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## THE ECONOMICS OF LIBEL

### An Empirical Assessment

Randall P. Bezanson  
Gilbert Cranberg  
John Soloski

Economic analysis is being applied to an ever-widening range of legal problems these days, and often with results that significantly advance our understanding of the law and the legal process. The contribution that economics can make is not surprising, for many of the economist's analytical tools are closely akin to those traditionally employed by the lawyer and legal scholar, and they reflect a more or less coherent analytical perspective. Like legal forms of analysis, however, their advantage is also a defect, for economic analysis often rests on certain underlying premises that give it coherence but may not reflect reality.

The subject of today's conference is the economics of libel—more specifically the “cost” of libel. Implicit in this title is a central focus on cost—cost measured largely in financial terms. Implicit also is the assumption that cost is an important, if not the determinative, ingredient of and explanation for libel suits. We suggest, however, that cost—at least in its conventional sense—is not determinative, and that nonfinancial considerations of an individual and ideological character may dominate the libel suit.

Our conclusions can most clearly be summarized by their contrast with more conventional approaches to economic analysis of law. Generally speaking, economic analysis of legal problems rests on three related assumptions: first, that parties to a dispute are motivated chiefly by money; second, that the parties' actions are based on economically rational decisions about financial risks, costs, and benefits of recovery in litigation; and third, that negotiation and litigation are governed by an economic calculus shaped by the doctrines and rules of liability within the formal legal system. These economic assumptions and the approach they reflect are a function not so much of the economist's preconceptions as of the legal system itself, for the law in most instances (including libel) translates disputes into financial terms for purposes of recovery in litigation.

We undertook an empirical analysis of libel suits in order to understand

the actions of the parties in the libel suit, and their motivations and objectives. We did so because, on the face of it, much that we knew about libel litigation seemed to defy the conventional patterns of litigation. We wanted to find out whether this was true and, if so, why. What we found was a dispute that defied the conventional expectations of economic rationality, and defied the conventional rules of the legal system itself. Specifically, we found:

- that the parties are often *not* motivated chiefly by money;
- that the parties' actions are *not* based on economically rational decisions about the prospects of financial recovery in litigation;
- and that the economic calculus that governs negotiation and litigation *has surprisingly little relation* to the rules of liability in the legal system.

Most libel plaintiffs lose; most media defendants win. For plaintiffs, the prospect of judicial victory is extraordinarily small, but the cost of suing is also small, as most lawyers work on contingency. For media defendants, the prospect of judicial victory is very high, but the price in terms of costs and fees is dear.

The strictly financial odds of victory or loss in the former legal system seem to play a distinctly secondary role in libel suits; the parties' stakes seem largely nonfinancial. Settlement and negotiation are infrequent when compared with other forms of civil litigation; the incidence of financial settlement is even less frequent. Plaintiffs believe that they win by suing, for the act of suing achieves an important measure of vindication. Media believe that they win by defending, and the high price is borne in order to avoid losing credibility.

In the following pages we will discuss selected findings of the Iowa Libel Research Project in some detail. Our analysis in this paper will principally rely on three data sets: 1) analysis of virtually all defamation cases with a reported decision or order in which the defamation claim is treated as colorable, and which were decided between 1974 and mid-1984; 2) interviews conducted with 164 plaintiffs who sued the media for libel; and 3) interviews conducted with 67 news organizations. Our objective is to outline the fabric of the libel dispute—who sues and who defends, and why. The actions and motivations of libel plaintiffs and defendants are, we believe, rational; but they do not follow patterns that either economics or law deem conventional. After reviewing our findings, we will return to the question of economics, and outline some of the implications of our analysis for the way in which the economics of the libel dispute should be approached.

## I. THE PLAINTIFFS AND THEIR OBJECTIVES

Libel suits are generally inexpensive for plaintiffs. But low litigation costs cannot fully explain why plaintiffs sue, for the hazards of suing, and the odds against prevailing in court, are immense. With the filing of a libel suit, especially one against the media, there is a strong likelihood that the alleged libel will be repeated in the media's coverage of the suit. Indeed, nearly 70 percent of the responding plaintiffs said that their lawyer warned them that the alleged libel would be repeated if the plaintiffs sued. In addition, 70 percent of the plaintiffs reported that their lawyer discussed the possibility that the libel suit would result in publicity about their past. With libel suits taking an average of four years to complete, any vindication of reputation from suit will occur long past the time when the offending statements can be recalled. The plaintiffs were aware of the likely delay. More than 45 percent of the plaintiffs reported having been told that the suit would take between two and five years to complete.

Nevertheless, plaintiffs have brought suit, and continue to do so. Why? They will almost certainly lose. Is it simply, as some people in the media have suggested, that plaintiffs see their libel suit as an opportunity to profit by winning large damage awards at the expense of the media? We think not. We have concluded that money is a surprisingly small element in a complex of factors contributing to the libel plaintiffs' decision to sue.

