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WAS *NEW YORK TIMES v. SULLIVAN* WRONG?

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I. NO MORE DANCING

Twenty years ago in his classic article, "The New York Times Case: A Note on 'the Central Meaning of the First Amendment,' "[1] the late Harry Kalven recounted a conversation about the then recent Supreme Court decision in *New York Times v. Sullivan*.[2] Alexander Meiklejohn, the father of modern First Amendment theory, had said that *New York Times* "was an occasion for dancing in the streets." Kalven joined in that judgment, even though elsewhere in that same article he noted the difficulties in speculating about the precise course that the First Amendment law would take after this epochal case. His own guesses included, for example, a prediction that the Supreme Court would expand the *New York Times* privilege to cover matters of public interest and concern. Here he was at best a partial prophet, for the Court first flirted with[3] and then rejected[4] this test in the decade that followed. Nonetheless, Kalven's uncertainty about the ultimate contours of *New York Times* did nothing to temper his glee and enthusiasm for the decision. For him the great principle of *New York Times* was that there was no such thing as seditious libel. Criticism of the government was to be regarded as protected from both criminal punishment and private defamation suits, while false statements of fact about public officials received a qualified privilege rendering them actionable only in cases of "actual malice," carefully circumscribed in *New York Times* to cover only statements published "with knowledge that it was false or with reckless disregard of whether it was false or not."[5] Kalven's piece was both a masterly analysis and an unrestrained celebration of a great historical event. His overt pleasure in the outcome was both uncommonly frank and refreshing in academic writing. In 1964, the world was a better place after *New York Times* was decided.

A generation has now passed, and the dancing has stopped. In retrospect, Kalven's optimism and enthusiasm seem to have been misplaced. It is a commonplace observation that the concern, not to say anxiety, about the threat that defamation actions hold out to freedom of speech and the press has grown mightily, especially in the last decade. If the

only uncertainties with *New York Times* lay in its transitional rules and marginal ambiguities, then exactly the opposite should have happened. There should have been a flurry of cases to clarify loose ends in the years immediately following the decision, followed by a period of stable tranquillity. The trend has been just the reverse, for without question the law of defamation is far more controversial today than it was a decade ago,[6] even though there has been little significant change in the framework of the substantive law. In recent years, the onslaught of defamation actions is greater in number and severity than it was in the "bad old days" of common law libel, as is evidenced by data collected by the Libel Defense Resource Center, which shows a steady increase in defamation suits notwithstanding *New York Times*.[7] There are today a number of proposals for legislative reform, all of which seek to provide alternative forms of relief to the present law, and most of which envision the use of the declaratory judgment on truth as a supplement or alternative to the constitutional tort.[8]

The question on everyone's lips is: What went wrong? Why a winter of discontent after a springtime of unrestrained joy? In part the problems may have little to do with any of the rules of defamation. The law of tort is far more active today than it was a generation ago, as we have witnessed a continued expansion of liability and escalation of verdicts in such areas as medical malpractice and products liability. The shifts in defamation could simply reflect the larger social trends in other areas, and have little to do with what the Supreme Court did to the law of defamation itself.[9] There are many reforms that should be made in the conduct of discovery, and in the handling of civil litigation generally, which would have a substantial effect upon the law of libel.

Yet there is also profit in focusing on the law of defamation itself as a source of the present discontent, and it is that possibility that I shall explore here. Given the unforeseen expansion in liability for defamation, one could argue that the *New York Times* rule is wrong because it did not go far enough. In an odd sense, abolishing the law of defamation against public officials *in its entirety* would provide a belated vindication of the Black and Douglas position in *New York Times*, that the First Amendment establishes an absolute ban against all libel actions.[10] This way of framing the question presupposes that the right response to the present uneasiness is to limit defamation actions even further. It regards the interest of the press as dominant, so that once we can identify a chink in its legal armor, the proper response is to afford the press still greater protection by edging closer to the absolute privilege.

II. THE DEFAMATION TRIANGLE

Today's frequent calls for increased protection of the press are difficult to evaluate in a vacuum. The *New York Times* case is not wanting in a rich profusion of rules that touch virtually every aspect of the common law of defamation. Before one can examine the possibilities of reform it is useful to outline the basic structure of the law of defamation.

The logic of defamation creates a tangled web because it necessarily involves at least three parties—the plaintiff, the defendant, and a third party—who interact in a wide array of circumstances. Often the cast of characters contains a far more extensive list of individuals and entities, as when a newspaper (and its staff) makes false statements about a group (and each member) to its readership (of thousands, if not millions). The tripartite division of the tort largely dictates the elements of the standard defamation action.[11] The plaintiff must allege the publication of a false statement of fact, that the statement was made of and concerning the plaintiff, and that the statement has deterred the plaintiff from entering into or maintaining advantageous relationships with third parties. Statements so actionable may in turn be overridden by privilege. Some privileges are private, as between a prospective employee and a reference for an employer. Others pertain to the public sphere. *New York Times* addresses the privilege of fair comment as it applies to public officials. That privilege could extend to public figures, or even to all matters of public concern. In addition there are general privileges to utter defamatory remarks while petitioning public officials, to reprint "record libels" (i.e., accurate reports of public documents whose contents are known by the author to be false), or to utter defamation in the course of an official proceeding. Any of these privileges in turn could be absolute or qualified (i.e., overridden by proof of malice), as the circumstances dictate. The record libel and legislative privileges are typically absolute, while those of fair comment and the right to commit libel while petitioning the government are typically qualified.

A sound law of libel depends upon getting the right rules for each element of the tort and integrating the elements into a coherent whole. It is far from obvious today which of these pieces is defective, or whether defects that exist cut in the same direction. Lots of different permutations are possible for the law of libel; necessarily there are lots of different ways to be wrong. Indeed the simple law of probability suggests that when the permutations are many, the possibility of hitting the right one is slim. The key to understanding the law of libel is to view it as an integrated whole, in which the choice of one rule on one issue is heavily influenced by the rules adopted on another question. To make

the point in its simplest fashion, the basic rule of liability cannot be chosen independent of the rules of damages, both compensatory and punitive. The failure to understand these interactions is, in my view, the source of the institutional distress that has emerged in recent years.

III. CONSTITUTIONALIZE THE TORT?

Thus far I have said nothing about *New York Times* as a constitutional decision. But the proper constitutional response is in large part a function of the difficulty in understanding how the constituent elements of the tort mesh with each other. If the tort of defamation represents a delicate balance, then the Supreme Court should tread carefully where so many common law judges have trodden before. My point is not that the first amendment has nothing to do with the common law of defamation. Quite the opposite, it clearly does. Yet to subject the common law to constitutional scrutiny only defines the scope of the judicial task. It does not even begin to state the proper solution. To understand what is right or wrong with the course the Supreme Court took in *New York Times,* it is necessary to retrace the path taken to see where, if at all, it made a wrong turn.

The defamation allegedly made by the New York Times was an advertisement sponsored by 64 prominent citizens under the heading "Heed Their Rising Voices." The ad, which appeared on March 29, 1960, contained a description of events in Montgomery, Alabama, at the height of Alabama's racial and political unrest. The ad said that the police had been ringing the campus, when in truth they were only deployed nearby. It said that padlocks had been used to keep all the students out of the dining hall, when in fact a few had been excluded because they were not properly registered. It said the students sang "My Country 'Tis of Thee" when in fact they sang the National Anthem. It said that Martin Luther King had been arrested seven times, but in fact he had been arrested only four times. The ad said the police had assisted King's enemies in bombing King's house when in fact they had sought to find the perpetrator. The ad said King was charged with a felony when the charge was a misdemeanor. The plaintiff, Sullivan, was a Montgomery City Commissioner, whose individual responsibilities included supervision of the Police Department as well as the Fire Department, the Department of Cemetery, and the Department of Scales. Many of these events occurred before Sullivan had taken office, but he claimed that the reference to police in the ad would lead persons to think of him as the government official in charge of the Police Department.

Simply reading the facts of the case reminds us how dramatically racial relations in the United States have changed for the better over the past 25 years. The events of the late fifties and early sixties are hardly conceivable today. The case also reminds us that men like Kalven may have danced to two separate melodies.[12] First, there was the doctrinal concern with the freedom of speech, for which the decision remains a landmark. Yet at the time the decision was, if anything, viewed more as a victory for the civil rights movement, guaranteeing a federal presence to offset the official power structure at the state level, which was an unholy bulwark for segregation and white supremacy in all areas of public and private life. The desire to reach the right result in *New York Times* had as much to do with the clear and overpowering sense of equities arising from the confrontation over racial questions as it did with any strong sense of the fine points of the law of defamation. The source of many of the modern problems with the law of defamation is that the *New York Times* decision was influenced too heavily by the dramatic facts of the underlying dispute that gave the doctrine its birth. In consequence the decision has not stood the test of time well when applied to the more mundane cases of defamation arising with public figures and officials.

