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THE ECONOMICS OF LIBEL LITIGATION

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Since the landmark decision in *New York Times v. Sullivan,*[1] courts and commentators have struggled with the question of what protection speakers should be given from liability for defamation: should speakers be shielded from liability through use of a fault standard, damage limitations, evidenciary burdens or through some other means? This paper sets out to analyze the utility or some of these approaches from an economic perspective. Part I develops a model of information production. This model, which focuses on how liability rules affect the professional media, demonstrates that such rules should be structured to induce the media to produce more information in order to help correct a failure in the market for information. Part I also examines some empirical evidence on the effect of both damage rewards and litigation costs on the production of information. We shall see that litigation costs have a far greater impact on information production than do damage awards. Part II compares the relative effects of three different types of protection against defamation suits—fault standards, limitations on damages, and fee shifting—and proposes a set of revisions of constitutional privilege centering on the use of awarding litigation costs to the prevailing party.

I. THE ECONOMICS OF INFORMATION PRODUCTION

A. Elements of the Market for Information

The market for information consists of information producers, information consumers, and information itself. The model of the market for information discussed below will assume that all information is produced by the professional media, who are responsible for most of the information we receive, and that rules affecting them are likely to have a major impact on the production of information. In addition, they—more than anyone—are likely to be aware of the rules of liability and to respond to changes in them.

Consumers, the second element of the market for information, purchase information directly, when they buy a book or newspaper, or

indirectly, when they obtain their information from advertising supplied mainly by television and radio. Consumers demand information both for its entertainment value and to help them make decisions. The demand for the latter type of information is presumed to be a function of its accuracy and the nature of the decision to be made.

This model assumes that information production is determined by the laws of supply and demand. This, in turn, assumes that consumers desire accurate information and are willing to pay for it, and that the media respond to the various financial incentives provided to them. Either or both of these assumptions could be wrong: consumers may, for example, care far less for the accuracy or relevance of the news they purchase than for its entertainment value, and the media may determine their output based on their desire for awards and prestige or to serve a professional ethic that encourages the publication of newsworthy stories rather than any desire to maximize profits.[2]

The assumption that the media are responsive to financial incentives is independent from the assumption that consumers are willing to pay for useful information. Even if the news content or quality of a broadcaster's or publisher's output were of no concern to consumers and had no effect on sales, the level of news produced should still be influenced by the cost of producing it. In this case, we would be able to determine how various liability rules affect the production of information. We would be unable to determine, however, whether the media were producing the appropriate level of information in the absence of effective signals in the form of consumer demand.

Some members of the media have claimed that they are unresponsive to at least one financial incentive—the threat of litigation.[3] Even if this is true in the case of some publishers and broadcasters, it is unlikely to be true generally. Rather, the much more common claim by the media is that the threat of libel litigation results in self-censorship, numerous instances of which have been documented.[4] For smaller publishers or broadcasters, a libel suit can be disastrous. It seems implausible that they do not take into account the risk of being sued when deciding what to publish.

A number of commentators have argued that, although the media are sensitive to the threat of defamation suits, they are relatively unaffected by the level of consumer demand for investigative journalism. These commentators typically favor increased protection of the media on the ground that there is no countervailing economic incentive for the media to run the risk of litigation. One reason why the media may be unresponsive to pressure from consumers to publish potentially libelous stories is that they are sheltered from competition.[5] Newspapers, in particular,

which are the most frequent targets of libel litigation,[6] are almost entirely without local competition.[7] Lack of competition, it is argued, frees timid publishers from the threat that more aggressive competitors will win their customers or advertisers by carrying stories that they refuse to publish. Moreover, the nature of the market for information allows the professional media great latitude in choosing the types of stories they will cover. In contrast to most other businesses, the media are able to reduce or eliminate the risk of tort liability (by refusing to carry offensive stories), without discontinuing their operations.[8] If true, this would mean that the media can determine their coverage of controversial stories largely without regard for consumer demand. It has also been argued that consumers are uninterested in "hard-hitting" stories and, therefore, decisions by the media to change the level of coverage of such stories would not affect their sales. One proponent of this view states that a newspaper "competing for circulation is more likely to fight the battle with comics, color photos, stock tables, or contests than with more daring treatment of potentially defamatory material. When a broadcaster's ratings slip, he is likely to respond by hiring a more congenial anchorman, or by replacing news and public affairs programming with entertainment, instead of opting for more aggressive journalism."[9] This argument implies that there is minimal financial pressure on the media to publish stories that may result in litigation.

While these views have some merit, there is still reason to believe that the production of information is affected by financial incentives. First, it seems doubtful that there is no consumer demand for investigative journalism. The success of such television programs as *60 Minutes* indicates that investigative journalism can be a profitable enterprise. That potentially defamatory stories are published despite the risk of litigation strongly suggests that there must be some financial incentive to do so. If ratings and circulations were unaffected by the boldness or timidity of the broadcaster or publisher, there would be no reason (except for the aforementioned professional ethic) to run the risk of any libel litigation.

Second, the relative absence of competition in local newspaper markets does not mean that publishers can afford to be unresponsive to the tastes of their customers. Even under conditions of monopoly, production is still determined by supply and demand. The effect of monopoly is to reduce the equilibrium output level from what it would be under conditions of perfect competition. Nonetheless, a monopolist will find it profitable to increase the demand for its goods. By making its product more desirable, a monopolist can charge higher prices for it, or increase sales to those who would have otherwise gone without the product.

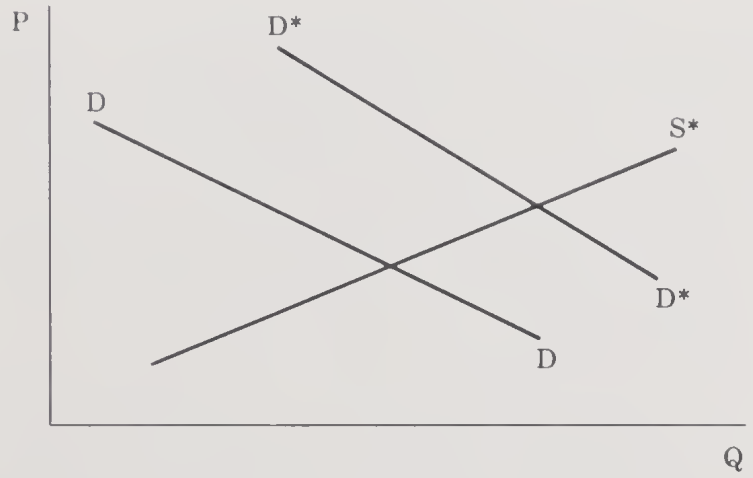
Thus, even newspapers without local competition will have some incentive to publish stories that increase the demand for their product.

One final reason that economic analysis is an appropriate tool in this area is that the use of constitutional privilege necessarily presupposes that the production of information can be affected by altering the financial incentives given to the media. Its primary, if not exclusive, purpose is to increase the production of information. If it does not accomplish this, then its only effect is to shift part of the burden of producing news onto private shoulders, without any accompanying benefit. If we assume that constitutional privilege has its intended effect, we must also assume that the media and their consumers are responsive to economic incentives.