Let us begin by examining the types of people who do sue. The libel plaintiffs we interviewed shared a number of characteristics. As a rule, they tended to be well-educated; many held graduate or professional degrees. Most plaintiffs were well-off financially, and they were long-time and highly visible residents in their communities. Most held jobs that brought them into contact with the public.

Many plaintiffs were community leaders. It was common for them to have held public office or to have been a public employee. Even those plaintiffs who worked in business or in a profession often had held public office either before or during the time the alleged libel appeared. In fact, about 45 percent of the plaintiffs we interviewed had held public office or had been a candidate for office before or during the time the alleged libel occurred. Most plaintiffs, in short, were community leaders, active in community affairs, who had a long-standing relationship with other members of their communities and who were associated publicly with the issues related to the subject of the alleged libel. As a rule, libel plaintiffs are not fly-by-night operators.

It was not a surprise, then, for us to find that when we analyzed the

universe of reported cases in the decade following *Gertz v. Welch*, upwards of 60 percent of libel suits brought against the media involved public plaintiffs. Public plaintiffs almost always sued over stories that dealt with their public or political activities. Private plaintiffs, on the other hand, tended to sue over stories that dealt with business or professional activities or with their allegedly criminal activities. The public plaintiffs we interviewed had a very high degree of community visibility, and the content of the alleged libel focused on their public activities.

The strong correlations among plaintiffs' legal status, degree of community visibility, and content of the alleged libel indicate that the courts have been consistent in applying the constitutional standards. The most important and obvious conclusion reached from these comparisons is that most libel suits involving the media result from stories that deal with a plaintiff's public activities. This suggests that, for most plaintiffs, the alleged libel is likely to be seen as damaging their public or political reputation.

To find out how the alleged libel affected the plaintiffs, we asked them a series of open-ended questions about what upset them about the alleged libel. Nearly all of the plaintiffs said that what upset them most about the alleged libel was that it was false. Some plaintiffs provided additional responses; almost all of these concerned reputational harm.

Plaintiffs were then asked open-ended questions about how they believed the alleged libel had harmed them. Plaintiffs offered a number of responses, but most related to reputational or emotional harm. In general, damage to their reputation, emotional harm, and damage to their political status were most often mentioned by the plaintiffs. While a minority of plaintiffs expressed their harm in financial terms (often in combination with another, more principal harm), and while some who expressed reputational harm may have considered financial damage to fall within that category, it appears that a minority of the plaintiffs surveyed expressed the harm in terms of money, whether separately or in combination with other factors.

Plaintiffs who were most likely to cite financial harm were those in business, especially plaintiffs who owned or managed a business. Plaintiffs who held public office or who were public employees were more likely to say that the alleged libel had damaged their political status or had caused them emotional harm.

It does not necessarily follow that plaintiffs who said that they suffered financial harm were bent on obtaining money from the media. To further gauge what it would have taken to rectify the situation, we asked the plaintiffs what the media could have done immediately after the alleged



libel appeared that would have satisfied them. Nearly three-quarters of the plaintiffs said that they would have been satisfied with a retraction, correction, or public or private apology. Less than 4 percent said that they would have been satisfied only if the media paid them money damages. Nearly all of the plaintiffs who said the alleged libel caused them some financial harm said that they would have been satisfied with a retraction, correction, or apology.

This finding is supported when the plaintiffs' actions following publication of the alleged libel are examined. About half of the plaintiffs interviewed said that they contacted the media after the alleged libel appeared, and about half contacted a lawyer. But nearly three-quarters of the plaintiffs—on their own, through their lawyer, or with their lawyer—contacted the media prior to filing their libel suit.

Nearly all of the contacts with the media occurred within two days of publication or broadcast of the alleged libel. And nearly all of the plaintiffs said that the media were asked to run a retraction, correction, or apology. Even those plaintiffs who said that they were financially harmed by the alleged libel said they were more interested in obtaining a retraction, correction, or apology than they were in obtaining money. The media turned down most of the plaintiffs' requests. Retractions, corrections, or apologies were forthcoming in roughly 20 percent of the cases. The plaintiffs who sued despite receiving a retraction, correction, or apology said they did so because they viewed the response as insufficient, often compounding the libel.

Once the plaintiffs have decided to sue, they appear to shift their objectives. When asked why they sued the media, plaintiffs predominantly said they sued in order to restore their reputation or to punish the media. Roughly 20 percent of the plaintiffs said that they sued to win money damages as compensation for actual economic harm. This is much higher than the 4 percent who said that money would have been necessary to satisfy them shortly after the alleged libel appeared. Of equal note, about half of the plaintiffs said that one of the reasons they were suing was to deter similar incidents and to punish the media.

