	35.9
	Negligence	Strict Liability	32.0

indeterminate, *a priori*. A large newspaper has greater financial resources necessary to defend a libel action, and, hence, may be chilled to a lesser extent than a small paper if the liability standard were changed. However, it may well recognize that potential plaintiffs view it as a more prominent target—and one with "deeper pockets" than a small newspaper; consequently, the chilling effect may actually be greater for large papers. The impact of population of market area and market penetration, defined as the ratio of circulation to population of market area, is similarly ambiguous.

A newspaper's competitive environment is expected to affect its response to a change in the standard. If the standard of proof is reduced, a newspaper that competes against other papers for market share is less likely to be deterred from publishing a controversial and high reader interest piece than a paper with no competition, especially if the paper believes its competitors will react similarly. The number of competitors is typically small, and each paper will consider the possible reaction of its rivals in formulating its own strategy.[28]

The effects of having been sued in the past and of having paid damages are difficult to assess *a priori*. The chilling effect resulting from a reduction in the standard may be greater for a paper that has been sued within the last fifteen years than for a newspaper which has not been sued. Even if a paper carries libel insurance (and 189 of the 206 papers did) the deductibles can exact a heavy burden on the paper in defending the suit.[29] A paper that has incurred such a cost (out-of-pocket expenses and the opportunity cost of time spent in meetings with attorneys, in preparing a defense, in discovery, depositions, and trial) may be especially sensitive to the threat of a future libel suit and may be chilled to a greater extent by a decrease in the standard than a paper that has not been sued. Another possibility exists, however. A paper that has defended a libel action may already have modified its editorial policy and become more cautious. If such is the case, a change in the standard may have little further effect.

A paper that has paid damages in the past may be acutely aware of the hazards of libel litigation and may be chilled to a greater extent by a change in the standard than a paper that has not paid damages. However, as before, a paper that has paid damages may already have become very cautious, in which case further caution would not be expected by a change in the standard. Still another possibility is that of a newspaper which has paid damages in the past because it had (and continues to have) a propensity toward highly controversial and potentially defamatory articles and may be willing to accept risk. Such a paper would not be expected to be deterred a great deal if the standard of proof were reduced.

We used least-squares regression and logistic regression analysis to see which factors will in fact influence the chilling effect. Logistic regression treats the chilling effect as categorical: A reduction in the standard of proof either will create a chilling effect or it will not. Least-squares regression analysis treats the chilling effect as continuous: it attempts to explain the *magnitude* of that effect. Both techniques assess the relationship between the chilling effect and all of the factors that are hypothesized to influence it simultaneously. Such an approach is superior to one that evaluates the impact of each factor separately on a paper's reaction to a change in the standard. Let us say, for example, that we had measured the impact of a paper's competitive environment on the chilling effect, without considering the influence of all the other factors that may be involved. We might have obtained spurious results, which we would have attributed to competitive environment—an explanation that rightfully belongs to one of the other variables. An explanation of the results of the statistical analysis is provided here. Those who wish technical documentation of the analysis are referred to Appendix C and to the endnotes.

An examination of the statistical results demonstrates that the percent of circulation accounted for by street and machine sales exerts a significant influence on a paper's reaction to a change in the standard of proof in several of the regressions. As hypothesized, those papers with large street sales are least likely to be chilled by a reduction in the standard of proof. An economic factor is clearly at work here. Papers sold primarily on the street must, out of necessity, be greater risk takers.

A newspaper's competitive environment is also of importance. Our statistical analysis confirms our hypothesis that a paper is less likely to be chilled when it competes against other papers for market share. This finding is especially significant in view of the trend toward one-newspaper markets.

We found no statistical evidence whatsoever that small newspapers are more adversely affected than large papers by a change in the standard. Moreover, evidence from two of the least-squares regressions and from several of the logistic regressions, indicates that large newspapers would be chilled to a greater extent than small papers by such a change. The evidence concerning market penetration, defined as the ratio of circulation size to population of market area, is mixed. Some of the results point to a larger chilling effect among papers having greater market penetration; whereas others point to a smaller chilling effect among this type of paper.