The third element of the market is information itself. In most respects, information is similar to tangible goods and commodities. Information varies in type and quality; it is often produced by large financial enterprises, sold wholesale (as by the wire services) and then retail. Information differs, however, from most other goods in an important respect: it is a *public good.* A characteristic of public goods is that their consumption by one does not diminish the ability of others to enjoy some or all of their benefits as well. Information is the classic public good; it can be enjoyed equally by one person or a million. Thus, free markets, unfortunately, cannot be relied on to produce the optimal level of public goods because the normal mechanisms that translate consumer preferences into goods and services break down. In the case of private goods (e.g., most tangible goods), persons must act on their preferences through market transactions in order to obtain the benefits of the goods. Would-be beneficiaries of these goods are forced to reveal their preferences by paying for them. The preferences of consumers for the goods are reflected in the perceived demand curve for them. Production of private goods in a perfectly competitive economy, in which the cost of the goods to consumers reflects the true social cost of producing the goods, is ideal in the sense that increased production could not be obtained except at the expenditure of resources valued more greatly by consumers than the incremental production.[10]

The benefits of public goods, in contrast, are more difficult to confine. "Free riders" can obtain the benefits of public goods without paying for them. Information production has a substantial free rider problem, basically because it is usually cheaper and easier to copy information than to create it. The ability of persons to copy information is only partially limited by the copyright laws. For example, once a news story is publicly disseminated, other members of the media can generally publish the same information as that contained in the original after only a short time lag.[11] In addition, the use of information, particularly political informa-

FIGURE 10.1: The Effect of Free Riders



tion, by paying consumers may also have public good aspects. Decisions made by voters have far ranging impacts and we traditionally assume that such decisions are improved by an informed electorate. The benefits of the additional information obtained by a portion of the electorate accrue not just to that portion, but to society in general. The impact of the investigative work performed by the *Washington Post* and other major news organizations during the early seventies, for example, surely reached far beyond their customers. Because political information will benefit persons other than those who pay for it, the production of political information suffers from a substantial free rider problem.[12]

The effect of free riders is illustrated in figure 10.1. D^* is the demand curve representing information as a purely private good. The demand curve D represents the actual level of information demanded. The lower equilibrium level of the intersection of S^* (the supply curve) and D illustrates that production of information is less than that actually desired by consumers.

B. Effect of Constitutional Privilege on the Accuracy and Quantity of Information Production

Modifications of the liability rules for defamation are likely to affect both the quantity and accuracy of information produced. This section compares the effects of the various fault standards—strict liability, negligence, actual malice, and absolute privilege—and differing measures of recoverable damages on the production of information. For the sake of simplicity, I assume that the legal system operates costlessly and without error, imposing liability in full conformity with the relevant legal

standards. The impact of costly litigation on the model is explored in section C.

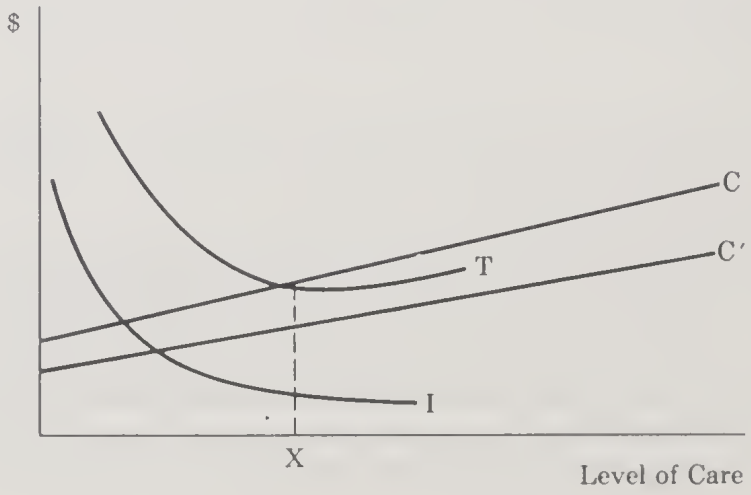
Constitutional privilege increases the production of information by decreasing its cost. Both the requirement that fault be proved and the restrictions on recovery of presumed damages reduce the media's expenditures on legal costs. By lessening the cost of production, constitutional privilege shifts the supply curve to the right. A new equilibrium is established, at which more information is sold, and at a lower cost relative to that under strict liability. The more expansive the protections given to the media, the greater these effects will be.

The liability rules will also influence the level of accuracy of the information produced, although these effects are somewhat more complicated. This section assumes that accuracy is a function of the amount of money spent on care. This seems reasonable, since additional accuracy can by "purchased" by requiring such things as multiple sources for controversial allegations, electronic recording of interviews, additional editing stages, and so forth.

Under a system of strict liability, the media will be held liable for all damages caused by the publication of defamatory matter. The media would attempt to avoid some, although not all, of these costs. They will optimize their expenditures on care to minimize the sum of the net amount spent on error-preventive measures and on legal expenses.

In Figure 10.2, line C represents the amount spent on care. Line C' represents the net amount spent on care after deducting the additional profits realized by the higher level of quality.[13] Line I represents the injury caused by the publication of defamatory matter. The sum of lines C' and I is represented in line T.

FIGURE 10.2: The Effect of Care



Under strict liability, the media will set care at X, thereby minimizing the total of expenditures on care and on defamation suits. The level of care that will be set under a negligence standard depends on how the standard is interpreted. Under one common formulation of the standard, put forth by Learned Hand, liability is imposed when the cost of increasing the level of care would be exceeded by the savings that the increase would bring in terms of reduced accidents.[14] It can be shown that the level of care required to avoid liability under this standard minimizes the sum of the amounts spent on care and the damage caused by the activity. Thus, the use of Learned Hand's negligence formula would induce the media to use the same degree of care that the strict liability standard would.[15]

The same cannot be said for standards that are more protective of the media, such as gross negligence, actual malice and absolute privilege. Under these standards, the media will be able to avoid the imposition of liability while employing less care than that required by negligence or strict liability. Within limits, the use of these standards will result in lower accuracy than would be used under negligence or strict liability.[16]

Alterations of the measure of recoverable damages will also affect the financial incentive to use care in the production of news. A requirement that the defendant pay the full measure of damage caused by the defamation (but no more) will result in the use of one degree of care. Limitations on the measure of recoverable damages will induce the media to use a lower degree of care, while allowance of punitive damages will result in the use of a greater degree of care.

It is sometimes suggested that the free interchange of information will by itself regulate the accuracy of information—i.e., that truth will eventually emerge from the "marketplace of ideas." This is based on a different sort of market analysis from that proposed here. The marketplace-of-ideas metaphor, which has been eloquently championed by Milton[17] and Mill,[18] can be summarized as follows: Truth is a product that is "bought" by persons who accept the validity of another's statements. The way to ensure quality in the marketplace for ideas is to allow competition. Eventually, falsehood will be rejected and truth will be accepted in its place. More recently, this idea has received support from Richard Posner, who has argued that truth and falsity are only labels that we attach to ideas that have been accepted or rejected by consumers of information.[19] Under this view, there is no need to protect the public from falsehood since they can protect themselves by rejecting defective information.

The marketplace-of-ideas model implies that an unregulated market would result in an optimal accuracy level. That model is predicated on a

belief that truth will necessarily prevail over falsehood in open debate. This assumption, however, has been repeatedly challenged by numerous scholars: "Although elegantly stated, in contemporary society, Milton's belief is rather naïve. Defamation rejects his empirical precept. At least in the short run, falsity may well win out.[20] And Professor Alexander Meiklejohn, whose writings influenced the *New York Times* Court, has "never been able to share the Miltonian faith that in a fair fight between truth and error, truth is sure to win."[21] Even Mill recognized that "[h]istory teems with instances of truth put down by error."[22]

The marketplace metaphor is incorrect because the assumption that self-interest will induce people to accept true information over false, while plausible, is an oversimplification. It ignores the fact that consumers of information do not necessarily know whether information being offered to them is true or false. A consumer could rationally decide to accept information that was probably false on the ground that the benefit of accepting it (assuming it is true) is high and the harm from accepting it (assuming it is false) is low. For example, let us assume that a consumer has been given information that a certain brand of food is unsafe to eat. Even if this information is almost certainly false, the rational consumer might avoid that brand because the cost of accepting the information as true is fairly low (the difference in satisfaction from purchasing that brand and from purchasing the consumer's second choice) whereas the potential benefit, assuming the information were true, is quite high. Because of this effect, consumers will tend to act on a wide variety of information that is unlikely to be accurate.

C. Accounting for the Effects of Costly Litigation

The preceding analysis assumed that the legal system could operate perfectly, charging the media for the exact amount of damage they cause by publishing defamatory matter. This is a fairly common assumption in economic analyses, but in the present case it seriously skews the results. In reality, the legal system imposes on the media the expense of damage awards and the expense of defending themselves in court—which they bear win or lose—as well. This is particularly troubling when what the defendant has published is essentially accurate. The proper choice of a liability rule cannot be made without some understanding of how it is likely to affect litigation costs.

