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PRINCIPLE AND INTEREST IN LIBEL LAW AFTER *NEW YORK TIMES:* An Incentive Analysis

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I. TWO FACES OF LIBEL

The law of libel has two very different faces. The first is derived from tort law. The issues there are the appropriate restraints on defamatory speech and the efficient mechanisms for imposing those restraints. The argot of efficiency analysis, if still not entirely common, provides an accepted vocabulary for this discussion. The other face of libel law is turned toward the First Amendment. The discussion of First Amendment concerns rarely includes explicit reference to dollar-valued costs and benefits. Rather, the high ground of principle provides the terms for this discussion, arguing the requisites of free speech or the virtues of vindication. Some commentators acknowledge that competing principles must be "balanced," and all commentators in fact engage in this practice, but many find the concern with economic costs and benefits misguided. The two different faces of libel, thus, produce two divergent conversations: one about economic interests among economists and economically oriented law professors, the other about First Amendment principles among other law professors, representatives of the news media, and plaintiffs' lawyers.

It should come as no surprise that the conversations are not so radically different in substance as in the lexicons they employ. The disparate focal points, however, draw the attention of torts discussants more quickly to some issues, of First Amendment discussants more readily to others. Discussion of *New York Times v. Sullivan*[1] illustrates the manner in which the conversations diverge. At the same time, examination of the decision's impact reveals how First Amendment principle and economic interest interact. Specifically, analysis of the incentive effects of *New York Times* reveals the economic basis for various parties' reactions, including parties that speak in terms of principle.

II. CHANGE OF *TIMES*: COMPETING EXPLANATIONS

A. Libel Litigation: Old and New

Before *New York Times*, libel law was a subject of tort law, but not a subject of serious constitutional concern.[2] The Supreme Court's dicta on the subject for some time had suggested that defamatory speech did not trigger First Amendment scrutiny.[3] Unlike its treatment of obscenity, the Court had not followed these dicta with efforts to define the excluded speech.[4] The law of libel thus was left to state control. The prevailing rule was strict liability with various privileges to defame.[5]

The Supreme Court's *New York Times* decision changed the law of libel in several ways. First, the decision explicitly brought defamatory speech within the ambit of First Amendment protection.[6] Second, it mandated proof of falsity as a constitutional prerequisite to a public figure's recovery for defamation.[7] Third, the decision forbade recovery by defamed public officials without clear and convincing proof that the defamatory statement had been made with "actual malice."[8]

Two decades later, the intensifying debate over libel law has begun to focus on the effects of this last change of *Times*, especially its effects on suits against news media.[9] So far as one can tell from available data (admittedly a qualification of no small significance), the post-*New York Times* world is characterized by suits against media defendants that have risen quite steeply in amounts claimed, in mean jury awards (when damages are awarded), and in the costs of litigation (at least to defendants), although the proportion of these suits won by plaintiffs is extraordinarily low.[10] The explanations for these changes vary with the author's perspective.

B. View from the First Amendment

Commentators writing from the First Amendment tradition suggest that non-economic factors provide the key.[11] One such author blames increased juror distrust of news media for the increase in awards.[12] This explanation of high awards may identify one factor behind initial jury awards, which are more likely than ultimate judgments following appeal to favor plaintiffs. It is not, however, a complete explanation of the current state of libel, as it does not address the relative infrequency of trials or of ultimate recoveries against media defendants.

Other commentators writing from the First Amendment vantage opine that the low incidence of pro-plaintiff judgments reflects libel plaintiffs' general uninterest in the financial stakes of litigation: these plaintiffs seek to establish not the fault of press defendants (the legal requisite of

recovery) but the falsity of the critical press statement.[13] The plaintiffs also sue out of irritation with the institutional press' unresponsiveness to informal complaints.[14] These plaintiffs assertedly are represented by attorneys who are unfamiliar with libel law and over-optimistic about the success of these cases.[15] Plaintiffs are said to succeed simply by getting their case to court and are able to do so at a cost only a fraction of that spent on average by libel defendants.[16]

There is much to this explanation, but it leaves many questions unanswered. Why, for instance, do libel defendants settle cases only one-half to one-sixth as often as all tort defendants,[17] given the high costs of defense and the plaintiffs' lack of interest in financial recompense? Why do plaintiffs pursue litigation through trial if they cannot get a favorable judgment? Why would plaintiffs' attorneys systematically misperceive the chance of success? And why are jury libel awards rising rapidly, if plaintiffs are generally uninterested in recovering money judgments?

C. Views from the Economics of Tort

Commentators more familiar with economic tort analysis offer a different view of the developments in libel law, focusing first on the effect of the *New York Times* actual malice rule on the probability of recovery.[18] Raising the threshold of recovery, as *New York Times* did, naturally reduces the incidence of recovery. This change would not provide anything approaching an efficient deterrent to harmful speech unless the size of adverse judgments increased.[19] For various reasons, however, juries and judges have increased damage awards, raising the noncompensatory component of damage awards either expressly through punitive damages or implicitly through inflated compensatory awards.[20]

Whether these changes on balance reduce or enhance efficiency depends on the degree to which the changes in probability of recovery and in award level are correlated and on the extent to which the rule change increases or decreases litigation costs. Presently available data do not suggest a clear answer. The increase in damage awards might be too great or too small to provide optimal deterrence of false statements. So, too, the economic implications of *New York Times* for litigation costs are not entirely clear. As damage awards rise, costs per case should be expected to increase (as these are in part determined, under standard assumptions of rational expectations models, by the award at issue), but the total level of process costs might rise or fall.[21]

This economic explanation, thus, does not produce strong conclusions about the change in libel law, and it also leaves subsidiary questions

unanswered. If expected damage awards drive litigation, why are so many unsuccessful claims not only brought but also litigated to judgment?[22] Why are defense costs so much greater than plaintiffs' costs?[23] Why do press defendants lose much less often than other defendants?[24] If economic factors such as the level of libel damage awards and the probability of recovery explain the structure and costs of libel litigation, how do they account for the very different reactions of judges and juries? Notably, judges, who see many more libel cases than any juror, generally have played the role of reducing large jury libel verdicts, and post-*New York Times* libel law has restricted plaintiffs' ability to secure noncompensatory damages.[25]

At the heart of the tort-economic argument is the relationship between the probability of recovery and the expected award if damages are obtained. Economic analysis suggests that these are not wholly independent variables. The governing legal rule, of course, affects the probability of recovery in any class of cases, but litigation outcomes are not entirely a function of the governing legal rule. As others have argued, it seems likely that the success rate of litigation is also a partial variable of litigation expenditures, which in turn are partially determined by the litigation stakes and partially by the expected probability of recovery.[26] Lowering the chance of recovery will decrease the overall expected return from plaintiffs' litigation expenditures, but it also will increase the marginal return from some litigation expenditures.[27] Given that expenditures help determine outcomes, the magnitude of the decline in libel plaintiffs' recovery rate cannot be thought to follow simply and directly from the rule change without explanation of parties' incentives to invest in litigation. The coincidence of a decline in the proportion of plaintiffs recovering damages and an increase in defendants' litigation costs calls for further explanation.

D. Integrating Analysis: Litigation Stakes and Litigation Incentives

What is at issue in libel suits, money or principle? The starting point for inquiry into the effect of *New York Times'* impact should be the stakes of the litigation, the point where First Amendment and economic tort analysis part company. The tort discussion equates litigation stakes to potential recovery, a common simplifying assumption of economic analysis.[28] First Amendment analysis finds the assumption misplaced:[29] plaintiffs declare that they seek vindication, not dollars;[30] spokesmen for the media assert that the media fight for freedom, not money.[31] Resolution of this argument is critical to understanding the nature of libel litigation,

to assessing the effect of the *New York Times* actual malice standard, and to evaluating proposals to change the law of libel.

Examination of the arguments from tort and First Amendment analysis reveals that each has insights to contribute. Surely, as tort analysis assumes, the prospect of gaining or losing money has a great deal to do with how much is invested in prosecuting and defending libel actions.[32] But the parties' claims to act in large measure without respect to the expected award of money damages have considerable substance as well.[33] Both analytic strands must be integrated to obtain a complete picture of the dynamics of libel. The following sections are a preliminary effort to incorporate into an economic analysis the First Amendment claims that much more is at stake in libel litigation than the possible transfer of damage payments from defendant to plaintiff. Part III offers an incentive-based explanation of these claims, focusing on the special interest of news media defendants.

III. THE MEDIA'S INTEREST IN PRINCIPLE: NON-AWARD STAKES

A. Plaintiffs and Defendants: Award and Non-Award Stakes

For centuries it has been a staple of libel law that information reflecting adversely on someone's performance in his chosen profession harms the subject's reputation, causing tangible, if not always provable, harm.[34] The law reflected an assumption that the information would be credited by some listeners, that some would act on the basis of the information, and that efforts to rebut the information would not be fully successful at dispelling its effect. (Imagine a lawyer running a series of full page advertisements under the bold-face heading "John Jones is not an incompetent attorney.")[35] The information thus is expected to have a negative effect on the subject's earnings from his profession.[36]

Although not traditionally a matter of concern for libel law, the same supposition should hold true for libel defendants: information reflecting adversely on a libel defendant's professional performance should reduce that defendant's earnings as well. This is one determinant of the stakes in libel litigation; judgment for the plaintiff may (partially) reinflate his reputation, but in many instances it will damage the defendant's. Interest in the reputation effect of litigation is a "non-award" stake, separate from the stake each party has in the damage payment explicitly at issue. Another source of non-award stakes, which can be found in any litigation involving a "repeat-play" party,[37] is the expected effect of this litigation on future suits involving that party. For non-media defendants, there is

no reason to believe any greater non-award stake is present in libel suits than in litigation generally.[38] For these defendants, expected transfer payments from them to plaintiffs are a suitable proxy for litigation stakes.

For news media defendants, however, the libel case entails significant non-award stakes. Understanding how losing a libel case can impose additional costs on a media defendant is critical to evaluation of the effect of *New York Times* on libel litigation.

B. Pre-*Times* Libel Stakes

Before examining the peculiar effects of *New York Times* on the non-award stakes of news media defendants, the non-award costs to media defendants from a pre-*New York Times* libel judgment are identified. One source of additional costs to media defendants from loss of a libel suit is the encouragement of additional litigation against the defendant.[39] In addition, loss of a libel case can impose three sorts of reputation-related costs on media defendants beyond those explicitly captured by the damage award.

1. Media Consumers' Demand

The first reputation-related non-award cost derives from reduced consumer demand for the defendant's product. News media are in the business of selling information in packages differentiated by various features: quality and quantity of information, the particular types of information presented (political news, sports, business news, advertising, and so on), the accessibility and attractiveness of its presentation, and price.[40] Consumers do not, of course, all place the same value on every feature. Their varied tastes will lead to their varied choices among news media products, according to the value they place on particular features. And within the group of consumers for any given news product, differences in the importance attached to particular features will cause different sensitivities to changes in that product. Some newspaper readers, for example, may value sports coverages especially; others may prize a comic strip. Changes will affect these groups in very different ways.

Of particular concern here are those consumers who are especially concerned with one aspect of news quality—its veracity. Most news consumers, even within this group, undoubtedly have poor information on the news they buy. But in a competitive market, some well-informed news consumers probably "comparison shop" for news in the same way especially price-conscious or quality-conscious shoppers do for other goods.[41] These news consumers, whose demand is sensitive to the

veracity, or more commonly the *perceived* veracity, of news products, police the quality (and price) of information even if the average consumer is relatively insensitive to, or uninformed about, news veracity.[42]

An adverse libel judgment provides such truth-sensitive consumers with additional information about the truth of the media defendant's product. The information can be useful even when it is ambiguous.

An adverse judgment under pre-*New York Times* law indicated simply that the defendant published a false and defamatory statement. In a world of imperfect information, truth-sensitive consumers would have been uncertain exactly how to evaluate this fact. After all, some errors are expected even from the most accurate sources. News reporting, like other businesses, has an optimal error rate above zero errors.[43] A publication that never prints a falsehood must compromise on some other desirable feature of a news publication: its information will not be so new, its topics not so interesting or important; or it may not be written so well, presented so attractively, or available so inexpensively as it otherwise might have been. For each publication, there is some ideal (profit-maximizing) compromise among these features.[44]

When a news media defendant is found to have published a false statement, consumers who are sensitive to truth may not find that fact very informative. They might conclude that the defendant's truthfulness is within the range they expected or, on the same evidence, they might conclude that the defendant is less truthful than they previously thought.[45] Even if adverse libel judgments are less frequent than the number of errors a given truth-sensitive consumer thinks acceptable, the consumer may believe that only a relatively small number of errors produce libel suits. Hence, when there is any adverse judgment, such consumers may conclude—perhaps unfairly—that the defendant publishes false information more frequently than they previously had thought.[46]

Although the number of truth-sensitive consumers who draw one or the other of these conclusions cannot be known, some consumers should conclude after an adverse libel judgment that the defendant is less trustworthy.[47] It seems probable that these consumers will not be willing to pay so much for the defendant's publication as before, and some may stop buying it altogether. When that happens, of course, the publication's earnings will decline. The potential magnitude of this effect is discussed further below.[48]

2. Media Labor Costs

Libel judgments also affect news media employees. Those who work for news enterprises—at whatever level—are concerned about their professional reputations, which inevitably are tied to the reputation of the

enterprise for which they work.[49] Future employers and peers will, like truth-sensitive consumers, probably infer—again, fairly or unfairly—some greater incidence of falsity after an adjudication of falsity.[50]

Critical to the inference drawn from the adverse judgment is the relative frequency of adverse judgments among comparable news enterprises. The reaction of peers is likely to be based on better information than that of consumers. This has two contradictory effects, increasing the proportion of the group that is aware of the judgment but, given greater confidence in *ex ante* assessments, reducing the likely impact of new information.[51] As with the consumer reaction, the direction, but not the magnitude, of the reaction among journalists to an adverse media libel litigation can be predicted: reputation of the defendant and its employees for truthful reporting will decline. The adverse reputation effect on employees raises labor costs to the enterprise: to get or hold the same caliber employee, the enterprise now must, at the margin, pay more.

3. Media Information Costs

Finally, the reputation of a news enterprise for veracity will affect the cost of acquiring accurate information.[52] Some news sources—those who most value faithful transmission of their information—will discriminate in favor of news enterprises with higher expected fidelity to the truth. At least some of these news sources—most probably those who are frequent sources of significant information—may be both aware of and responsive to judgments of false publication. These sources will therefore also perform a role in monitoring media accuracy.

C. Post-Times Libel Stakes

For all three groups—consumers, employees, and sources—the *New York Times* case should change the effect of an adverse media libel judgment. A finding of false publication will increase doubts about a publication's performance on one important aspect of its job and reduce its value.[53] But the fact of false publication in and of itself does not necessarily suggest serious professional deficiencies; after all, some false statements should be expected.[54]

The natural inference from a finding of publication with actual malice is different. The statement about a losing libel defendant sued by a public official (later public figure) that became implicit in the judgment after *New York Times* is: "defendant is the sort of person (company) who not only prints false information; he does so *knowingly* or *recklessly*." Publication with actual malice suggests that the defendant has little respect

for the truth, which allows the further inference that the veracity of its stories will generally be subject to much more serious question than that of one who merely made a false statement in good faith.[55]

All three monitor groups should react more strongly to this signal. Even if members of the monitor groups do not know or do not fully understand the exact meaning of the actual malice test, the *New York Times* rule indicates that a much more serious delict is necessary for adverse libel judgments and that such judgments implicate not just the veracity of the statement but the process of producing it.[56] Thus, for readers interested in veracity, there will be a greater decline in the expected value of the defendant's product.