The effect of a newspaper's experience in defining libel actions and in paying damages is quite interesting. The statistical results show that a newspaper which has been sued in the last fifteen years but has not paid

damages would be chilled to a greater extent by a reduction in the standard than a paper that has not been sued. Yet the *marginal* effect of payment of damages, once the paper has been sued, is to reduce the chilling effect resulting from a change in the standard. In fact, there is some evidence that the chilling effect resulting from a reduction in the standard is *smaller* for newspapers that have been sued and have paid damages in the past than for newspapers that have never been sued.[30] Either payment of damages in the past has already caused the paper to exercise more caution, so that a change in the liability standard will have little further effect, or it may have a natural propensity toward controversial stories and will not react a great deal to a reduction in the standard of proof. Further statistical analysis[31] was performed which indicates that a newspaper that has paid damages in the past is less likely to publish, under the existing standard of malice, than a paper that has not paid damages in the past. Therefore, the more likely explanation is that a paper that has paid damages in the past has already become more cautious.

The statistical results concerning the influence of the newspaper's initial willingness to publish are consistent with our earlier findings. In scenarios 2 through 4, the chilling effect resulting from a reduction in the standard of proof is relatively small when the paper is either strongly in favor of or strongly opposed to publication under the higher liability standard, but is greater when the paper is initially uncertain concerning the advisability of publication. When the standard proof in Scenario 2 is reduced from actual malice to negligence, for example, the peak chilling effect occurs when willingness to publish under malice is equal to 5.99.[32] As before, the pattern in Scenario 1 is somewhat different. When the standard proof in Scenario 1 is changed from actual malice to strict liability, or from negligence to strict liability, the chilling effect is greatest when willingness to publish under the higher standard is equal to 10, and declines as willingness to publish falls. When the standard in Scenario 1 is changed from malice to negligence, the maximum chilling effect occurs when willingness to publish under the higher standard (malice) is equal to 9.30.

Libel insurance would be expected to reduce the chilling effect, yet no such pattern was detected. What may be occurring is that newspapers that obtain coverage (as the vast majority of papers have done) may be more averse to risk and hence more sensitive to the threat of a libel action than those papers that choose to publish without insurance. The presence of libel insurance may simply compensate for the additional aversion to risk among those papers that obtain coverage.[33] The statistical results also show no variation in the chilling effect based on region of the country in which the newspaper is located.[34] There may be

variation from city to city within the same region, but there is no evidence of variation across regions.

CONCLUSION

The results of the survey show that a deviation from the *Sullivan* rule increases the likelihood that public persons will prevail in libel actions, while newspapers will be less likely to publish articles and opinion pieces on matters of public concern. The chilling effect is not uniform: it is most pronounced among papers that do not face competition, for which street and machine sales constitute a small percentage of circulation, and that have been sued but have not paid damages in the past.

The findings appear to argue against a reduction in the standard of proof in libel actions since such a change would discourage the media from gathering and disseminating information necessary for rational and informed judgment. By extension, the findings appear to argue against any change that would increase the likelihood that the media would be sued, would have to defend against a libel action, or would be required to pay damages. Yet society has an interest not only in encouraging public discourse but also in protecting reputation. Decisions concerning the optional liability rule must take into account both of these factors. Two of the authors have investigated the issue of the optimal liability rule elsewhere.[35]

The question of whether the protection afforded to the press in libel actions will be reduced and what the effects will be may not be merely academic. Even in some recent U.S. Supreme Court decisions favorable to the press, sharply worded dissents indicate great dissatisfaction with the current level of protection afforded the media.[36] The Supreme Court has refused to broaden the concept of libel to include the intentional infliction of emotional distress due to satirical comment. It was urged to do so by the Reverend Jerry Falwell in his suit against *Hustler* Magazine.[37] In contrast, shortly thereafter, that same court upheld the largest libel award ever brought before it, over $3 million, against CBS, for commentary severely critical of the tobacco industry.[38] It is not at all clear, given the changing composition of the Court, that the media will enjoy the same protection in the future.

APPENDIX A: NATIONAL LIBEL SURVEY

INSTRUCTIONS: The purpose of this survey is to discover the effect that standards of legal liability in libel actions have on the decision to

publish or not to publish an item. In answering the questions, simply react as you would in your capacity as an editor of a newspaper. We realize that actual decisions are made in a much more complex environment than that which is presented here. But, we are interested in the relative weight of the factors discussed rather than an absolute judgment.

