THE ECONOMICS OF WEAPONIZED DEFAMATION LAWSUITS

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INTRODUCTION

The law of defamation is the principal legal mechanism in both the United States and England for protecting the interest in reputation.[1] It entitles plaintiffs to a remedy, typically money damages, to compensate for reputational harm caused by defendants' publication of false and defamatory imputations about them.[2]

Strictly speaking, defamation law rarely *protects* the plaintiff's reputation against a defamatory publication, at least not directly. In both jurisdictions, courts are unlikely to award pre-publication injunctions to prevent a defamatory allegation from being made.[3] As such, it is more

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1. The word "defamation" refers to a combination of two torts – libel and slander – both of which protect plaintiffs' reputations. The distinction between the torts lies in the medium of publication: slander relates to publications made in a transient form (typically spoken); libel to publications made in a permanent form (typically written or broadcast). In most jurisdictions, it is more difficult for a plaintiff to establish a prima facie case in slander than in libel. For the purpose of this paper, we ignore the tort of slander, and the words "libel" and "defamation" are used interchangeably: our focus is on publications made by journalists, which will typically be classified as libel.

2. A statement is "defamatory" in U.S. law "if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." RESTATEMENT (SECOND) OF TORTS § 559 (AM. LAW INST. 1977). The main test in English law is similar: a statement is "defamatory" if it "tend[s] to lower the plaintiff in the estimation of right-thinking members of society generally." Sim v. Stretch [1936] 2 All ER 1237 (HL) 1240.

3. *See* Near v. Minnesota, 283 U.S. 697 (1931); CBS, Inc. v. Davis, 510 U.S. 1315 (1994). Bonnard v. Perryman [1891] 2 Ch. 269 (CA) (Eng.).

accurate to say that defamation law provides a remedy to a plaintiff whose reputation has already been harmed by the defendant.

However, one of the overarching goals of defamation law, in addition to remedying reputational harm already suffered, ought to be to produce incentives that deter publishers from unlawfully causing such harm in the first place. Compensating wrongly caused injuries through the courts is an imperfect mechanism that imposes costs on individual litigants as well as on the public, and is therefore less desirable than preventing those injuries from being caused at all. Just as an effective legal regime dealing with car accidents would deter drivers from creating a risk of injury to others by driving recklessly, defamation law should seek to prevent unwarranted reputational harm.

However, in seeking to prevent injuries, the law may in practice over-deter behavior, causing people to refrain from conduct that is lawful as well as from conduct that is unlawful.[4] This phenomenon is known as the "chilling effect."[5] In the context of defamation, the chilling effect occurs when the law deters the publication of statements that would not be actionable, for example because they are true.[6] Deterrence may be caused by a number of factors but is driven in particular by the potential cost of liability and prospective defendants' uncertainty as to the outcome of any litigation that might result from their publications.[7]

Over-deterrence of lawful behavior is generally undesirable. But in the area of defamation, the deterred behavior – speech – is not only lawful, but also constitutionally protected.[8] As such, over-deterrence is of greater concern than it would be in other legal contexts. Speech on matters of public interest generates social benefits that are lost when the law causes publishers to be overly cautious.[9]

As well as causing a general over-cautiousness on the part of publishers, the chilling effect of defamation law can be leveraged in specific instances by public figures to stifle legitimate criticism, to punish media

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4. *See* Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U. L. REV. 685, 693 (1978).

5. *Id.* at 685.

6. *See id.* at 693.

7. *See id.* at 687-88.

8. U.S. CONST. amend. I. In England, although no written constitution exists, freedom of speech is protected under the European Convention on Human Rights, art. 10, as applied in English law by the Human Rights Act 1998, c. 42. The Human Rights Act is considered by the courts to be a "constitutional statute." Thoburn v. Sunderland City Council [2002] EWHC (Admin) 195 [62], [2003] QB 151 (Eng.). *See* David Feldman, *The Nature and Significance of "Constitutional" Legislation*, 129 L.Q. REV. 343 (2013).

9. Schauer, *supra* note 4, at 691.

organizations for perceived slights, or to achieve some other objective for which the law is not primarily designed.[10] These lawsuits will be referred to here as "weaponized" defamation suits, and their particular effects will be our focus, alongside discussion of the chilling effect more generally.