No effort has been made to test this hypothesis through rigorous empirical research, but rudimentary data on changes in circulation for recent press libel defendants suggest that, temporarily at least, adverse judgment indeed is followed by a decline in sales.[57] The effect of the more serious adverse finding in libel cases after *New York Times* should also lead to greater downward adjustment in defendant's expected veracity for media employees and sources. This change then will make it that much more difficult to attract and retain qualified employees and to secure information from reliable sources at any given level of investment.

Additional, although similarly inconclusive, evidence of the increase in non-damage stakes wrought by *New York Times* can be found in the difference between the news media's response to accusations of falsity and their reaction to post-*New York Times* libel suits. Outside the context of a threatened suit, most media enterprises are willing, although obviously not eager, to publish corrections or retractions (acknowledging prior publication of false or misleading statements).[58] In contrast, media enterprises' response to the threat of post-*New York Times* libel liability frequently shows no room for compromise. Some media representatives have declared that they never settle a libel suit, at least not a public figure suit.[59] And a greater number of media enterprises have loudly proclaimed the important constitutional principles involved in libel suits against press defendants.[60]

These declarations could simply be strategic ploys by repeat-play defendants who intend to deter similar suits from being brought. After all, the no-settlement strategy at times is observed in other contexts where a large number of nuisance suits—suits for injuries too insubstantial or claims too unlikely to prevail to be worth the full cost of suit—are expected. Both the no-settlement announcement and the invocation of principle can serve this strategic function by raising the expected cost of the suit. Following such pronouncements, compromise is especially em-

barrassing to defendants, thus committing them, and consequently the plaintiff, to see the litigation through.[61]

The very fact that gives impact to such statements—these statements burn one of the few bridges affording a defendant inexpensive escape from the cost of suit, and especially of meritorious suits[62]—however, suggests the possibility that something beyond the possible future damage payments is at issue. Settlement often is a useful money-saving device, especially where large sums are at issue.[63] But if the admission of possible liability itself is costly, the normal economic advantages of settlement will be outweighed in many cases. Indeed, settlement, while undoubtedly saving defendants some of the expected costs of trial, may impose higher non-award costs than court-decreed liability, since settlement does seem to carry an implicit admission of fault.[64]

A related reason for the resistance to settlement in the libel context and for the public assertion that any libel damage payment threatens the very existence of a free press also suggest the role of the press' interest outside the award in this case, its *non-award* interest. These press moves signal not just potential plaintiffs but also other potential monitors —consumers, journalists, and news sources—that the press enterprise does not expect ever to be liable and that it attaches great importance to avoiding liability. The enterprise conveys the message of such confidence it will not commit the sort of error at issue as to be willing to lock itself into a position from which there is no easy escape if a meritorious suit is brought. This signal itself may be valuable enough to overcome the cost of the pronouncements' limitation on litigation strategy. The benefit of such announcement effects depends on the value of the enterprise's veracity to its monitors and the extent to which that value would decline if there were a finding of liability.

D. Effect of *Times*: Efficient Markets and Agency Costs

This analysis posits two principal assumptions as the basis for analysis of *New York Times*' impact on non-award stakes. First, it supposes the existence of groups at the margin of the larger categories of consumers, employees, and sources, who have information respecting, and are sensitive to, media enterprises' veracity. Second, it assumes that there is a response by these groups to media libel judgments, increasing substantially after *New York Times*.

The analysis need not suppose strong equation of the non-award costs actually represented by these effects with a news enterprise's evaluation of its non-award stakes. In a standard equilibrium model of competitive markets, the economic costs of reduced demand and increasingly costly

factors of production (inputs) would define the non-award stakes in any case.[65] The media defendant would behave as though the amount at issue in a libel suit exactly equaled the predicted dollar costs to the news enterprise from the potential damage award and the reactions of monitor groups. Agency-cost analysis[66] suggests that if the response to libel suits lies in the hands of employees-managers who are imperfectly monitored *within* the enterprise and whose individual interests (personal standing and marketability within their profession) are implicated in such suits, the enterprise might overreact to libel suits and overinvest in avoiding adverse judgment.[67]

The choice between these divergent assumptions—efficient, profit-maximizing reaction or inefficient overreaction to post-*New York Times* libel suits—is not critical to the analysis here. It will, however, affect the magnitude of the effects discussed below and, thus, will affect ultimate evaluation of the *New York Times* rule, matters I do not reach in this chapter.

In sum, as First Amendment discussion stresses, to understand libel, one must begin with appreciation of the non-award stakes in libel litigation. First Amendment discussion errs, however, in suggesting that the presence of important non-award interests makes the economic-tort analysis of libel irrelevant. Economic-tort analysis provides useful insight into both the effect of non-award interests on libel litigation and the probable distribution of non-award stakes. Even if non-award stakes derive in part from unknown forces that induce belief in moral principles, the non-award interests represented by invocation of constitutional principle in arguments over media liability for libel also have roots in economic forces. And, regardless of their source, these interests usefully may be incorporated in an economic-tort model. The general implications of non-award interests are explored in part IV below, while effects on various plaintiff and defendant classes are explored in parts V and VI, respectively.

IV. ECONOMICS OF LITIGATION: THE EFFECT OF NON-AWARD STAKES

A. General Effects: Rational Expectations, Media Investment, and Libel Plaintiffs

1. Basic Effects and Litigation Models

Several characteristics of post-*New York Times* libel litigation flow from the increase in non-award liability stakes to press defendants. First, treating investment in litigation as a positive function of stakes, the

investment in defense of libel suits will increase dramatically for some press defendants even if the damage award at issue remains small. Second, the added investment by these defendants decreases the chance of recovery against them for any given investment by plaintiffs, with a consequent reduction in the number of judgments against such defendants.[68] Third, reducing the chance of recovering money damages promotes a shift toward increased use of libel litigation for other purposes. If some press defendants are motivated largely by non-award stakes, one would expect less litigation against them by plaintiffs who are motivated solely by the prospect of obtaining money damages and relatively more litigation by those plaintiffs who, like the media, have substantial non-award interests at stake.[69]

The last effect is premised on the assumption that asymmetric stakes incline litigation outcomes in favor of the party with the greater interest. The model of litigation that supports this prediction posits rational decisions regarding expenditures, designed to secure returns the expected value of which equals or exceeds the sums invested in litigation.[70] The last dollar spent should just equal the expected value of its contribution.[71] The model also posits that litigation expenditures influence outcomes positively—the more a party invests relative to the opposing party, the greater his chance of success.[72]

Under one variant of this model, litigation outcomes are directly determined by expenditures which in turn are directly determined by stakes.[73] Were that so, suit should almost never be against the press by a public figure libel plaintiff interested only in the damage award.

The more likely variants of this model assume that litigation expenditures are only a partial determinant of outcomes.[74] Further, litigation expenditures are assumed to exhibit declining marginal utility past some point.[75] The party with the larger stake—by definition, the party with the greater non-award stake—remains the more likely victor even under this less extreme set of assumptions, but some lower-stakes parties prevail.

2. Plaintiffs: High Stakes and High Awards

Under this model of litigation, plaintiffs generally will be expected to lose libel suits against press defendants. The few plaintiffs who win should, for two reasons, be among those with larger damage award stakes. First, other things being constant, the larger the damage award at issue, the greater the probability that the plaintiff's stake will approach the defendant's.[76] Also, as the stakes, and derivatively the investment in litigation, increase, it is increasingly probable that the defendant's expenditures on litigation will pass the point at which the returns from litigation

investment begin to decline.[77] Thus, given the relatively large non-award stakes for legitimate press defendants under the actual malice rule, plaintiffs interested solely in the award will sue such defendants only if a very large damage award is a realistic possibility.

Under the same assumptions about litigation, plaintiffs with non-award stakes will find libel litigation relatively attractive (compared to parties with purely financial stakes).[78] Two different effects explain the advantage of non-award interests. First, the non-award stakes will justify increased litigation expenditures which will raise the probability of success. Only plaintiffs with very high non-award stakes are likely to invest amounts comparable to the press-defendant's litigation expenditures. This may translate into a substantial proportion of whatever libel recoveries there are against the legitimate press seeming to be uneconomical —the plaintiff may spend on the litigation sums well in excess of the damage award even where the award far exceeds the norm for tort litigation.[79]

At the same time, there should be a relative increase in suit by those for whom the damage award is not a necessary part of litigation success. For some plaintiffs, non-award success may come from developments related to the course of the litigation. These are discussed more fully below in part V. For other plaintiffs, the filing of suit itself confers a benefit. Just as the press' invocation of principle or declaration of strategy may have important announcement effects for monitor groups, so, too, plaintiffs may secure announcement effects from the filing of suit:[80] the more expensive a suit becomes and the lower the success rate for a class of plaintiffs, the greater the effect. The announcement implicit in the filing is that the plaintiff has so strong a case that he is willing to pursue his suit despite the obvious obstacles. This is not to say that the demand curve for litigation is positively sloped; litigation rates should fall, not rise, as the price of litigation increases. For certain plaintiffs, however, the benefit from filing suit is positively related to the cost (or at least the perceived cost) of the litigation.[81]

The benefit to plaintiffs from filing or from prosecuting a low-probability libel suit flows largely from the press' non-award stake in the litigation. Once the basis for liability is narrowed to exclude reasonable publication of falsehoods, a finding of liability against a member of the legitimate press is itself newsworthy.[82] By extension, the mere prospect of liability—the challenge to press credibility—becomes a matter worthy of news coverage. The extent to which the filing or trial of the case itself is publicized will differ with certain fairly obvious variables: the circulation and prestige (reputation for veracity) of the press defendant, the notoriety of the plaintiff, and the notoriety of the asserted libel.[83] In

at least a subset of libel cases against the legitimate press, the press' stake in avoiding non-award costs of libel assures sufficient publicity to alter both parties' course of action.

B. Paying for Suit: Attorneys' Incentives

The publicity attendant to press libel cases also has an effect on plaintiffs' counsel opposite to the general impact of *New York Times*. Given the role of legal counsel as the necessary intermediaries for suit, their incentives as well as the parties' incentives merit examination.

1. Before *Times:* Fees for All

Counsel may agree to represent clients on a straight-fee, contingency fee, or *pro bono* basis. In a pre-*New York Times* world, the contingency fee would have been the most likely arrangement for financing litigation. Parties were expected to be motivated in the main by direct financial gain from the suit.[84] The parties generally would not pursue a case without the expectation of a probability of recovery that justified the necessary expenditures. Budget constraints and limitations on sale of legal claims would have prevented some parties from committing to finance the litigation directly.[85] Attorneys, who enjoy a comparative advantage in evaluation of claims and in pooling claims to reduce the risks associated with suit, however, generally would underwrite suit through acceptance of contingency fees in cases for which suit seemed justified on the basis of the expected value of the award and the costs of suit.[86]

In contigency-fee litigation, the expected recovery by the attorney, not the client, must equal or exceed the expected costs of suit.[87] Therefore, not all suits that are fair bets will be taken by attorneys on a contingency fee basis. Nonetheless, in a competitive market for lawyers' services, most suits for which expected costs are marginally less than the expected recovery should be pursued on a contingency fee basis. Clients should be willing to trade away increasing shares of the recovery as the probability of recovery falls and the cost of suit rises, and attorneys should, at varied contingency rates, be willing to take nearly every cost-justified action.

There are, however, two impediments to a perfect market in lawyers' services that preclude this result in some cases: competitive constraints[88] and the substantial transactions costs involved in securing representation (including the costs to attorneys of eliciting and evaluating information concerning the facts of the plaintiffs' case as well as the costs to plaintiffs of obtaining information concerning attorneys' fees and quality of ser-

vice). Still, the contingency fee works sufficiently well to be the dominant payment arrangement for most ordinary tort litigation, including pre-*New York Times* libel suits.[89]

2. After *Times*: Representation Without Taxation?

The actual malice standard, by changing the expected value of libel claims, alters the attractiveness of contingency fee arrangements. The lower probability of recovery and higher cost of litigation under an actual malice rule reduce the expected value of many claims, thus making economically motivated (award-based) litigation unattractive for many cases. As this is the pool of cases suitable to contingency-fee financing, the actual malice rule decreases the number of cases that will be brought on a contingency fee arrangement. The existence of substantial non-award stakes for press defendants further reduces expected value of claims and further increases costs, leaving few cases for which a contingency fee would seem to provide reasonable compensation for the attorney. At the same time, the increased riskiness of contingency fee litigation should cause attorneys to decline more cases that might be fair bets to be remunerative.

The immediate effect of the *New York Times* decision, thus, is to shift away from contingency fee to other bases of representation. Plaintiffs who accrue substantial non-award benefits from litigation and who are substantially free from budget constraints may pay attorneys on a direct, fee-for-time basis to undertake libel litigation that is not justified by the expected value of the award.[90] One would expect that most other putative plaintiffs would not be able to secure representation.[91]

A by-product of the press' non-award stake in libel litigation does, however, facilitate contingency-fee or even *pro bono* representation of plaintiffs in some circumstances.[92] The press considers press libel litigation newsworthy, some cases especially so—this assures counsel that if the case goes to trial the plaintiff's attorney will be in the news. The legal profession, even when competing aggressively for business, traditionally has eschewed formal advertising. This tradition is changing, but the change is mainly affecting the "fast-food" end of the law business. The opportunity for effective, public advertising of high-quality legal services has been and remains restricted.[93] The availability of highly-visible news coverage, mentioning counsel by name, should present a significant inducement to representation of some clients whose cases of themselves do not promise a fair chance of financial reward.[94]

After *New York Times*, then, libel litigation should exhibit a characteristic that has largely been confined to criminal law: increased willingness of attorneys to undertake uneconomical representation in hopes of sub-

stantial future gains from a case's public notoriety.[95] *Pro bono* representation and contingency fee arrangements in cases in which the plaintiff is almost certain not to gain a damage award should therefore increase significantly following adoption of the actual malice rule.[96] The press' characterization of its interest in terms of principle further facilitates uneconomical litigation by providing a ready explanation for the attorney's promoting the set of opposed principles: assuring press responsibility, protecting the objects of press scrutiny from unfair, untrue, and unsupported accusations, and safeguarding the public from the misinformation that an unaccountable press might too readily provide.[97]

At the same time, the press spotlight on libel litigation offers the potential to create a few highly visible stars in the libel defense bar.[98] These attorneys even more than their opposite numbers are likely to become closely associated with the principles advocated by the press. The small number of libel cases, their high stakes, and the cost of information about lawyers' views and talents should assure that a select group of defense lawyers is able to earn rents from their libel practice.[99] This should be especially true so far as the litigation enterprise becomes theater rather than law.

C. Summary

The importance of a reputation for veracity to the income of press defendants transforms the public figure libel case after *New York Times* from a relatively routine contest between legal adversaries into a battle of competing principles and high stakes players where gains and losses cannot be measured solely in terms of the court-ordered transfer of dollars among the parties. The predictable responses of lawyers, plaintiffs, and defendants to incentives shaped by the actual malice rule reinforce the notion that reputation can command substantial economic value. The initial press reaction to a threat to reputation and income begins a series of responsive moves each of which increases the stakes and alters the rules of the libel game. The game, now defined largely by non-award stakes, plainly is not the same for all plaintiffs nor for all defendants. Distinctions among the potential parties are explored below.

