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Introduction

Libel law deals with a clash of two important societal values -- freedom of speech and freedom from defamation. The proper balance between these goals has been vigorously debated over the years. Libel cases make for interesting news copy, since their cast of characters tend to involve the powerful and the famous, often marking the political battles of the day -- Civil Rights, Vietnam, Lebanon, Chile. It is not surprising therefore that battles over libel law often have an intensity that far transcends the dispute over the actual damaging words, and this, in turn, leads to a certain loss of perspective. Members of the press often find a fundamental threat to the vigor of political debate when a sloppy article gets a publication into trouble. The objects of press coverage, in turn, complain of an "open season" on anyone in the public eye, with journalists and publishers motivated by Pulitzer Prizes and increased circulations.

In the words of the classic commentator of tort law, Dean Prosser, "There is a great deal of the law of defamation which makes no sense." (Post, p. 691) One way to establish analytical order is to recognize that libel is part of the broad class of legal wrongs or torts. Torts generally involve questions of liability for a harm inflicted by one party on another, intentionally or unintentionally.

It can be generally observed that any given class of potential tort-feasors will attempt to reduce its exposure to legal liability. Because the group's financial well-being typically has no priority for the rest of society, it must frame arguments for liability restriction in terms of greater societal values. Journalists and publishers are no different; as a profession and industry, their primary exposure to litigation are libel suits, and they do not like it any more than doctors like malpractice cases. And, just as one may not want to insulate a surgeon from the consequences of outrageous behavior, even if it raises the cost of surgery or deters new procedures, it is not obvious why a total absence of liability would be the optimal policy for a society that balances multiple values and rights.

Until the mid 1960s there was little reason for citizens not intimately involved in libel disputes to care much about them. They were typically played out in state courts and involved modest awards of little public consequence. The law of libel, while always perplexing and complex even to authorities on tort law, changed glacially and attracted relatively little public or scholarly attention.

The terms of the debate over libel law changed with the coming of a landmark case, New York Times v. Sullivan, decided by the Supreme Court of the United States in 1964. The case involved a dispute between a public official in Alabama and the New York Times, which in a paid advertisement had criticized rather indirectly his public performance. All this occurred in

the heat of the civil rights movement of the 1960s and involved, again indirectly, Dr. Martin Luther King.

The case, which extended constitutional protections to the press in its coverage of public officials and public policy, was seen by the media as a great victory -- real and symbolic. One critic even declared that "the law of libel [involving public officials] has been all but abolished." [cite] The interceding years brought a number of important progeny cases, most of which continued to expand the concept of the public official and public figure, the result being an extension of press protections. These protections were tied to the concept of actual malice, which was defined by the Court as "reckless disregard of the truth" or "knowing falsehood." The media were given great latitude in gathering news and information, and could even be forgiven some inaccuracies, as long as their journalistic efforts were made in good faith and they did not breach the malice standard.

These developments occurred in the 1960s and early 1970s, roughly coinciding with the so-called Warren Court. In the late 1960s, when Chief Justice Earl Warren retired, leaders of the American news media and the legal-judicial community began to speculate about what changes would be in store. Would the Court overturn what seemed to be an increasingly permissive standard for public criticism and assessment of public people? Would it, in Mr. Dooley's phrase, "follow the election returns," and redefine the role of the press, whose public approval and

credibility seemed on the downslide at a time when the president of the United States could appeal to a moral majority? Would increasingly conservative justices adhering to a doctrine of judicial restraint curtail or at least slow the rapidly expanding definition of freedom of the press?

The dire predictions and nervous speculation of media leaders and their critics never materialized. While there was some softening in the public figure definition and a tendency to be more rigid in what kind of political speech could be punished after the fact of publication with attending proof of harm, courts did not dismantle the doctrine of New York Times v. Sullivan.

But something else did happen. Those on the receiving end of press revelations and criticism began to fight back, using their full resources and pressing their battles in the legal system. They demanded and were given the right to examine the process of news gathering and editing to determine whether the malice standard had been breached. This allowed them to learn more about how reporters, editors and other media personnel did their work, what precautions they exercised, and whether the eventual publication or broadcast was the result of appropriate procedures and practices. And while it was considered somewhat out-of-bounds to raise the question of "fairness," something not required by the Constitution, it was nonetheless often discussed.

All this was happening at a time when there were serious questions raised about media credibility. One national survey

conducted by the nation's newspaper editors even declared that "three-fourths of the American people have some problem with media credibility."

In the midst of this upheaval, there were a number of dramatic libel cases involving major public figures -- military leaders like General William Westmoreland and former Israeli defense minister Ariel Sharon; business leaders like William Tavoulareas and entertainers like Carol Burnett. Juries began to return multi-million dollar verdict against the news media. From major media like CBS and The Washington Post to smaller midwestern and western publications, libel judgments seemed to be large and growing; public attention to libel issues grew.