The recognition that defamation law can have a chilling effect on important expression has been influential in the development of the tort across the common law world. In England, the courts' development of an absolute privilege for statements defamatory of government bodies,[11] and of a defence applicable to publications on subjects of public interest,[12] were both influenced to some extent by chilling effect reasoning. Recent statutory reforms to defamation law were driven in large part by concern about the chilling of important expression.[13] In the U.S., the constitutionalization of the defamation torts in *New York Times Co. v. Sullivan*, and the Supreme Court's imposition in that case of an "actual malice" fault standard on claims brought by public officials, were also a response to the perceived chilling effect of the common law.[14] In Justice Brennan's judgment, under the common law:

> [W]ould-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is, in fact, true, because of doubt whether it can be proved in court or fear of the expense of having to do so. . . . The [common law's strict liability] rule thus dampens the vigor and limits the variety of public debate.[15]

Chilling effect reasoning has also had a role in the development of the law in Australia,[16] New Zealand,[17] Canada,[18] and elsewhere,[19] as well as influencing the supranational European Court of Human Rights in its

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10. *See infra* Sections IV.B, IV.C.

11. Derbyshire CC v. Times Newspapers Ltd. [1993] AC 534 (HL) 548 (appeal taken from Eng.).

12. Reynolds v. Times Newspapers Ltd. [2001] 2 AC 127 (HL) 202 (appeal taken from Eng.).

13. Defamation Act 2013, c. 26 (Eng.). *See* MINISTRY OF JUSTICE, DRAFT DEFAMATION BILL: CONSULTATION, 2011, Cm 8020, at 5 (UK).

14. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

15. *Id.* at 279.

16. *Theophanus v Herald & Weekly Times Ltd.* [1994] HCA 46, [29]-[34] (Austl.).

17. *Lange v. Atkinson* (no. 2) [2000] NZCA 95 at [24] (N.Z.).

18. Grant v. Torstar Corp. [2009] 3 S.C.R. 640, para. 53 (Can.).

19. Similar reasoning has also been employed by courts in Germany's civil law system. ERIC BARENDT, FREEDOM OF SPEECH 218 (2d ed. 2005). *See also* Kyu Ho Youm, *"Actual Malice" in U.S. Defamation Law: The Minority of One Doctrine in the World?*, 4 J. INT'L MEDIA & ENT. L. 1, 2 (2011) (discussing the influence of the *Sullivan* doctrine in a variety of other jurisdictions).

interpretation of the obligations imposed on signatory states with respect to the right to freedom of expression.[20] All of these legal developments or reforms shifted the balance of defamation law in their respective jurisdictions towards greater protection for freedom of expression, necessarily at the expense of protection for the individual interest in reputation.

The chilling effect theory, put simply, asserts that defamation law creates sub-optimal incentives. As such, legal responses to the problem have sought to increase incentives to publish speech on matters of public interest, and thereby to move defamation law in the direction of more optimal incentives. These legal responses, in other words, "have been explicitly motivated by consequential concerns."[21] In deciding *Sullivan*, for example, the Supreme Court "intended . . . to reduce the extent of self-censorship caused by the common law's strict liability approach."[22]

But there has been substantial debate over whether the various reform options chosen in response to concerns about the chilling effect are actually effective in optimizing the incentives created by defamation law.[23] In the U.S., some commentators have argued that the "actual malice" rule developed in *Sullivan* has had unforeseen negative consequences on press freedom.[24] Similar criticisms were made of the application by English courts of the public interest defence created by the House of Lords in *Reynolds v Times Newspapers Ltd*.[25] As David Hollander has pointed out, if the *Sullivan* rule, or its equivalent in another jurisdiction, does not encourage socially beneficial expression as intended, "then its only effect is to shift part of the burden of producing news onto private shoulders, without any accompanying benefit."[26]

In assessing the incentives created by defamation law, and the likely effects of proposed reforms on those incentives, economic analysis can be useful: economics "provide[s] a scientific theory to predict the effects of

20. Tønsbergs Blad AS v. Norway, App. No. 510/04, para. 102 (2007); Indep. News & Media v. Ireland, App. No. 55120/00, para. 114 (2005).

21. Oren Bar-Gill & Assaf Hamdani, *Optimal Liability for Libel, Contributions to Economic Analysis & Policy*, 2 B.E.J. OF ECON. & POL'Y 1 (2003).