V. PLAINTIFFS' STAKES: POLITICIANS AND OTHER FIGURES

A. Sorting Out the Effects: the Central Case

The facts of *New York Times* reveal the particular set of plaintiffs, defendants, and circumstances that informed the Court's analysis. The

plaintiff in *New York Times* was an elected official associated with locally popular policies.[100] The defendant was the quintessential representative of the legitimate press, a paper foreign to the locality of suit and associated with locally unpopular views.[101] The *New York Times* court assumed that in these circumstances the local legal system would err frequently in favor of the plaintiff, that the class represented by the defendant would substantially alter its behavior in response to these errors, and that this response would generate significant social costs.[102]

The actual malice rule was fashioned to guard against the predicted errors and press reaction to them in these particular circumstances.[103] That standard was soon extended to other public figures, on assumptions similar to those relied on in *New York Times*,[104] but the contest between a popular, elected public official and an unpopular though widely respected press defendant has remained the central image sustaining the rule.[105]

The standard formulated with special reference to elected officials and press defendants does indeed have special application to these groups. This section focuses on the distinction among plaintiffs, and the succeeding section elaborates the rule's different effects on defendants.

B. Politicians: Plaintiffs' Corps, *Times'* Core

1. Wealth, Power, and Non-Award Stakes

The requirement that public figure plaintiffs prove actual malice with convincing clarity reduces the chance of recovery and increases the cost of suit against the press by all public figures, including elected officials.[106] The elevation of non-award stakes' importance, however, makes it peculiarly likely that certain public figures, disproportionately including elected public officials, will continue to pursue libel litigation against the press. Although the *New York Times* standard should reduce the number of suits filed by elected public officials, it should have less effect on this class of suits than on litigation by other public figures.

The intuition here can be presented in the following syllogism. After *New York Times*, press libel suits will be motivated largely by non-award interests.[107] For plaintiffs, this interest will be a subset of reputation interests: the idiosyncratic interest in reputation, which is not reflected in lost income and, thus, often is not a basis for damage awards, defines plaintiffs' non-award stakes.[108] As a class, elected public officials are likely more often than other plaintiffs to place a high value on this interest. Therefore, elected public officials will be less deterred from suit.

The systematic bias toward higher idiosyncratic value on reputation

for elected officials is inherent in the difference between elective office and other high-visibility employment. Elective office generally entitles the officeholder to a relatively modest salary compared with those of public figures as a class. The emoluments of office consist instead principally of power over important decisions now being made and of greatly enhanced prospects for the exercise of power over future decisions.[109] The power exercised by elected officials—their ability to influence important decisions—generally seems disproportionate to the pay they receive. For many private sector employees, the value of the decisions they make appears congruent with their pay: if a large sum of money, for instance, is at stake, the employer will pay a significant fraction of it to the employee whose decisions help determine its gain or loss. For elected officials, this is not the case. Officials overseeing multi-billion dollar public enterprises may receive far less than mid-level managers of much smaller private firms.

The importance of officials' decisionmaking authority is reflected in the fact that private parties will pay a great deal to influence the decisions of quite modestly paid officials.[110] The expenditure of large sums on election contests is but one aspect of this private investment in influencing official decisionmaking.[111]

The combination of modest salary and high dollar value to others of the work done by elected officials creates substantial nonmonetary rewards for officeholding and attracts office-seekers who place a high value on those non-monetary rewards. It is common to hear of office-seekers willingly exchanging greater salaries elsewhere for lower salaries as elected officials. Outside of this context, the exchange of more money for less is exceptional—how often have you read of one company luring a key executive from another firm with a substantial pay cut? The point is not that elected officials are indifferent to money; it is by no means clear that the choice to seek elected office reduces the candidate's expected lifetime earnings and less clear that successful pursuit of elected office does so.[112] Yet, unlike other publicly notable occupations, little of the personal value of officeholding is captured in direct payments during the term of office.

If a principal component of libel damages is lost income resulting from the libel,[113] elected officials are in a peculiar position. A serious libel that adversely affects a plaintiff's electability may force an official from office but leave him with a higher income than before. The provable money damages from injury to an elected officeholder's reputation, therefore, often will be smaller and the non-money damage to the official often will be larger than for other public figures. Of course, elected officials need not place a high value on non-monetizable injury to reputation. Some

elected officials possess relatively little power and probably derive slight idiosyncratic reward from office.[114] Just as plainly, some non-officials do place a high idiosynacratic value on their reputation.[115] As a class, however, elected officials seem most likely to value injury to reputation well above the harm to income.

2. Notoriety and Electoral Advantage

The non-award stakes to elected officials are further increased by the linkage of officeholding and notoriety. Holding an elected office plainly increases the officeholder's notoriety—and notoriety seemingly increases an individual's chance of holding elected office. The coverage given by the press to libel suits against them thus should act as a magnet for suit by elected officials, other things being equal. The opportunity for increased media coverage should encourage elected officials, relative to other public figures, not only to file libel suits more often but also to pursue the suits more vigorously, assuring continued coverage of their claims.[116]

Of course, the "other things being equal" assumption slips a rabbit into the magician's hat. Other things seldom are equal. For instance, the notoriety derived from libel litigation need not be beneficial; even if notoriety generally aids candidates, certainly some sorts of media coverage must hurt. Spiro Agnew was more notorious after he was accused of bribe-taking and bid-rigging than before. Richard Nixon received considerable notoriety from the Watergate episode, Gerald Ford from his pardon of Nixon, and Jimmy Carter for his handling of the Iranian hostage crisis. It is difficult to believe that any of this publicity helped enhance these officals' reputations or their electoral prospects (Nixon, already in his second term as President, may be excused on this score).

The non-award inducement for elected officials to sue press defendants for libel, hence, must take account of three considerations, beyond probability of press coverage, that help define the costs and benefits of suit. These considerations can be framed as practical prerequisites to suit by elected officials. First, the press coverage accorded the suit must not be expected to contain new damaging information or to increase substantially the audience for the initial critical statement. Second, the suit must provide the official the opportunity to make at least a semiplausible claim of vindication. And, third, the suit must provide better opportunities for useful publicity than alternative courses of action.

The first of these additional requirements—damage minimization—limits probable libel suits to challenge of critical press statements that received considerable notice. Such notice may be due to the seriousness of the charge, such as allegations of criminal behavior by officials.[117] Or

it may be due to the visibility of the event that spurred the critical statement, for instance, the killings at the Sabra and Shatila refugee camps in Lebanon.[118] The damage minimization requirement prevents suit where the initial libel merely scratched the surface of a more serious problem. Politicians' concern with damage minimization also gives an incentive to the press to let officials know that any libel suit will elicit a vigorous press effort to uncover new critical information.

The second added requirement—recoupment of reputation—has more ambiguous implications. If an election is imminent, the mere filing of suit may provide an opportunity for enhancement of the official's reputation sufficient to justify suit. The official-politician reaps the benefit of the suit's announcement effect on constituents and, if he is successful or his case is factually weak, he can quietly let the suit languish afterward.[119]

More generally, however, the ability to recoup one's reputation will rest on the opportunity to publicize information that casts doubt on the initial critical speech. In this regard, no elected official worthy of his peers' respect would be limited to a requirement that he prevail in the courtroom or even that he prove falsity, much less fault. The legal requirement of *New York Times* that the official prove with convincing clarity the defendant's knowing or reckless publication of information that is false and defamatory diverges sharply from the far more modest political imperative that the politician be able to use the suit to his advantage. Officials who can with a straight face claim, for example, that they took bribes as a secret ploy to catch the briber[120] certainly can make use of litigation that merely reduces the clarity and credibility of a critical statement without anything approaching *New York Times* proof of falsity and fault.

The third added requirement—relative advantage—merely restates the standard inquiry of economic analysis, "compared to what?" Some officials enjoy myriad opportunities for low-cost, high-yield publicity. For high-ranking incumbent officials such as the President, suit offers very little that cannot be attained at less cost (in his own time, in risk of further reputational damage, and so on) in other ways. Officials with enough superior publicity-generating alternatives may choose simply to stand above the libel, to answer it in a press conference and not pursue it in court, or to follow other alternative strategies. The value of publicity from the suit is far greater to less publicly visible elected officials.

Consideration of relative advantage suggests that libel suits may be most valuable to would-be elected officials who are not now in office. The interests and behavior of nonincumbent candidates for elected office generally resemble those of elected officials, but these other candidates generally enjoy fewer alternatives for repairing damage to their reputa-

tions than do incumbent officials. The greatest difference is between those incumbent officials in very high office (such as Governors or U.S. Senators) who have considerable opportunity to manipulate the levers of power in ways that generate favorable publicity and nonincumbent aspirants to such office (including former officeholders whose taste for office is not yet sated).[121] Non-incumbents, thus, should value even more than incumbent elected officials the opportunities for useful publicity that press libel litigation affords and should be relatively more inclined to file suit, to press for trial, and to pursue appeals.[122]

3. Suits and Slack: General Effects and Criticism of Official Performance

These three additional, practical prerequisites to suit by political officeholders or aspirants indicate that, although the *New York Times* rule will be less effective at preventing suit by current or prospective elected officials than by other classes of public, it clearly will prevent many suits by officials. For reasons given earlier, the rule generally will preclude suit where only financial and not political gain is to be had.[123]

The additional requirements, which define political gain, suggest that once prospects for financial gain are removed an important class of cases is quite unlikely to be brought. Press statements critical of an elected official's performance in office, even to the point of intimating incompetence, are apt to be poor candidates for post-*New York Times* suit. This sort of criticism is not likely to leave readers or auditors with so clear an impression as, say, a charge of criminal misconduct.[124] Litigation to correct misstatements about official performance probably will generate publicity that supports a broader perception that there are serious questions concerning the official's competence than existed as a result of the asserted libel. Even if no new, damaging, specific information emerges, the opportunity to enhance one's reputation through litigation over such libels is slim. Apart from the *New York Times* actual malice standard, the law excludes statements of opinion on public issues from the ambit of potentially libelous statements, which makes recovery for such criticism difficult.[125] The pragmatic non-award considerations that largely inform officials' decisions here work hand-in-glove with the law in discouraging suit.

The cases in which the non-award stakes of elected officials and candidates continue to support suit, then, are those involving relatively well-known charges of specific, significant delicts. These are also the cases in which subsidized representation is likely. To some extent, nonparties may be expected to underwrite the cost of suit in these cases. The substantial investment private parties make in influencing the election of official decisionmakers suggests an interest that could be

tapped to subsidize litigation efforts. Insofar as libel litigation is able to boost reelection prospects for an official or increase his influence on government decisions, the suit may be an attractive investment to parties who do not have a direct stake in the damage award. In addition, litigation over charges of serious official misconduct may be especially attractive for representation on a contingency fee arrangement.[126] These cases combine high stakes for both the official-plaintiff and the press-defendant and involve matters already of public note. In sum, these cases are tailor made for publicity and, therefore, are ideal vehicles for counsel interested in such exposure. Counsel's interest in these cases as well as the plaintiff's often will militate against settlement and in favor of continued litigation, even where the decision to press on seems, strictly in terms of expected recovery in the case, economically unsound.[127]

C. Other Public Figures

The other groups of plaintiffs who may be classified as public figures probably will have high non-award stakes less often than elected officials and non-incumbent aspirants. Other public figures, hence, should be more discouraged by the cost of post-*New York Times* libel litigation against the press. Nonelected public officials generally (although certainly not invariably) may be expected to have low public visibility, greater congruence between job value and pay, and less to gain from increased public notoriety (as opposed to notoriety within a specialized audience of potential government or nongovernment employers) than elected officials.

The principal exception here will be those nonelected officials who aspire to higher, elected office.[128] Performers, like candidates for elective office, seem to benefit greatly from general notoriety, but the benefit is reflected in their earnings and, derivatively, should be reflected in damage award stakes.[129] Corporations and corporate managers probably benefit less from general notoriety; certainly they capture more of their interest in income and reflect the interest in damage award stakes. Particular corporate managers may place high idiosyncratic value on their reputation and may find an expensive, unremunerative libel suit a good investment both for its initial announcement effect with a particular group of associates or peers and for its subsequent exposure of factual errors or editorial doubts.[130] As a class, however, managers seem to gain less apart from the damage award than elected officehold-

ers or candidates. The actual malice rule, hence, discourages litigation least by the very group with which it was directly concerned.

VI. PAYING FOR PRINCIPLES: DEFENDANTS' INTERESTS

A. Differential Effects: The Bipolar Media Model

As with plaintiffs, defendants also are affected differently by the actual malice rule. Also, as with the differential effect on plaintiffs, the distribution among media enterprises of benefits and burdens consequent to adoption of the actual malice standard may not be those anticipated by the Supreme Court.

The simple explanation of *New York Times*' expected impact begins with a division of media enterprises into two polar groups: (1) those that occasionally and unknowingly publish false statements but, for nonliability reasons, never do so with actual malice, and (2) those that, but for liability, would publish principally statements they know to be false. If judicial processes are error-free and plaintiffs are interested solely in financial gains from suit (damage recoveries less expenses), the *New York Times* rule clearly benefits the high-care media. There would be no judgments against those enterprises; potential plaintiffs would not sue, and these enterprises would incur no costs from the actual malice rule. Low-care media enterprises, in contrast, would lose all suits for which they exercise less than *New York Times*' mandated level of care. These enterprises would be forced to internalize the costs of their harmful, false speech unless or until they increase their level of care.

The reality, of course, diverges significantly from the assumptions on which this explanation is based. Media enterprises do not divide neatly into the invariably careful and the irretrievably sleazy. Plaintiffs sue for reasons other than immediate financial gain.[131] And judicial processes sometimes err.[132] There is, thus, some possibility that even the most careful media enterprises will bear some cost from libel litigation under the actual malice rule.

When the costs and benefits of the change to an actual malice standard are sorted out, it may be that all media enterprises gain. I do not here pass judgment on the social value of *New York Times,* an undertaking that requires more information on the magnitudes of the various effects discussed here than current data provide.[133] My endeavor instead is to provide the framework for analysis and to assess some of the probable distinctions among plaintiffs and defendants. The effects analysis used here suggests that, unlike the stark bipolar analysis, the greatest gains

from *New York Times* probably do not accrue to the media enterprises that use the highest level of care in their discussion of public figures.

B. Effects Analysis and Defendant Classes

1. Variables and General Effects

The impact on any given media enterprise of the *New York Times* shift to an actual malice rule will depend on the relative values attached to six variables under each alternative legal regime: the cost of damage awards, non-award costs, defense costs, risk costs, costs of investment in care, and gains or losses from altering the amount of speech produced.[134] The more readily observed effects of *New York Times* that may benefit the press are not directly relevant to this analysis. These observable benefits, decreased incidence of damage awards against media defendants and decreased incidence of suit,[135] do not correlate exactly with the factors that determine the rule change's effect. It is possible, for instance, that even with fewer suits and fewer adverse judgments, total defense costs and total money damages paid by a particular class of media defendants increase.[136] Available data are not sufficiently complete to resolve argument over the exact dimensions or, in some cases, the direction, of less readily observed effects.

Nonetheless, certain general conclusions seem plausible. The *New York Times* rule, of itself, undoubtedly reduces, first, the number of adverse judgments and, second, the number of suits against all media defendants. Third, the rule probably reduces total award costs. The most significant effects question, however, cannot be answered from this information alone. One also needs to know the level of non-award costs, actual and potential, and then the level of defense costs before one can assess the other effects of *New York Times*. The total amount of damages and non-award losses realistically at issue in suits against the press largely will determine defense costs[137] and also will substantially affect both risk costs and behavioral responses (alteration in the standard of care or level of speech activity).[138] Total (actual) non-award costs may increase for some defendants and decrease for others. Certainly, as discussed in part III above,[139] the potential non-award cost of a liability finding rises substantially for some press enterprises. Distinguishing those enterprises that face substantially higher actual potential non-award costs from those that do not largely explains *New York Times*' disparate impact on media enterprises.