One key to understanding the decision therefore is to ask how closely the first amendment issue was tied to the immediate political dispute before the court. In order to get a sense of that question, it is necessary to step back from the case and to ask how and why the private tort of defamation should be bound up with the Constitution at all. Before the *New York Times* case, defamation had been long regarded as the province of common law courts. The first step toward change had taken place a long time ago when the prohibitions of the first amendment were held to apply to the states.[13] But what was their force? To read Blackstone, one could easily conclude that freedom of press meant only that prior restraint by administrative officials was unconstitutional.[14] In *Near v. Minnesota ex rel. Olson*[15] that constitutional concern with prior restraint by the executive branch was lifted from its original moorings and extended to prohibit prior restraint by judges in a court of equity acting in response to a petition to abate a public nuisance. Yet Chief Justice Hughes' 5–4 opinion justified the removal of prior restraint by explicitly noting that defamation actions were available to public officials *after* publication:

> Public officers, whose character and conduct remain open to debate and free discussion in the press find their remedies for false

> accusation in actions under libel law as providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals.[16]

The passage does not contain the slightest hint of any constitutional infirmity in private tort actions for defamation. Indeed the hard problem raised in *Near* is whether court injunctions give rise to the same problems as censorship by administrative boards. One evident difference between the two systems is that administrative officials on a specialized censorship board will be chosen only on the basis of what they believe about censorship.[17] It is accordingly easier to stack a board devoted to a single issue than a court of general jurisdiction, which must deal with the full range of common law and equitable matters. The decision in *Near* must rest on the (good) sense that *any* form of prior restraint offers such possibility of abuse that it is best rejected.

The debate over prior restraint necessarily sets the stage for the analysis of common law defamation actions. As understood in *Near*, prior restraint and common law actions were substitutes for one another. The injunction can be removed from the plaintiff's legal arsenal precisely because the common law action remains. Yet once the two are recognized as substitute forms of social control, it becomes hard to say that one mode of control is subject to constitutional restraint while the other remains wholly beyond constitutional review. The Constitution speaks about freedom of speech, and liability rules can tread upon that freedom as much as direct regulation can.[18]

Once the boundary between legislative and judicial action was crossed in *Near*, then the line between ex ante and ex post remedies could not form a decisive bulwark against constitutional intervention. Yet by the same token, the decision to prevent all forms of prior restraint limits the extent to which constitutional restriction on private actions can and should take place. If private suits are wholly banned along with direct public restraints, then there is no prohibition on lying, for that in a word is what deliberate defamation is. It is hard to find in any theory of freedom of speech a theory that in principle protects the deliberate lie, just as it is inconceivable that any general theory of freedom of action could be pressed into service to reject the prohibitions against murder, rape, and theft. Freedom is not the same as anarchy, whether we deal with words or with actions. In both cases it speaks not only of individual rights of action but of correlative individual duties as well. Freedom, as countless efforts to "balance" interests have made clear, is a presumption in favor of speech or action, but it is one that can be overriden when the conduct regulated involves the use of force or misrepresentation.

Defamation often involves the latter so in principle it becomes fair game for some forms of state control. Where prohibitions ex ante are ruled out of bounds, then some liability ex post must be tolerated. The question is, what are its proper limits?

This issue came to a head in the *New York Times* decision. Before the case there was a quiet satisfaction with the basic common law rules of defamation, so much so that the issues left lurking in *Near* never became the subject of a direct judicial challenge. Yet the decision in *New York Times* shows that it is as easy to pervert common law rules as it is to pervert direct regulation. The New York Times had a tiny circulation in Alabama. The references it made to Sullivan were if anything indirect and obscure, and may well have improved his local standing, on the doubtful assumption that they had any effect at all. Yet the Alabama courts were prepared to sustain a judgment of $500,000 (in 1964 dollars) for this plaintiff, with the prospect of similar suits waiting in the wings. It is perhaps an exaggeration to say that this round of law suits would have bankrupted the Times, but any such judgments would have represented a deep miscarriage of the common law process. Harry Kalven thought that the common law rules would tolerate this result. I disagree. My sense is that tried anywhere outside the deep South, the plaintiff would have been sent home packing. The common law was sound; its application was not.

So what should be done in the United States Supreme Court? Here the task was complicated because the Court's powers of review were limited by the principles of federalism. The United States Supreme Court could not simply demonstrate that Alabama had misapplied its own substantive law. It had to show that its misapplication violated some rule of federal constitutional law. In order therefore to save the Times, it became necessary to constitutionalize some portion of the common law of defamation. Yet there is good sense in that endeavor, for one critical function of any constitution is to provide protection in moments of crisis, even those precipitated by common law adjudication.[19] There is a strict federal duty to police the line between permitted and prohibited speech. Let the major premise be that defamation should be actionable on the ground that freedom never encompasses the right to say false and harmful things about another individual. Nonetheless the states cannot be allowed to define defamation as they please. If they could, they might expand the boundaries of the tort until it covers what, in strict theory, belongs within the domain of protected speech.[20] The states cannot, either through their courts or their legislatures, circumvent the constitutional prohibitions by deft manipulations of common law rules.

In principle this argument is very powerful, and suggests that virtually

the entire law of defamation, at least as it relates to matters of public interest and concern, could be subject to constitutional revision. Indeed I think there is no stopping point short of that large proposition. Yet there are crucial questions of technique. In particular, there are two other points that loom large in the discussion of *New York Times* itself.

The first point is that nothing in this broad principle says that the common law rules crafted over many centuries struck the wrong balance between speech and reputation. There may be ample reason for federal constitutional *review* of common law principles, but it need not follow that there is any parallel presumption for constitutional *rejection* of state common law principles. If anything, our prior intuitions should be just the opposite, for the common law operates from a deep conviction in the importance of freedom of speech (as it does with freedom generally). How else could one explain the general satisfaction with the law of libel before *New York Times,* and the extensive protection generally afforded criticism of public works and public figures?[21] We should therefore expect a very high level of congruence between what the first amendment requires and what the common law has provided. If there is any presumption, it should be in favor of the constitutional permissibility of the common law rules. The necessary protection should be provided, where possible, without disrupting the good sense of the common law rules in ordinary cases.

The second point is one of tactics. The great step in *New York Times* was to breach the wall between prior restraint and tort liability. Entering into the common law turf is, however, no simple task. The law of defamation is a highly complex body of rules. Federal judges should be at least aware of the possibility that these common law rules contain a greater inner coherence than first meets the eye. The proper strategy therefore is to enter upon these fields with caution. To save the New York Times from possible financial ruin might be reason enough to begin the constitutional journey, but it does not dictate the entire course of the journey. Once it is recognized that the Alabama decision in *New York Times* was a common law aberration, the right Supreme Court strategy should have been to colonize as little as possible of the common law turf in its initial foray. This call for procedural prudence has important consequences for the ultimate shape of the law. At one level the Court might have intervened by saying to the Alabama Court:

> We think that the common law rules of defamation have clear constitutional implications. When we reverse your judgment below, we seek to impose upon you no standard that you have not accepted, both as a general matter of common law rule, and in the course of

> this case. Nonetheless we think that lip service to a common law standard is one thing; its faithful application in controversial cases is quite another. Mere pretext will not do. On our examination of this extraordinary case, it seems clear that you did not follow your own rules.

The other course of action starts with the assumption that the Supreme Court is under a constitutional duty to fashion a law of defamation (at least as regards public officials) from the text of the first amendment. Here the intervention upon state courts is far greater because now in effect the Court has to say:

> In this case we do not have to decide whether Alabama has properly applied the common law as it existed within its jurisdiction. As far as we are concerned the balance between freedom of speech and the protection of individual reputation is solely a matter for this Court and this Court alone to decide. We think that the Constitution gives us sufficient material to refashion the entire law of defamation. It is that task which we undertake today.

IV. THE NARROW PATH

In a decision fraught with long-term institutional ramifications, the Court clearly took the second course. Yet it was quite possible to have disposed of this case without reaching the one issue for which *New York Times* has become so famous—its actual malice rule. In particular there were at least two far narrower grounds for intervention available to the Court, which would have neatly disposed of the case without changing the entire structure of the common law.

First, the Court could have constitutionalized the "of and concerning" requirement. There is a great sense that if speech says bad things about a large number of persons it loses its force and its credibility about any single person. The broader the class of persons about whom a falsehood is made, the greater the likelihood that the intended audience will know or at least intuit that the statement does not capture the relevant distinctions between individuals. These broad group denunciations therefore carry with them the seeds of their own futility; defamatory speech cannot succeed where the audience to whom it is uttered is left unmoved. To refer generally to the police or even more generally to state authorities or Southern violators is to refer to everyone and no one at the same time, which is what the ad did.[22] It is not to say that *X* of the police force did some wrongful act. There is clearly a delicate line

between defamation of a huge part of the public and defamation of a small identifiable group. The standard common law decisions placed this gray area roughly between twelve and twenty persons.[23] That number could be right or wrong. But we have here a statement which refers to hundreds if not thousands of individuals. There is no need to struggle with the fine points. A summary judgment dismissing this cause of action, coupled with a general statement ordering all state and federal courts to enter similar judgments in other actions brought on the strength of this advertisement, would have ended the Times' travail. And if there had been any disregard at the lower levels, a simple summary reversal at the Supreme Court level would have stopped the issue dead in its tracks, while holding open the possibility of malicious prosecution actions against those parties who chose to continue with their suits after *New York Times*.