Those plaintiffs who claimed money as the reason for suing usually were those most likely to have experienced financial harm because of the alleged libel. Money and punishment represent the predominant motives for suit when the alleged libel focused on private activities. In contrast, reputation is the chief reason for suit when the alleged libel dealt with plaintiffs' public or political activities. Plaintiffs who sued over stories that dealt with their public or political activities quite consistently gave reputation-related reasons for bringing suit.

One conclusion that emerges from our study is that plaintiffs' motiva-

tions are related predominantly to reputation. Those plaintiffs who gave money as a reason for suit tend to have experienced financial harm. In these circumstances, only money will fully compensate for the harm. The low frequency with which money figured into the thinking of plaintiffs immediately following the publication or broadcast of the alleged libel may be related to the fact that an immediate correction or retraction can often avoid financial harm. As time passes and litigation costs increase, plaintiffs are more apt to think of, or need, money. Even then, however, money damages as compensation for economic harm appear to play a role only in a distinct minority of the cases.

What, then, led most plaintiffs to sue? No single factor can adequately explain the reasons for suit. Rather, we found that there are a number of interrelated factors that pushed the plaintiffs into court. One is that plaintiffs were disturbed chiefly by what they saw as the falsity of the alleged libel and its damage to their reputation. The impact of the alleged libel on plaintiffs' reputation is magnified for many plaintiffs because of their active involvement in their communities. For a large number of plaintiffs, the successful pursuit of their careers is dependent on their public reputation. Their concern with restoring their reputation underlies their contact with the media.

The plaintiffs' post-publication contact with the media reveals another key reason for suit. Nearly all of the plaintiffs said that they were angered or dissatisfied by their contact with the media. Especially noteworthy is the vehemence with which the plaintiffs described their reaction to their post-publication contact with the media. Plaintiffs regularly used such terms as "extremely angry," "incensed," "seething," and "very mad" to describe their reaction to their dealings with the media, which in turn were described as "arrogant," "rude," "indifferent," and "callous." Most of the plaintiffs told us that it was more than the rejection of their requests for a retraction, correction, or apology that angered them; it was the *way* they were treated by the media. In the words of one plaintiff, "I never confronted such arrogance in my life." In the words of another, "I was insulted. They did not treat me decently."

Plaintiffs who contacted the media prior to contacting a lawyer reported overwhelmingly that their post-publication experience was a factor in their decision to sue. These plaintiffs were likely to commit to suing before they contacted a lawyer. Moreover, they contacted a lawyer with the specific intention of filing suit.

## II. THE MEDIA'S ROLE IN THE LIBEL SUIT

Most plaintiffs reported that the response of the media to their pre-suit contact played a significant role in their decision to sue. To assess this response from the defendant's point of view, we collected information from editors and other news people as well as from libel plaintiffs. We anticipated when we went from interviewing plaintiffs to interviewing members of the press that we would encounter conflict. Instead, we found far more agreement than disagreement. Basically, the news people reinforced what the plaintiffs told us.

Yes, editors told us, there's a lot of rudeness and arrogance, and the press by and large does not do well in responding to complaints. As one newsman told us, "You get a quart of sour milk at your local grocery store, put it in a paper bag and take it back to the check-out counter and say the milk is sour and the guy will say to you either, 'Get a new quart' or 'Here's your money back.' The equivalent of taking a quart of sour milk back to a newspaper is you're lucky if they don't pour it on your head."

We found a newspaper environment uncondusive to creating satisfied customers. As Paul Neely of the *Chattanooga Times* wrote in 1984, "There seems to be a newspaper curse that at least every other complaining caller will be referred to at least one wrong place, and when the responsible person is finally identified, he or she is invariably at lunch." The brushoff at some places has become an art form. "Call your city desk sometime," publishers were advised by Kurt Luedtke, former executive editor of the *Detroit Free Press*, "and see if you like the feeling."

In a sense, newspapers are extremely efficient institutions. They could not gather and process the vast amount of information they handle daily, under deadline pressure, unless they were tightly organized. But all the attention focused on producing tomorrow's and next Sunday's paper exacts a price. These institutions, so highly organized and systematic in producing their product, too often are disorganized and unsystematic in dealing with the hurt that is sometimes caused by the product.

You can bet that editors are fully aware of how their papers are put together. However, time after time during our interviews we had editors describe procedures for dealing with complaints that were news to the subeditors, desk people, reporters, telephone operators, and receptionists we interviewed who were actually fielding the complaints in newsrooms. Practices that editors assumed were being followed simply weren't. In the absence of clearly articulated and communicated procedures, staff members haphazardly improvised their own.



And when you add to this disorganization the defensiveness that makes “I was wrong” the least used statement in the English language, the failure to isolate from the complaint process the staff members who wrote or edited the disputed story, and a mind-set that equates demands for retraction or apology with pressure, you have a recipe for trouble—which starts with t, and rhymes with d, and stands for defamation suits.