2. Media Defendants: Separating the Classes

In analyzing *New York Times*, the media will be segregated into three rough groups: high care, low care, and hybrid. The first group on

average employs a high level of care respecting the truth of reported statements.[140]

The second group is relatively unconcerned with the truth of its reports, functioning principally as an entertainment medium, albeit through stories that intrigue because they involve real people and because there is at least some basis for believing the stories true. The low-care media probably are not unaffected by proof that they published false information, but the demand for their product, and, derivatively, the cost of employee and source inputs, are not closely tied to credibility.

The third group is composed of media that on average use a high level of care but that also compete in an entertainment market. For these hybrid enterprises, the liveliness of presentation and the "shock value" of the news are more substantial influences on demand than for the first category, while veracity is a far more important demand determinant than for the second category. Concomitantly, the other monitors of this hybrid group's behavior—managers, employees, and sources—will be more sensitive to variations in the level of the enterprises's veracity than will monitors of low-care media performance and, perhaps, more sensitive to variations in income (for other reasons) than high-care media.[141] The foremost example of such a hybrid enterprise is CBS's *60 Minutes*, a news program competing against entertainment programs for a mass audience, well in excess of the normal audience for successful news media. Local television investigative news reports are similar, though on a much smaller scale. Some newspaper columns also may fit in this category. To a great extent, of course, all news media exhibit some mixture of entertainment and informational functions; the hybrid category is intended to separate those enterprises that, while subject to substantial monitoring for veracity, are unusually affected by the constraints of competition in the entertainment market.

3. Veracity Variability: Reputation and Reality

This categorization recognizes that media differ in levels of care and in incentives to use care. Both the high care and hybrid categories can be classified as belonging to the "Legitimate Press," defined as the class of press enterprises for which credibility substantially influences consumer demand and, immediately or indirectly, the enterprise's income and influence. Among these press enterprises however, the mixed news-entertainment media may be particularly susceptible to pressures that can produce publication with *New York Times* actual malice.

Apart from the variation between categories, this division, framed in nonpolar terms, recognizes that some variation in the level of care is likely within any one press enterprise. This inhouse variation occurs in

large part because the enterprise is not an integrated whole but rather a collection of individuals with different interests, information, pressures, and responsibility; it is costly for organizations, and especially for large organizations, to ensure that information is routed to the appropriate actors, to constrain the authority of subordinate employees, or to identify in advance those who on occasion will act with less than the optimal level of care.[142] Thus, while the least careful enterprise often will exercise care well above what *New York Times* requires, decisionmakers at the most careful enterprise at times may act with actual malice.

Overall, the assumption here is that, at least down to some level of tolerance, an enterprise's reputation for veracity will be related to its average level of care. Variance from the average is discussed but is not treated here as a distinct variable, although for any enterprise and any given average level of care variance from the average may have significant consequences for reputation and, independently, for suit. Analogously, a reputation for ill health may be tied to the number of severe illnesses or injuries an individual suffers, rather than to his average level of health. The number of pathological cases bears no necessary relation to the general level of health. The common supposition, however, is that good health and few pathologies more often than not go hand-in-hand That simplifying assumption is indulged here.

C. High-Care Enterprises

The defendants on which the *New York Times* Court focused were these: traditional, respected, credible news media, especially those with national audiences that might be subject to local antipathy. These are the media that, as a group, probably have not only the highest average level of care but also the lowest variance.

1. Defense and Discontinuity: The Change to Actual Malice

The high-care media almost never lose under the actual malice standard.[143] But, as that high level of care is employed for reasons divorced from liability, they probably are insulated from relatively few adverse judgments by the change in standard. The dollar value of judgments precluded for most enterprises in this category is uncertain, but for the largest high-care press enterprises the dollar value of even a modest reduction in adverse damage awards might be considerable.[144] Because there are almost never adverse judgments against these enterprises, the actual malice rule may generate non-award savings for them as well. Whatever costs—in decreased readership, revenues, influence, employee satisfaction, and the confidence placed in them by sources—

formerly attended adverse libel judgments disappear along with the decline in judgments.

The critical difference, however, is the actual malice rule's introduction of a sharp discontinuity in the yield from investment in avoiding liability. Prior to *New York Times,* damage awards were more frequent and smaller, and the non-award costs of loss also were smaller. By raising the award and non-award costs of liability, *New York Times* increased the marginal return from defense expenditures for suits of any given (exogenous) probability of success; with more at stake, a slight increase in the chance of winning is worth more.[145] The increase in marginal return must be set off against the decrease in the probability of success effected by *New York Times.* The data on settlements and defense expenditures suggest, however, that the increase in potential non-award costs to press defendants dominates the decrease in probability of plaintiffs' success attributable to the actual malice rule, apart from changes in the parties' litigation expenditures.[146]

It follows that high-care defendants will spend more on defense of each suit after *New York Times,* perhaps in excess of the dollar value of awards prevented. A rational defendant would not pay more than $50,000 to avoid a one-in-four chance of a $200,000 liability judgment, but the defendant will spend up to $300,000 if the adverse judgment is predicted also to cause a $1 million loss in advertising and subscription revenues or in costs of retaining (in their current level and quantity) employees and sources.[147]

The increase in marginal return of defense expenditures aimed at preventing an adverse judgment in a given case, thus, may explain burgeoning defense costs. But, given an offset for the reduced probability of loss, this is not apt to be a complete explanation.

2. Non-Award Costs and Non-Judgment Goals

The rest of the explanation for rising defense costs may be that the press defendant's expenditures are in part directed at ends other than preventing an adverse judgment in the immediate suit. One goal of defense expenditures may be to prevent trial, rather than loss. If non-award costs of *liability* have increased since *New York Times,* so should non-award costs of *trial* insofar as trial now raises questions over the care a defendant uses as well as the truth of the statement at issue. It appears in fact that sales of high-care press defendants' products decline during libel trials,[148] and monitor groups other than consumers also seem likely to react to disclosures during trial. The negative effects of trial should be especially pronounced if the reputation of the defendant is

strong and if scrutiny focuses on defendant actions in a pathological case, one in which normal, healthy defenses against faulty publication fail.

Beyond its immediate value in preventing trial or liability, a defense investment also has value insofar as it raises the possibility of success in future litigation—as by the creation of favorable precedent—or otherwise decreases the likelihood of future litigation. The effort to influence the incidence of litigation is particularly important if the filing of suit conveys announcement effects.[149] The other side of the benefit a plaintiff receives from filing suit is a cost to the defendant: the filing, of itself, raises some question as to defendant's veracity.

Of course, expenditures that help a defendant win the instant suit also pay future dividends: future litigation will probably decrease following a decrease in the likelihood of plaintiffs' success. Expenditures on litigation defense, however, can reduce filings another way. Some defense investments not only influence a litigation's outcome but also directly raise plaintiffs' litigation costs. A variety of defense strategies—refusal to answer interrogatories, delayed responses to discovery requests, aggressive pursuit of discovery requests directed at the plaintiff, frequent filing of motions respecting either process issues or ultimate judgment—should be useful to this end.[150] High-care press defendants, having the greater stakes in libel litigation, should invest more heavily than others in such strategic behavior as well as in announcements indicating the level of the press enterprise's resistance to suit, which signal the probable level of defense investment if suit is filed.

These cost-raising defense expenditures are especially attractive for high-care press enterprises in light of the likely incidence of suit motivated by plaintiffs' non-award stakes. A subset of these suits—those tied to the publicity given the libel suit—should be brought principally against legitimate press defendants (those in the high-care and hybrid categories). These defendants' greater non-award stakes cause them to take such suits more seriously and, therefore, to publicize them more. The *New York Times*, *Time* magazine, or CBS is likely to give far more coverage to a libel suit against it or a fraternal member of the legitimate press than will *The National Enquirer*, *The Star*, or *Penthouse* to a similar libel suit against one of those publications.[151]

Further, apart from the *amount* of publicity the suit draws, press enterprises are especially good targets for suit by elected officials because of the *type* of publicity. Legitimate press enterprises often are associated with particular political ideologies.[152] The focus on "hard news," and the inevitable choices of coverage and tone inherent in that focus, make perceptions of ideological bias common. Put the label liberal or conservative in one column and the names *New York Times*, *Boston*

Globe, Washington Post, Newsweek, Chicago Tribune, Los Angeles Times, Time, Commentary, and *The National Review* in another column; few consumers of news will have difficulty matching the two columns. Suit against a press enterprise associated with an ideology that is unpopular with a politician's constituency not only gains extra publicity at home; it also sends the message that the official has been libeled for illegitimate, ideological reasons and is willing, for the sake of principle, to incur the cost of fighting back. The *New York Times* case itself is illustrative. Sullivan was not engaged simply in litigation over a personal injury; he was vindicating the honor of the South against the hostile, liberal, northern press that carried anti-South statements.[153]

The incidence of suit, thus, will not decline so much for high-care press enterprises as the incidence of damage awards. Consequently, even if both award and non-award costs have declined for these enterprises since *New York Times,* aggregate defense costs, as well as costs per suit, may rise. Whether high-care enterprises in fact face an overall increase in expected costs for libel defense is difficult to say without better data. Certainly, the demonstrable increase in defense expenditures per suit does not conclusively demonstrate this effect. The most that can be said at this point is that an increase in total libel defense costs for high-care press enterprises is possible.[154]

3. Insurance

More clearly, the press' non-award incentives to contest libel litigation in combination with the non-award incentives of some plaintiffs to pursue libel suits alters the insurance picture for press enterprises. Normally, assuming risk aversion, the risk of a large loss would be reduced by purchasing insurance, thereby pooling risks and increasing certainty respecting loss.[155] Given their likely defense expenditures, high-care press enterprises will find insurance of libel defense costs quite expensive.[156] The resistance of these press defendants to settlements deprives the insurer of an important means of controlling cost.[157]

This same factor will increase, albeit less dramatically, the liability component of insurance cost. The insurance company will want to retain flexibility to buy out of a suit when the price seems right.[158] Nonetheless, when other factors are considered, the price of liability-only insurance for high-care press enterprises probably will lie below that for other types of liability with equal expected loss. One standard concern of insurers, moral hazard (the risk that insured parties will increase their exposure to liability judgments),[159] is abated considerably in libel insurance for high-care press enterprises given these entities' non-award incentives to control their exposure to liability, through both *ex ante*

regulation of their activities and *ex post* investment in contesting litigation. So long as insurers are willing to distinguish between high-care and low-care media enterprises,[160] this should limit the former's insurance costs for libel liability.

4. Behavioral Effects: Level of Activity and Level of Care

Another element in analyzing the effect of *New York Times* is the potential behavioral response. If the potential non-award costs of libel litigation rise sufficiently to induce increased defense expenditures and at the same time reduce the attractiveness of insurance against such costs to high-care press enterprises will those enterprises modify their behavior to avoid suit? Would they take more care in screening information, or would they avoiding certain kinds of statements or certain kinds of stories?[161] Neither response seems likely except in extremely small doses.

The marginal return from increased care, like the marginal return from defense expenditures, might be thought to rise if potential non-award costs of libel litigation increase more rapidly than expected award costs decrease. The analogy, however, is inapposite. To hold, the analogy's terms must be comparable: while litigation costs are critical to litigation investment, the question relevant to the return on investment in care is whether expected costs from *false critical statements* (rather than from *litigation*) increase after *New York Times*. This requires data on the total expected costs (award, non-award, defense, and risk costs) associated with false statements critical of public figures. If total costs decline for high-care enterprises after *New York Times*, the litigation-derived incentive to use care will be reduced. Declining costs from such false statements are at least plausible because the incidence of suit by public figures declines under the actual malice rule and because the number of suits is not a direct function of the number of false statements either before or after *New York Times*. False, critical statements prompt some suits; others are triggered by the promise of recompense; and still others by criticism, false or true.[162]

Given present information on the costs associated with *New York Times*, there is no firm basis for predicting a change, and especially not for predicting an increase, in the average level of care among high-care news media. *New York Times* may well have prompted a change, however, in the variance of care taken by the press in making different types of critical statements. On the one hand, the media may worry less about public figures who seem unlikely to place high non-monetizable value on reputation and especially those whose monetizable value also is low.[163] Statements about these public figures now may be scrutinized less than

was the case before *New York Times*. On the other hand, by raising the stakes for cases in which suit is most likely, such as accusation of serious wrongdoing by politicians,[164] *New York Times* may encourage additional care in those cases. Although not certain, these seem the most likely changes in high-care press behavior.

The alternative response to altered liability is a change in the level of activity. One such change, decreased speech, is the principal focus of First Amendment concerns. This is the "chill" so often referred to in discussion of First Amendment values.[165] The likelihood of a change in the level of speech activity after *New York Times* depends, *inter alia,* on the public's demand for speech critical of public figures, the capacity of any given enterprise to capture that public value, and the cost of producing the information at a given level of care.

The calculus of production of critical speech is complicated by the fact that the production of critical information probably has substantial common costs with production on noncritical information about public figures, which in turn has substantial common costs with production of information generally respecting public issues. The presence of substantial common costs may make the marginal cost of producing critical speech relatively low for those that are in the business of reporting on public issues, a description generally applicable to high-care press enterprises. The adjustment of these enterprises' relative investment in critical and other speech will be responsive to the marginal costs and price elasticities of demand for each.[166]

For high-care press enterprises, criticism of politicians is the only category for which a decrease in speech is a possible reaction to *New York Times,* given the likely incidence of suit by actual or would-be officials for reasons extrinsic to the ultimate judgment and the cost of such suits. Several authors have argued that this sort of reduction in speech has indeed occurred and have offered some anecdotal support for this proposition.[167] It is, however, not at all clear that press speech critical of highly visible political officials has changed much since *New York Times*. One could speculate as to the reasons for apparent constancy in the quantum of speech critical of politicians. For instance, demand for such speech may be relatively price inelastic and thus affected less by changes in its cost than other speech. The oft-noted adversarial relationship between press and government may reflect a strong demand for privately produced critical information, perhaps a consequence of the fact that positive information is supplied by government in ample quantity. Such speculation, however, also provides no firm basis for conclusions respecting levels of press activity.

In sum, then, for high-care press enterprises *New York Times* pro-

duced ambiguous, and possibly beneficial, effects. Award and non-award costs probably declined. The increase in potential costs (especially potential non-award costs) drove up defense costs per suit and possibly in total. High-care press enterprises probably bear increased risk costs with respect to libel suit *defense,* but the change in risk costs for *liability* is uncertain and may have declined. No substantial behavioral effects can be established with confidence and perhaps none has occurred.

5. Big and Little, Better and Best: Special Effects

These various effects, it should be noted, will not affect all high-care enterprises the same. The categorization employed here segregates media enterprises principally by their average level of care and the influence of a reputation for veracity on the demand for and cost of the enterprise's product. As elaborated earlier, a publication's pre-suit credibility among the three monitor groups largely determines the non-award harm threatened to or suffered by defendant during libel litigation.[168] Credibility is not, however, the sole determinant of potential non-award harm.

In addition, non-award harm will be affected by factors that dictate how reduced credibility translates into reduced income. These other determinants of an enterprise's loss from reduced credibility are the availability of substitute sources of information, the shape of the enterprise's marginal revenue curve, and its level of earnings; better available substitute sources of information will increase consumers' responsiveness to changes in perceived veracity.[169] Given estimated economies of scale in newsgathering and dissemination,[170] it seems likely that national-audience publications will have better substitute sources than locally oriented media and thus will be more affected by changes in perceived credibility. Similarly, the steeper an enterprise's marginal revenue curve and the higher its earnings from the publication at issue, the greater the likely reduction in returns from any given decrease in demand.[171]

The shift in non-award incentives after *New York Times,* then, has its greatest affect on large-circulation, high-care, national media enterprises. Because of the threat of large costs from adverse judgment, these enterprises will bear the heaviest burden in defense costs and related strategic activity. Other high-care enterprises may get a "free ride" on the back of the large national news media's investment in discouraging suit and recovery.[172] The cost and duration of this ride will depend on the extent to which the large national firms' investment yields a perception among potential plaintiffs that libel litigation against any high-care defendant is expensive and generally nonremunerative. In-

deed, as developed below, other media enterprises may come along for the ride as well.