The standards of legal liability under study and their definitions are as follows:

1. *Strict Liability:* Any false, defamatory statement published can result in an award of damages *no matter how much care* was taken to avoid the false statement. It is easiest to win damages under this standard.

2. *Negligence:* A false, defamatory statement can result in an award of damages *only if the newspaper did not use reasonable care* in checking on the truth or falsity of the statement. It is more difficult to win damages under this standard than under strict liability.

3. *Actual Malice: Only knowledge of the falsity* of a statement or *reckless disregard of whether the statement was true or false* can result in an award of damages. Sometimes referred to as the Sullivan Rule, it is most difficult to win an award of damages under this standard.

As you read each of the following brief situations, we would like to know whether your decision to publish would be influenced by the legal standard that applied in the case. Simply circle the number that you feel best indicates your willingness to publish the relevant item having followed normal editorial procedures under each of the standards.

Please Proceed to Situation One—

Situation One

A citizens group has formed to combat pornography. It wishes to purchase a half page ad in your paper. The ad supports the closing of pornography outlets in your city. The ad also names a particular individual as the "kingpin of the pornography business" in your city. The ad further details the harm that pornography does, especially to women, and then details the connections between organized crime and the pornography business nationally. It does not name a specific individual as associated with organized crime. The alleged "kingpin" is a person well known in the community and sits on the city plan board. It is verified by a staff member that he owns several "adult bookstores."

	WILLINGNESS TO PRINT										
	ABSOLUTELY UNWILLING									ABSOLUTELY WILLING	
STRICT LIABILITY	0	1	2	3	4	5	6	7	8	9	10
NEGLIGENCE	0	1	2	3	4	5	6	7	8	9	10
ACTUAL MALICE (Sullivan Rule)	0	1	2	3	4	5	6	7	8	9	10

Situation Two

During the "open forum" segment of a local city council meeting, a citizen complains vehemently about the new, more stringent housing inspection plan. When he is chastised by the mayor for his intemperate remarks, the citizen replies, "Why you are the biggest slumlord in the city," and then proceeds to produce what he claims is evidence of the fact that the mayor owns numerous properties that were cited even under the old, more lenient code. It is established that the mayor owns numerous rental properties. The reporter on the scene, an experienced staff writer, is certain of the correctness of the quotes and includes them in a story she files. It is established, through further investigation, that some of the mayor's properties were indeed cited, but for relatively minor violations.

	WILLINGNESS TO PRINT										
	ABSOLUTELY UNWILLING									ABSOLUTELY WILLING	
STRICT LIABILITY	0	1	2	3	4	5	6	7	8	9	10
NEGLIGENCE	0	1	2	3	4	5	6	7	8	9	10
ACTUAL MALICE (Sullivan Rule)	0	1	2	3	4	5	6	7	8	9	10

Situation Three

An editorial critical of the Chief of Police refers to him as "deceptive." The writer states that "he often misleads the City Council, sometimes blatantly lies to them." The basis of the editorial is a series of news stories by three reporters over a six-month period in which various officials are quoted as saying that the Police Chief had furnished the Council with inaccurate, misleading, and self-serving information about steps he was taking to reduce the crime rate. The editorial concludes

that "we can't have honest law enforcement if we don't have honesty at the top."

	WILLINGNESS TO PRINT										
	ABSOLUTELY UNWILLING										ABSOLUTELY WILLING
STRICT LIABILITY	0	1	2	3	4	5	6	7	8	9	10
NEGLIGENCE	0	1	2	3	4	5	6	7	8	9	10
ACTUAL MALICE (Sullivan Rule)	0	1	2	3	4	5	6	7	8	9	10

Situation Four

Your humor columnist, who is compared by many local people to Art Buchwald, makes the claim in a column that the country administrator is such a skinflint that he is "building his own casket and digging his own grave to save on funeral expenses." In an interview in your paper somewhat earlier, the administrator had spoken with pride of his frugal nature. No specific criticism is made of the performance of the administrator's public duties in the column.