Of the obstacles in the way of doing a better job of dealing with complaints, the mind-set against pressure may be the most difficult to overcome. As one newspaper’s lawyer told us:

“There’s tremendous pressure exerted on the paper all the time—financial pressure, political pressure to tone down its stories, not to do certain stories. It’s a constant fight against all those pressures that are brought to bear. And so the editors just in their day-to-day business have to have this kind of defensive attitude in some respects. They’ve got to resist all this pressure and their reflex is to resist. . . . And when that special pressure of legal threat is brought to bear the reflex action is to resist all that much more. That’s the posture that they’re in and it takes a lot of confidence to overcome that reflex and to really allow yourself to hear that person who has a complaint and to admit that you’re wrong and to run that correction, so you’re fighting that kind of built-in attitude that is required by the job in some ways.”

The determination not to knuckle under to pressure, or not to be seen as knuckling under, perhaps helps explain why settlement is so much more common in other civil litigation than in suits for libel.

Contributing to the problem is the almost total absence of written procedures for dealing with complaints. At some papers this is attributed to legal advice that the less put in writing the better. One editor has described his lawyer’s advice this way:

He explains [to staffers] that internal memos can present difficulties. . . . This goes not just for ‘cute comments’ or wisecracks, but also for explicit, dead-sober critiques of stories written, say, from a copy editor to a desk or a reporter. If memos are necessary at all, they should be routinely destroyed when no longer timely. In addition, reporters should, at least, consider discarding their own notes and story drafts when no longer needed—all their notes, not just those for sensitive stories.”

Organizations ordinarily instruct and learn from their institutional experience by communicating to employees in writing. One of the oft-cited advantages of the print press, in fact, is that you can clip stories and save them. While much has been said about the chilling effect of libel on news coverage, not enough has been said about the way libel has made institutions whose reason for being is the written word afraid to communicate internally in writing.



The legal advice to shun permanent written records may be sound in light of the way the law has evolved, but the ironical consequence is that advice intended to protect the press against libel suits may make the press less able to prevent them.

The plaintiffs told us that the thing that bothered them most about the allegedly libelous story was its falsity. Most of the press strives for accuracy, but given the way newspapers are produced, error is bound to occur. While error cannot be eliminated, it can be corrected.

Clearly, the press must improve its response to complaints. That means developing systematic procedures for receiving, checking, and responding to requests for correction, retraction, or apology. It means dealing in a considerate manner with people whose complaints are unwarranted and making adequate amends when they are justified.

Plaintiffs sometimes sue after they receive a correction or retraction. Many in this category told us that the paper's response was so grudging and unsatisfactory that the correction or retraction made matters worse. Examination of the paper's response in these instances suggests that the plaintiffs had reason for the dissatisfaction in possibly as many as half the cases.

The dissatisfaction may be due in some degree to the excessive involvement in the corrections process of the persons responsible for the disputed story. We found it to be common for those who wrote or edited the story either to do the follow-up checking or to write the correction. The experience of James Squires, editor of the *Chicago Tribune*, suggests that this is a mistake. "I do not make the people who made the error write a retraction and deal with the response," Squires told us. "That's where I got into trouble years ago. I learned that they cannot bring themselves far enough along to admit the error with enough flourish to appease the aggrieved party. And by this time they're usually mad, everybody's mad."

Improved systems for dealing with complaints must include whatever investment in time and personnel is necessary to have a disinterested person, preferably one with good human-relations skills, respond to complaints. At many papers this could be an added responsibility of a person already on the payroll. At papers receiving large numbers of complaints, it may be advisable to employ the equivalent of an ombudsman, with or without that title. The ombudsman should deal solely with complaints and not, as most of the same 30 ombudsmen now do, also write critical columns or in-house memos assessing the paper's performance. The latter duties, we found, antagonize news personnel and lead them to divert complaints from the ombudsman.

The point is that at minimal or modest expense, newspapers can do

much to buy protection against the disorganization and defensiveness that afflict too many of their newsrooms and expose them unnecessarily to libel suits.

Newspapers nowadays have rid themselves of the notion that to admit a mistake is to undermine their credibility. Almost all papers periodically run corrections. But almost always it is about a factual error. As former *Wall Street Journal* editor Vermont Royster has pointed out, while newspapers are willing to “confess they misstated the date of the public school board meeting,” most are reluctant to admit publishing stories that are “basically wrong or misleading or unfair.” The *New York Times* now does this in its “Editor’s Notes.” A newspaper’s or broadcaster’s complaint procedure needs to include similar means to confess to shortcomings in the tone and balance of stories.