22. Alain Sheer & Asghar Zardkoohi, *Is the Law of Defamation as it Relates to Public Officials and Public Figures Economically Efficient?*, *in* THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS 207 (Everette E. Dennis & Eli M. Noam eds., 1989).

23. *See infra* Sections II.C, II.D, Part III.

24. *See infra* notes 119-29 and accompanying text.

25. *See infra* notes 130-40 and accompanying text.

26. David A. Hollander, *The Economics of Libel Litigation*, *in* THE COST OF LIBEL, *supra* note 22, at 260.

legal sanctions on behavior."[27] The goal of this paper is to draw on existing law and economics literature assessing defamation law, in addition to our own economic model of libel litigation,[28] to see what lessons can be learned about the effect of various reforms on the incentives induced by the law. Our analysis focuses in particular on the effect of weaponized defamation lawsuits by introducing the perceived litigiousness of public figures as a factor that may influence publication decisions. We focus on the legal regimes applicable in the United States and England, as the distinctions between these systems provide interesting points of contrast in respect of both substantive and procedural defamation law.

The structure of the rest of this paper is as follows. Part I provides an overview of U.S. and English libel laws, focusing on the ways in which they have diverged from their shared common law origins in response to concerns about the chilling effect. Part II analyses those concerns, and the substantive reforms that have been motivated by them, within the framework of economic theory. Part III discusses the impact of litigation costs on the chilling effect and on the effectiveness of the reforms discussed in Part II. Part IV considers the factors that influence plaintiffs' litigation incentives, with a particular focus on the weaponization of defamation lawsuits by public figures seeking to deter future criticism of their conduct. After a brief conclusion in Part V, Part VI suggests some tentative links between the discussion in this paper and the second subject of this Symposium, the phenomenon of "fake news."

I. RESPONSES TO THE CHILLING EFFECT IN THE U.S. AND ENGLAND

Before the U.S. Supreme Court's 1964 decision in *Sullivan*, defamation laws in the U.S. and England were broadly the same.[29] Both were based on the English common law, which was notably plaintiff-friendly in several respects.[30] The *Sullivan* decision marks the most significant point of divergence between the two legal systems.[31] In response to concerns about the common law's potential to chill expression, it fundamentally altered

27. ROBERT B. COOTER, JR. & THOMAS ULEN, LAW AND ECONOMICS 3 (6th ed. 2014).

28. David J. Acheson & Ansgar Wohlschlegel, *Libel Bullies, Defamation Victims and Litigation Incentives*, PORTSMOUTH BUS. SCHOOL ECON. & FIN. (2018).

29. Russell L. Weaver & David F. Partlett, *Defamation, Free Speech, and Democratic Governance*, 50 N.Y. L. SCH. L. REV. 57, 57-58 (2005).

30. *Id.* at 57.

31. *See* Andrew T. Kenyon & Megan Richardson, *Reverberations of* Sullivan*? Considering Defamation and Privacy Law Reform, in* COMPARATIVE DEFAMATION AND PRIVACY LAW 331-32 (Andrew T. Kenyon ed., 2016).

aspects of American defamation law that remained unchanged on the other side of the Atlantic.[32] Although those same concerns did later lead to legal developments in England as well, the English reforms have been more limited than their American counterparts.[33] This Part first describes the most relevant plaintiff-friendly features of the common law, then outlines the responses to the chilling effect problem that have altered that common law approach in both the U.S. and England. The descriptions of the law given here are necessarily brief and incomplete; their purpose is to contextualize the discussion that follows about the impact of various aspects of defamation law on incentives.

A. The Common Law

A series of legal presumptions operated in favor of the plaintiff in the common law action: the presumptions of malice, falsity, and harm. These presumptions, taken together, illustrate the plaintiff-friendly nature of the common law and explain the perception that the law risked imposing an unacceptable chill on speech.[34]

1. Presumption of Malice

At common law, outside of occasions of qualified privilege,[35] the motive or intention of the defendant was not relevant to liability.[36] As such, defamation was essentially a strict liability tort: the defendant did not need to have acted with any degree of fault to be held liable.[37] In general, the presumption of malice was irrebuttable: it was not a defence to a defamation claim for the defendant to prove the absence of fault.[38] Even a

32. *See id.* at 333.