Litigation costs complicate the foregoing analysis in a number of ways. First, because plaintiffs must generally bear their own costs even if they prevail, many plaintiffs with small claims may find it unprofitable to bring suit. This may reduce the level of litigation below what is socially

appropriate.[23] This problem cuts both ways. Since defendants must also bear their own costs—which can exceed the cost of making a cash settlement—plaintiffs whose claims lack merit may be tempted to bring "nuisance" suits, which would raise the level of litigation above the appropriate level. Moreover, as will be seen, there are a number of nonmonetary incentives to bring suit, which may also result in excessive litigation. Without the appropriate data, one cannot determine which of these effects is likely to prevail.

It is important to understand the role of litigation costs in libel cases because they greatly overshadow damage awards. Approximately 75 to 80 percent of the total cost of libel suits goes toward legal fees.[24] This is significantly higher than in other fields of civil litigation, including medical malpractice and product liability cases.[25] The expense of defending extraordinary libel cases can be staggering.[26] Even the costs of defending routine actions are significant, particularly in the aggregate.[27]

One can argue that the high cost of defense should not, by itself, be cause for concern. After all, the media's unparalleled expenditures have bought them an equally unparalleled success rate.[28] If the defendants prefer to pay more in defense costs and less in damage awards, one can argue, that is their business; so long as the overall level of protection is adequate, we need not specifically worry about litigation costs.

There are, however, a number of reasons why we should be concerned about litigation costs. One is that they are a deadweight loss to society. Unlike damage awards, which are simply transfers of wealth, litigation costs represent the consumption of resources. Although defendants may be indifferent to paying litigation costs or damage awards, society clearly is not. If litigation costs could be reduced, more resources would be available to compensate defamation victims without imposing a greater burden on the media.

Another, more significant problem posed by litigation costs is the effect they have in discouraging the production of valuable information. As will be shown below, a significant percentage of all defamation suits brought have no realistic chance of success under prevailing legal standards. Many of these probably involve stories that, while unflattering, are essentially accurate. The media cannot avoid these suits by being more careful, since such suits are brought regardless of the accuracy of the publication. While having no beneficial effect on accuracy,[29] these nonmeritorious suits discourage critical but accurate commentary. The easiest way for a publisher to avoid libel suits is to refuse to carry controversial stories. This is particularly troubling because the persons and organizations that have the power and motive to discourage unfavorable reporting are very often the ones about which society has the

greatest need for information. This type of suit may "chill" the production of particularly valuable speech.

We have little direct evidence of a percentage of defamation suits or harassment suits in which the underlining story is essentially accurate because libel suits rarely reach the issue of truth.[30] There is, however, a fair amount of inferential evidence that the percentage is high. One reason that this may be the case is that persons who have been subjects of negative but accurate commentary can achieve a number of goals by bringing defamation suits, even if unsuccessful. The most obvious of these is the desire to punish the defendant for publishing an unpopular opinion, or to discourage the defendant and others from publishing unfavorable material in the future. A defamation suit may also serve to retaliate against a defendant who has angered the plaintiff by poor treatment either in the story itself, or by the defendant after the plaintiff has complained. These suits, commonly referred to as nuisance or harassment suits,[31] probably constitute a third to a half of all defamation suits. Another motive for bringing a suit is the belief that defending one's name in court will by itself produce a positive change in public opinion by substantiating the plaintiff's claim of falsity.[32]

It is important to note that a plaintiff will have just as much incentive to pursue the above goals regardless of the accuracy of the information. Indeed, the plaintiff may even have more reason to bring suit when the story is true, since may be more widely believed and thus be more damaging. Furthermore, plaintiffs can successfully pursue those goals even if they lose their suits. Because the defendants must bear their costs even if they win, libel litigation is an effective tool to harass the press. And, at least according to many plaintiffs, the act of bringing suit can persuade others of the validity of the plaintiff's cause regardless of the outcome of the case.

In addition, plaintiffs with a continuing interest in discouraging public criticisms of them have made very frequent use of the nuisance value of the defamation laws. Of course, an individual suit cannot be assumed to be nonmeritorious simply because the plaintiff wanted to deter negative media coverage, but it is likely that the disproportionate level of litigation by these plaintiffs is due at least in part to their litigious tendencies rather than to lack of care by the press.[33]

Much has been made of the alarming regularity with which plaintiffs in defamation actions have been awarded "mega-verdicts"—those in excess of $1 million.[34] This could imply that plaintiffs are bringing suits in the hope of receiving a large award. Were this the case, it might mean that plaintiffs are bringing weak cases simply in the hope of making

money, rather than to harass the defendant. But the profitability of defamation suits is largely illusory. Plaintiffs in defamation actions win a lower percentage of cases than in any other area of tort law. The great majority of the awards that plaintiffs receive at trial are either reduced or completely eliminated upon appeal.[35]

Not only do plaintiffs lose most of their cases, but the awards that have been sustained on appeal have tended to be rather small. In Franklin's study, a total of $683,500 was awarded in 291 cases, including 37 that went through a trial and appeal. Thus, the average award per full trial comes to $18,472. The statistics in the LDRC study are only slightly better. They show a total of $829,500 awarded in 35 cases that had gone through trial (34 of which had gone through an appeal as well). The average award here was $23,700.

The ILRP Study found that successful litigants obtained an average of $80,000 in damage awards and that, after excluding two large awards, the average recovery "was only $20,600, a sizable portion of which went to fees and costs."[36] Moreover, a portion of these awards is not allocable to the decision to litigate. Plaintiffs with strong cases would have received some money in out of court settlements had they pursued that path. Only the excess of the awards received in trial over the amounts that the cases could have been settled for is properly attributable to the decision to litigate.

Compounding the low return to libel suits is the high cost of conducting them. The cost of bringing a simple defamation suit is estimated at between ten and fifty thousand dollars.[37] The more costly suits (those brought by the wealthy and famous) have increasingly been financed by plaintiffs on an hourly fee basis rather than on a contingency fee basis.[38] Such suits, which have little chance of success, have proved enormously expensive to bring.[39] These statistics support the contention that plaintiffs are not bringing these suits because it is profitable to do so. The plaintiffs in the ILRP Study corroborated this conclusion: "Only about one-fifth of the plaintiffs said that they sued to win money damages. . . . Most plaintiffs said that their chief objective was restoring reputation or punishing the media."[40]

One of the most intriguing (and overlooked) pieces of evidence of the extent of excess litigation is the percentage of claims that are litigated instead of being settled without trial. The ILRP Study found that only fifteen percent of cases brought against the media are settled out of court.[41] This contrasts markedly with the overall settlement rate for tort litigation, which is estimated at 50 percent.[42]

This disparity is also present in appellate rates. Various studies show

that only a fraction of trial verdicts in other areas of tort litigation are appealed.[43] In contrast, virtually all defamation cases that reach trial are subsequently appealed.[44]

The most plausible explanation for this remarkable disparity in litigation rates seems to be that people are bringing defamation suits in order to pursue nonmonetary goals, such as harassing the defendant. To see this, it is necessary to understand how the decision to litigate or settle a dispute is made. In general, parties will litigate instead of settle if the plaintiff's estimate of his or her expected judgment exceeds the defendant's estimate by at least the sum of their legal costs.[45] Where both parties place the same estimate of the expected judgment at trial, the dispute will be settled. The low settlement rate of libel disputes can be explained as the result of nonmonetary benefits that defamation plaintiffs receive by going to trial. These benefits will create a divergence between the defendant's estimate of the expected cost of going to trial—damage awards—from the plaintiff's estimate of the expected reward from going to trial—damage awards plus nonmonetary benefits. The greater the divergence, the less likely is settlement. If we assume that the settlement rate for defamation disputes would be the same as that for other tort actions were it not for the ability of plaintiffs to receive nonmonetary benefits at trial, then it would seem that a high percentage of defamation cases are now being brought for reasons other than the recovery of damages. Many of these disputes are probably based on critical but essentially accurate speech.