In other words, far better—and far less costly—than the courtroom for resolving libel disputes in the newsroom. As James Squires told us:

“I have over the years become a firm believer that even a serious post-publication complaint could best be handled by the newspaper, through its policy, before it gets to the lawyers and the libel people. I think, in other words, that the best defense against libel in newspapers is the newspaper’s response after it’s done something wrong. . . . The people who sue us either are jerks looking for a deep pocket and never getting anywhere, so they’re not that big of a problem—they’re a nuisance—or people who are forced to sue us because we ignore them and kick them and refuse to deal with them.”

Money may be the root of all evil, but it is not the root of all libel cases. The combination of plaintiff responses and their actions lead us to conclude that the underlying motivation for the libel suit in many cases is something other than avarice. For many plaintiffs, the objective is some type of reputational repair or vindication. As William Tavoulareas (who incidentally, was not one of the plaintiffs we interviewed) has said, “Monetary compensation in cases of libel is not, I think, the real issue. Of far greater consequence to a ‘public figure’ than the prospect of collecting damages is the right to clear the record when he has been falsely maligned.”

On this issue, too, we found editors inclined to agree. While the editors we interviewed were more apt than the plaintiffs to attribute a money motive, we found more agreement than not on the importance to plaintiffs of some form of non-monetary exoneration.

We undertook our study to see if it were possible to develop alternatives to litigation. If plaintiffs’ chief goals were to obtain money, it’s highly doubtful that the idea of alternatives would appeal to the press. As unsatisfactory as the libel system is for the media, it does produce

victory for them nearly all the time. Very few members of the press are likely to be attracted to an alternative that would create a greater risk of having to pay damage awards.

Eliminating money from the picture would not necessarily make a non-litigation alternative, whatever its form, attractive to the press. News people cherish their independence. Many of them were hostile to the National News Council because they objected to the idea of being held accountable to an outside agency. The adverse reaction to the National News Council by important segments of the press is a sign that moves to develop substitutes for the legal process would face rough sledding.

But the experience with the National News Council is not conclusive. For one thing, the News Council's jurisdiction extended far beyond libel-type complaints. The Council was neither touted as an alternative to the courts for libel disputes nor was it perceived that way by the press. Moreover, the News Council process was bound to create resentment. Complainants who used the process were expected to first seek redress from the party who published the disputed story. When that attempt failed, the News Council entered the picture. Thus, the complainant chose the forum and the press was placed in the position of being summoned to answer for its misdeeds. It's not surprising that editors were put off and were disinclined to cooperate.

A more attractive alternative to litigation, with its high costs and its intrusiveness into the newsroom, would be a forum in which both parties would have a voice in establishing the ground rules and in choosing a neutral party or parties to arbitrate.

A consensus seems to be emerging that a key missing ingredient in the legal system for dealing with libel suits is an assured way to resolve the issue of truth. The plaintiffs, we have seen, are upset most by the alleged falsity of the story. The press, which is, of course, not in the misinformation business, has an equal interest in the truth. The public's interest, too, is served whenever the record is set straight. Seldom, however, does libel litigation produce a clear-cut verdict on the issue of truth.

Various proposals have been advanced to reshape the legal system to make such verdicts common. The Schumer bill would do it by giving media defendants the option of converting defamation actions by public officials and public figures into proceedings concerned solely with the question of truth.

You don't need a law, however, to convert a libel dispute from a traditional civil suit for damages into a proceeding on the issue of the truth of the alleged libel. Media defendants could offer *now* to participate in such proceedings. If the plaintiffs we interviewed were telling us the



truth about their interest in vindication rather than money, and about their willingness to participate in alternatives to litigation, there should be no shortage of takers. The shortage is in the availability of such non-litigation remedies. The people who bring libel actions do so at least in part because they have no other recourse.

There seems to be growing awareness, however, that not every problem calls for a legal solution. In New York, the Center for Public Resources has proposed one such alternative for libel disputes, and in Minneapolis, Otto Silha, former publisher of the Minneapolis *Star and Tribune*, who recently contributed \$25,000 to the Minnesota News Council, has suggested that the Minnesota state council broaden its mandate and serve as a resource for resolving libel-type disputes that originate outside the state.

For our part, the Iowa Libel Research Project has begun an inquiry into the establishment of alternative forums, and the testing of voluntary nonlitigation processes for libel disputes. These processes will be evaluated to determine their strengths and weaknesses and to determine whether they offer a realistic alternative to litigation or create more problems than they solve.

No system, whether established by statute or court rulings or by voluntary action, will be without drawbacks. The question, though, is not whether a proposal meets some abstract standard of perfection, but whether it represents an involvement over the existing system. The present system is seriously flawed. Our study has made us acutely aware of how defective the system is in such proceedings.