33. *See id.* at 331.

34. Other factors also played a part in generating this perception, including, for example, the unpredictability caused by the use of juries in defamation trials and their tendency to make large damages awards. GEOFFREY ROBERTSON & ANDREW NICOL, MEDIA LAW § 3-079, 3-081 (5th ed. 2008); Marlene Arnold Nicholson, *McLibel: A Case Study in English Defamation Law*, 18 WIS. INT'L L.J. 1, 34 (2000). The presumptions described here were probably the most important features of the common law in this context, and are the most relevant to the discussion in this paper.

35. A qualified privilege can be rebutted if the plaintiff shows that the defendant published the statement with malice. *See* Paul Mitchell, *Duties, Interests, and Motives: Privileged Occasions in Defamation*, 18 OXFORD J. LEGAL STUD. 381 (1998).

36. Campbell v. Spottiswoode (1863) 122 Eng. Rep. 288; 3 B. & S. 769 (QB) 781.

37. RICHARD PARKES ET AL., GATLEY ON LIBEL AND SLANDER § 1.8 (12th ed. 2013).

38. Eric Descheemaeker, *Protecting Reputation: Defamation and Negligence*, 29 OXFORD J. LEGAL STUD. 629 (2009).

defendant who was unaware of the plaintiff's existence at the time of publication would have no defence on that basis to a defamation action.[39]

2. Presumption of Falsity

Once the plaintiff had established that the statement complained of was defamatory,[40] the law would presume its falsity. In other words, although the remedy in defamation is for the reputational harm caused by *false* and defamatory imputations, plaintiffs did not actually need to establish their falsity in court. Instead, the burden was on the defendant to prove the truth of the statement complained of, or plead another defence, in order to avoid liability.[41]

3. Presumption of Harm

The final relevant presumption is that of harm. Once a statement was held to be defamatory, its publication was presumed to have harmed the plaintiff's reputation.[42] In contrast to most other torts, defamation law did not require a plaintiff to identify and prove an injury that had in fact been caused by the defendant's wrong.[43] Further, the presumption of harm meant that, once liability was established, damages were "at large"; that is, the quantum of damages was not limited to compensating actual injuries proven by the plaintiff.[44]

The presumption of harm, as with the presumption of malice, was irrebuttable in most cases. In general, evidence that the plaintiff had either suffered minimal harm to reputation, or had no good reputation to protect,[45] went to the quantum of damages rather than to liability.[46]

Together, these presumptions made it comparatively simple for defamation plaintiffs to make good their claims. To establish liability (subject to defences) all plaintiffs needed to prove was that the defendant

39. Jones v. E. Hulton & Co. [1909] 2 KB 444 (CA) 454, 455.

40. See *supra* note 2 for definitions of the word "defamatory."

41. *See* Elizabeth Samson, *The Burden to Prove Libel: A Comparative Analysis of Traditional English and U.S. Defamation Laws and the Dawn of England's Modern Day*, 20 CARDOZO J. INT'L & COMP. L. 771, 776 (2012).

42. This presumption did not apply in cases of slander not actionable *per se*, but these are a relatively small subset of defamation claims overall and are not the concern of this article.

43. Hough v. London Express [1940] 2 KB 507 (CA).

44. Broome v. Cassell & Co. [1972] AC 1027 (HL) 1071.

45. *E.g.*, Polanski v. Condé Nast Publications Ltd. [2005] UKHL 10.

46. Scott v. Sampson [1882] 8 QBD 491.

had published to a third party a statement that was defamatory of them.[47] In claims against media defendants, which by definition publish statements to third parties and which almost always directly name the subjects of their reporting, in effect a plaintiff needed only to establish that the statement complained of was "defamatory".[48] From there, liability and an entitlement to more than nominal damages was effectively presumed unless the defendant could plead and prove a defence to the action.