A second strategy was also available in the case. The $500,000 in general and punitive damages was entered without the slightest showing of any actual damages. In many defamation cases the use of general damages is appropriate because it is quite often impossible to reconstruct the ever-expanding web of influence that false statements can spin. The third parties who have been misled by the falsehood decide not to do business with the plaintiff but cannot be tracked down.[24] Nonetheless the recognition that there must be general damages does not provide an open season for a trier of fact to award whatever damages seem nice. Here the want of any precise measure shows the need to identify sensible surrogates for the anticipated damages. The focus of the statement upon the plaintiff and the size of the local circulation of the libel are the obvious tests, and both of these weighed very heavily against Sullivan's case. The Supreme Court with but little imagination could have struck down the entire verdict on the ground that Alabama clearly misapplied the law of general and punitive damages in the case.

In addition, the Court could have intervened on the ground of truth, which is regarded as a defense at the common law.[25] Nonetheless the common law rules exhibit two strange discontinuities. First, the ounce of falsehood is able to destroy the pound of truth. Thus any statement that is wrong on matters of inessential details is treated as though it were false altogether, so that marginal mistakes are allowed to condemn essentially truthful accounts.[26] But one could argue, as with other tort doctrines,that only the *incremental* harm attributable to the false portions of the statement is actionable, and not the total harm attributable to true and false portions alike. At this point the level of intervention has increased because the rationale for the constitutional decision breaks from the common law rule. But it does so in ways consistent with the

general theories of tort liability. In any event, this principle clearly works wonders on the facts of *New York Times* because most of the errors in the advertisement were on matters of detail. The $500,000 judgment is manifestly unsupportable.

Second, one could argue, even as a constitutional matter, that the burden on truth should be on the plaintiff, as has finally been held in the recent case of *Philadelphia Newspapers v. Hepps*.[27] Again this requires the Court to go beyond the common law, but there are strong reasons for the warrant, at least in a world with the strict liability rule. Initially the idea of truth as *justification* strikes a discordant note in the law. In the usual case justifications are never absolute, but are themselves defeasible if their appropriate limits have been exceeded.[28] No one doubts that self-defense is a good justification for the infliction of a deliberate harm. Yet the nature of the justification is limited to the wrong that brought it into being, so that self-defense may be overriden by a showing of excessive or deadly force.[29] But truth is said to be absolute, which suggests it is error to regard it as a defense to defamation at all. Instead the real staying power of defamation, notwithstanding the fact that it has nothing to do with physical harm, is that it falls neatly within the general libertarian prohibition against the use of force and misrepresentation in human affairs. That is just what is at stake when defamation is rightly understood as false statements made to a third party to the discredit of the plaintiff.[30] Without the falsehood there is at most a hard case for invasion of privacy that has generally and rightly foundered.[31] It follows therefore that a proper understanding of falsehood would make truth a necessary requirement of the prima facie case, in which instance the ordinary burden of proof should fall upon the plaintiff to show falsity.[32] In *New York Times* the appropriate burden of proof probably would have not been decisive on most of the statements in the ads, but the proper allocation of this burden is of clear importance with respect to future cases, where the issue of truth or falsity may be harder to resolve.

V. ACTUAL MALICE: A RETURN TO FUNDAMENTALS

The *New York Times* case is, however, most remembered for the point that it did not need to decide, and which it may have wrongly decided: that proof of actual malice (i.e., knowledge that the statement is false or that it is made with reckless disregard for its truth) is required for a public official to bring a defamation action against a media defendant. The proposition stands in very sharp opposition to the majority common law

position on the same question, which drew a line between statements of fact, for which liability was strict if the statements were false, and statements of opinion, which were generally privileged absolutely because they are incapable of being either true or false.[33]

In making the case for or against the actual malice privilege, the Constitution does not arm us with any knowledge or technique unavailable to the ordinary common law judge. The question is how those tools are put to use. In order to get a sense of what privilege, if any, should be accorded to false statements about public officials, it is useful to step back a bit and to recall why defamation is actionable at all, given the popular saw that "sticks and stones may break my bones but words will never hurt me." Here, moreover, the argument is the same within a system of common law as it is under the Constitution, because both start from the same general presumption that freedom of action (and freedom of speech) is protected unless it is shown to become an evil to others—not merely because others dislike it, but because it takes what they own.

That words can work the taking can be seen simply enough by reverting to the set of examples that show how narrow the gap is between speech and conduct. Case one: I take a thing from you which you own. It is an act of trespass. But what about variations on the simple theme? Suppose I put a gun to your head so that you will hand it over to me? I haven't said anything, but that is because everyone understands the assertive nature of the basic conduct. Now assume that the words: "Your money or your life" are added. Here is a threat. But go further, and suppose that I leave the domain of coercion and enter the domain of persuasion. I tell you I need the thing because I am sick. Now it is a gift if my statement is true, but it is a taking of the thing if the statement is false; and it matters little if we introduce the complexity of third persons. If I use force to compel you not to do business with *X*, then there is tortious behavior. When I utter words to that same effect, false words, there is also a removal from individuals of their right to dispose of their property and labor as they choose. Now my falsehoods prevent persons from engaging in the voluntary transactions in which they would otherwise participate. The range of these transactions is very wide, including all personal and social arrangements as well as those of a more strictly economic character. But in each case a strong theory of freedom generates individual rights of association, and recognizes that these are infringed by defamation as well as by physical means. The concerns with trespass and defamation come from the same source. The key difference is that it is usually easier to duck a libel than a bullet. But this point only

shows that some wrongs are more serious than others; it does not show that defamation should not be actionable simply because the use of force provides a greater peril to the social order.

The general tendency in defamation cases has always been for a powerful rule of strict liability. I think this result rests upon commendable moral instincts here as it does with physical injuries.[34] Defamation is made to third persons about the plaintiff, so that prima facie the plaintiff is in no way responsible for the commission of the wrong and typically could do very little, if anything, to protect himself. As the defendant is prima facie the sole actor, the rule that places powerful incentives against his misconduct will be one which tends to deter the abuse that will otherwise take place. Where the plaintiff is not a stranger to the process and stands to benefit from it, a sensible body of privileges softens liability, as with references that prospective employers request in employment cases.[35] Understood in this fashion the parallels between defamation and the rules of trespass to land are very close. With trespass to land the strictness of the older common law rules rests upon the idea that the plaintiff landowner is wholly passive and the intruder is very active. The balance can shift of course, as when the landowner invites the defendant upon the property or plants a trap in order to harm him. The situation is surely simpler with the ordinary trespass because it involves only two parties, not three or perhaps many more. Nonetheless one can see in both trespass and defamation different applications of a unified concern with liberty and property.

VI. SHOULD WE BAR DEFAMATION ACTIONS BY PUBLIC OFFICIALS?

The critical question for *New York Times* is whether this account of the tort of defamation should extend without modification to false statements made about public officials. Here nothing about the merits of the individual case encourages abrogation of the tort or special protection of the defamer. People take public office at a risk to their serenity and composure; while they can respond in kind, there is nothing which says that the response will be effective, especially if it is about matters that are not well known, so that the world at large is in a genuine quandary as to who is telling the truth. Elections can be lost by an assertion of marital infidelity or bribery; careers can be ruined by charges of criminal misconduct. Reputation is not some lifeless abstraction, but the summation of all the possibilities for gainful interactions—economic, social, and politi-

cal—with others that are stripped away by false statements. Specific rebuttals from the defamed party offer some protection but they are often too little, too late.

So why not allow the action for defamation? Here the argument is best stated in terms of error costs. There is a danger that if the false statements are punished, then the true statements will not be made at all. Self-censorship will substitute for government censorship, so that speech will not be free, open, and robust. The "breathing room" required for speech will disappear. The important point to note about this argument is that it recognizes only the error costs that run in one direction: those which lead to the reduction in the quantity of speech. If this is all there were to the analysis, then it would be hard to find anything which could allow the Supreme Court to stop short of the Black and Douglas position of no tort liability for the defamation of public officials. If the law desires only to maximize breathing room, then it must run to this extreme; it must afford absolute immunity from private defamation actions by all public officials.

New York Times stops short of that extreme position. What drives it back in the opposite direction? One way to see the problem is to ask what the world would look like if public officials could never sue for defamation. The first point is that we could not assume that primary conduct would remain unchanged by the radical difference in legal response. Defamation suits impose a price on those who make false statements about others. Repeal of the law of defamation dramatically reduces that price, given that all administrative and injunctive remedies have already been ruled out of bounds.[36] The cost to the defamer does not become zero, because those who engage in widespread defamation run the risk of ruining their own reputations and inviting retaliation by others. We should not expect an infinite supply of lies. Still the utter want of any restrictions against defamation does create the classical economic externality (I lie and you suffer) and the consequent misallocation of resources. The party who makes the statement keeps all the benefits and bears part but not all of the costs. The result is that the level of false statements will rise until private benefit equals private marginal cost. The presence of the powerful externality insures that an equilibrium position is reached where marginal social benefit is less than marginal social cost. A world without any protection against defamation is a world with too much defamation, too much misinformation—in a word, too much public fraud.