### III. SUING FOR LIBEL: WHAT PLAINTIFFS WANT AND WHAT PLAINTIFFS GET

The decision of plaintiffs to bring suit is an outgrowth of their perceived harm and of their interaction with the media. The media's decision to defend rather than to negotiate and settle is a byproduct of their organizational arrangements and the fear of buckling under to pressure and losing credibility. The decision to sue is made in the environment of these general objectives and perceptions.

That decision, of course, is much more complex than this statement of general objectives might suggest, and it is to these complexities that we will now turn. We know, for example, that lawyers play a role in the decision to bring and defend a libel suit. We also know that negotiation and settlement are infrequent in libel litigation. Finally, we know that, in retrospect at least, the *act* of suing, without anything more, achieves

substantial vindication for many plaintiffs. In the following pages we will discuss selected data that bear on these and related issues, and will outline the principal conclusions that tell us something about the dynamics of the libel dispute. We will also touch on suggestions for reform in libel law, including the libel dispute's susceptibility to nonjudicial resolution. Our analysis will focus on six conclusions drawn from the Iowa Libel Research Project.

Our first conclusion is that the remedial focus of the legal system is frequently inconsistent with, or irrelevant to, the remedial interests of the plaintiffs. The legal system's response to libel is built upon money damages, and this is particularly so today because of the constitutional privileges. Indeed, one occasionally reads of cases in which an otherwise successful libel suit is dismissed notwithstanding its merits because no money damages were sought or awarded, but we have, of course, found that a majority of plaintiffs say they are interested in curing alleged falsity, not in receiving money; and that a surprisingly large proportion of the plaintiffs report that their injury is truly reputational in character, but not necessarily financial or economic.

Even more ironically, the plaintiffs seeking correction or reputational repair are *in fact* employing the legal system to achieve that objective, notwithstanding the law's formal refusal to respond to their perceived harm. For instance, the plaintiffs who are most frustrated with the legal system are those who explain their harm in economic terms, and express a need for economic relief in the form of money damages. In contrast, the plaintiffs who seek correction of reputational repair express the least frustration with the legal system, the greatest satisfaction with the results of their litigation, and an extraordinary intention to sue again if faced with the same situation. Is this because such plaintiffs win? Certainly not, as the plaintiffs seeking nonfinancial remedies through suit lose more often than any other group. Yet they do often win, even though they lost in court; for commencing suit achieves their nonfinancial objectives remarkably well (and they have no other effective alternative).

Our second conclusion relates to the role of lawyers. By any measure and anyone's statistics, the likelihood of recovery of money through judicial victory or settlement in libel litigation is low. For seriously litigated libel claims, the incidence of success is less than 10 percent; for plaintiffs who are public figures, success is even more fleeting. Our analysis indicates that no more than 25 percent of libel suits are settled; in only 10 to 15 percent does money change hands. Moreover, with but very few exceptions, the recoveries and settlements that are obtained are pretty small, averaging around \$20,000 in judicial recoveries, and

\$7000 per settlement. Yet more than two-thirds of the plaintiffs whose claims were seriously pursued engaged counsel on some form of contingency arrangement, and average lawyer fees and total litigation costs to plaintiffs were quite low—less than \$10,000, with the vast majority below \$5000. Indeed, 16 percent of the plaintiffs reported that they bore no litigation costs at all, and 30 percent reported costs under \$1000. Finally, most of the lawyers appear to have been optimistic in their predictions of success, and while many of the lawyers appear to have been inexperienced, this tendency was not unique to that lawyer group.

These observations about fees, costs, and recoveries raise perplexing questions about the role of lawyers in libel litigation. Why are the plaintiffs' lawyers so optimistic in the face of such odds (roughly three-quarters tell their clients that the odds of winning are 50 percent or better)? Why do they work on contingency in such a large proportion of the cases? Why do they usually recommend suit?

While we do not have conclusive answers to these questions, our data provide us some insight with which to suggest possible answers. The plaintiffs who are most often represented on a contingency basis are the public plaintiffs—especially the public officials. Private plaintiffs most often pay the legal bill. The influence of the lawyer on the decision to sue is greatest with the private plaintiffs, where lawyers are somewhat more pessimistic in their advice. Public plaintiffs, in contrast, tend to have decided to sue before seeing the lawyer, and consider the lawyer's advice least influential. Roughly half of the plaintiff lawyers seem to be relatively inexperienced in litigation and more than two-thirds had no experience with libel litigation.