	WILLINGNESS TO PRINT										
	ABSOLUTELY UNWILLING										ABSOLUTELY WILLING
STRICT LIABILITY	0	1	2	3	4	5	6	7	8	9	10
NEGLIGENCE	0	1	2	3	4	5	6	7	8	9	10
ACTUAL MALICE (Sullivan Rule)	0	1	2	3	4	5	6	7	8	9	10

Finally, in order to classify your opinions, would you please give us the following information about your paper.

1. Approximately what percentage of circulation is accounted for by:

   ____ % Carrier Delivery
   ____ % Street and Machine Sales
   ____ % Mail Subscriptions
   100% TOTAL

2. Average Daily (Mon.–Fri.) Circulation _____

3. Approximate Population of Market Area _____

4. How many papers do you directly compete with in your market area? _____

5. How many of your competitors, if any, are owned by the same company that owns or controls your paper? _____

6. Approximately how many times has your paper been sued for libel in the last fifteen years?

   Never   1 to 3   4 to 6   7 to 9   10 or more

7. Have you ever had to pay an award for damages in a libel case?

8. Does your newspaper carry insurance in the event you are sued for libel?

   YES   NO

Thank you for your help.

APPENDIX B: SAMPLE

Characteristics—Distribution of Respondents by Circulation Size, Population of Market Area, Number of Competitors, Percent of Circulation through Street and Machine Sales, Number of Times Sued, Damages Paid, Insurance Status, Region ($N = 206$).

TABLE 3.B.1

Circulation	Percent
5,000 or less	9.2
5,001–10,000	24.3
10,001–25,000	26.7
25,001–50,000	22.8
50,001–100,000	9.7
100,001–250,000	4.9
250,000–500,000	1.5
More than 500,000	1.0

TABLE 3.B.2

Population of Market Area	Percent
25,000 or less	16.0
25,001–50,000	21.8
50,001–100,000	20.4
100,001–500,000	33.0
500,001–1,000,000	5.3
More than 1,000,000	3.4

TABLE 3.B.3

Number of Competitors	Percent
0	18.4
1	23.8
2–3	33.0
4–5	17.0
6 or more	7.8

TABLE 3.B.4

Percent of Circulation Through Street/Machine Sales	Percent
5 or less	24.3
6–10	32.0
11–15	12.6
16–20	17.0
More than 20	14.1

TABLE 3.B.5

Number of Times Sued	Percent
0	36.9
1–3	39.3
4–6	13.6
7–9	4.9
10 or more	5.3

TABLE 3.B.6

Paid Damages	Percent
No	84.0
Yes	16.0

TABLE 3.B.7

Insured	Percent
Yes	91.7
No	8.3

TABLE 3.B.8

Region*	Percent
North	14.2
Midwest	33.8
South	31.9
West	19.1
Pacific	1.0

*Standard Bureau of the Census Classification

APPENDIX C: ECONOMETRIC RESULTS

The results of least-squares estimation of the regressions are found in table 3.1. Variables are defined as follows:

TABLE 3.C.1: Regression Results

EQ.	DEPENDENT VARIABLE	INTERCEPT	CIRSMS	AVGDIR	POPMKT	PCTMKT
1	DIFAMN1	-0.21163 (0.371)	0.00456 (0.010)	0.63721* (0.193)	-0.05916* (0.019)	0.68177 (0.933)
2	DIFAMSL1	0.59699 (0.475)	-0.00433 (0.013)	0.38515 (0.247)	-0.06011* (0.024)	-1.79004* (1.195)
3	DIFNSL1	0.74708 (0.400)	-0.01028 (0.011)	0.02658 (0.207)	-0.02505 (0.020)	-2.04500* (1.002)
4	DIFAMN2	-0.07478 (0.642)	-0.02271* (0.010)	0.33080* (0.196)	-0.02272 (0.019)	0.58339 (0.953)
5	DIFAMS2	0.33910 (1.352)	-0.04072* (0.021)	0.26723 (0.413)	-0.01985 (0.041)	1.35783 (2.007)
6	DIFNSL2	0.14334 (0.872)	-0.01668 (0.015)	-0.03371 (0.296)	0.00077 (0.029)	0.10210 (1.449)
7	DIFAMN3	0.21837 (0.420)	0.00397 (0.0097)	0.05795 (0.190)	-0.00643 (0.019)	-0.30347 (0.908)
8	DIFAMSL3	1.15422 (0.825)	0.00810 (0.019)	-0.16486 (0.374)	-0.01391 (0.037)	-2.01870 (1.785)
9	DIFNSL3	0.88829 (0.500)	-0.00518 (0.012)	0.05359 (0.228)	-0.01618 (0.022)	-2.14449* (1.091)
10	DIFAMN4	0.96105 (0.423)	-0.00459 (0.011)	0.19482 (0.204)	-0.01714 (0.020)	2.69375* (0.977)
11	DIFAMSL4	0.64223 (0.710)	-0.00963 (0.018)	0.17577 (0.342)	-0.02281 (0.033)	2.11581* (1.641)
12	DIFNSL4	0.46199 (0.431)	-0.01564* (0.011)	0.06307 (0.206)	-0.00324 (0.020)	-0.71335 (0.991)