D. The Social Impact of Constitutional Privilege

As noted, one effect of protecting speakers from defamation liability is to increase the production of information by decreasing its cost. We can be quite certain that this is beneficial: The market will naturally tend to underproduce information, because of the free-rider problem and, to a lesser extent, the monopolistic characteristics of many local markets. By "subsidizing" the media, constitutional privilege pushes the level of information production closer to what would prevail under conditions of perfect competition.[46]

The second major effect of certain of the protections is to decrease the accuracy of the information. Use of the actual malice standard or absolute privilege (but not negligence) will reduce the incentive to use care below that which would be used under strict liability. Similarly, restrictions on recoverable damages will result in lower accuracy. The reduction in accuracy that certain liability rules cause is clearly undesira-

ble, and constitutes the major disadvantage of using constitutional privilege to subsidize the media.

One cost of excessive protection of the media is the loss of public faith in the credibility of the press. The real public benefit of defamation law comes from ensuring that certain standards of care are met. Increasing the accuracy of information benefits not just paying consumers (who presumably can bargain for whatever standards they wish) but free riders as well. Conversely, the major disadvantage of protecting the media against defamation suits is the risk of reducing the media's accuracy. This problem has not received the attention it deserves. Admittedly, the historical purpose of defamation law was to compensate the victim, not to protect the public from misleading information. But once we have decided that defamation law must be tailored to accommodate the public need for information, it seems inescapable that we must also be concerned with the effect defamation law has on accuracy. All of the benefits arising from an increase in the production of information are based on the accuracy of the information. Few people seriously believe that falsehoods contribute anything worthwhile to public debate.[47] On the contrary, falsehood is likely to result in the making of poor decisions by a misinformed public. By ensuring that reasonable care is used, defamation suits serve the public good:

> [A]n action for defamation at least partially ensures that only truthful information is disseminated. Since first amendment goals are not furthered by false information, restricting the flow of such information is permissible and beneficial. If undeterred, falsehood may inhibit debate and the democratic goals discussion is designed to serve. "Surely, if the 1950's taught us anything," wrote Justice Stewart, "they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society." Liability for defamatory falsehoods encourages a publisher to investigate and ascertain the truth of potentially harmful statements before disseminating them.[48]

This analysis illustrates the fundamental problem with using constitutional privilege to correct failures in the market for information: constitutional privilege may replace the problem of under-production with that of suboptimal accuracy. Further expansions of this privilege that have been proposed—extension of the actual malice requirement for private figure plaintiffs, giving the media absolute privilege, and severe restrictions on damages—would exacerbate the problem of reduced accuracy.

This is not to say that these proposals would necessarily be counterproductive. The benefit from the higher level of information that would be produced under those proposals might well outweigh the harm caused by the decreased level of accuracy. Unfortunately, this tradeoff is difficult to evaluate.

II. MODIFICATIONS OF CONSTITUTIONAL PRIVILEGE

The preceding analysis suggests what defamation law should do. First, the law should foster the production of information by decreasing its cost. Second, the law should increase, or at least maintain, the media's incentive to be accurate. And third, the law should minimize the resources needed to enforce it. To some degree, these goals are inconsistent. The first and third goals could be achieved at the expense of the second by granting speakers absolute privilege, while the second goal would be furthered by returning to strict liability. It is hard to determine which of these goals should have priority in the absence of empirical data. It may well be, for example, that the level of care taken by the media is determined almost entirely by their sense of professionalism, and that their level of accuracy would not fall appreciably even if all defamation suits were barred. In such case, the social gain from increased information production would outweigh the minimal loss from decreased accuracy. On the other hand, it is possible that the degree of care used by the media is influenced greatly by the liability rules, in which case absolute privilege would result in a marked decline in standards. Theory alone cannot determine which of these is likely to be the case, and the data that could tell us do not exist.

A partial solution to this dilemma is to seek rules that increase the flow of information without significantly reducing its accuracy. Use of the negligence standard in place of strict liability is one example of such a rule, albeit of limited utility. Much more could be gained by rules that limited the financial impact of nonmeritorious suits without simultaneously restricting meritorious ones. Rules that disproportionately deter nonmeritorious claims are more likely to result in a net gain than are rules that deter both types of suits equally. Such rules would offer the possibility of significant improvements in the system of constitutional protections at minimal risk.

I now examine how well a number of liability rules, including those currently in force, advance the above goals. I place particular emphasis on each rule's comparative impact on meritorious and nonmeritorious

claims. After reviewing a number of possible revisions of the law, I conclude that a set of rules based on fee shifting is most likely to increase the production of information without decreasing its accuracy.

Constitutional privilege gets mixed reviews. On the one hand, its major elements—the fault requirement and the limitation on damages in *Gertz* cases—do not protect the media from the threats that they face in the real world. Nor do they foster accuracy. The problem is that these rules were designed on the assumption that damage awards, rather than litigation costs, were the primary burden on defendants. Given the size of the awards in many libel cases, the concern about damages is not surprising.[49] Most of these awards are eventually reduced or eliminated, however, whereas the defendants must bear their litigation costs in any event. While the Supreme Court has acknowledged the chilling effect of litigation costs,[50] it had, until recently, made no effort to address this problem, and had even opposed the efforts of lower courts to make summary judgment more available to defendants.[51]

On the other hand, constitutional privilege is effective in shielding the media from much of the costs they would otherwise incur. The difficulty of prevailing under either the negligence or actual malice standards prevents most plaintiffs from recovering damages, and no doubt discourages many others from ever bringing action. Accordingly, the present rules do a good job in decreasing the cost of information. But to the extent that this is achieved by restricting the ability of legitimate claimants to receive compensation, the present rules also decrease the media's incentive to be accurate. In addition, the form of protection now offered is inefficient in that it requires substantial expenditures on litigation costs to operate.

One type of proposal to give the media greater protection involves extending the actual malice requirement to private-figure plaintiffs, or granting the media absolute privilege in some or all cases. Both proposals would encourage the flow of information by reducing or, in the case of absolute privilege, eliminating liability for defamation. But both proposals would seriously reduce the incentive of the media to use care. In addition, the continued use of unwarranted litigation as a means of achieving nonmonetary goals would still be possible under an actual malice standard. Those seeking to harass or punish the press would still be able to force defendants to pay the not-inconsequential cost of litigating at least through the summary judgment stage. And though many cases are dismissed at this stage under the actual malice standard, many others are not. Any harassment suit that puts the defendant to the expense of a full trial can be considered a success to the plaintiff regardless of outcome. Plaintiffs seeking to validate their claims of falsity would

also be able to do so under an actual malice standard. As noted in the ILRP study, plaintiffs believe that they can partially vindicate themselves simply by bringing suit. Increasing the fault requirement would not remove this incentive, since victory on the merits is not essential to those plaintiffs. In fact, the requirement that the plaintiff prove fault may actually encourage this type of suit. Because most defense verdicts are based on lack of fault, rather than truth of the publication, plaintiffs can sue without "fear that their claim will ever be compromised by a finding that what was said about them was true."[52] The extension of the actual malice requirement would thus have much less impact on unwarranted litigation than on legitimate suits. Only the use of absolute privilege would end the use of unwarranted suits, and at a cost in accuracy that may be unacceptable.

A second type of proposal is to limit recoverable damages. One commonly suggested rule is to eliminate punitive damages.[53] Other proposals go beyond that, and would limit damages to "provable injury to reputation,"[54] actual pecuniary loss,[55] or to actual pecuniary loss plus some fixed amount for compensatory damages.[56] These proposals are aimed at reducing the wide latitude now enjoyed by judges and juries in determining damages. Although the Supreme Court has attempted to limit discretion by prohibiting awards of presumed damages where there had been no showing of actual malice, this effort has not been successful. The Court has taken a broad view of the "actual damages" that may be awarded in *Gertz* cases.[57] Judges and juries may award damages for humiliation and suffering, thus allowing the trier of fact to award damages vastly in excess of any possible pecuniary injury suffered by the plaintiff. Further, the limits on damages that do exist do not apply where actual malice is shown.