The point can be recast by taking literally the familiar observation that the first amendment is designed to protect a marketplace of ideas. This marketplace, no less than any other, presupposes that there are certain

private moves that are simply not permitted. A belief in markets for ordinary goods requires government protection (funded by taxes) against theft and fraud. A belief in the marketplace of ideas requires the same protection. Some protection against defamation is part of the total package.

It follows therefore that even with public officials there are two types of error in devising the rules of defamation. There can be too much defamation or too little. The task is to find that set of rules which minimizes the costs of the two forms of error taken together. This proposition is not only of abstract concern but relates directly to those issues that go to the core of the first amendment. The traditional justifications for the *New York Times* rule on absolute malice stress the need to encourage free and robust debate. Nonetheless, it seems clear that the absolute privilege will not give rise to the best kind of public debate.

There are at least two sources of anxiety. First, the rules of defamation are important not only for the way in which they decide cases that arise. They are also important in the way in which they shape the primary decisions to enter into political discussion and debate. It does not seem far-fetched to assume that some honest people are vulnerable to serious losses if defamed. The greater their reputations, the greater their potential losses. If the remedies for actual defamation are removed, or even watered down, one response is for these people to stay out of the public arena, thus opening the field for other persons with lesser reputations and perhaps lesser character. The magnitude of this effect is very hard to measure, but there is no reason to assume that it is trivial. Distinguished men and women invest substantial sums in their reputation. They have the most to lose if the price of participating in public debate is the loss of all or part of that reputational capital.

The second cost relates to the public at large. The level of discourse over public issues is not simply a function of the total amount of speech. It also depends on the quality of speech. If there is no law of defamation, then the mix between truthful and false statements will shift. More false statements will be made. The public will then be required to discount the information that it acquires because it can be less sure of its pedigree. The influence of the press will diminish as there will be no obvious way to distinguish the good reports from the bad, in part because no one can ever be held legally accountable for their false statements. It is very hard to conceive of how the world would really look if there were no law of defamation. But one cannot assume that newspapers and public officials would behave with the same degree of caution as they do under the *New York Times* rule, or as they did under the common law rules.

One can get some sense of the extreme nature of total immunity by turning the constitutional inquiry on its head. There seems to be no obvious first amendment violation if the Court were to adopt the Black and Douglas position. But on reflection why is the point so obvious? Suppose one were to argue that the absolute ban on defamation action imposed an intolerable tax upon honest individuals who wanted to speak their mind but were afraid to do so. Is the issue now so clear? There have been first amendment cases which have protected the first amendment rights of nonspeakers, of workers who are opposed to union political positions to which they are forced to contribute, and of college students who are opposed to the use of student fees to support a public interest law firm that takes positions in opposition to their own.[37] The argument is that the tax makes people pay for what they oppose, which is inconsistent with any idea of freedom. But the difference between the express tax on the one hand and the implicit tax created by the abolition of all tort protection is not clear in principle. It has little place in first amendment theory, which has generally found in taxation,[38] regulation,[39] and modification of liability rules (as in *New York Times* itself) impermissible limitations upon freedom of speech.

The issue, if anything, becomes clearer when the question is set against ordinary property notions. I have argued elsewhere that it is an unconstitutional taking of property for the state to pass a rule which simply abolishes all common law rights against trespassers to land.[40] In effect that "small" change in legal rules would make all property held in common. In my view, there is good reason to think that reputation, rightly understood, is one of the bundle of property rights and liberty that all individuals enjoy. If the analysis given above is correct, then the action of defamation protects the rights of disposition in property and labor against the false statements of others. The abolition of the action generally amounts to a taking of the property for which insufficient compensation is tendered, given the disastrous overall consequences of the no liability rule. No cash compensation can be paid over to all persons, while the insertion of all reputations into the common pool so diminishes the value of human and physical resources that most everyone is left worse off in consequence.[41] The only way to prevent that form of taking is to retain some level of common law protection. I doubt very much whether the Supreme Court would find this line of argument appropriate, although it has flirted with the idea that reputation is protected under the due process clause, at least against defamation by public officials.[42] Analytically, however, there is no such thing as a free constitutional lunch. Just as the contraction of the rights of speech raises first amendment issues, so their indefinite *expansion* raises constitutional

issues as well. There is an evident need to find the workable intermediate position in the law of defamation.

VII. THE ACTUAL MALICE COMPROMISE

The Supreme Court's recognition of the undesirable consequences of an absolute immunity rule led it to the actual malice rule as a compromise between the strict liability and no liability positions. Nonetheless, in dealing with liability rules the middle position may well be inferior to one of the two extremes. That point seems true here, for I think it can be shown that the Supreme Court has miscalculated both the costs and benefits of its own actual malice rule. Initially the rule offends the sense of justice because it makes innocent persons bear the harms that have been inflicted upon them by other persons, including those who have acted with negligence or even gross negligence. Indeed my own view is that the proper rule in defamation is strict liability, as it was at common law,[43] so that the deviation between the present law and the ideal is even greater than it might seem to others. The question, then, is what public interest can justify the deviation from these ordinary standards of liability?

I take it that in a world of error-free determinations there would be no case whatsoever, because then there would be no risk that innocent persons will be chilled from their exercise of protected speech and no risk of overcompensation for persons in fact defamed. This proposition remains true whether we worry about the internal operation of the legal system or the calculations made by private parties. The error-free world of litigation could only exist in a world of zero transaction costs, and in that world private parties would be able to make perfect predictions of how courts would respond to false statements. The subjective evaluations of truth and falsity would therefore come into alignment with the judgments of judges and juries.

The need for the actual malice rule therefore depends critically upon the error rate in litigation, which in turn complicates the analysis that any private parties make before publication. We can assume, I think, that the error rate in litigation is high, so that private decisions on publication are, consequently, clouded. The theory of *New York Times* is that a malice rule reduces the level of false positives (i.e., cases in which liability is found where none should be imposed) to a level that satisfies the first amendment. That it increases the number of false negatives (i.e., cases in which no liability is found when some should be

imposed) simply becomes a cost to be borne for making good the constitutional commitment to freedom of speech.

It is doubtful, however, that the total situation is improved by the adoption of the actual malice rule. My argument on this point takes two parts. First, it is possible that the actual malice rule has made the situation worse for media defendants than it would be under a sensible strict liability rule. Even if these costs to the media were the only relevant issue, the older common law might be superior. In broaching this possibility I am going against the wisdom of the media professionals, who candidly prefer the actual malice rule to any regime of strict liability. For that reason alone I should be hesitant in raising this ironic twist, because most professionals do know their self-interest. But even if this dramatic conclusion is false, the factors in the analysis may well show that the media systematically overestimates their net benefits from the actual malice rule.

More critically, however, the final judgment about the desirability of the *New York Times* rule rests upon the *social* consequences of the rule. The common law principle of strict liability is supported by strong legal theory, so that any deviation from it should be justified by the net social benefits produced. Any complete evaluation therefore must take into account both the costs and benefits to plaintiffs and to the public at large under alternative legal regimes, as best we can do it. Expanding the field of vision, however, only makes the case for the actual malice rule less defensible, for plaintiffs and (probably) the public are losers as well. The argument ranges over a number of issues. Let me develop the particular facets of the case. These include liability and damages, litigation costs, uncertainty costs, and reputational effects. I shall take them in order.

Liability and damages. The nature of liability rules has powerful influences upon the way in which parties litigate their suits. In general, any liability system must make two critical choices. The first concerns the likelihood of success of the plaintiff's action, and this typically varies with the theories of liability adopted. Strict liability cases are uniformly more likely to succeed than those which require actual malice. The second element that the system controls is the level of damages awarded once liability is established. In the simplest model the damages could be low, as with actual damages, or high, as when punitive damages apply. In more complex models the level of actual damage could be allowed to vary with the strength of the plaintiff's case. Yet for the moment the central points can be made by confining attention to cases with two standards of liability and two measures of damages. On this assumption, four combinations of liability and damage rules have to be taken into account in assessing the complete situation. It seems possible to elimi-

nate two of these fairly quickly, as the case law has always done. Thus it is highly unlikely that anyone would advocate a strict liability rule coupled with punitive damages. The high probability of success when coupled with the high level of damages yields a sanction for speech far in excess of the harm that it causes. The objection based upon overdeterrence of speech, both good and bad alike, seems evident without further comment. *New York Times* does allow punitive damages for public officials, but only when actual malice is proved.

By the same token one runs the risk of serious underdeterrence if there is a rule that provides a low probability of success (when actual malice must be proved) coupled with a low (or even zero) payoff once defamatory falsehood is established. Most people have the sense that if the defendant has acted in a terrible and malicious manner, courts ought not to trim damages in his favor; the risk of underdeterrence is too great. Even the Supreme Court has moved toward this view in a sense, for *New York Times* does not identify any obvious case where punitive damages could be denied once actual malice is established. Instead, taken as written, the opinion seems to say that whenever actual malice is established the plaintiff is entitled to recover both actual and punitive damages. It is conceivable to adopt (as at common law) mixed systems where actual damages are routinely allowed for defamation, and punitive damages come in only where malice is established, but that does not seem to be the current situation.