New York Times v. Sullivan had affected libel law in two significant ways. First, it brought state libel law under the purview of the first amendment and thus constitutionalized it. And second, it changed the legal rules affecting libel from those of a "strict" liability for falsity to those of behavior -- the standards of actual malice and reckless disregard. While this was first viewed as helpful to defendants, in time -- particularly after the 1979 decision in Herbert v. Lando -- plaintiffs turned the table and began to investigate the investigators. This should not necessarily be viewed as negative. Openness of institutions, after all, is what the press seeks, so why should it itself be an exception? But there were also practical burdens associated with the change in liability rules: focussing on the process of reporting and editing makes

for more complex and costly litigation. And while this may scare away some plaintiffs, others may be encouraged by the possibility that their media adversaries would settle or retract in order to avoid a protracted law suit. All this led to an escalation of the stakes. Plaintiffs raised the damages they sought to more than half a billion dollars. Juries, in turn, awarded ever-increasing damages, reflecting a pro-plaintiff attitude in tort cases generally, and their willingness to disregard the reckless disregard standard if a sympathetic plaintiff had been harmed by what was perceived as an arrogant press. The number of libel suits grew; and created their own momentum: as libel actions became common, some people felt compelled to sue only to negate the impression that they acquiesced with the story.

This led to calls for reform of the libel law, with proposals by academics such as Marc Franklin, Anderson, and Barrett and legislative proposals such as the Schumer and Lockyer bills, which aimed at affecting damages, legal expenses, and incentives to sue, and the framing of the issues. In assessing their potential impact it is important to remember that many of the effects of New York Times v. Sullivan had not been anticipated at the time. How then should the new and more complex proposals be analyzed? The conventional approaches are those of legal constitutional discussion, or of an investigation of practical ramifications on news rooms and publishers. But there is also another way to proceed. Defamation is, after all,

a subcategory of tort law, and tort law has been in the past fifteen years the subject of an increasingly sophisticated analysis by academic economists and lawyers. Their focus has been to investigate the impact of liability and damage rules, primarily for product liability and safety issues, but the methodology applies to libel, too. One illustration: When a newspaper invests in developing a story, it normally gains only a relatively small benefit, since the new information is rapidly used by others publications, too. This has to do with the peculiar economic properties of information. On the other hand, if the story turns out to be false and defamatory, the initial publisher may be held liable for the entire damages, even though it enjoyed only part of the benefits. Such asymmetry is further enhanced by juries' building into their awards a deterrent element for other publications' sins. In such situation, the economically efficient -- let alone socially optimal -- investment into news stories would not take place.

Thus, liability rules require careful analysis as to their treatment of gains and risks. For example, the absence of an economic or legal corrective force, in the face of vigorous competition and profit motivation, can lead to a deterioration of the news product, i.e. to less fact and more fiction or errors. Ideally, of course, readers would honor quality, but the circulation figures of various journals suggest that audiences like to be entertained as well as informed, and fiction is cheaper to produce than facts. Hence, bad journalistic practices

could abound, and also affect the credibility of those segments of the press that do not succumb to them. Like a common meadow that becomes overgrazed as each participant strives to maximize its own benefit, respect for the medias' role erodes.

There are similar negative "externalities" by a publication's over-zealous defense of a weak case. In the case of Sharon v. Time, a magazine's reporting, editing, and promotion practices led the jury to find defamation and falsehood in the story, and negligence and carelessness among certain of its employees; only the reckless disregard standard saved the publication from a legal defeat. Millions of dollars in litigation fees could have been avoided if Time had been willing to admit imperfection. Renata Adler [New Yorker and book], Steven Brill (The American Lawyer) ("Say it Ain't So, Henry," Feb. 1985, p. 1), Rodney A. Smolla (Suing the Press, Oxford University Press, 1986). In the words of the distinguished trial judge, Abraham Sofaer [in Smolla, p. 94] "[I]t would be pure fantasy to treat Time in this case like some struggling champion of free expression, defending at great risk to itself the right to publish its view of the truth."

These examples show that the "market place of ideas" does not necessarily lead to a flawless product, i.e. truth, anymore than an unfettered market leads necessarily to optimal quality of clean environment, safe products, or technical innovation. And while the outcome may still be far preferable to regulated alternatives, one should understand the trade-off.