Damage limitations might be useful if they deterred nonmeritorious claims more than meritorious ones, but it is not clear that such would be the case. Since the recovery of damages is not essential to those bringing nonmeritorious suits, restrictions on damages might have no significant effect on them. These rules might consequently deter a disproportionate number of plaintiffs who are seeking only compensation for injury. But other factors must also be considered. For example, it is possible that the largest awards—those which would be disproportionately affected by damage limitations—are disproportionately made in nonmeritorious cases. There is reason to believe that many excessive awards are the result of jurors' antipathy toward the defendant and not merely egregious error by the defendant. Like some plaintiffs, jurors may be punishing defendants for taking unpopular positions rather than publishing false information. Such antagonism would help explain why

defendants fare so much worse in front of juries than judges.[58] Curbing jury discretion to award damages could therefore disproportionately reduce the impact of harassment suits.

Another factor to consider is the effect of damage limitations on the ability of plaintiffs to bring small but legitimate claims. Most plaintiffs, who can rarely prove actual pecuniary loss,[59] might find it unprofitable to sue even when the evidence of fault and falsity was clear. Damage limitations might thus close out a great many plaintiffs with legitimate grievances. There are at least two ways of mitigating this risk. One is to award attorneys' fees to a successful plaintiff who has proved actual pecuniary loss. Another possibility is to allow plaintiffs to recover both their pecuniary loss and some fixed sum. In an interesting proposal by Steven Brill, plaintiffs would be entitled to recover for their pecuniary loss and an amount based on the advertising rates of the offending publication. A simpler alternative is to allow the recovery of pecuniary loss plus an amount picked by the trier of fact up to an arbitrary limit—$100,000, for example.

A third approach to protecting the press from unwarranted suits is to award attorney's fees to the prevailing party.[60] Fee shifting has a number of complex effects that are not easy to predict with certainty. Fortunately, a large body of good literature on this has appeared in recent years.[61] While these articles do not all reach the same conclusion, most conclude that fee shifting will have the following effects. First, assuming the plaintiff is risk neutral, fee shifting will increase the probability the plaintiff will bring suit if the suit's likelihood of success is above some critical percentage.[62] Second, also assuming the plaintiff is risk neutral, fee shifting will decrease the probability the plaintiff will bring suit if the suit's likelihood of success is below some critical percentage. And third, fee shifting increases the risk involved in bringing suit.[63]

The first effect will be desirable whenever the rate of litigation under the American system, where each party bears its own costs, is below the socially appropriate level. Unfortunately, we cannot determine what this level is without knowing the extent to which meritorious libel suits deter the publication of falsehood. If they have no deterrent effect, for example, then the socially appropriate level of litigation would be zero. In other words, it is possible that absolute privilege is the best alternative. But if we have decided that a cause of action for defamation is warranted on the basis of its beneficial deterrent effect, then it also follows that we should encourage the bringing of meritorious claims. This goal would be furthered by use of fee shifting.

The second effect will be desirable whenever the rate of litigation under the American system is above the socially appropriate level. We

are on much firmer ground in believing that this would be beneficial. By hypothesis, nonmeritorious claims do not increase the incentive to use care, but instead chill the production of valuable speech. Discouraging these suits should result in a unambiguous social gain.

The third effect, that of increasing the risk associated with bringing suit, complicates the above analysis. Assuming that plaintiffs are risk averse, additional risk would tend to discourage suits, even for meritorious claims. Risk aversion should be strongest when the claim is small relative to the likely attorneys' fees. The effect of risk aversion counters the tendency of fee shifting to encourage meritorious claims, and might outweigh it.[64] The relative lack of enthusiasm that commentators have shown for fee shifting stems in part from fear that this risk would discourage too many legitimate claimants.[65] This concern should not be lightly dismissed, since the increase in risk could restrict access to the courts by legitimate claimants as effectively as use of protective fault standards.

Increasing the level of risk involved in bringing meritorious claims is a serious disadvantage of using fee shifting, one for which there is no simple solution. One proposal is to exempt from the payment of fees unsuccessful plaintiffs who have suffered special damages.[66] The utility of this is limited, however, by the low percentage of plaintiffs who can prove special damages. Most plaintiffs, particularly those of moderate means, would probably find the risk involved in bringing suit to be excessive, at least if their claims were not clearly meritorious.[67]

What is needed is a method of recovery for those who have been legitimately defamed, but whose claims do not justify the risk of paying the defendant's attorneys' fees. I suggest that the following set of rules provides an acceptable compromise between the competing goals of freeing the media from nonmeritorious litigation and allowing a means of recovery for defamation victims.

First, plaintiffs proving falsity but not fault on the part of the defendant would be entitled to recover their actual pecuniary losses, if any, plus reasonable attorneys' fees. For most plaintiffs, this would operate as a means for obtaining declaratory judgment. Plaintiffs who currently sue to set the record straight would be given an opportunity to do so. At the same time, since every defamation trial would result in a finding of truth or falsity, those bringing actions in cases in which the publication was accurate would suffer the added penalty of a judicial pronouncement on the invalidity of their claims.

Allowing a plaintiff who proves falsity to recover reasonable attorneys' fees goes far in reducing the risk involved in pursuing small but meritorious claims. Where only falsity is at issue, the litigation costs should be

much lower than is now typical. In addition, since the plaintiffs should know whether the publication were true, they should be able to evaluate the risk of having to pay the other side's attorneys' fees well in advance of any discovery or litigation. Cases in which plaintiffs do not feel confident that falsity can be proved should not be brought.

Requiring defendants to pay reasonable attorneys' fees in these cases should not pose an unacceptable threat to the media. Where evidence of falsity is clear, defendants could and probably would concede the case at an early stage, thus granting the defendant the admission of error, which many plaintiffs seem to be seeking, and limiting damages to a negligible amount. Of course, many members of the media might simply decide to take the laudable step of attempting to satisfy aggrieved victims without litigation by a more judicious handling of complaints.

Second, a plaintiff who proves both falsity and fault amounting to at least negligence would be entitled to recover both reasonable attorneys' fees plus actual damages, as currently defined. This proposal would eliminate punitive damages and presumed damages, but would not eliminate a jury's discretion to award for humiliation, loss of reputation, etc. This would apply to both public and private figures, who would henceforth be subject to the same rules. This proposal does not go further in the restriction of recoverable damages for two reasons. First, it does not appear to be necessary. As noted, few large awards are sustained on appeal. Most of the costs of defamation suits go toward the defense, a problem addressed by the use of fee shifting. Second, there is the risk that restrictions on damage awards would deter legitimate claimants more than nonmeritorious ones. However, both of these propositions are subject to empirical verification. If it appears that damage awards pose an unacceptable threat to the media, then proposals to limit damages to fixed sums should be explored.

The requirement that the plaintiff prove negligence is based on the analysis in part I. A negligence rule provides the media with greater protection than strict liability, yet does not decrease their incentive to use care. The proposal requires proof of negligence rather than actual malice, in order to eliminate the possibility of reduced accuracy.

Third, a plaintiff who does not prove defamatory falsehood would be liable for the other side's reasonable attorneys' fees. This proposal should greatly reduce the burden on the media by deterring the bringing of claims in cases in which the publication was accurate. Those seeking to harass the press would be deterred both by the prospect of having to pay the defendant's attorneys' fees and by the knowledge that they would not be able to inflict punitive litigation costs on the defendant. This rule would protect the media from suits involving accurate publica-

tions which, according to the evidence in part I, constitute a significant proportion of all suits now brought.

CONCLUSION

The law of constitutional privilege provides insufficient protection to the media, to defamed persons, and to the public. The media continue to be threatened by the use of harassment suits, which may constitute more than half of the total number of defamation suits brought. Requiring the loser to pay the winner's reasonable attorneys' fees provides an attractive alternative to the present system. The loser-pays rule would eliminate the incentive to bring harassment suits, and would protect the media from the largest element of expenses associated with defamation suits. At the same time, this rule need not pose an insurmountable barrier in the path of those with legitimate claims. If this rule were coupled with appropriate fault standards and damage rules, the media would retain their incentive to be accurate, and defamed individuals would still have a chance to be compensated.