Postponing consideration of this mixed strategy, two strategies remain: strict liability and low damages; actual malice and high damages. The key question is which strategy better controls for the risk of error in defamation cases. In one sense there is no obvious answer to that question a priori. To see the point note that, as a first approximation, the net cost of the defamation laws to a defendant are simply a product of the two numbers—the probability of plaintiff's success and the level of damages awarded. It is easy to think of numbers in which first one and then the other system has greater total effect. In strict liability the probability of recovery is relatively large and the damages can be kept relatively small. With actual malice the probability of recovery is relatively small and damages are relatively large. It takes little mathematical sophistication to realize that if success is more likely with strict liability, and damages are more generous with actual malice, it becomes uncertain whether the total liabilities, which equal the product of loss and damages, are greater under the strict liability rule or the actual malice rule. The tipping point depends upon the relative magnitudes of the different variables.

The point has important implication for the soundness of the decision

in *New York Times*. If it turns out that actual malice liability is greater than strict liability, then the *New York Times* rule has the odd and unfortunate consequence of increasing the expected costs of defamation actions to media defendants, all in the name of protecting freedom of speech. It is therefore important to analyze the relationship between the relevant variables, while remaining aware that there is very little hard data available on the question.

Consider first the question of probabilities. Here my own instinct is that the difference between success in strict liability and in actual malice is likely to be smaller than expected at first blush. The key variable that separates strict liability from the actual malice rule is the defendant's knowledge that the statement made is false, or his reckless disregard of whether it is true or false. In ordinary strict liability actions for physical harm inflicted upon strangers, any new knowledge barrier would be an effective limitation upon liability, for most defendants do not even know the identity of the persons whom they hurt by accident. But it is the rare defamation action where the words spoken just happen to defame a person of whom the defendant has no knowledge.[44] It is every bit as rare that words innocent on their face are rendered defamatory by some extrinsic facts known to the audience of the defendant's statement but unknown to the defendant himself.[45]

In the usual case the defendant names the plaintiff; in the usual case the defendant knows that the statement is defamatory and that it will hurt the plaintiff. That is one of the reasons why it is made, perhaps in the belief that the plaintiff's behavior warranted the hurt so inflicted. Ordinarily, the actual malice issue is not decided against a backdrop of innocent and inadvertent conduct. It becomes quite plausible for a plaintiff to assert that given what the defendant did know about the facts of the case, and about the sources from which these facts were acquired (persons with underground connections or with grudges to settle), it was incumbent upon him to take further steps to insure that the statement was truthful.[46] To be sure this statement may look like a simple assertion of ordinary negligence—a failure of ordinary investigation—which is of no avail to the plaintiff. But the skillful lawyer may often be able present these facts so as to make it clear, or at least arguable, that more is involved. The defendant had notice of the harm inflicted and made a conscious decision to stop the inquiries before he was perfectly satisfied that the statement which harmed the plaintiff was true. The line between ordinary negligence and recklessness may sound bright in principle, but it is easily grayed by stressing what the defendant had to know when critical decisions were made. The plaintiff's lawyer may also be aided by a marked change in sensibilities that has developed elsewhere

in the law. In particular, plaintiffs may take some comfort from the carrying over of the modern law of products liability, where simple notice of a problem, coupled with a considered failure to change past practices, has been regarded, probably wrongly, as evidence sufficient to support a verdict of punitive damages.

The plaintiff's case is also fueled by a strong sense of equity. Why should this plaintiff be sacrificed on the alter of free speech when the defendant's words were both false and harmful? These tendencies can of course be checked by diligent judges, but there is enough play in the joints that a fair number of cases may well get through. There is no question that the probabilities of plaintiff success are diminished by the hurdles of the Supreme Court's actual malice rule. Some observers think that defendant's chances of being granted summary judgment on actual malice are very great. Numbers as high as 90 percent have been mentioned in conversation, but hard data to either confirm or contradict that assertion is difficult to find. The number may be that large, or it may be somewhat smaller.

The hard question is, how does one evaluate such a 90 percent figure even if it turns out to be true? Here the question can only be approached in the round. One key question concerns the total frequency of suit. These seem to have increased apace in the post-*New York Times* period, along with much other tort litigation. The data of the Libel Defense Resource Center hints at a threefold increase in the number of litigated cases, which may parallel the increase in total cases brought. The increase in total number of cases therefore suggests that the reduction in total libel suits is not as great as the extreme 90 percent figure suggests. In addition, the cases which pass the hurdle are not randomly selected. They are more likely to be the major cases where the plaintiff is willing to spend the money in discovery and investigation to get to the heart of a case. So even if 90 percent of the cases are stopped before trial, 90 percent of the potential exposure, measured either in dollars or publicity, is not.

One critical issue, then, concerns the source of the increase in cases. If that increase is attributable solely to general changes in litigation style, then the *New York Times* rule plays a major role in reducing the total number of cases brought. But in part the number of cases brought may well be a function of the types of damages that are demanded under the actual malice rule. One critical feature of *New York Times* is that it blurs the line between actual and punitive damages. Once the plaintiff has overcome the obstacle of actual malice, both compensatory and punitive damages are recoverable. A court or jury is not dealing solely with a wrongful statement, but with a pre-selected defendant whose conduct

varies from the highly reprehensible to the quasi-criminal. To make matters worse, media defendants are not engaged simply in idle gossip. Typically they print these stories to boost sales and to obtain a private profit. The gains attributable to defamatory stories are difficult to quantify, and no one expressly advocates that the restitution measure of damages, based on a theory of unjust enrichment, should be systematically applied on a case by case basis. The difficulties of trying to figure how much one defamatory story increased the sales of a national newspaper or television show are formidable indeed. Nonetheless, the influence of defendant's gains cannot be ignored in trying to get some sense of the behavior of judge and jury alike. A bad defendant has made a killing at the expense of an innocent plaintiff. Why not haul out the lumber and swing away? The occasional mammoth jury award of $25,000,000 or more shows this tendency in action.[47] The increase in expected awards may therefore be a response to the larger sense of culpability that the media defendant is found to bear. No one suggests that this attitude will be shared by all juries and judges, but the relevant probabilities are undeniably changed if it is held by some. A ballpark estimate might suggest that compensatory and punitive damages would increase by, say, 60 percent. Indeed the review of the cases conducted by the Libel Defense Resource Center notes that the amount of jury awards far outpaced inflation, and was even more rapid than the parallel increases found in both medical malpractice and product liability cases. These findings must be adjusted to reflect the substantial reduction in award levels that routinely occur as the cases wind their way through the review and appellate process. Nonetheless, there is every theoretical reason to believe that, holding other factors constant, the abandonment of strict liability in favor of actual malice will induce a systematic increase in damage awards, which in turn might induce more plaintiffs to bring suit. It is very difficult to measure their relative extent, but by the same token it is not obvious, a priori, that the total payments from defendants to plaintiffs are reduced by the rule.

The relationship between liability rules and damage levels deserves a further observation, for there is no reason to assume that the two numbers, probability and severity, vary independently over their separate ranges. Juries and judges may think strategically about the proper calculation of awards. If they know that many defendants escape scot-free (i.e., if the probability of liability under actual malice is low), then they might deliberately raise the damage awards in order to compensate for that error. After all, the key defendants are *institutional* players who are necessarily involved in multiple incidents of arguable defamation. In some cases raising damages could be a conscious reaction, and in others

it need not. But in all cases the effect may be the same. The rise in damages paid removes much of the protection that the actual malice rule wants to provide to a defendant. We can say that the more the plaintiff's probability of recovery is reduced, the more likely it is that damages in the cases that remain will increase. The total level of damage payments may not be substantially reduced.

Litigation costs. The case against the actual malice rule of *New York Times* is strengthened when litigation costs are taken into account. One obvious point is that there is simply more to litigate once actual malice is critical to liability. Under the common law rules the question of liability for defamation tended to turn largely on external facts. It was easy to determine whether or not a newspaper published a certain statement; generally it is not too difficult to find out whether it is defamatory.

The question of whether it was false is more problematic. In the *Westmoreland* case, for example, the issue of truth raised enormous problems. The events took place decades before the suit was brought, and the facts placed in issue spanned continents and years. Any thorough examination of the case required at a minimum a review of all contacts between President Johnson and General Westmoreland, and spread beyond it to the papers and recollection of others. Even more routine defamation cases could require a jury to understand the point behind certain complex business transactions. Truth can be a messy business where the statements are not about discrete persons at particular times and places. In practice, moreover, we should expect that litigation will be most prevalent where the uncertainty over truth is at its highest.[48] But it is risky to generalize from the most difficult cases that vex judge and jury alike. Truth and falsity may be touch-and-go in some cases, and one should not endow the common law with more clarity than it possesses. Still, for the general run of cases, finding truth does not raise intolerable burdens for the parties or the courts. If it did, then one could not try ordinary misrepresentation and fraud cases, and we would have to question the entire range of common law litigation, which typically presupposes the serviceability of its fact-finding efforts. Even within the libel context, falsehood must be ascertained before liability is established under *New York Times.* Short of the absolute immunity on liability, *any* system of defamation will have to address the issues of publication, defamation, and truth. We can survive such difficulties.