To discuss libel issues, theoretical analysis must be accompanied by empirical research. For example, if it can be shown that juries will strongly decide on the grounds of falsity rather than on behavior, regardless of instructions, either the behaviorist liability rules must be changed, or the role of juries must be limited in this field. The media and many civil libertarians warn about the high and growing cost of libel, and their chilling effect on the freedom of expression. In scores of articles and public forums, it was argued that the role of the press to engage in reporting on activities affecting the public was being restrained by onerous threats of libel suits that could result in multi-million dollar judgments. This is partly an empirical question. Were there, in fact, more libel suits with bigger judgments? Did the press do less well in the courts than other institutions? Were there excessive costs not only in jury verdicts, but also legal fees? Were the costs simply the natural outgrowth of an increasingly litigious society, or were the libel verdicts more costly and thus cause for real concern? Did the economics of libel, including all costs -- direct and indirect -- involving judicial awards, legal fees, lost time, productivity and information, really pose a threat to freedom of expression and to the proper functioning of the mass media? Were these major economic changes simply typical of legally determined damages and costs generally, or was there something different about the economics of defamation? Finally, has the libel regime gone out of control? Does it need new understandings and

assumptions, possibly involving legislation or court-directed reform?

Clearly, many of these questions cannot be addressed by economic analysis as the only discipline. Libel is a peculiar tort insofar as damages are highly subjective and often relate to an individual's standing in society. The Bible admonishes "[A] good name is rather to be chosen than great riches." Proverbs 22:1. Or in Shakespeare's words, "Take honour from me and my life is done." (Richard II, I, i, 11. [77-83. Check])

But these questions do have consequences for the public. The public has a stake in the system of freedom of expression, including the news media, which increasingly acts as a central nervous system for our social, political and economic communication. The public might also be concerned about an efficient system of accountability in which the mass media, as with other social institutions and entities, must allow for feedback. But before citizens or their surrogates can make sense of the current debate over the economics of libel and its effects, they need more information and analysis, gathered systematically and presented cogently enough to be useful.

That is what this book attempts to do. In the chapters that follow, the editors have commissioned leading legal scholars, communication researchers and economists to pursue many of the questions mentioned above. Happily, we have tuned in to a considerable amount of on-going research that probes questions about the costs of litigation involving torts and other areas of

the law. This book also provides background information, some derived empirically, some through documentary study and qualitative analysis. The studies commissioned here help to define the problem of libel in an economic sense, offer data and scholarly evidence, speculate knowledgeably about the impact of particular court rulings, provide a close-up look at New York Times v. Sullivan and our nearly quarter-century experience with its rules, and lay out some alternative approaches to our complex libel regime.

While the free speech discussions of libel are useful and help derive a proper theory for the adjudication of disputes, they are less than fully pertinent without consideration of other costs, especially economic ones. This book tries to cut new ground, to synthesize much of the useful research on the law and economics as it can be applied to libel, presents heretofore unpublished new findings, and suggests public policy solutions to a problem that once may have seemed distant from citizen concern, but which now threatens to have impact on the quality of public discussion and debate in America.

This book was developed concurrent with work on a national conference on the economics of libel cosponsored by the Gannett Center for Media Studies and the Center for Telecommunication and Information Studies, both at Columbia University. The conference, held in New York in June 1986, featured some of the nation's leading communication lawyers, media and legal economists, media decision-makers representing communication

companies, broadcasters, newsmagazines and newspapers. Also in attendance were media scholars and practitioners of communication law, especially those who work for media companies and who are therefore quite directly concerned with libel issues. Libel plaintiffs, who take quite a different view, also attended and took part in the proceedings. The leading scholars of the economics of libel, some represented in this volume, as well as those who have proposed solution -- law professors, legislators and judges -- were also participants in this unique event.

We mention the conference here because it signaled considerable public and scholarly interest in the topic pursued in this book. However, this book is not a record of the conference. Much of the work presented here was mentioned only in abbreviated form at the conference. Some of it was written afterwards. A record of the conference does exist in the form of a Gannett Center report, The Cost of Libel: Economic and Policy Implications.

The chapters that follow either (a) assemble new data and help define the libel-economics problem, (b) provide analysis of the present legal regime, or (c) propose revision or reform.

In Chapter 1, Henry R. Kaufman, general counsel of the Libel Defense Resource Center, sets the stage for analysis and discussion of the economics of current libel litigation by providing new data tracing trends in damage awards by juries, as well as insurance premiums and litigation itself. (It should be noted, however, that a majority of these awards is subsequently

scaled down by the judge or the appellate process.) Mr. Kaufman finds the trends toward increased libel litigation troubling, especially in light of accelerating insurance premiums. Costs, he concludes, must be brought into line with the constitutional mandate for protection of First Amendment freedoms.

In Chapter 2, legal scholar Randall P. Bezanson and two journalism professors, Gilbert Cranberg and John Soloski, provide a glimpse of the nonconventional costs of libel litigation that involve ideology. Money, they argue with the support of solid evidence, is not the chief motivating factor for the parties in a libel suit, and, in fact, the economic issues involved in negotiation and dispute resolution have little to do with the rules of liability. Their study involved detailed and systematic interviews with plaintiffs and defendants in libel suits between 1974 and 1984 and is probably the most complete portrait of the views of those important sources ever assembled.