These and other observations lead us to some tentative conclusions about lawyers' optimism and the apparently low fees born by plaintiffs. Because of experience, many lawyers may not fully understand the odds faced in a libel suit or the intricacies of the litigation. In any event, the "equitable" appeal of a plaintiff's claim is often great. Perhaps most important, for relatively inexperienced lawyers—and even for experienced ones—the prospect of representing a well-known public figure or official has appeal beyond the fee, for libel suits often attract publicity which may inure to the lawyer's benefit. Finally, the cost of filing a libel suit is often not great, and frequently little more is involved than filing a complaint and briefing points of law, as 75 percent of the cases are resolved in advance of trial. Once a case passes through the pretrial privilege phase, the odds of success for plaintiffs increase markedly, with plaintiffs winning at trial in roughly two-thirds of the cases. Costs of litigation, it appears, are generally much greater for the defendant than



for the plaintiffs. A recent study indicated that average media libel defense costs may range as high as \$95,000.

More basically, the information about costs of litigation points to ironies in the operation of the rules and assumptions of the legal system itself. The plaintiffs who were more frequently represented on contingency, and whose lawyers were remarkably optimistic about success, tended to be the public plaintiffs whose rate of success in court was lowest, and there is no reason to expect that this low success rate does not apply as well to the incidence of settlement. Interestingly—if not ironically—it is the public plaintiffs, and particularly the public official plaintiffs, whose suits should be most deterred by the onerous privilege requirements. Yet with the public plaintiff group, and particularly with the public officials who sue, contingency arrangements are most frequent, predictions of success are optimistic, and the lawyer's advice is deemed least influential (but most satisfying, as most of these plaintiffs—unlike the private plaintiffs—would employ the same lawyer again). The public plaintiffs are predetermined to sue, their lawyers seem to help them by reinforcing their decision to sue and by bearing most of the costs, and—not surprisingly—the public plaintiffs are most satisfied with the litigation experience, notwithstanding ultimate loss. The public plaintiffs, in particular, seem to win by suing. The rules of the legal system are in a real sense irrelevant to *their* dispute.

Our third conclusion relates to the definition of the dispute itself. As we have indicated, the basic dispute from the plaintiffs' perspective is clear-cut: falsity. In contrast, the legal system defines the dispute in fundamentally different terms: fault. Largely, although not exclusively, because of the constitutional privileges and their practical operation, the litigation process is geared to resolving a dispute about whether the publisher was at fault: whether the offending statement, independent of its truth or reputationally damaging character, was published negligently or recklessly in light of what was or should have been believed by the publisher at the time of publication. This issue frequently has little relation to falsity and reputational harm, and often it has no relationship whatsoever.

The plaintiffs are largely interested in falsity, not in fault. Interestingly, the media defendants understand this. Indeed, in terms of their institutional mission, the media defendants are also interested in truth or falsity. They pursue the denial of fault not because they view that as the relevant professional question, but because fault represents an inviting opportunity to escape liability in the legal system. Whatever the reasons accounting for this situation, the important observation is that the dis-

pute over fault is fundamentally different from the dispute over falsity. The legal system is simply *not* adjudicating the same dispute that lies at the core of the real conflict between the plaintiffs and the defendants. Ironically, what the legal system *is* doing—under the banner of first amendment fault privileges—is crafting a legal action to enforce press responsibility.

Our fourth conclusion concerns the way in which the legal system is operating for those plaintiffs who do need and seek money damages. We have found that not all plaintiffs sue only because of falsity; and that not all plaintiffs would be satisfied with correction rather than money damages. Actually, roughly one-fifth of the plaintiffs do sue to obtain money damages, and most of these (largely private) plaintiffs feel that they have suffered real economic consequences because of the libel. We have also found that up to 30 percent of the plaintiffs are—often understandably—motivated by a desire to get even. These findings do not detract from the fundamental insight that most plaintiffs are interested in correcting falsity rather than in money damages, but they do suggest that other motivations are at work for a significant proportion of the plaintiffs.

We have drawn some limited, but important, conclusions from this mixture of motives. Roughly one-fifth of the plaintiffs seek and appear to need some form of financial remedy coupled with correction of factual error, as real and material economic loss ensues from the alleged libel. For these plaintiffs, alternatives to litigation might appear more difficult to structure, at least in the absence of financial remedy. Our study of these plaintiffs, however, has led us to a less certain conclusion, as virtually all of these plaintiffs expressed an interest in a nonjudicial process involving a prompt, fair, and public determination of truth—without money damages. We should not automatically assume, therefore, that alternatives to suit do not exist for these plaintiffs.

A significant proportion of the plaintiffs mentioned “punishment” as a motive for litigation. While we found that the majority of such plaintiffs are nevertheless principally concerned with falsity, some may not be. There is reason to suspect that, in a *limited* group of cases, vengeance and punishment may be paramount, irrespective of the merits of the claim. Because the fault issue rests upon the question of subjective state of mind in light of what was known at the time of publication, it is more than theoretically possible to recover in such a libel action even though the published statement was true. While this is not a quantitatively substantial problem, it is a qualitatively troubling one.