Actual malice, however, now shifts the inquiry from the external facts to the internal state of mind. Suits brought against the media typically turn on the state of mind of many people, not of one single person. Each of these persons must be subject to depositions and interrogatories, so that the elephantine rules of civil procedure now increase the burdens

on both sides in a defamation case. There is no obvious way to rule out-of-bounds the very evidence on mental state that the *New York Times* rule decrees is central to the question of liability, as the Supreme Court recognized in *Herbert v. Lando,*[49] itself an epic piece of litigation that has been prolonged by attention to the actual malice question. The ability of a well-heeled or determined plaintiff to hound a defendant in discovery is an inescapable fact of life under the present law. It was a smaller risk in common law trials that were conducted on strict liability principles.

The difficulties of proof under an actual malice standard have a powerful influence on the overall behavior of the media. Defendants worry about the total costs of their speech, both defamatory and nondefamatory, and take into account the costs that they pay their lawyers as well as the costs they pay the plaintiffs. To be sure, the two types of costs operate in different fashion: the costs to the plaintiff are transfer payments, which in and of themselves generate neither social losses nor gains. They are typically justified as redress for individual wrongs or for the incentives they create against further misconduct. Legal fees are not transfers, but represent the private consumption of real resources—lawyers, experts, and others who would seek other employment if these suits were not brought. Defendants make these payments in order to avoid greater payments to the plaintiff and other losses associated with losing legal cases. Their hope is that if the defense is successful it will deter other plaintiffs from bringing similar suits, a vital concern for media defendants who are repeat players in defamation actions. "Millions for defense and not a penny for tribute" contains the germ of a rational institutional defendant's strategy, serviceable in many instances when long-term incentives are taken into account. Yet it represents an unhappy social strategy, given that litigation expenses are deadweight social losses, whereas transfer payments are not.

The important point here is to note the relationship between litigation expenses and the shape of the substantive rule. It is easy to be incautious and to assume that the costs of litigation are solely a function of the expected losses. Nothing could be further from the truth. The key point depends upon the relationship between probability of loss and anticipated damages. To begin at the limit, if recovery is certain there is no incentive for any defendant to resist payment. It will have to pay damages in any event, and therefore should act rationally in order to economize on litigation costs. On the other hand, when the probability of success is zero, the parallel conclusion holds. Why should the plaintiff bring a lawsuit if the return is known to be negative? (There are bluffing complications which I ignore.) Let the probability move towards 50 percent and uncertainty of outcome becomes very great. In addition, the

uncertainty in total payoff is even greater because damages in actual malice cases are large relative to those in strict liability suits. There is now something worth fighting over, and private parties, out to maximize their private returns, will now find, especially under the American system of costs, that there is a greater anticipated payoff to very large litigation expenses. Stated otherwise, high uncertainty/high stakes games generate high litigation expenses for plaintiffs and defendants alike. The low uncertainty/low stakes games get resolved at far lower cost. It follows therefore that even if total liabilities under the two legal regimes are the same, the total litigation costs to a defendant may well be greater under the actual malice standard. A defendant would have to pay more for defamation under the *New York Times* rule than he would have to pay under a common law rule of strict liability, where probability of loss is greater and the amount in controversy is smaller. Even if the total liabilities under strict liability were greater than those under actual malice, it is quite possible that the difference in administrative costs would tend to narrow the gap further, and might even reverse the direction of the inequality.

Uncertainty and risk aversion. The matter is complicated still further because the defendant's costs under *New York Times* are increased by risk aversion, that is, by the simple observation that most people regard uncertainty itself as a cost. Generally risk aversion drives both sides to settlement precisely because each receives gains when an uncertain liability is replaced by a certain sum. It follows therefore that any legal rule which increases the uncertainty in outcomes can only have the effect of diminishing the utility of the parties that are governed by it. As with administrative costs, risk aversion is a feature that strikes at plaintiffs and defendants alike. In particular, the uncertainty under actual malice may be greater, especially in those big cases that dominate defamation litigation. Uncertainty again shifts the balance toward the strict liability rule.

Reputational effects. We have thus far looked at the gains and losses to the press from the point of view of its total exposure in litigation. Yet it is quite clear that a complete analysis would ask one to take into account the effects that the law of defamation has on the ability of the press to collect revenues and to obtain influence in the world at large. To see how the law of defamation works in this context, it is useful to analogize the situation here to that found in the ordinary law of consumer warranties. In many businesses sellers are quite eager to have a strict liability rule for their products. That eagerness will not express itself in litigation, after the loss has occurred, where the cost-minimizing strategy is to seek ways to escape payment. But it becomes quite clear ex

ante, where the defendant has to trade off the ability to gain sales against the possibility of having to pay damage awards. Here the major function of the strict liability rule is to bond the defendant, and therefore to increase the willingness of people to purchase its product even when they lack any precise information as to how it is manufactured or marketed.[50] If for example the common law retreated from its strong presumption that sellers typically warrant that their wares are free from contamination and adulteration, superior manufacturers could stand to lose from the shift, as they would now be required to devise other ways to extend their cost-effective warranties to a large class of distant and disorganized consumers.[51] The public would lose as well because it would now be required to incur the search and inspection costs that the warranties otherwise reduce.

A simple model of the media shows the importance of the warranty conception as well. Newspapers and television stations are normally unable to enter into direct contracts with their customers. Yet they can be seen as bonding themselves to public reliability through common law defamation actions brought by injured persons. Where these actions make clear whether the statement was true or false, and provide some financial compensation as well, the public gains greater confidence that what they read is true and reliable. In consequence they pay more for the information so provided. The actual malice rule, in effect, is a rule in which the law regards bad information as favorably as good information so long as it was produced only with gross negligence. It is tantamount to a rule that a merchant can escape the consequences of selling contaminated goods so long as he did not mean to hurt his consumers. Ex ante, consumers as a class tend to lose, as do producers.

It is important to note that the consequences are not the same for all producers. Superior producers have lower costs of complying with strict liability rules than do inferior ones. The shift in liability rules therefore works an implicit subsidy of the inferior goods at the expense of the superior ones. That result would be regarded as quite indefensible in ordinary product markets, and it should be so regarded in defamation cases as well.

It may be said that superior media institutions have the remedy in their own hands, for all they need do is to announce to their customers that they are prepared to litigate cases under the traditional common law rules, without requiring proof of actual malice. Yet that approach creates complications of its own, for the media institution that follows this course of action cannot bind the prospective plaintiff to a regime that contemplates strict liability and limited damages. Those plaintiffs, and there will be some, who prefer to try the case under the actual malice rule will

elect that remedy. As there is no feasible bilateral contract between the defamation plaintiff and the media defendant, the unilateral declaration, even assuming that it were otherwise practical, does not bring about a sensible strict liability system. The election conferred upon any persons so defamed would tend therefore to increase the costs of libel to the firm as plaintiffs will elect their remedies to maximize their own gains from litigation. There is no obvious reason to believe that the increased sales revenues would offset the increased costs of defending libel actions. The barrier of high transaction costs again makes its presence felt in an area long thought to be dominated by constitutional issues.

It follows therefore that the actual malice rule creates unanticipated difficulties for the revenue end of the business as well as for the liability end of the business. The normal pattern of strict but limited warranties that has proved itself stable in ordinary product markets was at work with the common law of defamation, where suits by injured plaintiffs gave indirect but effective protection to both readers and superior producers. When people say that "you can't trust the newspapers any more," they simplify the situation by treating trust as a simple "yes/no" variable. But behind that ordinary perception lies the greater truth that the level of trust declines with the relaxation in liability rules. We can now say that the reputational losses to the media seem greater under the actual malice rule than under the strict liability rule. Again the balance shifts closer towards a strict liability rule, looking at matters solely from the defendant's point of view.

VII. THE SOCIAL PERSPECTIVE

The picture is still not complete, for thus far we have viewed the situation from the standpoint of the defendant. Yet if absolute immunity is not wholly desirable, then it is because of the position of the plaintiff and the public at large. Recall that even the Supreme Court in *New York Times* did not treat the want of recovery in cases of actual harm as an end desired for its own sake, but only as a bad which was designed to purchase other greater goods. Here this overall social judgment involves a comparison of the total gains and losses for plaintiffs and defendants alike under both regimes. In figuring out the total gains and losses, the amount of money transferred between plaintiffs and defendants simply washes out, for what is gained by the one side is lost by the other. What remains therefore is the rest of the picture.

To start with litigation costs, the effects of the actual malice rule are uncertain. In those cases where actual malice forms an impenetrable

barrier, the costs will be reduced, but the plaintiff will be denied all relief for the wrong. In other cases the plaintiff may sue for collateral reasons —publicity and saving face—without the hope of obtaining any judicial relief. In still others the plaintiff will be prepared to spend additional funds in search of the larger payoffs that victory in an actual malice case might provide. On balance the situation is unclear, but total litigation costs may well rise. Needless to say, the levels of uncertainty will increase in a system of this complexity as well.