B. U.S. Divergence from the Common Law

David Anderson has noted that "[a]lthough the American law of defamation has descended from that of England, it has diverged so greatly that nowadays the resemblance is largely superficial."[49] The divergence of U.S. law from the English common law has its genesis in the Supreme Court's *Sullivan* decision,[50] which made far-reaching changes to the law of defamation by bringing it within the scope of the First Amendment.[51]

The *Sullivan* case arose from a libel suit brought by an elected official in Montgomery, Alabama, in respect of criticism of the handling of civil rights protests by police in the city.[52] The Court's decision was likely influenced by the fact that Sullivan's claim could fairly be characterized as a weaponized lawsuit against the *New York Times*.[53] Anthony Lewis has described the suit as having been used as "a state political weapon to intimidate the press."[54] The Court's decision to subject the state court's verdict to independent review after having found it unconstitutional, rather than to remand the case for a retrial, was intended to ensure that the suit "was not then used further to harass [the] defendants."[55]

The most prominent change made to the law of defamation in *Sullivan* was the imposition of an "actual malice" fault standard, in place of the common law's strict liability approach, on claims brought by public

47. Samson, *supra* note 41, at 776.

48. *See* FRANCES QUINN, LAW FOR JOURNALISTS 232, 236 (5th ed. 2015).

49. David A. Anderson, *Defamation and Privacy: An American Perspective*, *in* SIMON DEAKIN, ANGUS JOHNSTON & BASIL MARKESINIS, MARKESINIS AND DEAKIN'S TORT LAW 866 (6th ed. 2008).

50. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

51. The Court had previously suggested that libelous statements did not attract the protection of the First Amendment. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

52. *Sullivan*, 376 U.S. at 256.

53. ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 35 (1991).

54. *Id.*

55. *Id.* at 159 (quoting Former U.S. Attorney General William P. Rogers, who represented other defendants in the case).

officials.[56] Under that standard, a defendant will not be liable unless the plaintiff can prove, with "convincing clarity,"[57] that the statement was published "with knowledge that it was false or with reckless disregard of whether it was false or not."[58] As Kyu Ho Youm notes, the use of the actual malice standard rather than strict liability "is often what makes U.S. law stand out from the rest of the world."[59]

Subsequent Supreme Court decisions expanded the constitutional privilege created in *Sullivan*. The requirement to prove actual malice was extended from public official plaintiffs to "public figures" in *Curtis Publishing Co. v. Butts*.[60] Despite an earlier plurality opinion suggesting that the standard should apply to all statements on subjects of public interest,[61] the Court established different constitutional requirements for claims brought by private figures in *Gertz v. Robert Welch, Inc.*[62] In those claims, states could permissibly impose a more exacting standard of care on defendants, although they must require the plaintiff to prove at least negligence: the common law strict liability standard would be unconstitutional in this context as well.[63] The *Gertz* Court also limited the availability of presumed and punitive damages to plaintiffs proving actual malice; plaintiffs proving only negligence were limited to obtaining compensation for actual injury.[64] As a result of this line of cases, the presumption of malice no longer operates in U.S. law; the plaintiff must prove that the defendant was at least negligent.[65] Similarly, the plaintiff is no longer entitled to presumed damages absent proof of malice.[66]

The Court has also dispensed with the common law presumption of falsity in claims brought by public figures and those brought by private figures in respect of public issues.[67] Rather than placing the onus on defendants to plead and prove the truth of their statements, U.S. law now

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56. *Sullivan*, 376 U.S. at 279-80.

57. *Id.* at 285-86. This is obviously a higher standard of proof than the "preponderance of evidence" or "balance of probabilities" standards normally used in civil claims.

58. *Id.* at 280.

59. Youm, *supra* note 19, at 2.

60. Curtis Pub. Co. v. Butts, 388 U.S. 130, 155 (1967).

61. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 59 (1971).

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

63. *Id.* at 346-48.

64. *See id.* at 349.

65. *Id.*

66. *See Rosenbloom*, 403 U.S. at 52.

67. Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 777-78 (1986).

requires these plaintiffs to prove their falsity in order to establish liability.[68] As such, the most plaintiff-friendly elements of the common law action are now constitutionally prohibited in the majority of U.S. defamation claims.

C. More Limited Developments in English Law

In contrast, English law has retained most of the elements of the common law abandoned by the *Sullivan* Court. It has developed over the last few decades to increase the protection offered to speech, but in a more limited way than American law.