Three economists, Stephen M. Renas, Charles J. Hartmann and James L. Walker, offer an empirical analysis of "the chilling effect" in Chapter 3. To what extent, if at all, they ask, is the behavior of newspapers affected by the liability standards they face in defamation actions? In their survey of newspapers, the economists conclude that the greater the prospect of public persons prevailing in libel suits, the less the likelihood that the press will publish articles and opinion pieces of a highly controversial and potentially litigious nature.

Chapters 4, 5 and 6 all address the role, dimensions, impact and probable future of the New York Times standard. Ronald A. Cass, a law professor at Boston University on leave as a member of the International Trade Commission, offers what he calls "an incentive analysis," sorting out the relationship between the Sullivan case's impact on both First Amendment principles and on economic interests. He argues that when the New York Times case introduced the concept of "actual malice" into the law of libel and raised it to a constitutional level, it altered the incentives of some press defendants to resist libel suits. All this, Cass says, may even have an impact on the press's credibility.

Richard A. Epstein, professor of law at the University of Chicago, gets right to the point, asking bluntly whether the New York Times doctrine that led to a more explicit definition of actual malice was, in fact, wrong, and whether the initial media enthusiasm over the case was shortsighted. While agreeing that the now more than 20-year-old decision was decided correctly on its facts, Mr. Epstein believes that the common law rules of libel, as administered by state courts, were thrown out prematurely. He suggests a pathway toward reform and toward correcting what he regards as the public policy mistakes of the New York Times v. Sullivan decision and its subsequent interpretations.

Mark S. Nadel, of the U.S. Congress' Office of Technology Assessment, tries to redefine the doctrine of New York Times v.

Sullivan. He suggests two major changes: one that would require the press to admit either error or some degree of uncertainty when responding to a libel complaint where there is not an incontrovertible fact situation and, secondly, allowing the press to recover attorneys' fees when a libel plaintiff fails to prove that an uncorrected defamation was false.

In Chapter 7, Marc A. Franklin, professor of law at Stanford University, looks at the costs incurred by defendants in the current libel system and then examines them speculatively in terms of three different proposals for reform of the libel system. The three proposals are: (1) the Lockyer Bill introduced in the California legislature that would allow public officials to seek a declaratory judgment in instances where statements are defamatory and false; (2) the Schumer bill in the U.S. Congress, which is similar to the Lockyer bill but would bar a plaintiff who seeks declaratory relief from also seeking damages; and (3) the Plaintiff's Option Libel Reform Act (POLRA), which would require all plaintiffs to show falsity and actual malice with convincing clarity and would eliminate punitive damages. Mr. Franklin's impact analysis predicts that none of the proposals would not cost more than the present system and all could produce lower costs for the media, especially smaller publications. In any event, he says, the economic concerns of the media in carrying out their public function would not likely be harmed by proposed alternatives to the current libel regime.

In Chapter 8, Alain Sheer, an attorney for the Federal Trade

Commission, and management professor [check] Asghar Zardkoohi ask whether the current law of defamation as it relates to public officials is economically efficient. They are especially concerned with the efficiency of the old strict liability rule, which was replaced by the public law of libel. Neither old rules nor new rules seem fully appropriate or especially efficient, they argue. One, the strict liability rule, includes too much self-censorship, while the other, the actual malice rule, induces too little self-censorship and concern for accuracy.

Judith Lachman, professor at MIT's Sloan School, examines the relationship between reputation and risk-taking in Chapter 9. Using a framework familiar in the analysis of tort law, she considers both the costs of injury and costs of avoiding injury, suggesting that these trade-offs ought to be central concerns in any proposal for libel law reform.

Finally, in chapter 10 David Hollander, an attorney, provides an analysis of the economics of libel litigation, focusing on constitutional protection for all parties, asking how much is needed and what form it should take. In doing so he develops an economic model of information production, focusing on the professional mass media. He looks at the elements of the market for information, the effect of constitutional privilege on the accuracy and quantity of information production, and accounts for the effects of costly litigation and the social impact of the constitutional privilege provides insufficient protection to the media, defamed persons and to the public. He, too, suggests that

one way out of the present dilemma is to make "the loser pay all" of the winner's reasonable attorneys' fees.

What these essays point up is that economic incentive considerations are inextricably intertwined in the current libel regime. What the Supreme Court intended in extending constitutional privilege to libel may have actually resulted in a litigation-conscious response by plaintiffs and defendants that reduces the yeast of the public debate, diminishing rather than accelerating the amount and quality of information actually reaching the American people.

These essays taken as a whole document quite dramatically show the inhibiting effect of the present libel regime on freedom of expression in America. They provide a cogent analysis of the conceptual thicket and suggest that there may be pathways out that will benefit all parties, especially the public, which has the greatest stake of all in the economics of libel.

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