D. Low-Care Enterprises

Ironically, the principal beneficiaries of *New York Times* on balance may be those media enterprises that use relatively little care in reporting, succeeding more by virtue of their style and capacity to shock, titillate, or intrigue consumers. At first blush, this may seem odd: these enterprises are likely both to generate a substantially greater proportion of false statements and to lose a substantially greater proportion of cases than will high-care defendants under a negligence or strict liability test.

Given the burden placed on plaintiffs under the *New York Times* rule, however, these media enterprises may be protected by the actual malice standard against adverse judgment considerably more often than high-care media. Even if publishers of these media are largely indifferent to the truth of their stories, proving that fact with convincing clarity along with the falsity of the statement is another matter.[173] Seldom will it be possible to demonstrate knowledge of falsity, and no mind-probe is available to measure concern or indifference; moreover, solid evidence of subjective doubt about a story's truth may be more difficult to come by in respect to enterprises that do not in fact care much about truth.[174] Low-care enterprises still should lose more cases, and a greater proportion of cases, than high-care enterprises. But the actual malice rule and precedents implementing it should confer a substantial benefit on these media in aiding their escape from liability.[175]

As the proportion of judgments against low-care media enterprises declines, the incidence of suit against them should fall correspondingly.[176] Indeed, if plaintiffs do not distinguish between the cost of suit (or probability of success) against high- and low-care enterprises, the number of suits might decline more than proportionately to the drop in recoveries, as the low-care defendants will not make the same investment in defense as enterprises with high non-award stakes.[177] The average award will rise, but that is the natural corollary of reduced probability of suit: a greater stake is necessary to justify the investment in litigations.

The low-care enterprises might face a more than commensurate increase in the size of potential damage awards if the shift to a fault-based standard encouraged an increase in punitive damages against defendants who seem to exercise peculiarly little care. The *New York Times* rule, in limiting recovery to cases of knowing or reckless untruth, does make the set of all recoveries much more congruent with the set of recoveries

for which punitive damages might be available.[178] It does not, however, appear to have generated an increase in total punitive damages paid out by media defendants.[179]

Low-care media, thus, probably face lower total costs—award costs, non-award costs, and defense costs—after *New York Times* and may respond by decreasing care or increasing the amount of speech activity.[180] To the extent that these enterprises' coverage is skewed toward some group of public figures—for instance, entertainers—those individuals are likely to be subject to more, or less accurate, critical comment after *New York Times*.

E. Hybrid Media

The most interesting case is that of press enterprises that combine a reputation for veracity with a need to compete in an entertainment market. Protection against possible liability may be especially important for these news-entertainment hybrids. Combining the attention-getting instinct of entertainment-oriented media with the claim to veracity of the legitimate press, critical statements by these enterprises may be particularly damaging. As a result, both the likelihood of suit and the size of potential damage awards will be relatively high.[181] Moreover, insofar as the audience for libel affects the degree of harm,[182] the news-entertainment hybrids generally will benefit from *New York Times'* insulation more than standard high-care news enterprises.

Like high-care enterprises, hybrid media also will have very high non-award stakes in libel litigation, often exceeding those of high-care press enterprises. This may seem counterintuitive, as the monitor groups probably respond less to credibility variations for hybrid media than high-care media. Plainly, demand for the hybrids' product should be less affected by their credibility; after all, by definition demand for these media is substantially dependent on their entertainment value. (Contrast *60 Minutes* with the *Wall Street Journal*. My guess is that the ratio of production values to credibility as a demand determinant is considerably higher in the former). Similarly, managers, employees, and sources may be less concerned about credibility where entertainment values are recognized to loom larger, although the distinction between these groups' response to hybrid and high-care media is less certain. Even with proportionately smaller responses to signals of reduced credibility, however, the total dollar value of the changes in cost and income could be much larger for hybrid media. This most clearly is true for changes in demand, given that hybrid media appear to enjoy higher returns[183] and that substitute (entertainment) products are readily available.

These media, thus, should invest heavily in defense and litigation avoidance strategies.[184] While *Times*' benefit of insulation against liability has substantial value for hybrid media, they will pay a high price for it. These enterprises also should bear heavier noninsurable risk costs than other media, because they combine a disincentive to settle, high potential damage awards, and greater potential moral hazard in exposure to liability, born of greater financial rewards for surprising information about well-known individuals.

The behavioral implications of *New York Times* for these firms are unclear. The high stakes of libel litigation may increase the marginal return from behavioral adjustments in speech most likely to produce litigation (increasing care in some statements or decreasing the amount of critical speech), but the protection against damage awards may dominate an increase in other costs for most speech by these enterprises, leading perhaps to a decrease in the average level of care. For at least the better known hybrid media, the competing interests, defined by high returns from aggressive, critical speech and high risks from such speech, seem roughly balanced. So long as they maintain that balance, dramatic changes in their behavior are unlikely.

VII. CONCLUSION

The change in *New York Times* to an actual malice standard for public figure libels substantially altered the incentives of some press defendants to resist suit. This change most affects the highly respected, successful, national news publications the *New York Times* Court was trying to protect. The actual malice rule does protect these defendants by reducing the number of adverse judgments against them and possibly also reducing the sum of costs associated with speech critical of public figures. But by raising the potential costs of adverse judgments for these defendants, the *New York Times* rule induces them to make investments in litigation defense and related activities that consume a large portion of the savings conferred by the more press-protective rule. Elected government officials, the group of plaintiffs with which *New York Times* was directly concerned—indeed, the group whose potential power over the press lay at the heart of the decision[185]—are within the class of plaintiffs least likely to be deterred from suit by the rule.

Although these conclusions about the effect of the actual malice rule indicate that the Court probably misperceived some of the consequences of its decision, they do not necessarily suggest that the decision was unwise nor that some better rule is easily identified. Evaluation of the

overall effect of the *New York Times* decision and its desirability requires careful disaggregation of factors that dictate the quantity and quality of information about public affairs that is produced. It also requires judgment as to the value of various changes consequent to *New York Times*. Any conclusion on this score is apt to be controversial if only because the necessary complexity of the analysis provides many opportunities for disagreement over premises as well as derivations from them. Analysis based on First Amendment concerns and analysis based in tort may lead in different directions on any of these issues. Both, however, should build on the common ground of recognition that the rule's effects flow in substantial measure from the inherent tension generated by a liability rule that is so highly press-protective that its invocation puts directly in issue a valuable asset of the press: its credibility.

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NOTES

1. 376 U.S. 254 (1964).

2. For an extensive history of the development of libel law, *see generally*, C. Gregory & H. Kalven, *Cases and Materials on Torts* (1st ed. 1959).

3. *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250 (1952), (Justice Frankfurter's majority opinion stated: "[We] are precluded from saying that speech concededly punishable when immediately directed at individuals cannot be outlawed if directed at groups with whose position and esteem in society the affiliated individual may be inextricably involved. [Libelous] utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase 'clear and present danger.' Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class."); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), (Justice Murphy stated for the majority: "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the *libelous*, and the insulting or 'fighting' words." [Emphasis added]).

4. F. Schauer, *Free Speech: A Philosophical Enquiry* (1982); Kalven, "The Metaphysics of the Law of Obscenity," 1960 *Sup. Ct. Rev.* 1; Magrath, "The Obscenity Cases: Grapes of *Roth*," 1966 *Sup. Ct. Rev.* 7.

5. *See, e.g.*, Walker v. Bee-News Publishing Co., 240 N.W. 529 (1932); Oklahoma Publishing Co. v. Givens, 67 F.2d 207 (1925); *see also* W. Prosser, *The Law of Torts* 596–604 (2d ed. 1955); Franklin, "Winners and Losers and Why: A Study of Defamation Litigation," 1980 *Am. B. Found. Res. J.* 455 [cited as Franklin, Winners and Losers].

6. *New York Times*, 376 U.S. at 264–265; *see also* Franklin, Winners and Losers, *supra* note 5, at 458.

7. *New York Times*, 376 U.S. at 279–80.

8. *Id.*

9. *See, e.g.*, Bezanson, "Libel Law and the Realities of Litigation: Setting the Record Straight," 71 *Iowa L. Rev.* 226 (1985); Cranberg, "Fanning the Fire: The Media's Role in Libel Litigation," 71 *Iowa L. Rev.* 221 (1985); Lewis, "*New York Times v. Sullivan* Reconsidered: Time to Return to the Central Meaning of the First Amendment," 83 *Col. L. Rev.* 603 (1983); Smolla, "Let the Author Beware: Rejuvenation of the American Law of Libel," 132 *U. Pa. L. Rev.* 1 (1983); Soloski, "Who Sues for Libel?," 71 *Iowa L. Rev.* 217 (1985).

10. *See, e.g.*, Anderson, "Libel and Press Self-Censorship," 53 *Texas L. Rev.* 422, 435–36 (1975) (discussing high jury verdicts in libel cases); Barrett, "Declaratory Judgments for Libel: A Better Alternative," 74 *Cal. L. Rev.* 847, 857 (1986); Goodale, "Survey of Recent Media Verdicts, Their Disposition on Appeal, and Media Defense Costs," in Practicing Law Institute, *Media Insurance and Risk Management* (1985) [this book will be cited as *Media Insurance*]; Kaufman, ch. 1, *supra;* Lewis, *supra* note 9, at 608; Smolla, *supra* note 9, at 2–7.

The rise in cost of libel litigation since 1975 has been described as "an uncontrolled firestorm," Goodale, *supra*, at 86–89. For example, in the recent case, Westmoreland v. CBS 596 F. Supp. 1166 (S.D.N.Y. 1983), 601 F. Supp. 66 (S.D.N.Y. 1984), *aff'd*, 752 F.2d 16 (2d Cir. 1984), *cert. denied sub nom.* Cable News Network, Inc. v. U.S. District Court, 105 S. Ct. 3478 (1985), combined costs exceeded $10 million prior to settlement. *See* "A General Surrenders," *N.Y. Times*, Feb. 19, 1985 at A22, col. 1. *See also* Kaufman, *supra* ch. 1 ("it has been estimated that defense costs amount to 80% or more of the dollars spent by insurers of the media in libel cases. . . . [O]ne representative from a leading insurance carrier has estimated that defense costs in the average litigated case (at least in larger cities) have perhaps doubled in the last four years."); Lewis, *supra* note 9, at 609 (noting that CBS spent between $3 and $4 million for legal fees in Herbert v. Lando, 441 U.S. 153 (1979)).

The plaintiffs' ultimate financial rewards are small. The great majority of libel cases against media defendants are dismissed before trial, and few plaintiffs who succeed in securing a favorable jury verdict are able to sustain the verdict on appeal. *See* Franklin, "Good Names and Bad Law: A Critique of Libel Law and a Proposal" 18 *U.S.F. L. Rev.* 1, 4–5 & n.23 (1983) [cited as Franklin, Critique of Libel Law]. The proportion of cases in which plaintiffs ultimately prevail against media defendants is estimated to be no more than 5 to 10%. *Id.*

11. *See, e.g.*, Barrett, *supra* note 10; Bezanson, *supra* note 9; Bezanson, Cranberg & Soloski, ch. 3, *supra;* Cranberg, *supra* note 9; Kaufman, *supra* ch. 1; Lewis, *supra* note 9; Soloski, *supra* note 9.

12. Kaufman, *supra* ch. 1.

13. Bezanson, *supra* note 9, at 228; Bezanson, *supra* ch. 3; Soloski, *supra* note 9, at 219–220.

14. Cranberg, *supra* note 9, at 221; Soloski, *supra* note 9, at 219–220. *See also* R. Smolla, *Suing the Press* 186–87 (1986).

15. Bezanson, *supra* ch. 3.

16. *Id.*

17. Different figures are suggested by the various empirical studies. *See, e.g.*, Bezanson, *supra* ch. 3; Franklin, Critique of Libel Law, *supra* note 10 at 4–5; Franklin, "Suing Media for Libel: A Litigation Study," 1981 *Am. B. Found. Res. J.* 795, 800 [cited as Franklin, Litigation Study]; Kaufman, *supra* ch. 1. For tort litigation generally, *see* R. Posner, *Federal Courts* (1985).

18. *See, e.g.*, Epstein, *infra* ch. 5; *see also* Franklin, Winners and Loser, *supra* note 5; Franklin, Critique of Libel Law, *supra* note 10; Franklin, Litigation Study, *supra* note 17; Sheer & Zardkoohi, "An Analysis of the Economic Efficiency of the Law of Defamation," 80 *Nw. U. L. Rev.* 364, 369 (1985).

19. Epstein, *infra* ch. 5.

20. *Id.* For other related explanations for increase in jury awards, *see* Franklin, Critique of Libel Law *supra* note 10, at 10–11; Smolla, *supra* note 9, at 6–7; Note, "Punitive Damages and Libel Law," 98 *Harv. L. Rev. 847* (1985).

21. Epstein, *infra* ch. 5; Franklin, Critique of Libel, *supra* note 10, at 13–14.

22. Professor Epstein argues that risk aversion should lead to an *increase* in the settlement rate, given the uncertainties of litigation and the magnitude of the damage award stakes involved in post-*New York Times* libel litigation. Epstein, *infra* ch. 5. The settlement rate for at least one important class of libel suits—those against news media—appears, however, to be quite low relative to other sorts of litigation. *See* Bezanson, *supra* ch. 3; Franklin, Critique of Libel Law, *supra* note 10, at 12, n. 56.

23. *See* note 10, *supra.*

24. Franklin, Winners and Losers, *supra* note 5. "Westmoreland Takes on CBS," *Newsweek*, Oct. 22, 1984, at 61 [cited as *Newsweek*, Westmoreland]. The press' record is considerably better after all appeals have run than it is when jury verdicts alone are examined. *See* note 10 *supra.*

25. *See, e.g.*, Gertz v. Welch, Inc., 418 U.S. 323 (1974). *See also* T. Carter, M. Franklin & J. Wright, *The First Amendment and the Fourth Estate: The Law of Mass Media* 495–96 (3rd ed., 1985); Franklin, Winners and Losers, *supra* note 5, at 498; Franklin, Litigation Study, *supra* note 17; Smolla, *supra* note 9, at 4–6. The Supreme Court's recent decision in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985), makes it easier for plaintiffs to secure presumed or punitive damages in some cases. But judges remain less receptive than juries do to large libel damage awards.

26. *See, e.g.*, Landes & Posner, "Adjudication as a Private Good," 8 *J. Legal Stud.* 235 (1979).

27. *See* Katz, Judicial Decisionmaking and Litigation Expenditure: An Economic Approach (May 1985; unpub.).

28. Epstein, *infra* ch. 5.

29. *See supra* notes 11–16 and accompanying discussion.

30. *See* Bezanson, *supra* note 9 at 228; Franklin, Critique of Libel Law, *supra* note 10 at 5; Soloski, *supra* note 9 at 220.

31. *See* Franklin, Critique of Libel Law, *supra* note 10 at 32; *Newsweek*, Westmoreland, *supra* note 24.

32. *See supra* notes 26–27 and accompanying discussion.

33. *See supra* notes 11–16 and accompanying discussion. *See also* discussion *infra* parts III, IV, V, VI.

34. Restatement (Second) of Torts §559 (1977); W. Prosser, *The Law of Torts* 739–744 (4th ed. 1971).

35. *See, e.g.*, C. Gregory & H. Kalven, *supra* note 2; W. Prosser, *supra* note 34.

36. This effect may not produce a readily seen footprint. The absolute level of post-libel earnings may not decline from the pre-libel level; and if a decline occurs, the cause may be obscure. The common supposition, however, was that post-libel earnings would be lower than they would have been but for the libel.