Despite various calls for the presumption of falsity to be discarded in English law,[69] it has been retained. As such, truth remains a defence to a claim in defamation.[70] Likewise, the presumption of malice has been retained, and defamation remains "[f]undamentally . . . a tort of strict liability."[71]

The most important and relevant response to concerns about the chilling effect of English law has been the creation and subsequent liberalization of a defence protecting statements on subjects of public interest. The defence was established by the House of Lords in *Reynolds v. Times Newspapers Ltd.*[72] It was intended to better facilitate the flow of information on subjects of public interest and in effect immunized statements on such subjects from liability, even if they were false, provided that they were published responsibly.[73] Whether the defendant had acted with the requisite degree of responsibility was decided according to the circumstances of each case, but the judgment of Lord Nicholls set out a list of ten factors considered likely to be relevant to that decision.[74]

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68. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974).

69. ENGLISH PEN & INDEX ON CENSORSHIP, FREE SPEECH IS NOT FOR SALE: THE IMPACT OF ENGLISH LIBEL LAW ON FREEDOM OF EXPRESSION (2009), https://www.scribd.com/document/71553250/Free-Speech-is-Not-For-Sale; DARIO MILO, DEFAMATION AND FREEDOM OF SPEECH 183-84 (Oxford U. Press 2008); Samson, *supra* note 41, at 783-84.

70. Defamation Act 2013, c. 26, § 2 (Eng.).

71. PARKES, *supra* note 37, at § 1.8.

72. Reynolds v. Times Newspapers Ltd. [2001] 2 AC 127 (HL) 193 (appeal taken from Eng.).

73. Eric Descheemaeker, *A Man Must Take Care Not to Defame His Neighbour: The Origins and Significance of the Defence of Responsible Publication*, 34 U. OF QUEENSL. L.J. 239, 239 (2015).

74. Reynolds v. Times Newspapers Ltd. [2001] 2 AC 127 (HL) 193, 205 (appeal taken from Eng.). The ten factors as laid out by Lord Nicholls:

> 1.The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. 2. The nature of the information, and the extent to which the subject matter is a matter of public concern. 3. The source of the information. Some informants have no direct knowledge

Although an important development in the law, the *Reynolds* defence was less effective than hoped in addressing the chilling effect.[75] As such, Parliament repealed the defence in the Defamation Act 2013 and replaced it with a more open-textured statutory public interest defence, intended to be applied more flexibly in the courts.[76] Section 4 of the 2013 Act provides that a defendant can avoid liability for defamation by showing that:

a) the statement complained of was, or formed part of, a statement on a matter of public interest; and

b) the defendant reasonably believed that publishing the statement complained of was in the public interest.[77]

In *Reynolds*, the House of Lords effectively introduced a fault standard – irresponsibility – in defamation claims brought in respect of certain kinds of statements; this element of fault has been retained in the section 4 defence, although it is now described as "unreasonableness."[78] But both the section 4 and *Reynolds* defences differ from the *Sullivan* fault standard in that the burden is on defendants to prove they did *not* act with the requisite level of fault.[79] Under the *Sullivan* rule, in contrast, the onus is on the plaintiff to prove the defendant's fault.[80]

In addition to broadening the *Reynolds* defence, the Defamation Act 2013 made what might have been a further important change to the common law, by requiring a plaintiff to show that the defendant's statement "has caused or is likely to cause serious harm to the [plaintiff's] reputation."[81] This provision, in section 1 of the Act, was initially interpreted as having effectively abolished the common law presumption of harm.[82]

> of the events. Some have their own axes to grind, or are being paid for their stories. 4. The steps taken to verify the information. 5. The status of the information. The allegation may have already been the subject of an investigation which commands respect. 6. The urgency of the matter. News is often a perishable commodity. 7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary. 8. Whether the article contained the gist of the plaintiff's side of the story. 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. 10. The circumstances of the publication, including the timing.

Id.

75. *See infra* notes 130-40 and accompanying text.
76. Defamation Act 2013, c. 26, § 4 (Eng.).
77. *Id.*
78. Descheemaeker, *supra* note 38, at 603, 625, 639.
79. Samson, *supra* note 41, at 782.
80. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 267, 271 (1964).
81. Defamation Act 2013, c. 26, § 1 (Eng.).
82. Lachaux v. Indep. Print Ltd. [2015] EWHC (QB) 2242 [60] (Eng.).

However, the provision was poorly drafted.[83] Despite its initial appearance, the most authoritative interpretation to date, from the Court of Appeal, entails that the common law presumption of harm still applies in English law.[84] Although it may still be of some use to defendants, the effect of section 1 is now likely to be limited to providing courts with a strengthened mechanism for the early resolution of weaker claims.