NOTES

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

2. *See* Anderson, "Libel and Press Self-Censorship," 53 *Tex. L. Rev.* 422, 434 (1975): "Reporters and editors share a professional ethic that encourages them to seek to inform the public, even at the risk of libel litigation. This may even be institutionalized, so that it represents the prevailing ethic of a broadcasting organization; 'all the news that's fit to print' presumably includes some news that creates a danger of legal action. Although impossible to measure, this professional pressure to publish is probably the strongest force against self-censorship."

3. *See* e.g., Smith, "The Rising Tide of Libel Litigation: Implications of the Gertz Negligence Rules, 44 *Mont. L. Rev.* 71, 87 & n. 98 (1983) citing statement from counsel for the *Washington Post* that libel litigation has not changed its editorial practices.

4. For discussion of some of this evidence, see Franklin, "Good Names and Bad Law: A Critique of Libel Law and a Proposal," 18 *U.S.F.L. Rev.*, 1, 14–18 (1983) [hereinafter *A Critique*].

5. *See id.* at 14–15; *see also* Anderson *supra* note 2 at 433.

6. *See* Soloski, "The Study and the Libel Plaintiff: Who Sues for Libel?" 71 *Iowa L. Rev.* 217, 219 (1965) (finding that two-thirds of all media cases were brought against newspapers).

7. A 1972 study found that only 42 cities had competing daily newspapers. "Media and the First Amendment in a Free Society," 60 *Geo L. J.* 867, 892 (1972). A study done in 1976 found that this number had decreased to 39, out of 1550 cities studied. Sobel &

Emergy, "U.S. Dailies' Competition in Relation to Circulation Size: A Newspaper Data Update," 55 *Journ. Q.* 145, 146 (1978).

8. *See* Franklin, *A Critique*, *supra* note 2 at 15.

9. *See* Anderson, *supra* note 2 at 433.

10. This can be derived from the fact that, under conditions of perfect competition, firms set their output levels such that the marginal cost of producing an additional unit will exceed the social cost, as measured by its price, or the resources needed to produce it.

11. E. Kitch & H. Perlman, *Legal Regulation of the Competitive Process* 25, 28 (1972).

12. This differs from ordinary free riding in that nonpaying beneficiaries in these cases do not receive the goods themselves; rather, they receive secondary benefits created by use of the goods by paying consumers.

13. The analysis of libel law's effect on accuracy is complicated by the dual economic rule that accuracy plays in the production of information. Not only does the level of care used change the expected liability of a producer to third parties, it also changes the desirability of the product to its customers. Greater accuracy should increase demand for the product and, all other things being equal, profits. This should induce the media to use more care than they would if the only benefit from care were decreased liability. This is accounted for in line C' by netting out the incremental profits brought by higher accuracy from the cost of error-preventive measures.

14. United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).

15. The Hand formula imposes liability when the sum of accident costs and prevention costs could be reduced by using more care. A producer operating under this formula would spend no more on care than is required to avoid this liability. The degree of care that is just sufficient to enable the producer to escape liability under this negligence formula minimizes the total costs of care and accidents. This is the point that a firm under strict liability would choose.

16. The decline in the use of care would be limited by consumer demand for accuracy. The incentive to meet this demand is reflected in line C' in Fig. 10.2. The additional sales that can be obtained from improvements in accuracy would induce the media to use some care even if they were protected by absolute privilege.

17. J. Milton, Areopagitica (E. Rhys ed. 1946).

18. J. S. Mill, On Liberty (Harvard Classics 1921).

19. *See* R. Posner, *Economic Analysis of The Law* § 28.1, at 543–45 (2d ed. 1977); R. Posner, *The Economics of Justice*, 264–66, 287–99, 337–38 (1981).

20. Ingbar, "Defamation: A Conflict Between Reason and Decency," 65 *Va. L. Rev.* 785, 794 n.37 (1979).

21. Meikeljohn, "The First Amendment Is an Absolute," in *Free Speech and Association* 14 (P. Kurland ed. 1975).

22. J. S. Mill, *supra* note 18.

23. The "socially appropriate" level is a function of the social benefit derived from litigation—the deterrence of harmful behavior—and the social cost of litigation—attorneys, fees, court costs, etc. *See* Shavell, "The Social Versus the Private Incentive To Bring Suit in a Costly Legal System," 11 *J. Legal Stud.* 333, 334 (1982).

24. Worrall, "Negotiating the Libel Policy: Examination in Detail of One Policy," in *Media Insurance* 365, 373 (J. Lankenau, ed 1983); R. Smolla, *Suing the Press* 75 (1986). More recently, Worrall has estimated that up to 90 percent of the money spent by insurance companies on libel insurance policies goes to legal fees. *See* Baer, "Insurers to Libel Defense Counsel: 'The Party's Over.' " *The Am. Lawyer* 69, 70 (1985).

25. *See* O'Connell, "An Alternative to Abandoning Tort Liability: Elective No-Fault Insurance for Many Kinds of Injuries, 60 *Minn. L. Rev.* 501, 508 (1976) (estimating 72%

of expenditures going to litigation costs and overhead in medical malpractice cases and 62.5% going to litigation costs and overhead in product liability cases).

26. B. Sandford, *Libel and Privacy: The Prevention and Defense of Litigation* 8 (1985) (citing estimates that the cost of the Westmoreland suit against CBS was in excess of $6 million and that Time, Inc. reportedly spent more than $4 million defending itself against General Sharon's suit). ABC reportedly spent $7 million defending itself against a suit brought by Synanon, and CBS was said to have spent between $3 and $4 million defending itself in Herbert v. Lando. R. Smolla, *supra* note 24 at 75.

27. The "minimum cost in responding to a complaint is $2,500 and in defending a suit in court, $15,000–$20,000." Larry Worrall, quoted in *Broadcasting*, Nov. 17, 1980, at 63. *See also* Worrall, quoted in L. Kramer & C. Wright, "Up Against the Wall," *Wash. Journalism Rev.*, Sept–Oct. 1978, at 49, 51 ("even if the paper can show that there was no malice in a suit involving a public figure, it can hardly get the case thrown out on a summary judgment for under $5,000"). Defense costs escalate rapidly if the case is not dismissed on summary judgment. According to Congressman Charles Schumer of New York, an average libel suit now costs $150,000 to try. Baer, *supra* note 24 at 69. Much of these costs are attributable to the fact-intensive nature of a defense based on constitutional privilege, requiring extensive discovery. "Protracted discovery on both sides of the litigation and greater defense emphasis on trial preparation [have] tended to drive the costs of defending a case through trial to over $250,000 for relatively uncomplicated cases, over $400,000 for more factually complex cases.'" B. Sanford *supra* note 26 at 8 n.19.

28. Plaintiffs in defamation actions lost 75% of their cases at the trial level as well as losing 75% of their appeals. Franklin, "Suing the Media for Libel: A Litigation Study," 1981 *Am. B. Found. Research J.* 797, 802 [hereinafter cited as *A Litigation Study*]. The Iowa Libel Research Project (ILRP Study) similarly found that "plaintiffs win only ten percent of the cases pressed to judicial resolution, while the media win ninety percent." Soloski, *supra* note 6 at 218. This compares with an average loss rate of only 50% in most other tort actions. Priest & Klein, "The Selection of Disputes for Litigation," 13 *J. Legal Stud.* 1 (1983).

29. Nonmeritorious suits will not include greater accuracy unless by using greater accuracy the media were able to dismiss more of such suits on motions for summary judgment, thus avoiding a portion of the litigation costs they would otherwise face. This is unlikely. Actions taken prior to publication, when they can improve the story's accuracy, are unlikely to produce the convincing evidence of truthfulness that a motion for summary judgment requires. Indeed, truth is rarely the basis for a successful defense even at trial. *See* Franklin *A Litigation Study supra* note 28 at 820. The media are similarly unlikely to be able to obtain summary judgment on the issue of due care, regardless of the amount of care they take. The courts view due care as a question of fact to be decided at trial. (*See infra* note 50.)

30. In the Franklin study, only 4 of the 126 defense verdicts were based on proven truth or lack of proven falsity of the story. Franklin *A Litigation Study supra* note 28 at 820–26. This was corroborated by the Iowa Libel Research Project study, which found that "[t]he actual truth or falsity of that which was published is rarely addressed." Bezanson, "Libel Law and the Realities of Litigation: Setting the Record Straight," 71 *Iowa L. Rev.* 266, 230 (1985).