The greatest cost of the present system is that it makes no provision for determining truth. When a defendant wins a case on actual malice, there is no correction of past errors, and no sense of vindication for the plaintiff who can complain bitterly that he lost on a technicality that was of no concern to him. Indeed it is not surprising that the plaintiff's level of frustration is so great in defamation cases precisely because of the frequency with which the defendant avoids the only issue that matters to the plaintiff—falsehood, which could allow rehabilitation of the plaintiff's reputation.[52] The public, too, is a loser because the present system places systematic roadblocks against the correction of error. If it is important for the public to know that Jones has been a faithless public official, it is equally important for the public to know that Jones has been a diligent public official falsely accused by the press. The centrality of truth is of critical importance to any overall assessment of the system. Even if a system that turned on truth were more expensive to operate than one which rested upon actual malice, which is far from obvious, it would still provide information of far greater social value. More cases might be brought, but they would serve an important public purpose.

VIII. PATHS FOR REFORM

So the question remains what, if anything, should be done in order to change the situation. In my own view the optimal strategy involves a return to earlier principles in which strict liability rules are used to determine liability. I have no question as a matter of general principle that any plaintiff should be entitled to a determination in court that a statement made by the defendant was false with respect to him. (I take it as a correlative that pure statements of opinion should never be subject to liability.) Even if not a penny is paid over, the determination of falsehood, unclouded by any examination of the defendant's motive, is like the restitution of a thing taken by the defendant. To use the simple analogy, if a defendant takes the plaintiff's land, a court may choose

(mistakenly) to deny interim damages, but it must surely order restoration of the thing taken. Judging from the recent cases involving Sharon and Westmoreland, the money was almost secondary to the question of whose reputation would survive the trial, the plaintiff's or the defendant's. It is an easy guess that Time magazine would have preferred a substantial monetary payment to Sharon, without any admission of falsehood, than the verdict which left its own reputation for accurate and reliable reporting tarnished. A rule that hurts the reputation of unreliable members of the press creates useful differential advantages for their competitors, and it helps elevate the entire level of public discourse and debate. If this change and this change only were made, it would markedly improve the structure of the law.

More substantial changes might be considered as well. Thus once strict liability rules are the norm, there is little reason to keep with the very high damages that plaintiffs have requested, and in some instances have obtained. Most present proposals provide that the plaintiff who receives declaratory relief must forgo all opportunity to recover damages.[53] That approach still leaves a fair sting in the libel remedy, but does not compensate for the interim loss before the judgment was entered and the residual loss that remains after correction has been made. My own sense is that some damage award does remain appropriate under a strict liability regime, but that it should be carefully circumscribed. In part the desired reduction in award levels will be obtained simply because the element of actual malice is removed from the case; juries and judges are far less likely to be inflamed if the only evidence they see relates to the statement made and its consequences for the plaintiff's welfare. What the change in attitudes does not supply can be supplemented by continued judicial scrutiny of excessive damage awards, even if there are no other structural changes in the law.

Nonetheless, further movement in the control of damages might be appropriate. The record to date suggests that no plaintiff has ever actually recovered a libel award in excess of $1,000,000. A sensible statute might impose a fixed maximum on recovery in all libel cases, so as to minimize the residual uncertainty about the stakes of litigation. As no final judgment in a libel case seems ever to have been entered for more than $1,000,000, that figure offers one possible maximum, and lower numbers are surely conceivable—some might say imperative—as well. Alternatively it might be possible to find some fixed rule that calibrates the award to the revenues obtained by the defendant. It has been suggested for example that the plaintiff's award should never exceed three times the cost of a page of advertisement[54] (or alterna-

tively a minute of advertising time). The precise number or formula could be subject to endless debate, but the fixed upper limit has many attractive features.

There is still the question of whether actual malice has any role to play in the ordinary defamation case. One possible plaintiff's response to the strict liability rule is to join punitive damage counts to actual damage counts. The punitive damage counts could then be abandoned, but only after extensive discovery into motive, and perhaps after the use of that evidence at trial. Yet the strength of the strict liability rule is that it keeps out all the evidence which the plaintiff's new strategy could let in. To forestall that possibility, it seems desirable to adopt a rule that simply says that public officials can *never* recover punitive damages from media defendants. The gains achieved in reducing both administrative costs and general uncertainty would be very substantial. Yet the rule would give undeserved relief to certain defendants who have pursued systematic and willful campaigns of defamation against innocent persons. It might be thought overbroad by some. If the return to actual malice is thought unacceptable, it is possible to fashion some intermediate position that allows punitive damages only for repeated and systematic defamation which the defendant refuses to correct or retract even after clear and convincing evidence of falsehood has been presented to him by the plaintiff. The irony here is that a rule such as this was on the books in Alabama, only to be manipulated to improper ends in the state court.[55] The point of the retraction statute is that it organizes and channels the inquiry into malice. By putting the burden on the plaintiff to make the formal written request, it becomes easier to evaluate the defendant's state of mind, not from an overall examination of the original events but from the more limited inquiry into defendant's responses to the plaintiff's request. Once the retraction is made, it operates like the judicial determination of truth. By formalizing the negotiations between the parties, the retraction statute makes it possible to look at one set of events for actual damages and a distinct set for punitives, and hence obviates the risk of confusing the compensatory and punitive parts of the case.

On balance, it is a very close question whether a total ban on punitive damages is preferable to a sensible retraction statute. But ironically, one clear defect of the actual malice requirement of *New York Times* is that by making basic liability turn on subjective intentions, it blurs the line between actual and punitive damages and thereby unwittingly simplifies the recovery of the latter.

IX. WAS *NEW YORK TIMES* RIGHT?

The question remains whether on balance *New York Times* was rightly decided. To be sure, the case was correctly decided on its facts. The Supreme Court had to stay the hand of the Alabama law of defamation. But as a matter of principle the decision is far more dubious. It is one thing to condemn the common law of defamation as it was applied in a single case, and it is quite a different thing to condemn the basic set of common law principles in their entirety. Here the ultimate judgment is extremely hard to reach because the choice of a liability rule influences the conduct of plaintiffs and defendants alike, before, during, and after litigation. At root therefore the great problem with *New York Times* is that the choice of legal principles rests heavily on certain elusive, empirical issues. What are the costs of error and of administration, under alternative legal rules? What are the incentives upon the press to investigate important matters of public affairs, or of prospective plaintiffs to participate in public affairs? The explicit empirical evidence, which reports jury verdicts and maybe settlements, is wholly inadequate to estimate the relevant empirical issues, so that the question reduces to one of intelligent guesses about difficult matters. In general I start with two such presumptions. The first is that simple rules are to be preferred to complex ones in organizing human affairs. The second is to look with some skepticism upon the claims of any group or individual that their activities are so special that they should be exempt from the general legal rules that govern relations between persons. The discussion of defamation takes us down so many byways that it is difficult to know whether these presumptions should be displaced. I believe they should not. On balance, the common law rules of defamation (sensibly controlled on the question of damages) represent a better reconciliation of the dual claims of freedom of speech and the protection of individual reputation than does the *New York Times* rule that has replaced it. Now that the exigencies of the immediate case and of the segregation crisis that brought it to the fore have passed, the sensible constitutional conclusion is to abandon the actual malice rule in *New York Times*. In its institutional sense, *New York Times v. Sullivan* was wrongly decided.

NOTES

1. Kalven, *"The New York Times Case: A Note on the Central Meaning of the First Amendment,"* 1964 S. Ct. Rev. 191, 221 n.125.
2. 376 U.S. 254 (1964).

3. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).

4. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

5. *New York Times*, 376 U.S. at 280.

6. See, e.g., Marc Franklin, "Winners and Losers and Why: A Study of Defamation Litigation," 1980 *Am. B. Found. Research J.* 457 (details the operation of the system from 1976 to 1979, without any special sense of urgency).

7. While exact data is difficult to come by, the Center has noted, for example, that in the ten years before *New York Times* there were only 55 media libel cases that went to trial—34 in state court and 21 in federal court. Of these the plaintiff won 40, and obtained an average verdict, unadjusted for inflation, of about $129,000, a sum which was skewed by the award of more than $3,000,000 in Butts v. Curtis Publishing, 351 F.2d 702 (5th Cir. 1965), *aff'd sub nom.* Curtis Publishing Co. v. Butts and Associated Press v. Walker, 388 U.S. 130 (1967). The verdict was entered in the pre-*New York Times* era. The total amount of the final judgments awarded was far less, although the precise numbers are not reported in the Center's survey. In *Butts*, for example, the trial judge ordered a remittitur of $460,000, which was accepted by the plaintiff. This pattern, whereby extensive jury awards are sharply trimmed on appeal, has continued into the post-*New York Times* era. Since 1980 the average jury award has been slightly over $2,000,000, with three verdicts over $25,000,000. Again the pattern of massive reduction from verdict to final judgment seems to hold, with the average judgment being something under $100,000. (It is not clear whether the verdicts in the three very large cases were reduced to final judgment in the same time period.) Between 1980 and 1984, 81 trials were reported, which averages out to about 16 a year, compared with only 5 per year in the pre-*New York Times* days. Several of the modern suits have been of the epochal Westmoreland or Sharon variety, where defense expenses can mount easily into the millions of dollars. Evidence on the number of suits filed is not presented in the studies done by the Center, but the number of summary judgments on the "actual malice" issue is surely very great, perhaps amounting to more than 80% of the suits brought. The legal expenses of suit, rather than the total payout in final judgment, is clearly of paramount importance to media defendants. These figures are derived from papers delivered at a conference held in June of 1986; the conference was entitled "The Cost of Libel: Economic and Policy Implications," and was sponsored by the Gannett Center for Media Studies and the Center for Telecommunications and Information Studies, Columbia University Graduate School of Business. *See* Randall Bezanson, "The Libel Litigation Process: What the Parties Want, and What the Parties Get" *Wm. & Mary L. Rev.* (forthcoming); Henry Kaufman, Trends in Damage Awards, Insurance Premiums and the Cost of Media Libel Litigation (unpublished manuscript on file with *The University of Chicago Law Review*). When these papers were presented at the conference, there was general agreement that these numbers accurately represented the present situation.