The protection of speech in English defamation law has been enhanced by the above developments, but "in substantive terms the balance remains very different from in the US,"[85] with stronger protection still provided to the interest in reputation in England.

These significant changes to both U.S. and English defamation law have been driven largely by concern over the law's chilling effect on expression and have sought to better optimize the incentives induced by the law. As such, they can reasonably be assessed by reference to their effects on those incentives. Part II discusses the contribution that economic analysis can make to assessing the consequences of the distinct libel regimes in each jurisdiction.

II. ECONOMIC ANALYSES OF DEFAMATION LAW

The economics literature focusing specifically on the law of defamation is relatively sparse. Its focus is generally on the effects of the different standards of fault that might be required for a finding of liability, particularly comparing strict liability with the *Sullivan* actual malice standard. In line with the *Sullivan* Court's overarching concern with the chilling effect, most literature focuses on media organizations' incentives to publish statements that risk attracting liability in defamation.[86] As will be described below, however, these are not the only variables and incentives that have interested economists.

The discussion in this Part starts with an insight from the economics literature into the wider public importance of the chilling effect, especially in the context of lawsuits brought by public officials. We then discuss the economics of defamation law and the chilling effect as framed by the *Sullivan* Court, before considering criticisms of the Court's reasoning found in the law and economics literature.

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83. *See generally* Eric Descheemaeker, *Three Errors in the Defamation Act 2013*, 6 J. EUR. TORT L. 24 (2015) [hereinafter Descheemaeker, *Three Errors*].

84. Lachaux v. Indep. Print Ltd. [2017] EWCA (Civ) 1334 [72], [82] (Eng.).

85. Kenyon & Richardson, *supra* note 31, at 348.

86. *See infra* Section II.B.

A. Public Figures and the Press as Watchdog

As discussed above, the *Sullivan* case was brought by a public official in relation to allegations about his official conduct.[87] The Supreme Court was partly motivated by the particular dangers associated with this kind of lawsuit.[88] One way in which these concerns can be understood is to recognize that the choice of legal rules used to resolve defamation disputes has important ramifications that go beyond the immediate outcomes of lawsuits. Of particular importance in respect of public official plaintiffs is the effect of the law in either facilitating or obstructing the press's role in scrutinizing their conduct, acting as a "watchdog" for the public.[89] Economic analysis can help highlight the mechanisms through which these effects operate.

In two closely related papers, Nuno Garoupa uses economic theory to investigate libel law's "implications for the existence of dishonesty in a society in which the media can influence social behavior."[90] He analyses the effect of various features of the law on public figures' incentives to act dishonestly or corruptly, and on the accuracy of news stories about public figures.[91]

One important insight that is reflected in Garoupa's analysis is that the law of defamation can influence public figures' decisions about whether or not to engage in wrongdoing, as well as influencing the media's publication decisions and both parties' litigation outcomes.[92] The basic incentive for public figures to do wrong – whatever benefit that they would obtain from the wrongdoing – is independent of defamation law. But when deciding whether to do wrong, a public figure also needs to take into account the likelihood that she will be exposed by the media and the harm that she would suffer if she is exposed. She would further need to consider the possibility of recovering some of the loss from being exposed through a defamation suit, taking into account her likelihood of success in court and the magnitude of the payoff that she could expect if successful. Defamation

87. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 256-57 (1964).

88. *See supra* notes 40-41 and accompanying text.

89. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, AM. B. FOUND. RES. J. 521, 572 (1977).

90. Nuno Garoupa, *Dishonesty and Libel Law: The Economics of the "Chilling" Effect*, 155 J. INSTITUTIONAL STUD. 284, 286 (1999).

91. *See generally* Nuno Garoupa, *The Economics of Political Dishonesty and Defamation*, 192 INT'L REV. L. & ECON. 167 (1999).

92. Garoupa, *supra* note 90, at 287; *see generally* Gabriele Gratton, *The Sound of Silence: Political Accountability and Libel Law*, 37 EUR. J. OF POL. ECON. 266 (2015).

law obviously influences both of these factors, in addition to affecting the media's publication incentives, and therefore the probability of wrongdoing being exposed. As such, a public figure's expectations as to what might follow her wrongdoing will depend in part on the applicable libel laws. Although defamation law has no *direct* effect on wrongdoing incentives, it will influence a public figure's decision whether or not to do wrong – in a libel regime that is more protective of reputation, she will be less likely to be exposed, and capable of recovering more of her losses in court if she is exposed, and therefore will expect to retain more of the benefit obtained through her wrongdoing.