31. *See* Larry Worrall, head of the Media/Professional Ins. Co. quoted in Franklin, *A Critique, supra* note 5, at 6 n.27 (characterizing 50 percent of libel actions as nuisance suits); Eberhard, "There's Got To Be A Better Way: Alternatives To The High Cost of Libel," 38 *Mercer L. Rev.* 819, 820 (1987) (citing results of a survey of newspaper editors

indicating that one-third of the cost of defending libel suits was spent defending nuisance suits). These figures, coming as they do from the targets of libel suits, are hardly unbiased. Nonetheless, the exceptionally low success rates of plaintiffs in defamation actions clearly demonstrates that many persons are bringing suits that they must know have little chance of success.

32. This was one of the major findings of the ILRP study on why libel plaintiffs bring suit. This study found that money is rarely a motive. Instead, plaintiffs bring suit "to correct the record and to get even." Interestingly, plaintiffs claimed that a favorable decision was not necessary for them to consider the suit a success: "Instead, plaintiffs see the act of initiating suit, independent of its result, as an effective and public form of reply or response. By invoking the formal judicial system, the plaintiffs legitimate their claim of falsity. Reputational repair follows without the assistance of—indeed in spite of—the judicial system." Bezanson, *supra* note 30 at 228.

33. One group that has been accused of using harassment suits is the Church of Scientology. In a famous internal memo, L. Ron Hubbard, the founder of the Church, wrote: "[W]e do not want Scientology to be reported in the press, anywhere else than on the religious page of newspapers. It is destructive word of mouth to permit the public presses to express their biased and badly reported sensationalism. Therefore, we should be very alert to sue for slander at the slightest chance so as to discourage the public presses from mentioning scientology." Shaffer, "Church of Scientology Attacks Investigator and Critics." *Wash. Post,* August 16, 1978 at A14.

In another part of the memo Hubbard wrote: "The purpose of a suit is to harass and discourage rather than to win." In the course of one defamation suit that the Church of Scientology had brought, the judge noted that the Church was "litigious" and that a Lexis search showed that it had been a party to over 30 other reported cases (not all necessarily involving defamation). Church of Scientology v. Siegelman 475 F. Supp. 960 (S.B.N. 1979). Another organization that has been accused of similar tactics is Synanon, which as of 1982 had brought defamation suits seeking a total of $400 million in damages. See *N.Y. Times,* June 4, 1982, at A21. In addition, between 1978 and 1979, Synanon sent 960 form letters to various members of the media demanding corrections and retractions. See LDRC Bulletin, No. 3 at 27 (1982). Other organizations that may be making extensive use of defamation litigation include police associations, Franklin, *A Litigation Study,* supra note 29 at 807, LDRC Bulletin No. 7 at 66, 67 (1983).

34. "A fair estimate would place the total of million-dollar defamation awards at somewhere between 25 and 30 in an over-20-year period. However, most of these awards have been imposed in the past three years, with half or more of these coming within the past year." LDRC Bulletin No. 9 at 27 (1984).

35. Three studies attest to the relative unprofitability of libel suits. The study by Franklin, which included 291 cases spanning a period of four years, showed that only 37 cases went to trial of which 23 resulted in awards for plaintiffs. Thirteen of those awards were reversed upon appeal, and five of the remaining awards were reduced. Franklin, *A Litigation Study, supra* note 28 at 804–5 & n.21. These data were collated in a study conducted by the Libel Defense Resource Center, which found that of 47 trials in which damages were awarded, only seven were affirmed on appeal, 18 others were set aside entirely and one was reduced. Two others were settled and 19 others were still on appeal at the conclusion of the study. LDRC Bulletin No. 4 (Part 1) at 7 (1982). And, as previously noted, the ILRP Study found that damage awards were sustained in only 10 percent of defamation suits.

36. Bezanson, *The Libel Suit in Retrospect: What Plaintiffs Want And What Plaintiffs Get,* 74 Cal. L. Rev. 789, 791 n.4. [hereinafter *The Libel Suit in Retrospect*].

37. Barrett, *Declaratory Judgments For Libel: A Better Alternative*, 74 *Cal. L. Rev.* 847, 859 (1986). On the other hand, the ILRP Study found that the cost to plaintiffs of bringing the defamation suits was quite low. Eighty percent of the plaintiffs in that study had engaged their lawyers on a contingency fee basis, as had virtually all of the public figure plaintiffs. The ILRP Study concluded that low cost was a major incentive for plaintiffs to bring suit. Bezanson, *Setting the Record Straight, supra* note 30, at 228.

38. *See* R. Smolla, *supra* note 24 at 75.

39. For instance, of the $7 to $9 million spent on the *Westmoreland* case, approximately $3.25 million was spent by the plaintiff's side. *N.Y. Times*, Feb. 18, 1985, at A1. Similarly, the plaintiff in Tavoulareas v. Washington Post testified that he had spent $1.8 million on lawyer's fees in the case. Lewis, "New York Times v. Sullivan Reconsidered," 83 *Colum. L. Rev.* 603, 613 (1983). Legal fees in Rancho La Costa v. Penthouse Int'l reportedly reached $4 million for each side. R. Smolla, *supra* note 32 at 175.

40. Soloksi, *supra* note 17 at 220.

41. Bezanson, *supra* note 30 at 228.

42. D. Trubek, J. Grossman, W. Felstiner, H. Kritzer & A. Sarat, 1 Civil Litigation Research Project Final Report S23 (1983). *See also* Bezanson, *The Libel Suit in Retrospect, supra* note 36, at 790 n.3: "Information from a variety of sources, including the case history of over 1300 insurance claims, suggest that the overall incidence of settlement activity in libel cases is much lower than for civil litigation in general. Perhaps 25% of libel claims involve some source of negotiated resolution, although only a small proportion—perhaps—10%—involve financial settlement."

43. *See* Priest & Klein, *supra* note 28, at 2 & n.1, n.2: "It is well known, however, that only a very small fraction of disputes come to trial and an even smaller fraction is appealed."

44. *See, e.g.*, LDRC Bulletin No. 4 (Part 1) at 7 (1982) (finding that out of 47 cases in which damages were awarded, defendants appealed 46); Bezanson, *Setting The Record Straight, supra* note 30, at 231.

45. This model of the process by which disputes are selected for litigation is explained and elaborated on in Priest & Klein, *supra* note 28.

46. Indeed, it is difficult to justify constitutional privilege except as an attempt to correct market failure. Where the market is working properly, we generally rely on it to determine how scarce resources should be allocated. For this process to work, consumers must pay a price for goods that reflects their true social cost. Shielding producers from a portion of their costs distorts this process and could lead to suboptimal resource allocations. The gain to consumers from the additional production of information would be more than offset by the loss of the resources required to produce it.

The common assertion that constitutional privilege is justified because free speech is "more important," or "socially desirable" than ordinary (e.g., tangible) goods is unpersuasive. If consumers agree that free speech is valuable, they are free to obtain whatever quantity of information they desire as long as they are willing to pay the costs. Strict liability for defamation does not, after all, prohibit any speech from taking place. It only makes it more expensive. The media will produce whatever quantity of information that consumers are willing to pay for. Intervention is justified only because consumers are unable to transmit their true demand through market channels.

47. The main exception are the adherents to the marketplace of ideas metaphor, who maintain that even falsehood is a valuable contribution to public debate. Mill, for example, believed that falsehood resulted in the "clearer perception and livelier impression of truth, produced by its collision with error." As noted in part I, however, the market place model

is unsatisfactory. Falsehood is far more likely to detract from public debate and lead to mistakes by the people who rely on such information.

48. Hunsaker, "Adequate Breathing Space in a Poisonous Atmosphere: Balancing Freedom and Responsibility in the Open Society." *Duquesne L. Rev.* 9, 15–16 (1977–78).