37. *See, e.g.*, Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," 9 *Law & Soc. Rev.* 95 (1974); Landes & Posner, *supra* note 26.

38. Of course, injury to reputation is also of concern to other businesses and individuals who trade on trust. Thus, a bank must worry about reputational repercussions arising out of actions for misuse of depositor's funds; but news media are special in the libel context because they trade on trust in the business of providing information.

39. *See, e.g.*, authorities cited at note 37, *supra*. Other commentators also have noted disparate time-discount rates and attitudes toward risk as factors differentiating parties' interest in the outcome of a given litigation. *See, e.g.*, R. Posner, *Economic Analysis of Law* 524–25 (3d ed., 1986). Although these factors might be present in media libel litigation, the discussion here focuses on different causes of divergence in the parties' interests, causes less integrally related to evaluation of the money transferred in the instant litigation.

40. For some news media, features other than the quality and quantity of information may be so important that it is more accurate to say that these media also, or even principally, are in the business of selling entertainment. *See infra*, notes 173–184 and accompanying text.

41. *See* Wilde & Schwartz, "Equilibrium Comparison Shopping," 46 *Rev. Econ. Stud.* 543 (1979); *see also Newsweek*, *supra* note 24.

42. Anecdotal evidence on this point is presented *infra* at note 57.

43. For discussion of error and optimality in other business decisions, *see, e.g.*, Schwartz, "Products Liability, Corporate Structure, and Bankruptcy: Toxic Substances and the Remote Risk Relationship," 14 *J. Legal Stud.* 689 (1985).

44. *See* B. Owen, *Economics and Freedom of Expression: Media Structure and the First Amendment* 34–37 (1975).

45. The problem of inference based on thin data, of course, is not peculiar to this context. For various views of the role of probability and inference in law, *see* "Symposium: Probability and Inference in the Law of Evidence," 66 *B.U.L. Rev.* 377–952 (1986).

46. This indeed may be the source of the "availability heuristic" observed by psychologists and labelled as cognitive error. *See, e.g.*, Kahneman & Tversky, *Subjective Psychology* 430 (1972); Tversky & Kahneman, "Judgments Under Uncertainty: Heuristics and Biases," 185 *Science* 1124 (1974).

47. A normal distribution of error predictions across truth-sensitive consumers would produce a bell-shaped curve of divergent predictions. The judicial confirmation of a truth-error need not lead every consumer to shift his error-rate estimate upward, but it should not lead any consumer to shift his estimate downwards. The probabilistic result, then, is an overall upward adjustment in the predicted error rate. At the margin, this adjustment will lead some consumers to value the news product at less than its cost.

48. *See infra* notes 134–184 and accompanying text.

49. Cranberg, *supra* note 9, at 221. *See also* "Absence of Malice," *Newsweek*, February 4, 1985, at 52.

50. *See* discussion of error rate expected by consumers, *supra* notes 43–48 and accompanying text.

51. The difference between the cost of reputation effects among peers and that of reputation effects among consumers is akin to the difference between insider information (which usually anticipates public information) and public reactions (which follows). Although a smaller proportion of the consumers or outside investors are aware *ex post* than the proportion of media peers or corporate insiders, the change in the outsiders' evaluation of the veracity of a news enterprise or of the value of corporate stock will be greater as that group begins with less information about the enterprises, so that any new information is relatively more influential.

52. It should be noted that under pre-*New York Times* law, punitive damages awards had effects comparable to the adverse judgment in a public figure case after *New York Times*. The overlap between pre-*New York Times* punitive damages awards and "actual malice" findings under the *New York Times* standard, however, is incomplete. Moreover, the award of punitive damages probably always has been less visible to press monitors than the judgment itself; the cost of obtaining information about matters other than the win or lose judgment is higher, making other signals of press performance marginally less effective.

53. *See* discussion in section III A, *supra*.

54. *Id.*

55. This assumes an anthropomorphic reaction to institutions. *See Gertz*, 418 U.S. at 339–341. *See also* G. Allison, *Essence of Decision: Explaining the Cuban Missile Crisis* 9–11 (1971) (describing rational individual actor model).

56. For reasons indicated *infra*, the actual meaning of *New York Times* is probably known to the monitor groups, in part because it is well publicized in connection with high-visibility libel trials. *See infra* notes 82–83, 92–94, 151 and accompanying text. Professor Warren Schwartz rightly notes that, in addition to increasing the cost of adverse judgments to media defendants, *New York Times* decreases the affirmative benefit such defendants derive from favorable judgments. While this will limit the increase in defendants' non-award stakes, its effect should be modest so long as monitor groups expect the defendant to behave in a manner that minimizes the probability of losing libel suits. The stronger this expectation, the lower the affirmative gain from a favorable judgment and the greater the potential non-award cost of an adverse judgment. *See infra* notes 140–184 and accompanying text.

57. For instance, the *Washington Post*'s circulation figures show a decline of roughly 5% following the decision of the Court of Appeals to reinstate the jury verdict against the *Post* in the moderately publicized *Tavoulareas* case. *See* Tavoulareas v. Piro, 759 F.2d 90 (D.C. Cir. 1985). [I have not examined circulation figures for the *Post* following its subsequent appellate successes in this case, *petition for reh'g den., vacated for reh'g en banc*, 763 F.2d 1472 (1985); *judg't below aff'd*, 817 F.2d 762 (D.C. Cir. 1987) *(en banc)*.] Circulation of the *Post*'s only daily, local competitor rose just over 5% (on a much smaller base) over the same period.

The *Post*'s circulation also declined about 5% following the original jury verdict against the paper in the *Tavoulareas* case in July 1982. Ten months later, the district court set aside the jury verdict and rendered judgment *n.o.v.* for the Post. 567 F. Supp. 651 (D.D.C. 1983). Between the two adverse judgments (the jury verdict in 1982 and the appellate decision in 1985), the *Post*'s circulation increased more than 6%.

It is difficult to place much reliance on figures such as these without controlling for potential seasonal variations in circulation an other, non-libel-related effects, and without examination of a much larger sample of cases and comparable pre-*New York Times* data. The infrequency of libel judgments against press defendants since *New York Times* makes strong empirical support for any proposition regarding the effects of such judgments

unlikely. Although the anecdotal evidence at this stage is comforting, the propositions advanced in the text are grounded in intuition, not data.

58. *See* Bezanson, ch. 3; Kupferberg, "Libel Fever," *Colum. J. Rev.*, Sep.–Oct., 1981, at 36; "What the Jury—and Time Magazine—Said," *Newsweek*, Feb. 4, 1985, at 58. For a very different account of media behavior, at least where some possibility of suit exists (and arguing that failure to print retractions is a principal contributing cause of libel suits), *see* Bezanson, "The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get," 74 *Calif. L. Rev.* 789, 792 (1986); Cranberg, *supra* note 9, at 221–222; Soloski, *supra* note 9, at 220.

59. *See* Franklin, Critique of Libel Law, *supra* note 10, at 12, n. 56.

60. *See* Simon, "Libel as Malpractice," 53 *Fordham L. Rev.* 449, 452 (1984); *Newsweek*, *supra* note 54, at 58.

61. *See* T. Schelling, *The Strategy of Conflict* (1960).

62. As a rule, the direct costs associated with settlement are considerably less than those associated with litigation to judgment. While a number of factors—most notably, different assessments of the likely outcome of litigation by plaintiff and defendant—may impede settlement, that should remain the preferred vehicle for resolution of parties' disputes given its cost advantage. For samples of the extensive literature exploring settlement-versus-litigation decisions, see authorities cited *supra* notes 26 and 27 and *infra* note 70.

63. Franklin, Litigation Study, *supra* note 17, at 800; Smolla, *supra* note 9, at 13.

64. Kaufman, *supra* ch. 1. Though settlement is usually less visible than an adverse judgment, it may be much more visible in libel that in other contexts. *See infra* text at notes 82–83.

65. Franklin, Critique of Libel Law, *supra* note 10 at 14–16; Sheer & Zardkoohi, *supra* note 34, at 374–380.

66. An especially lucid introduction to the concept of agency costs, and to several interesting applications, is Pratt & Zeckhauser, "Principals and Agents: An Overview," in J. Pratt & R. Zeckhauser, eds., *Principals and Agents: The Structure of Business* 1 (1985).

67. Two important assumptions might be implicit in this account of systematic media overinvestment in contesting libel suits. First, because managers are imperfectly monitored (e.g., by shareholders and outside directors), they will commit more corporate funds to protect the press enterprise's reputation than the other members of the enterprise would agree is ideal. That is, the managers will spend a corporate dollar in reputation protection when the expected yield of that dollar (money saved from subscribers, employees, and sources as a result of the favorable outcome of litigation multiplied by the increased probability of such an outcome consequent to this marginal investment) is, say, 10 cents to the managers and 20 cents to the corporation. If managers were well monitored, they would invest only until the marginal dollars equalled their expected marginal benefit to the corporation.

It is clear that self-interested over-investment in libel litigation by managers will leave shareholders worse off. It is not, however, clear whether it in fact advantages managers. That depends on a second assumption regarding the efficiency of capital markets. The agency-cost analysis can build on an assumption that capital markets do not operate efficiently, in which case the managers will be able to arrogate to themselves real wealth from shareholders (and perhaps from other members of the corporate organization). *See, e.g.*, Bebchuck, "Toward Undistorted Choice and Equal Treatment in Corporate Takeovers," 98 *Harv. L. Rev.* 1693 (1985); Coffee, "Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance," 84 *Colum. L. Rev.* 1145 (1984).

If, however, the capital markets operate efficiently (in the strong sense of that term), the shareholders discount *ex ante* (in approximately the correct amount) the return expected on their investment in light of the managers' propensity to waste corporate funds when personally advantageous. In such circumstances, enterprise managers in the ordinary case would be unable to secure a real wealth transfer; their potential gain from self-interested action contrary to the interests of the shareholders generally would be less than their gain from action congruent with shareholders' interests and, in all events, would already be taken into account by the shareholders (whose relative disinclination to invest in circumstances where agency costs are high would impose higher capital costs on such firms and thus constrain the availability of funds to support self-interested behavior). *See, e.g.*, Fama, "Agency Problems and the Theory of the Firm," 88 *J. Pol. Econ.* 288 (1980); Jensen & Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs, & Ownership Structure," 3 *J. Financial Econ.* 305 (1976); Macey & McChesney, "A Theoretical Analysis of Corporate Greenmail," 95 *Yale L. J.* 13 (1985).

For examples of the literature expressly arguing the issue of capital market efficiency, *see* Fama, "Efficient Capital Markets: A Review of Theory and Empirical Work," 25 *J. Fin.* 383 (1970); Grossman & Stiglitz, "On the Impossibility of Informationally Efficient Markets," 70 *Am. Econ. Rev.* 393 (1980). An excellent survey and discussion of the arguments respecting market efficiency is Gordon & Kornhauser, "Efficient Markets, Costly Information, and Securities Research," 60 *N.Y.U. L. Rev.* 761 (1985).

68. The exact relation between any given investment and the consequent change in outcomes depends on the base probability of plaintiff success (given some probability distribution respecting the court's determination of critical fact and the state of applicable precedent). *See* Landes & Posner, *supra* note 26.

69. This conclusion is consistent with findings published in Bezanson, ch. 3. No rigorous comparison, however, to pre-*New York Times* data has yet been made.

70. *See, e.g.*, Landes & Posner, *supra* note 26; Priest & Klein, "The Selection of Disputes for Litigation," 13 J. *Legal Stud.* 1 (1984); Shavell, "Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs," 11 *J. Legal Stud.* 55 (1982).

71. *See* authorities cited *supra* note 70.

72. *See e.g.*, Landes & Posner, *supra* note 26.

73. *See* Goodman, "An Economic Theory of the Evolution of the Common Law," 7 *J. Legal Stud.* 393 (1978).

74. *See* Landes & Posner, *supra* note 26; Priest, "Selective Characteristics of Litigation," 9 *J. Legal Stud.* 399 (1980).

75. Landes & Posner, *supra* note 26.

76. This assumes that damage award stakes and non-award stakes vary independently.

77. This assumes that, as to one or more elements of litigation expenditure, litigants reap declining marginal utility past some absolute level of investment not related to litigation stakes. Thus, for example, beyond some point it adds less and less to one's probability of success to continue advancing additional legal arguments on a given issue to the judge. *See* Landes & Posner, *supra* note 26.

78. *See* Bezanson, *supra* ch. 3; Soloski, *supra* note 9, at 219–220.

79. For example, the plaintiff in the *Tavoulareas* case, cited at note 57, *supra*, stated that he had spent $4 million to secure the $2 million judgment that now has been overturned a second time. The facts of and jury reaction to the *Tavoulareas* case are discussed in R. Smolla, *supra* note 14, at 182–97.

80. Bezanson, *supra* note 58, at 791–795; Bezanson, Setting the Record Straight, *supra* note 9, at 228–229.

81. For other positive relations of consumer demand to perceived cost, in circumstances for which negative correlations with actual cost still hold, *see* "Liebenstein, Bandwagon, Snob and Veblen Effects in the Theory of Consumer's Demand," 64 *Q.J. Econ.* 183 (1950).

82. This follows either from the efficient response to truth-sensitive, marginal consumers or from the personal interest of journalists (assuming that capital markets cannot reduce to zero agency costs from divergence of journalists' and consumers' new interests).

83. Although other factors, such as the level of competition faced by the press defendant, will affect the magnitude of defendant's non-award stakes (*see* discussion *infra*, part VI), these additional factors will not significantly affect the publicity given a libel case. The competitor who wishes to see a rival enterprise saddled with a large damage judgment and severely injured reputation does not have markedly different incentives regarding publicity for the libel suit than do non-competing publications unless the competitor is uniquely situated to influence the legal proceeding or to inform a group of its rival's potential consumers who otherwise would remain ignorant of the libel suit. Given the unlikelihood of these events, general newsworthiness considerations may be expected to dominate the publicity from competing and non-competing publications alike.

84. *Cf.* R. Posner, *supra* note 39, at 522–25. There will, of course, be some non-award stakes in the pre-*New York Times* world, and some of these may properly be classified as not involving direct financial interests. *Cf.* Leff, "Injury, Ignorance, and Spite—The Dynamics of Coercive Collection," 80 *Yale L. J.* 1 (1970). But the expectation here is that these will be dominated, as in the typical tort case, by direct financial incentives.

85. *See, e.g.*, R. Posner, *supra* note 39, at 534.

86. *See* Schwartz & Mitchell, "An Economic Analysis of the Contingent Fee in Personal-Injury Litigation," 22 *Stan. L. Rev.* 1125 (1970). *See also* Coffee, "Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions," 86 *Colum. L. Rev.* 669 (1986).

87. *See* Coffee, *supra* note 86.

88. A variety of practices historically has restrained competition among lawyers, including limitations on entry to the market for supply of lawyers' services, advertising constraints, prohibitions on certain fee agreements, and even collusive price-setting for some services. Although some of these have been relaxed after decisions such as Bates v. State Bar of Arizona, 433 U.S. 350 (1977), In re Primus, 436 U.S. 412 (1978), and Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985), a number of these restrictions on full competition remain. *See, e.g.*, Ohralik v. Ohio State Bar, 436 U.S. 447 (1978). *See also* McChesney, "Commercial Speech in the Professions: The Supreme Court's Unanswered Questions and Questionable Answers," 134 U. Pa. L. Rev. 45 (1985).