* Indicates significance at the .10 level. Standard errors appear below each coefficient.

DEP. VARIABLE = Change in willingness to publish resulting from a specified reduction in the standard of proof, e.g., DIFAMN1 = difference (DIF) in willingness to publish when standard of proof is reduced from actual malice (AM) to negligence (N) in Scenario 1.

CIRSMS = Percent of circulation accounted for by street and machine sales.

AVGDIR = Average daily (Monday–Friday) circulation.

COMPETS	SUED	PAYDAM	SITXXX	SITXXX2	R^2	$\overline{R}^2$	F
0.05196 (0.251)	−0.13716 (0.213)	−0.34317 (0.280)	0.47835* (0.107)	−0.02571* (0.011)	0.40	0.37	14.371*
−0.16315 (0.322)	−0.28334 (0.273)	−0.62632* (0.359)	0.79139* (0.137)	−0.01816* (0.014)	0.69	0.68	49.14*
0.11099 (0.271)	−0.18919 (0.230)	−0.42574 (0.302)	0.68954* (0.107)	−0.02611* (0.012)	0.56	0.54	27.99*
−0.34062* (0.256)	0.44265* (0.219)	−0.53711* (0.286)	0.58927* (0.197)	−0.04919* (0.016)	0.11	0.06	2.57*
−0.50007 (0.540)	0.68784* (0.462)	−0.81391 (0.603)	1.29782* (0.415)	−0.10138* (0.033)	0.09	0.05	2.14*
−0.29899 (0.388)	0.28163 (0.329)	−0.19495 (0.434)	0.96950* (0.247)	−0.08507* (0.019)	0.12	0.08	2.91*
−0.30075 (0.247)	0.17642 (0.210)	−0.55123* (0.274)	0.33187* (0.125)	−0.02392* (0.012)	0.10	0.06	2.48*
−0.87749* (0.485)	0.03168 (0.413)	−1.05142* (0.539)	0.92547* (0.245)	−0.06920* (0.023)	0.16	0.12	4.12*
−0.42735* (0.297)	−0.15024 (0.252)	−0.34607 (0.329)	1.03655* (0.127)	−0.09561* (0.012)	0.29	0.26	8.86*
−0.33866* (0.265)	0.49950* (0.225)	−0.71607* (0.297)	0.32292* (0.128)	−0.02717* (0.012)	0.13	0.09	3.37*
0.04033 (0.445)	0.88557* (0.379)	−1.33760* (0.499)	0.80195* (0.216)	−0.06597* (0.020)	0.15	0.11	3.84*
−0.43173* (0.269)	0.39687* (0.228)	−0.52423* (0.300)	0.86631* (0.122)	−0.08103* (0.011)	0.24	0.20	6.83*

POPMKT = Population of market area.

PCTMKT = Market penetration (ratio of circulation size to population of market area).

COMPETS = 1 if paper faces competition; 0 otherwise.

SUED = 1 if paper was sued for libel in last fifteen years; 0 otherwise.

PAYDAM = 1 if paper paid award for damages; 0 otherwise.

SITXXX = Willingness to publish under higher standard of proof.

SITXXX2 = SITXXX squared.

SITXXX and SITXXX2 were included as regressors to test for an inverted-U response based on willingness to publish under the higher standard. The expected signs of the coefficients on SITXXX and SITXXX2 are positive and negative respectively. Measurement of the chilling effect when the paper has been sued and has paid damages in the past, relative to the omitted class (not sued), is made via the coefficient sum on SUED and PAYDAM in table C.2.