8. *See, e.g.*, Three Proposals for Libel Law Reform (unpublished manuscript on file with *The University of Chicago Law Review*). The three proposals are California Senate Bill 1979 (the Lockyer bill); H.R. 2846, 99th Cong., 1st Sess. (1985) (the Schumer Study Bill); and an unpublished proposal developed by Marc Franklin.

9. *See* Smolla, "Let the Author Beware: The Rejuvenation of the American Law of Libel," 132 *U. Pa. L. Rev.* 1 (1983).

10. *New York Times*, 376 U.S. at 293 (Black, J., concurring). Justice Goldberg took the same line. *Id.* at 297 (Goldberg, J., concurring).

11. For a summary, see *Restatement (Second) of Torts* §§ 558–623 (1977); 2 F. Harper, F. James & O. Gray, *The Law of Torts*, §§ 5.0–.30 (1986).

12. See his writings on the interaction. Harry Kalven, *The Negro and the First Amendment* ch. 1 (1965).

13. *See* Gitlow v. New York, 268 U.S. 652 (1925).

14. "The *liberty of the press* is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published." *4 W. Blackstone, Commentaries* *151. For a qualified endorsement that Blackstone's view was incorporated into the first amendment, see Leonard Levy, *Emergence of a Free Press* 281 (1985).

15. 283 U.S. 697 (1931).

16. *Id.* at 718–19.

17. Blackstone hints at the problem when he writes: "To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution [of 1688], is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government." 4 *W. Blackstone, Commentaries* *152.

18. The close substitution between liability rules and direct regulation exists elsewhere as well, as with the law of eminent domain. For discussion of this point, see Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* ch. 8 (1985).

19. *See* Blasi, "The Pathological Perspective and the First Amendment," 85 *Colum. L. Rev.* 449 (1985).

20. "At the simplest level, it is, of course, correct that the Court cannot permit the concepts of state law to control constitutional scrutiny. If the constitutional principle, for example, is that the state may regulate *X*, the principle can become illusory if the state is left free to define *X* as it will." Kalven, *supra* note 1, at 201.

21. For discussion of the absolute protection afforded critical opinion and review of public officials and public figures at the common law, see Carr v. Hood, reported in note to Tabart v. Tipper, 1 Camp. 350, 354, 170 Eng. Rep. 981, 983 (K.B. 1808); J. Spencer Bower, *Actionable Defamation* (1908). The operative common law line between harsh criticism of published works and improper criticism of the author's private life and personal character was also well observed. *See* Triggs v. Sun Printing & Publishing Ass'n, 179 N.Y. 144, 71 N.E. 739 (1904); Veeder, "Freedom in Public Discussion," 23 *Harv. L. Rev.* 413 (1910).

22. Note that the references contained in paragraph six of the ad, including those that referred to the seven arrests and the intimidation, did not refer expressly to anything that happened in Montgomery, but followed two other related paragraphs. *See* 376 U.S. at 292 (appendix). Paragraph four began: "In Tallahassee, Atlanta, Nashville, Savannah, Greensboro, Memphis, Richmond, Charlotte, and a host of other cities in the South, young American teenagers, in the face of the entire weight of official state apparatus and police power, have boldly stepped forth as protagonists of democracy." *Id.* The reference to Southern violators follows this paragraph, which undercuts any claim that the charges made were exclusively or even largely about Montgomery.

23. *See, e.g.*, Nieman-Marcus Co. v. Lait, 13 F.R.D. 311 (S.D.N.Y. 1952); 2 F. Harper, F. James & O. Gray, *supra* note 11, § 5.7.

24. *See, e.g.*, Ellsworth v. Martindale-Hubbell Law Directory, Inc., 68 N.D. 425, 280 N.W. 879 (1938).

25. *See Restatement (Second) of Torts, supra* note 11, § 582.

26. *See, e.g.*, Sharpe v. Stevenson, 34 N.C. (12 Ired.) 348 (1851).

27. 106 S. Ct. 1558 (1986).

28. *See generally* Epstein, "Pleadings and Presumptions," 40 *U. Chi. L. Rev.* 556 (1973) (discussing legal rules of presumptions and exceptions).

29. On the structure of justification generally, see *id.*; on its application to self-defense, see Epstein, "Intentional Harms," 4 *J. Legal Stud.* 391, 410–20 (1975).

30. *See* Youssoupoff v. Metro-Goldwyn-Mayer Pictures, 50 T.L.R. 581 (C.A. 1934).

31. *See, e.g.*, Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir. 1940).

32. The same conclusion need not carry over to cases litigated under *New York Times*, for it is far from obvious that the plaintiff should be put to the burden of proving falsehood after he has been made to overcome the substantial hurdles on actual malice. *See* Philadelphia Newspapers v. Hepps, 106 S. Ct. 1558, 1567–69 (1986) (Stevens, J., dissenting).

33. See Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc), for the adoption of this proposition, and for some sense of the difficulties at the margin.

34. *See* Epstein, "A Theory of Strict Liability," 2 *J. Legal Stud.* 151 (1973).

35. *See, e.g.*, Gardner v. Slade, 13 Q.B. 796 (1849).

36. Therefore the case is not comparable to one that proposes the adoption of an automobile no-fault system to replace the common law damage action, for in the latter situation systems of comprehensive insurance and direct regulation of traffic behavior exist that are absent here.

37. *See* Wooley v. Maynard, 430 U.S. 705 (1977) (rights of nonspeakers); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (forced union contributions by workers); Galda v. Rutgers, 772 F.2d 1060 (3d Cir. 1985) (student fees), *cert. denied*, 106 S. Ct. 1375 (1986).

38. *See, e.g.*, Minneapolis Star v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983); Grosjean v. American Press Co., 297 U.S. 233 (1935).

39. *See, e.g.*, Thomas v. Collins, 323 U.S. 516 (1944); Schneider v. State, 308 U.S. 147 (1939).

40. *See* R. Epstein, *supra* note 18, ch. 16.

41. *See id.* chs. 14 & 15.

42. *See* Paul v. Davis, 424 U.S. 693 (1976).

43. *See, e.g.*, E. Hulton & Co. v. Jones, 1910 A.C. 20.

44. *See, e.g., id.* Here the facts suggested that the defendant had indeed known the plaintiff, although the point was held immaterial as a matter of law.

45. See, for example, Braun v. Armour & Co., 254 N.Y. 514, 173 N.E. 845 (1930), where the defendant listed the plaintiff as one of the dealers who sold its bacon products. The plaintiff was a Kosher butcher.

46. See, for example, Tavoulareas v. Washington Post Co., 763 F.2d 1472 (D.C. Cir. 1985), for a taste of some of the complexities that can arise.

47. The Libel Defense Resource Institute report three such awards since 1980. *See* Kaufman, *supra* note 7, at 4.

48. For a general discussion of this point, see Priest & Klein, "The Selection of Disputes for Litigation," 13 *J. Legal Stud.* 1 (1984).

49. 441 U.S. 153 (1979).

50. *See* Bishop, "The Contract-Tort Boundary and the Economics of Insurance," 12 *J. Legal Stud.* 241 (1983).

51. For the present provisions on this subject, see U.C.C. § 2–318 (1977).

52. The point is stressed at great length in Bezanson, Cranberg & Soloski, "Libel Law and the Press: Setting the Record Straight," 71 *Iowa L. Rev.* 215 (1986).

53. For three such proposals, see *supra* note 7.

54. Stephen Brill, the editor of the American Lawyer, made the point in commenting on this paper.

> 55. Alabama law denies a public officer recovery of punitive damages in a libel action brought on account of a publication concerning his official conduct unless he first makes a written demand for a public retraction and the defendant fails or refuses to comply. Alabama Code Tit. 7 §914. The Times did not publish a retraction in response to the demand, but wrote respondent a letter stating, among other things, that "we . . . are somewhat puzzled as to how you think the statements in any way reflect on you," and "you might, if you desire let us know in what respect you claim the statements in the advertisement reflect on you." Respondent filed this suit a few days later without answering the letter.

New York Times, 376 U.S. at 261. Clearly the letter from the Times does not amount to a failure or refusal to retract; it is merely an inquiry for further information, leaving the ultimate question open. Here, moreover, the Times was correct in the opinion it gave that the plaintiff was wrong in his application of the "of and concerning" requirement.