89. Findlater, "The Proposed Revision of DRS-103(B): Champerty and Class Actions," 36 *Bus. Law* 1667, 1669 (1981).

90. The *Tavoulareas* case, cited at note 57, *supra*, is illustrative. The *Washington Post* had, at least by implication, charged the principal plaintiff, William Tavoulareas, who was President and Chief Executive Officer of Mobil Oil Corporation, with improperly using Mobil's resources to benefit his son. The article did not explicitly state that the behavior it suggested was questionable had resulted in any loss to the Corporation. It did, however, at least arguably provide a basis for belief that Tavoulareas had engaged in improper self-dealing. Tavoulareas had considerable interest in keeping a reputation for honesty. Plainly, the Post article's charge was inimical to his continued successful operation as head of Mobil. The dollar worth of the harm to Tavoulareas is not easily calculated, but he both felt strongly that the article harmed his reputation and was in a financial position to underwrite litigation that might not be a good investment for a party whose sole interest

was a right to the damage judgment recovered, if any. *See* discussion of the Tavoulareas case in R. Smolla, *supra* note 14, at 182–97. It should be added that the Mobil Oil Corporation apparently picked up the expenses for the litigation. Barrett, *supra* note 10, at 859.

91. *See* Franklin, Critique of Libel Law, *supra* note 10, at 12 (arguing that "lawyers specializing in the [libel] area would have little upon which to build a successful practice based on the contingent fee").

92. The two most highly publicized libel trials of the last few years, Sharon v. Time, Inc., 599 F. Supp. 538 (S.D. N.Y. 1984), and Westmoreland v. CBS, 596 F. Supp. 1170 (S.D.N.Y.), *aff'd*, 752 F.2d 16 (2d Cir. 1984), *cert. denied sub nom.* Cable News Network, Inc. v. U.S. District Court, 472 U.S. 1017 (1985), were both brought by the plaintiff's attorneys, Shea & Gould and The Capital Legal Foundation, respectively, without direct compensation from their clients. *See* Adler, "Annals of Law: Two Trials, Part II," *The New Yorker*, Jun. 23, 1986, at 34.

93. The change in large measure traces to judicial decisions holding formal prohibitions to be unconstitutional. *See* In the Matter of R. M. J., 455 U.S. 191 (1982); Bates v. State Bar of Arizona, 433 U.S. 350 (1977). More narrowly tailored restraints have received a mixed reception from the courts. *See, e.g.*, Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265 (1985); Ohralik v. Ohio State Bar, 436 U.S. 447 (1978).

94. *See, e.g.*, *supra* note 92.

95. *See* A. Dershowitz, *The Best Defense*, (1982); F. Bailey, *The Defense Never Rests* (1971).

96. *See* Bezanson, *supra* note 9, at 228; *but see* Franklin, Critique of Libel Law, *supra* note 10, at 12.

97. *See, e.g.*, R. Smolla, *supra* note 14, at 200 (describing the ideologies of the opposing camps in *Westmoreland v. CBS*, cited *supra* note 10).

98. Examples include Floyd Abrams, James Goodale, and now David Boies. Observation of the non-parallel development of opposing sides of the libel bar can be found in Franklin, Critique of Libel Law, *supra* note 10, at 11–12. Professor Franklin opines, however, that recent developments may presage emergence of a more expert plaintiff's libel bar.

99. Of course, the opportunity for publicity lowers the real cost of representation to the defense lawyer as well as the plaintiff's lawyer; but the asymmetric interests of defendant and plaintiff means that the defense lawyer can hold out for direct payment that, together with revenue derived from the publicity generated by the case, will, in contrast, be well above the defense attorney's reservation price. Plaintiff's attorney, in contrast, will be compensated principally from publicity, without a similar dollar compensation from his client in many cases.

100. 376 U.S. at 294 (Black, J., concurring).

101. 376 U.S. at 260, n. 3.

102. *Id.* at 278–279.

103. *See* Lewis, *supra* note 9, at 608.

104. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

105. Public figures/officials account for 60% of the libel plaintiffs who sue the media. *See* Smolla, *supra* note 9, at 20–21; Soloski, *supra* note 9, at 218.

106. *See supra* notes 68–83 and accompanying text.

107. *See supra* notes 69–81 and accompanying text.

108. *Id.*

109. Not only do office-holders frequently move from one position in government to other, often more important, positions—Jimmy Carter, Gerald Ford, Lyndon Johnson,

John Kennedy, Richard Nixon, and Ronald Reagan are visible examples of movement up the electoral ladder. Additionally, given the electoral advantage enjoyed by incumbents, *see, e.g.*, Beth, " 'Incumbency Advantage' and Incumbency Resources: Recent Articles," 9 *Cong. & Pres.* 119 (1981–1982); Lott, "Brand Names and Barriers to Entry in Political Markets," 51 *Pub. Choice* 87 (1986), holding one electoral office greatly increases the prospects for holding the same office in the future. The same increase in probability for further exercise of power also characterizes appointive office, witness Elliot Richardson and Caspar Weinberger, for examples.

110. *See, e.g.*, W. Ashworth, *Under the Influence: Congress, Lobbies, and the American Pork-Barrel System* (1981); Lowenstein, "Political Bribery and the Intermediate Theory of Politics," 32 *U.C.L.A. L. Rev.* 784 (1985); Wright, "Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?," 82 *Colum. L. Rev.* 609 (1982).

111. *See, e.g.*, D. Mayhew, *Congress: The Electoral Connection* (1974); Aranson, Gellhorn & Robinson, "A Theory of Delegation," 68 *Cornell L. Rev.* 1 (1982); Lee, "Marginal Lobbying Cost and the Optimal Amount of Rent-Seeking," 45 *Pub. Choice* 207 (1985).

112. Presidents Johnson, Nixon, and Ford are ready examples of individuals who became quite well-to-do following (or, perhaps, in some cases during) public service. *See, e.g.*, Lindsey, "Busy Gerald Ford Adds Acting to His Repertory," *N.Y. Times*, Dec. 19, 1983, at A 16, col. 1.

113. *See* W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Torts* §116A, at 843 (5th ed., 1984) [cited as Prosser & Keeton]; Franklin, Critique of Libel Law, *supra* note 10, at 11.

114. This seems especially likely to be true at the local level. One possible example is the small-town mayor whose libel claim was at issue in Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971). *See* Schauer, "Public Figures," 25 *Wm. & Mary L. Rev.* 905, 910 (1984).

115. Indeed, this may explain a significant proportion of public figure libel suits. In particular, it may help explain some of the well-publicized suits by former military officers, *e.g.*, Westmoreland v. CBS, *supra,* and Herbert v. Lando, the full citation for which is unnecessarily long but which can be accessed through its Supreme Court phase, 441 U.S. 153 (1979).

116. *See* Franklin, Litigation Study, *supra* note 17. The same statement could apply to entertainers, albeit less so than to public officials. Although entertainers are not elected, notoriety and public exposure certainly play a large role in the success of an entertainer's career. Advertisers who invest in a television program and producers who invest in a play or movie often rely on the popularity of particular entertainers to draw viewers and produce revenues. An entertainer's popularity, therefore, directly influences the financial returns to him or her. An entertainer's popularity generally will be reflected in his or her immediate earnings, but popular approval has a separate value to future income. The entertainer, like the public official, relies on the work he or she does now, even if it is not very lucrative in terms of direct payments, to bring higher income later.

117. *See, e.g.*, Alioto v. Cowles Communication, Inc. 623 F.2d 616 (9th Cir. 1980).

118. Sharon v. Time, Inc., 599 F. Supp. 538 (S.D. N.Y. 1984). Although Sharon might be seen as a retired general, his inclusion within the "politician" category is generally accepted. *See, e.g.*, Deming & Kubic, "What Next for Sharon?: Using the Trial to Keep His Political Ambitions Alive," *Newsweek*, Feb. 4, 1985, at 57.

119. *See supra* notes 80–83 and accompanying text. *See also* Bezanson, *supra* note 9, at 231. Note that there may be harm from letting the suit die, yet the politician has the capacity either to explain that electoral victory is sufficient vindication or to decide that

after libel and electoral loss the added cost of harm to his reputation from dropping the suit is *de minimus*.

120. This was the explanation provided by (now former) Congressman Richard Kelly, charged with accepting bribes in the FBI's "ABSCAM" operation. *See N. Y. Times*, Jan. 8, 1981, §II, at 13, col. 1.

121. *See, e.g.*, Lakian v. Globe Newspaper Co., 399 Mass. 379 (1987) (unsuccessful gubernatorial candidate); "Lakian Cites Positive Effect of Settling WXKS Libel Suit," *Boston Globe*, Apr. 26, 1984, at 34, col. 1 (same plaintiff); Kennedy, "King Asks SJC to Order Trial in Suit Against Globe," *Boston Globe*, Feb. 6, 1987, at 82, col. 3 (former Governor and unsuccessful candidate for reelection). *See also* Franklin, Critique of Libel, *supra* note 10, at 2.

122. *See* Note, Punitive Damages, *supra* note 20, at 856. This is not inconsistent with a success rate for aspirants less than that for incumbents. *See* Franklin, Litigation Study, *supra* note 17, at 809 (elected officials are "proportionately more successful at winning and keeping verdicts than any other large group." *Id.* at 808–809). Those who place higher value on the *publicity* from filing media libel suits presumably will, as compared to others, be more inclined to file cases that have lower probabilities of yielding a successful judgment. In this regard, Glen Robinson suggests that a useful distinction can be drawn between *promotional* libel suits and *defensive* suits. The former class consists of suits that grant an electoral advantage other than simply combatting the ill effects of the libel. At first blush, these suits would appear to divide incumbents from aspirants to elective office, with promotional suits better adapted to an aspirant's interests and defensive suits better adapted to an incumbent's. The division of these suits along plaintiff class lines, however, is difficult, as incumbents also are apt to find promotional suits useful—*New York Times* seems illustrative—and aspirants may find defensive suits necessary more often than incumbents. I find Glen's suggestion attractive, but I have not yet found an appropriate device for integrating the categorization into the analysis of libel litigation.

123. *Supra* notes 69–79 and accompanying text.

124. *See* Franklin, Litigation Study, *supra* note 17, at 813.

125. *See e.g., Gertz*, 418 U.S. at 339–340; Miskovsky v. Oklahoma Publishing Co., 654 P.2d 587 (Okla.), *cert. denied*, 459 U.S. 923 (1982).

126. *See, e.g.*, R. Adler, *Reckless Disregard* 41 (1986). The *Sharon* case, *supra* note 90, is exemplary. This case is discussed in detail in R. Adler, *supra* (along with the *Westmoreland* case), and in less extended fashion in R. Smolla, *supra* note 14, at 80–99.

127. *Supra* note 92 and accompanying text. *See generally* R. Adler, *supra* note 126.

128. Of course, there is a peculiar difficulty here in digging proof of this out of data; guess-work suggests this answer in particular cases. *See, e.g.*, R. Adler, *supra* note 126, at 24; Smolla, *supra* note 14 (Smolla's title for chapter 4 of his book is indicative: "*Ariel Sharon v. Time Magazine:* The Libel Suit as Political Forum, International Style"); Deming & Kubic, *supra* note 118.

129. *See, e.g.*, Burnett v. National Enquirer, 144 Cal. App. 3d 991, 193 Cal Rptr. 206 (1983).

130. *See, e.g., Tavoulareas, supra* note 57, and discussion, *supra* note 90. Note that the court of appeals did not decide whether Tavoulareas was a public figure and, thus, had to meet the actual malice test; the court found that, if Tavoulareas is a public figure, the test was met in his case.

131. *Supra* notes 107–130 and accompanying text.

132. Note the frequent reversals,—*e.g., Tavoulareas, supra* note 57 (trial court reversed the jury verdict on motion for judgment *n.o.v.*; a panel of the D.C. Circuit reversed

the *j.n.o.v.* on appeal; the panel's decision was vacated, and the court *en banc* affirmed the judgment of the trial judge); *Miskovsky*, *supra* note 123 (court reversed jury verdict because trial court erred in submitting matter to jury)—and the frequent reductions in damages, *e.g.*, Pring v. Penthouse Int'l, Ltd., 695 F.2d 438 (10th Cir., 1982), *cert. denied*, 462 U.S. 1132 (1983) (trial judge reduced the punitive damages by half, and the Tenth Circuit set the award aside); Burnett v. National Enquirer, 144 Cal. App. 3d 991, 193 Cal Rptr. 206 (1983)(jury awarded $300,000 compensatory damages and $1.3 million punitive damages; trial judge reduced compensatory damages to $50,000 and punitive damages to $750,000; court of appeals reduced punitive damages to $150,000), *appeal dismissed*, 465 U.S. 1014 (1984).

133. For efforts to speculate, *see* Franklin, Litigation Study, *Supra* note 17; Lewis, *supra* note 9; Smolla, *supra* note 9. For an analysis of the desirability of *New York Times* under an approach *not* calling for similar data, *see* Schauer, *supra* note 114. *See also* Cass, "The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory," 34 *U.C.L.A. L. Rev.* 1405, 1455–65 (1987).

134. The changes associated with the *New York Times* legal standard will vary for different media. The simple formula for comparison of pre- and post-*New York Times* conditions requires summation of the costs (or benefits) listed above: award costs (A), non-award costs (N), defense costs (E), risk costs (r), costs of investment in care (C), and costs of reduced speech or benefits of increased speech (Q). While a summation of these costs before *New York Times*—(1) $A^b + N^b + E^b_d + r^b + c^b + Q^b$—and after—(2) $A^a + N^a + E_d{}^a + r^b + C^b + Q^b$—will represent the terms to be compared, actual comparison will not be easy because the terms are interrelated and because the change in any term need not be the same for all media. Even description of the relationships in their most general form suggest the difficulty.

So, for example, award costs (A) will be a function of several factors: the operative legal rule (after *New York Times*, L^a, or before *New York Times*, L^b; this term might be conceived of, as in Priest & Klein, *supra* note 70, as the proportion of a given set of disputes that would be resolved in plaintiff's favor, other things being equal); the relative investments of the plaintiff and defendant in the litigation (E_π and E_d, respectively); and the facts of the case (F, which might be conceived in terms of the location of a case within a dispute set arrayed horizontally from the case most clearly favoring defendant to that most clearly favoring plaintiff). Thus, (3) A = § L, E, E_d, F, with A correlating positively with L, E_π, and F, and negatively with E_d.

While a value can be assigned to L exogenously, both E_π and E_d, as well as F, are endogenous variables. Litigation costs are influenced by expected award stakes, $\bar{A}$ (assumed equal for both parties to litigation), by each party's expected non-award stakes ($\bar{N}_\pi$, $\bar{N}_d$), by assessment of the probable outcome at any level of investment ($\bar{p}$, defined as the expected probability of plaintiff's success, with 1-$\bar{p}$ denoting the probability of defendants' success), and the risk costs associated with the litigation (r_π, r_d). Formally, (4) $E\pi$ = § $\bar{A}$, $\bar{N}_\pi$, $\bar{p}_\pi$, r_π, with $\bar{p}_\pi$ being plaintiff's expectation of success; (5) E_d = § $\bar{A}$, $\bar{N}_d$, $\bar{p}_d$, r_d, with $\bar{p}_d$ being defendant's expectation of plaintiff's success. These terms that define the magnitude of expenditures also exhibit endogenous relations, with the probability of success dependent in part on relative litigation investment—(6) p = § L, F, E_π, E_d—and expectations respecting opposing parties' litigation investments (E_π, E_d) influencing the reciprocal investments.

The array of factual circumstances that gives rise to litigation also is influenced by the parties. First, the set of potential disputes any media enterprise faces is partly determined by its investment in care. Second, the likelihood that any dispute will result in litigation is partly determined by the potential plaintiffs non-award stakes and also partly by the

potential plaintiffs' expectation respecting the media enterprise's investment in litigation. The greater the enterprise's investment in care, other things equal, the more likely F will have a lower mean (more favorable to defendant). The greater the news enterprise's expected investment in litigation, the higher the mean level of F. And the higher the mean non-award stake of potential plaintiffs, other things being equal, the lower the mean level of F. Thus, (7) $F = \S\ C, \bar{E}_d, \bar{N}_\pi, \lambda$, where λ is a random variable.