Logistic regressions were used to identify variables that can distinguish between chilled and non-chilled categorical states. The dependent variable CHILL is defined as 0 when a reduction in the standard of proof does not result in a change in willingness to publish and 1 when it does.

TABLE 3.C.2: Significance of Coefficient Sum (SUED and PAYDAM)

Eq.	Sum	Standard Error[a]
1	−0.48034	0.302
2	−0.90966*	0.387
3	−0.61492*	0.327
4	−0.09445	0.310
5	−0.12607	0.653
6	+0.08667	0.470
7	−0.37481	0.295
8	−1.01974*	0.580
9	−0.49631	0.355
10	−0.21657	0.318
11	−0.45203	0.534
12	−0.12736	0.323

[a] Calculated from the $\hat{\sigma}^2 (X'X)^{-1}$ matrix.
* Indicates significance at the .10 level.

Application of least-squares regression in this situation may yield predicted values of the dependent variable which are greater than 1 or less than 0. Also, with a binary dependent variable, the assumption of homoskedastic disturbances in least-squares regression is untenable. As a result, logistic regression, which constrains the response to the unit interval, is used. Logistic regression is preferred to the linear discriminant model in our application since several of the explanatory variables

TABLE 3.C.3: Logistic Analysis—*Actual Malice to Strict Liability in Scenario 2*

Variable	Coefficient	Stand. Error	χ^2	Probability
INTERCEPT	−0.33612	0.428	0.62	0.432
PCTMKT	2.99701	1.450	4.27	0.039
CIRSMS	−0.02001	0.014	2.18	0.140
PAYDAM	−0.42768	0.410	1.09	0.297

Model Chi-Square 9.81
(−2Log Likelihood Ratio)

Probability 0.020

TABLE 3.C.4: Logistic Analysis—*Actual Malice to Negligence in Scenario 4*

Variable	Coefficient	Stand. Error	χ^2	Probability
INTERCEPT	−2.06086	0.624	10.92	0.001
PCTMKT	3.13639	1.505	4.34	0.037
PAYDAM	−1.19176	0.643	3.43	0.064
COMPETS	0.56414	0.505	1.25	0.264

Model Chi-Square 10.11
(−2Log Likelihood Ratio)

Probability 0.018

are qualitative, violating the multivariate normality assumption of discriminant analysis. Since the logistic model is highly nonlinear in the parameters, problems of convergence to the final solution, using the maximum likelihood approach, can become very serious as the model size and model complexity increase. The results of two logistic regressions are found in tables 3.C.3 and 3.C.4.

ACKNOWLEDGMENTS

NOTES

1. 376 U.S. 254 (1964).
2. *Id.* at 279.
3. *Id.* at 279–80.
4. Associated Press v. Walker, 388 U.S. 130 (1967).
5. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).
6. See Kalven, "The New York Times Case: A Note on The Central Meaning of the First Amendment" *1964 Sup. Ct. Rev.* 191.
7. 418 U.S. at 390.
8. See Riley, "Lawyers Who Look for Libel" 7 *National Law Journal* 1 (May 27, 1985).
9. Massing, "The Libel Chill: How Cold Is It Out There?" *Columbia Journalism Review* 31 (May–June 1985).
10. See Soloski, "The Study and the Libel Plaintiff: Who Sues for Libel?" 71 *Iowa L. R.* 217, 220 (1985) in which the results of a survey of libel plaintiffs between 1974 and 1984 reveal that seven out of ten cases were against the news media and that among media defendants, newspapers were the medium most often sued. Only one-fifth of the plaintiffs said they sued for money. Most said they sued to restore their reputation or punish the media.
11. Bezanson, "Libel Law and the Realities of Litigation: Setting the Record Straight" 71 *Iowa L. R.* 226–230 (1985).
12. *Westmoreland v. CBS, Inc.*, 82 CIV. 7913, S.D.N.Y.; *Sharon v. Time, Inc.*, 83 CIV. 4460, S.D.N.Y.
13. Bernstein, "Chilling Effect" or Fresh Air?, *N.Y. Times*, December 23, 1984, at E 13; Cain, "Protect Us From A Reckless Press," *ABA Journal*, July 1985, at 38.
14. Two of the authors have shown elsewhere that the *Sullivan* rule affords the press too much protection and that a new standard, known as "relaxed liability," is required based on the economic theory of the second best. See Renas, Hartmann *et al.*, "Toward