49. These awards, if sustained, would pose an enormous threat to the media. For example, Mr. Sullivan was awarded $500,000 in his suit against the *New York Times*. Four other suits had been filed against the *Times* based on the same advertisement. In one, a $500,000 verdict had been entered against the *Times*, and in the others, a total of $2 million in damages was sought. Awards of this magnitude constituted a significant threat to the continued existence of the *Times* and bankruptcy remains a possibility for other media defendants hit with large verdicts. The *Times*, *See* e.g., Guccione V. Hustler Magazine, Inc. *7 Media L. Rptr.* 2077 (Ohio Ct. App. 1981) ($40,300,000 awarded at trial; case reversed and remanded); Pring v. Penthouse International, Ltd., *7 Media L. Rptr* 1101 (D.Wyo. 1981) 695 F.2d 438 (10th Cir. 1982) *cert. denied*, 462 U.S. 1132 (1983). In one case involving a $9.2 Million award, the defendant, Alton Telegraph, was forced to declare bankruptcy. Kupferberg, "Libel Fever," 20 *Colum. Journalism Rev.* No. 3 at 36 (1981).

50. *See* New York Times v. Sullivan, 376 U., 254, 279 (without the protections of the fault requirement, "would be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true. . . . because of doubt whether it can be proved in court of fear of the expense of having to do so.") *See also* Washington Post v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967) ("[t]he threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself").

51. Some lower courts had taken the position that, because of the First Amendment interests involved in libel suits, defendants should be according greater access to summary judgment. *See*, e.g., Southard v. Forbes, Inc., 588 F.2d 140, 145 (5th Cir.) *cert. denied*, 444 U.S. 832 (1979); Vandenburg v. Newsweek, Inc. 441 F.2d 378, 379 (5th Cir.), *cert. denied*, 404 U.S. 864 (1971); Karp v. Miami Herald Pub. Co., 359 So.2d 580, 581 (1978) ("summary judgment is especially appropriate in libel cases where the facts are not essentially in dispute because of the chilling effect of libel suits upon First Amendment freedoms"). *But see* Greenberg v. CBS, 419 N.Y.S.2d 988, 9912 (N.Y. App. Div. 1979) ("solicitude for first amendment freedoms was not intended to abrogate the fundamental rules governing the administration of summary judgment").

The Supreme Court indicated its disfavor of expansive use of summary judgment in Hutchinson v. Proxmire, 443 U.S. 111 (1978). The trial court in this case, after reviewing the case law on actual malice, concluded that summary judgment "may well be the rule rather than the exception." Hutchinson v. Proxmire, 431 F. Supp. 1311, 1330 (W.D. Wis. 1977). The Supreme Court criticized this practice, stating that "[t]he proof of 'actual malice' calls a defendant's state of mind into question and does not readily lend itself to summary disposition." 443 U.S. 111, at 120 n.9. *Hutchinson* seems to have had little effect, though, on the success rate of summary judgment petitions, which has remained around 75%. LDRC Bulletin No. 4. (Part 2) at 2 (1982).

The Court has recently retreated somewhat from its position in *Hutchinson*. In Anderson v. Liberty Lobby, 106 S.Ct. 2505 (1986), the court held that cases brought by public figures must be dismissed before trial unless the plaintiff can produce clear and convincing evidence on the issue of actual malice.

52. Bezanson, *supra* note 30 at 231. Bezanson goes on to note that "the fault requirement also leaves invitingly open the possibility of winning even when the publication was

true or not probably false. In these respects, the constitutional privileges not only fail to deter or discourage unwarranted suits, they may encourage them." *Id.* at 232. One wonders how many of the plaintiffs in the ILRI' study who claimed to have sued to set the record straight were truly interested in a judicial pronouncement on the accuracy of the publication.

53. *See* Franklin, *A Litigation Study supra* note 29 at 39 n. 172.

54. *See also* Anderson. "Reputation, Compensation, and Proof," 25 *Wm. & Mary L. rev.* 747 (1984). Anderson would limit recovery to the amount of "actual injury" suffered by the plaintiff. This would include nonpecuniary reputational losses, but not mental anguish.

55. *See* Ashdown, Gertz & Firestone, "A Study in Constitutional Policy-Making," 61 *Minn. L. Rev.* 645, 670 (1977). Ingber, *supra* note 20 at 852–56. In Ingber's proposal, pecuniary damages would be recoverable without the need to prove fault. A plaintiff proving scienter would also be entitled to recover actual, nonpecuniary damages.

56. Brill, "Redoing Libel Law," *The American Lawyer*, at 1, 14 (Sept. 1984). In Brill's proposal, a successful plaintiff would be entitled to actual pecuniary loss plus a limit of three times the cost of a full-page ad in the defendant's newspaper or magazine, or two minutes of advertising on the show the offending story was broadcast on.

57. *See* Time, Inc. v. Firestone, 424 U.S. 448 (1976). As a result of the expansive interpretation of the "actual damage" limitation, it is nearly impossible to demonstrate that an award should be reduced because of inadequate evidence to support it. *See* Franklin, "Winners and Losers and Why: A Study of Defamation Litigation," 1980 *Am. B. Found. Res. J.* 455, 493 n.83 (finding only one case, out of 3.5 years of litigation studied, in which the award was held to be insufficiently supported by the evidence).

58. The Franklin study found that juries are significantly more likely than judges to find for the plaintiff. *See* Franklin, *A Litigation Study, supra* note 28 at 804 & n.20. Moreover, more than half of the jury verdicts for the plaintiff were reversed on appeal, suggesting that jurors are either misunderstanding or ignoring their instructions. *Id.* at 806. The tremendous size of some jury verdicts itself raises the possibility that jurors' animosity toward the defendant, rather than error by the defendant, may be to blame. Guccione v. Hustler Magazine, Inc. seems to be an example of this.

59. A number of commentators have proposed the use of some form of fee shifting in defamation cases. *See*, e.g., Brill, *supra* note 56.

Franklin, *A Critique supra* note 5; Hulme, "Vindicating Reputation: An Alternative to Damages as a Remedy for Defamation," 30 *Am. U.L. Rev.* 375 (1981); Ingber, *supra* note 12. In Brill's proposal, the loser would pay the winner's reasonable legal costs in all cases. Franklin would require free shifting in all cases except those in which the plaintiff suffered special damages and had a reasonable chance for success. Hulme would make the award discretionary with the judge. Ingber would authorize awards of attorneys' fees to the plaintiff only, and only if the plaintiff proved negligence or scienter.

61. An extensive list of articles on fee shifting is given in Christie, "Attorney Fee Shifting: A Bibliography," 47 *Law & Contemp. Probs.* 347 (1984).

62. A Theoretical analysis of the effect of awarding attorneys' fees to the prevailing party can be found in Shavell, "Suit, Settlement and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs," *11 J. Legal Stud.* 55, 62 (1982).

63. Shavell's analysis supports the conclusion that, under most circumstances, nuisance suits will be less likely under the British system, while meritorious suits will be more likely. The reason is that, "when the plaintiff is relatively optimistic about prevailing, his expected legal costs will be relatively low under the British system—he will be thinking about the possibility of not having to pay any such costs—whereas under the American

system he must bear his own costs with certainty. Thus, he will be likely to find suit a more attractive prospect under the British system. But when the plaintiff is not optimistic, converse reason explains why he would be expected to sue more often under the American system." *Id.* at 59–60. *But see* Braeutigan, Owne, &, Panzar, "An Economic Analysis of Alternative Fee Shifting Systems," 47 *Law and Contemp Probs.* 139, 153 (1984).

64. It is quite difficult to determine this without empirical research. Rowe, *id.* at 149.

65. *See,* e.g., Anderson *supra* note 2 at 437 n.76: "Another method of attacking the problem of defense costs in libel suits might be to require unsuccessful plaintiffs to pay defendant's attorney's fees. This is not an attractive solution because it could impose a severe—possibly disastrous—penalty on the plaintiff who miscalculates the merit of his claim. If the law is to retain a remedy for defamation, it should not put a plaintiff to such great peril for seeking to avail himself of that remedy."

66. *See* Franklin, *A Critique supra* note 5.

67. Rowe, *supra* note 64 at 153.