Our fifth and related conclusion is that fault, combined with the disjunction between the plaintiffs’ interests and the legal system’s focus, may encourage litigation—or at least may leave undeterred libel suits

that should not be encouraged. On the basis of our review of the limited material available in the published record of virtually all reported media libel cases between 1974 and 1984, we have concluded that a majority of such suits are insubstantial when judged by the underlying interests in material falsity and material reputational damage. I should note that such cases may involve falsity or inaccuracy, and surely may involve emotional distress. In many such cases, however, the falsity may be technical only, or the falsity and reputation claimed may pale in the face of other known facts.

Even a 50 percent rate of insubstantial claims, so defined, seems high, especially since we were dealing almost exclusively with seriously litigated cases that involved at least one instance of formal reported judicial actions. How can we account for the phenomenon? While we can provide no conclusive explanation, we believe that two factors contribute to it. First, as mentioned earlier, prior to the recent *Hepps* decision, and even after it, the law does not technically foreclose the prospect of recovering significant damages in the absence of falsity being shown, as long as the plaintiff can show calculated indifference to the known facts by the publisher at the time of publication. This seems a small crack in an otherwise largely closed door, but perhaps it is not an irrelevant factor, for a showing of actual malice can go a long way in substituting for a showing of material falsity and material reputational harm. Second, and we believe more importantly, the high incidence of apparently nonsubstantial claims is a direct function of the plaintiffs' chief interest, and the law's indifference to it. Plaintiffs are interested in falsity and the emotional manifestations of perceived reputational harm. Bringing a lawsuit is an apparently inexpensive and virtually risk-free means of achieving vindication of those interests. Put differently, if, as we believe, plaintiffs often and largely win by suing, the legal system provides an invitingly open and effective means of accomplishing this objective, with but a minimal risk that the issue of truth will be substantially explored or be decisive in the outcome.

Our sixth and final conclusion concerns the reputational interests served through the libel suit. If we judge reputational relief to the plaintiffs in terms of the effect of bringing suit, without more (and many plaintiffs seem to do just that), the libel action seems to provide a most effective remedy for plaintiffs, although the legal system plays no part in this, and attempts no distinction among cases in terms of this interest. If, on the other hand, we judge reputational relief in terms of the formal legal response in finally decided cases, we find that the results bear only the most idiosyncratic relationship, if any, to the interest in reputation, although the law purports at this stage to have distinguished among



cases in terms of this interest. The results of the formal legal system, in short, bear no apparent systematic relationship to reputation. On this question Robert Sack made the point both effectively and, as we have discovered, quite accurately when he said:

The few plaintiffs who succeed resemble the remnants of an army platoon caught in an enemy crossfire. Their awards stand witness to their good luck, not to their virtue, their skill or the justice of their cause. It is difficult to perceive the law of defamation, in this light, as a real "system" for protection of reputation at all.

## CONCLUSION

What, in light of our findings, can we say about the "economics" of libel litigation? We would venture a few general conclusions.

- When we analyze the economics of the libel suit, we should not focus too heavily on the incidence of judicial victory, the likelihood and amount of money damages, or the strict rules of liability within the legal system. The "economics" of libel suits seem to be largely nonfinancial, and to exist outside the confines of the rules governing liability in the legal system.
- Libel plaintiffs and media defendants act in consistent, predictable patterns. Their actions appear to be rational, but they are responsive to objectives that are not strictly economic (in the financial sense of the term). Both plaintiffs and defendants are resistant to negotiation and settlement unless their reputational and ideological concerns (vindication through admission of falsity for plaintiffs; resistance to pressure and maintenance of credibility for the media) are satisfied more effectively than they would be in litigation. This is a tall order, if as we conclude, plaintiffs win by suing, while media always in court.
- Major participants in the libel dispute may serve, for reasons extrinsic to the dispute, to encourage litigation. The media tend to foster suit by organizational practices that anger plaintiffs. Human relations skills, more careful attention to the complaint process, and willingness to admit error and apologize for it when it occurs, might go a long way toward avoiding litigation. Plaintiff lawyers, too, may distort the calculus of risk in litigation by underwriting litigation costs which they recover indirectly through representation of prominent clients.
- Finally, the legal system seems to have contributed to the pres-

ent mix of factors at work in libel suits. From a dispute whose essence seems straightforward—truth or falsity and reputational harm—the legal system has evolved an intricate, complex, and expensive set of rules and procedures having little relationship to the underlying dispute, but which may be providing an ironic safe harbor in which plaintiffs and defendants can act out their separate drama. The direct social costs in terms of judicial time and energy are immense, and appear to us to be of little value.

The libel dispute could, in our view, be efficiently adjudicated, either within the judicial system or outside of it. But the sad fact is that there are no alternatives to either party. In reality, for many plaintiffs and defendants alike, libel litigation is the only available choice today. It is toward development of efficient and effective alternatives that we hope economic analysis will turn.