While these relationships can be presented in more detail, additional detail will entail substantially more complexity. Moreover, the one consistent relationship, $L^a < L^b$, will not significantly clarify the outcome of most equations under pre-*New York Times* and post-*New York Times* law. For efforts to formalize similar relationships and consideration of some of the complexities inherent in them, *see* Denzau, "Litigation Expenditures as Private Determinants of Judicial Decisions: A Comment," 8 *J. Legal Stud.* 295 (1979); Landes & Posner, *supra* note 26; Priest & Klein, *supra* note 70.

135. *See* authorities cited note 10, *supra.*

136. *See* Franklin, Litigation Study, *supra* note 17, at 810. This effect is dependent on the relative rates at which suits and judgments decrease in number and those at which defense costs and judgments rise in magnitude.

137. *Cf.* Landes & Posner, *supra* note 26; Shavell, *supra* note 70.

138. *See, e.g.,* Shavell, "On Liability and Insurance," 13 *Bell J. Econ.* 120 (1982) [cited as Insurance]; Shavell, "Strict Liability vs. Negligence," 9 *J. Legal Stud.* 1 (1980) [cited as Liability].

139. *See supra* notes 34–67 and accompanying text.

140. In attempting to sort out the various media enterprises, a definitional problem must be addressed. The assumption here is that these enterprises differ in their stake in libel suits and, further, that this difference is related to enterprises' varying sensitivity to the effect of libel litigation on the enterprise's reputation for veracity. It is not, however, clear what best correlates with sensitivity (or with a reputation for veracity). I frame the divisions in terms of average levels of care in reporting. Two other factors suggest themselves readily as alternative determinants of likely reaction to libel prospects: (1) the frequency of false reports, of (2) the frequency of recklessly false reports. I assume that these alternative factors are positively correlated (at a very high level of correlation) with the average level of care within an enterprise. I also assume that the level of care correlates well with reputation. Finally, insofar as there is divergence among these various factors, I think that average level of care would better indicate the media enterprise's own assessment of its reputation and of its interest in libel litigation. On the choice of average rather than marginal levels of care, *see infra,* text following note 142.

141. Of course, high-care media are sensitive to profit constraints. Anyone who doubts that can look to Rupert Murdoch's takeovers of enterprises such as *The Times of London.* Nonetheless, owners of high-care media, especially in closely-held corporations, may seek to attain a higher lever of veracity than the consumer market rewards. This preference may be justified by the savings from lowered input costs (managers, employees or sources) or it may be a taste for which the owner is willing to pay in lower profits. In this regard it may be noteworthy that many news enterprises remain family-owned, closely-held ventures. The choice among efficient-profit-maximizing owner-taste and agency-cost explanations is a difficult one that I do not reach here.

142. This point can, of course, be made with respect to any large organization. *See, e.g.,* Arrow, "Control in Large Organizations," in K. Arrow, *Essays in the Theory of Risk-Bearing* 223 (1971); Cass, "Allocation of Authority within Bureaucracies: Empirical Evidence and Normative Analysis," 66 *B.U. L. Rev.* 1 (1986); Pratt & Zeckhauser, *supra* note 66. The point also is made poignantly in the descriptions of reporters' and editors'

conduct that formed the background for the *Sharon* and *Westmoreland* suits. *See* R. Adler, *supra* note 126; D. Kowett, *A Matter of Honor* (1984); R. Smolla, *supra* note 14.

143. Franklin, Litigation Study, *supra* note 17, at 810; Smolla, *supra* note 9, at 12–13.

144. The damages awarded in the *New York Times* case itself, for instance, were $500,000, the equivalent of roughly two million dollars today. And at least another $2.5 million (1964 dollars) was at issue in related suits and could reasonably be expected to have been assessed against the *New York Times*. *See* Smolla, *supra* note 9. (Concurring in *New York Times*, Justice Black states that suits against the *New York Times* in Alabama asked for a total of $5.6 million, of which $1 million already had been awarded. 376 U.S. at 294–95.)

145. The change in expected marginal yield from defense expenditures wrought by *New York Times* is akin to the change that accompanies movement from a strict liability standard to a negligence standard. *See* Cooter, "Prices and Sanctions," 84 *Colum. L. Rev.* 1523 (1984).

146. Although the data are not clear on this point, some of the sources reporting recent trends in libel litigation seem to indicate that overall defense expenditures are rising for media enterprises. *See* Barrett, *supra* note 10; Goodale, *supra* note 10; Kaufman, *supra* ch. 1.

147. *See supra* notes 53–75 and accompanying text. This formulation of the defense calculus assumes risk neutrality.

148. During the *Sharon* trial, for example, non-subscription sales of *Time* magazine fell by 14% from the prior two months (slightly more when compared to the average of the prior six months). In the two months following the verdict, in which *Time* was found to have made a false, libelous statement and to have acted negligently, but not with actual malice, the publication's non-subscription sales declined an additional 5%. During the trial and post-trial period, single-copy sales of *Time*'s chief competitor, *Newsweek*, rose 5%. The *caveat* given in note 57 *supra* applies here as well.

149. *See supra* note 80–83 and accompanying text.

150. *See* R. Adler, *supra* note 126; Lewis, *supra* note 9.

151. Thus, for example, *Time* as well as *Newsweek* gave extensive coverage to the *Sharon* case. Although it may at first seem anomalous that a press enterprise would publicize libel actions against it, a fairly straightforward cost-benefit analysis explains this conduct. If the press-defendant were a monopolist of the news regarding the law suit, there would be substantial gain from suppressing the information. The existence of competing news outlets, however, reduces substantially the likelihood that libel suits against high-care press enterprises will go unnoticed. The rational, profit-maximizing defendant, aware that most of the information regarding the suit is publicly available, will calculate the number of its readers (and other monitors) who are expected to remain ignorant of the suit unless publicized by the defendant, and weigh the harm from disclosing the suit to these monitors against the benefit of telling the defendant's side of the story and the benefit of seeming sufficiently concerned about reporting all important stories to include in its publication information not unambiguously favorable to the defendant. Presumably, the monitors most sensitive to the fact that the suit has occurred, and those most sensitive to the quantity of information provided by the defendant publication, already will know of the suit. The additional publicity given by the defendant, thus, is not likely to be terribly costly to defendant and frequently will be outweighed by its benefits.

At the same time, the incentive for other press enterprises aggressively to publicize suits against a competitor is less than may at first blush appear. Two factors reduce the gains to be had from this publicity. First, there is some possibility for negative spillover effects: some monitors of the non-sued media enterprises will react to news of the suit

against the competing enterprise by discounting the value not just of the competing publication but of all news media. The point can best be made by analogy. Airlines do not advertise their services by emphasizing comparative safety, relating the advertising carrier's safety record to those of his competitors. The airlines avoid this strategy because, while it may shift passengers from a less safe carrier to a more safe carrier, that effect may be dominated by the reduction in use of all air carriers consequent to the increased perception that air travel (generically) is unsafe. Second, aside from the effects of publicity in any given case, tacit collusion could reduce such publicity. If there are relatively few media competitors in a given "class" and if these competitors expect to be sued with roughly comparable frequency, they might tacitly agree to publicize such suits less vigorously than self-interest in the individual case would dictate. It is not evident that in the case of media libel suits either of these publicity-decreasing factors plays much of a role. To the extent, however, that press libel defendants and their competitors do not differ greatly in the publicity given to a libel suit, these factors, as well as those regarding the defendant noted above, may be implicated.

152. *See, e.g.*, American Security Council Educ. Found'n v. FCC, 607 F.2d 438 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980); and sources cited in R. Cass, *Revolution in the Wasteland: Value and Diversity in Television* 1–2, 20–22, 171–72, nn. 32–43 (1981).

153. Indeed, Sullivan was not directly (or, perhaps, even indirectly) the subject of the advertisement at issue in *New York Times*, which declared:

> [A]s the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights. . . . In their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom. . . .
>
> In Montgomery, Alabama, after students sang "My Country, 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission. . . . Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for "speeding," "loitering" and similar "offenses." And now they have charged him with "perjury"—a felony under which they could imprison him for ten years. . . .

376 U.S. at 246–58.

Concern that this sense of idealogical and regional conflict permeated the libel litigation at issue in part explains the Court's decision to place its holding on relatively broad constitutional grounds. *See, e.g.*, Lewis, *supra* note 9, at 608 (stating that Justice Brennan's opinion for the *New York Times* Court "took an extraordinary step to make sure that the Alabama courts would not find some new way to punish *The Times* when the case went back down to them").

154. *See* Bezanson, *supra* ch. 3; and authorities cited *supra* note 144.

155. *See, e.g.*, K. Arrow, *supra* note142; Shavell, Insurance, *supra* note 138.

156. *See* Barrett, *supra* note 10, at 858.

157. *See* Worrall, "Libel Policy Deductibles and Limits," in *Media Insurance*, *supra* note 10, at 147, 143–57.

158. *See* Lankenau, "Comparison of Three Leading Insurance Policies," in *Media Insurance*, *supra* note 10, at 195, 236–37.

159. *See, e.g.*, Shavell, "On Moral Hazard and Insurance," 93 *Q. J. Econ.* 541 (1979).

160. *See* Lankenau, *supra* note 158, at 161–63. Although insurance companies do seem to distinguish between high-care and low-care companies in setting premiums (and not just on the basis of past losses), some companies that might be characterized as super-high care will find that their expected losses still will be well below the cost of insuring against them. This point simply applies the standard observation that insurance rating by class disfavors the least risky member of the class. This also might explain the historic disinclination of *The New York Times* to purchase libel liability insurance.

161. *See, e.g.*, Franklin, Critique of Libel Law, *supra* note 10, at 14–16; Schauer, "Fear, Risk, and the First Amendment: Unravelling the 'Chilling Effect,' " 58 *B.U. L. Rev.* 685 (1978); Sheer & Zardkoohi, *supra* note 18, at 374–79.

162. *See* Lewis, *supra* note 9, at 621–22.

163. Thus, reduced press care in statements regarding low-level officials, for example, may be a consequence of *New York Times*. *See* Schauer, *supra* note 114.

164. *E.g.*, Garrison v. Louisiana, 379 U.S. 64 (1964) (criminal prosecution for alleged libel of district attorney). *See* Franklin, Litigation Study, *supra* note 17. *See also* Smolla, *supra* note 9, at 2.

165. *See, e.g.*, United States v. Robel, 389 U.S. 258 (1967); Aptheker v. Secretary of State, 378 U.S. 510 (1964); *see also* G. Gunther, Constitutional Law 1148 (11th ed., 1985); Note, Punitive Damages, *supra* note 20, at 856.

166. Although the setting is different, the calculus for a profit-maximizing new enterprise will resemble that of a firm utilizing Ramsey prices. *See* Baumol and Braunstein, "Empirical Study of Scale Economies and Production Complementarity: The Case of Journal Publication," 85 *J. Polit. Econ.* 1037 (1977).

167. *See, e.g.*, Barrett, *supra* note 10, at 855–61; Smolla, *supra* note 9; Abrams, "Why We Should Change the Libel Law," *N.Y. Times*, Sep. 29, 1985, §6 (Magazine), at 34, 93. *See also* authorities cited in Schauer, "The Role of the People in First Amendment Theory," 74 *Calif. L. Rev.* 761, 767 n.35 (1986).

168. *See supra* notes 148–149 and accompanying text.

169. *Newsweek*, Westmoreland, *supra* note 24, at 66.

170. *See* B. Owen, *supra* note 44, at 34–37 (discussing local limits on these economies of scale, given geographic segregation of local news sources, demand for local news, and advertiser demand for geographically-restricted (local) audiences).

171. *See* G. Stigler, *The Theory of Price* 333–36 (3d. ed., 1966).

172. *Cf.* Landes & Posner, "Legal Precedent: A Theoretical and Empirical Analysis," 19 *J. L. & Econ.* 249 (1976).

173. One of the relatively few examples of successful press libel litigation, the *Burnett* case, cited at note 129 *supra*, illustrates the difficulty. *See* discussion in R. Smolla, *supra* note 14, at 100–17.

174. It is unlikely, for instance, that enterprises such as *The National Enquirer* or *The Star* would generate the sort of internal documentation of concern over the veracity of a story such as *Time* did with respect to the story about Ariel Sharon or CBS in its "Benjamin Report" did with respect to its story about William Westmoreland, both with less than wholly salutary effect from the media enterprises' point of view. *See* R. Adler, *supra* note 126.

175. Indeed, even where malice, in both its common and *New York Times* senses is present, the law may offer considerable protection to publishers of less than unimpeachable scruple. *See, e.g.*, Falwell v. Flynt, 797 F.2d 1270 (4th Cir. 1985) (affirming a judgment

against Hustler Magazine publisher Larry Flynt for intentional infliction of emotional distress, but finding that this tort was subject to same actual malice requirement as defamation; the article in question had been found non-defamatory as parody, hence not reasonably construed as stating facts), *rev'd* 108 S.Ct. 876 (1988).

176. This follows from standard assumptions about economically-motivated litigation, *see, e.g.*, Epstein, *supra* note 18; Sheer & Zardkoohi, *supra* note 18; and authorities cited *supra* note 70.

177. *See* discussion *supra*, text at notes 124–131. *Cf.* Lankenau, *supra* note 158.

178. *See, e.g.*, authorities cited in Note, *supra* note 20, at 854 n. 43. The precise degree of congruence between *New York Times* actual malice and common law malice is not clear, but plainly the *New York Times* standard increases the overlap between liability for defaming a public figure and liability for punitive damages.

179. *See* authorities cited *supra* note 10. Much of the concern over punitive damages in media libel cases has focused not on the amounts actually collected from media libel defendants, but rather on the amounts prayed for in plaintiffs' complaints. *See, e.g.*, Note *supra* note 20, at 847. Discussion of libel suits by reference to their ad damnum clauses has been criticized in Barrett, *supra* note 10, at 857 n. 59.

180. *See, e.g.*, Epstein, *infra* ch. 5; Schauer, *supra* note 114; Shavell, Liability, *supra* note 138 (making same point for tort defendants generally when faced with decreased expected costs of harm-producing activity).

181. *See, e.g.*, Friendly, "CBS Settles Large Libel Suits by Public Officials in 2 Cities," *N.Y. Times*, Oct. 21, 1982, at 15, col. 5 *See also* Friendly, "Investigative Journalism Is Changing Some of Its Goals and Softening Tone," *N.Y. Times*, Aug. 23, 1983, at 8, col.1.

182. Under a rule of common law libel widely accepted until the middle of this century, each copy of a publication that was sold or distributed constituted a separate defamatory act. Although few American jurisdictions currently follow this rule, the size of the audience for the defamatory publication still influences determination of the degree of damage from the defamatory remark. *See, e.g.*, Prosser & Keeton, *supra* note 113, at 797–801.

183. *See, e.g.*, R. Cass, *supra* note 152, at 61, and authorities cited *id.* at 188 n. 10.

184. For descriptions of media behavior consistent with this proposition, *see* R. Adler, *supra* note 126 (describing CBS' strategy in responding to General Westmoreland's complaint).

185. *See* Brennan, "The Supreme Court and the Meikeljohn Interpretation of the First Amendment," 79 *Harv. L. Rev.* 1 (1965); Cass, *supra* note 133; Kalven, "The New York Times Case: A Note on 'The Central Meaning of the First Amendment,' " 1964 *Sup. Ct. Rev.* 191; Schauer, *supra* note 114.