an Economic Theory of Defamation, Liability, and the Press" 50 *Southern Economic Journal* 451 (Oct. 1983) and Hartmann, Renas *et al.*, "Relaxed Liability: A Proposed New Standard for Defamation by the Press" 22 *Am. Bus. L. J.* 93 (1984). The authors have elsewhere compared defamation laws in the United States and the United Kingdom. See Hartmann and Renas, "Anglo-American Defamation Law: A Comparative Economic Analysis" 5 *Journal of Media Law and Practice* 3, London (April 1984).

15. Prosser, *Handbook of the Law of Torts* (1941) (1971).

16. *Id.* 4th edition (1971) at xi.

17. *Id.* at 819.

18. *Prosser and Keeton on the Law of Torts* (1984).

19. "Developments in the Law—Defamation" 69 *Harv. L. R.* 875, 904-5 (1956).

20. *Id.* at 906 (citing as *contra* Swindler, *Problems of Law in Journalism* 99 [1955]).

21. Concerning defenses of privilege and truth and retraction, *see generally* Developments, *supra* note 19 and Prosser and Keeton, *supra* note 18, Sections 114–116A.

22. Prosser, *supra* note 15 at 819–20 (1971).

23. 376 U.S. 254 (1964).

24. "Justice Black and the First Amendment, 'Absolutes': A Public Interview" 37 *N.Y.U. L. Rev.* 549, 557–58 (1962).

25. *Supra* note 5 at 356 (Douglas J., dissenting).

26. Chi-square goodness-of-fit tests were conducted. Pacific and Western regions were combined to ensure that expected cell frequencies were sufficiently large.

27. The proportion of papers that were chilled in none, one, two, three, and all four of the scenarios was also calculated. When the standard is changed from malice to negligence, 41.3% of the papers were not chilled in any of the scenarios. The proportion chilled in only one of the scenarios was 21.4%; the proportion chilled in two of the scenarios was 17.5%; and the proportion chilled in three of the scenarios was 15.5%. Approximately 4% of the papers were chilled in all four of the scenarios. When the standard changes from malice to strict liability, 29.1% of the papers were not chilled in any of the scenarios. The proportion chilled in one, two, three, and all four of the scenarios is 14.6%, 23.8%, 20.4%, and 12.1%, respectively.

28. Papers will behave as non-collusive oligopolists. The argument regarding carrier delivery vs. street sales may also apply to the impact of competitive environment and circulation size on the chilling effect.

29. Deductibles in libel insurance policies have been increasing. See Greenwald, "Libel Cover Crisis Puts the Press on U.S. Media," *Business Insurance* (March 10, 1986) at 19.

30. Tests of significance of the coefficient sum on SUED and PAYDAM, which deal with this issue, are found in Table 3.C.2.

31. Regressions were estimated in which willingness to publish under malice was the dependent variable.

32. The peak chilling effect is determined by setting the first partial derivative of DIFXXX with respect to SITXXX equal to zero and solving. The second partial derivative is negative, ensuring a maximum.

33. This point came out in a conversation with Henry Kaufman, General Counsel, Libel Defense Resource Center. Since virtually all of the papers sampled carried such insurance, and since this factor was found to be statistically insignificant, the insurance variable was dropped from the least-squares and logistic regressions.

34. Regional dummy variables were included as regressors in the least-squares and logistic regressions. Also, chi-square contingency tests were performed.

35. See *supra* note 14.

36. See, e.g., Bose Corp. v. Consumers Union of U.S., Inc., 80 L Ed 2d 502 (1984)

and Philadelphia Newspapers, Inc. v. Hepps, 89 L Ed 2d 783 (1986) (dissenting opinions). The Burger Court was sometimes regarded as anti-defendant in libel actions. See Garbus, "New Challenges to Press Freedom," *New York Times Magazine*, (Jan. 29, 1984) at 34.

37. Hustler Magazine v. Falwell, —US— 107 Sct 3259, 97 LEd 24 788.

38. Jacobson v. Brown & Williamson, NDI 11, 644 FSup 1240, 1988.