The publication of speech on political subjects has particular social benefits, if it is presumed that democratic decisions are improved by the public's access to relevant information, in that it should enable citizens to self-govern more effectively.[93] Legal reforms that aim to reduce the chilling effect are in part motivated by a desire to preserve these benefits. The opposite side of this coin is demonstrated by Garoupa's analysis: where the chilling effect of defamation law on political speech is too great, less effective or more corrupt officials are allowed to go unchecked, and the long-term effectiveness of government may be eroded. A defamation regime that is too restrictive of expression will also be more conducive to being weaponized because it will be easier or more effective for public figures to leverage libel claims to suppress criticism and thereby to hide or facilitate their misconduct. We will return to discuss the effect of libel laws on public figures' conduct below,[94] after discussing in more general terms the economics of defamation and the chilling effect.

B. The Economics of the Chilling Effect

The following discussion puts the *Sullivan* Court's critique of the common law of defamation into the language of economics. Economic theory can explain the Court's perception of the chilling effect problem and indicate why it considered the common law to have too great an impact on expression. Our intention is to provide a basis for the discussion of the economics literature that follows, much of which assesses the decision in *Sullivan* and related reforms within this conceptual framework.

Law and economics scholars have sought to explain how different fault standards affect potential litigants' incentives to engage in activities that create a risk of injury to others. One goal of this literature is to help

93. *See* Hollander, *supra* note 26, at 260-61; *see generally, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

94. *See infra* notes 217-19 and accompanying text.

understand which liability regimes are appropriate to induce socially optimal activity levels in given cases.[95] Activity levels are socially optimal at the highest level of activity at which the actor's benefit from increasing her activity is not outweighed by the social cost of the risk of accidents imposed by that additional activity.[96] Absent the risk of liability for injuring others, actors would increase their activity until continuing to do so offered them no benefit, regardless of any risk of injuring others, because the cost of those injuries is externalized.[97] In general, assuming that courts are able to perfectly resolve disputes, a strict liability standard will be effective in optimizing activity levels.[98] The strict liability standard optimizes activity levels because it forces actors to internalize the social cost of increasing their activity, by taking into account the risk of injury to others in the form of potential liability costs.

In the context of defamation law, the relevant "activity" decision is the defendant's choice whether to publish a potentially defamatory statement. As such, the standard economic analysis would suggest that publication incentives would be optimal under a strict liability standard. In contrast, under a regime using a fault standard, publishers would be indemnified against liability for all statements published with the relevant standard of care and as such would have no expected liability costs to take into account when deciding whether or not to publish. This would result in over-publication, since any statement offering a marginal benefit to the publisher would be published, regardless of the additional risk of reputational injury it could create.

However, there are two significant ways in which the law of defamation differs from this general understanding of fault standards. Firstly, courts are unable to perfectly resolve defamation disputes.[99] Where courts are only imperfectly able to determine liability, identifying the fault standard at which activity levels will be socially optimal is more complicated.[100] The imperfect resolution of defamation disputes by the

95. STEVEN SHAVELL, ECONOMIC ANALYSIS OF LAW 41-43 (2004).

96. *Id.* at 43.

97. *Id.*

98. Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 3 (1980). The defamation setting is most closely analogous to the category of accidents that Shavell refers to as "unilateral accidents between sellers and strangers." *Id.*

99. This is also true in other areas of law, but courts may be particularly imperfect in deciding disputes relating to speech. *See* Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 25-26 (1986).

100. *See* Steven Shavell, *Uncertainty over Causation and the Determination of Civil Liability*, 28 J. L. & ECON. 587, 587-88 (1985); Eberhard Feess, Gerd Muehlheusser & Ansgar

courts makes publishers less certain of their risk of liability in respect of potential stories, and thereby contributes to the law's chilling effect on legitimate speech.[101]

Secondly, and more peculiar to defamation law, the activity being regulated – speech – generates significant positive externalities, to a greater extent than other risky activities. The Consitution provides more protection to speech than to other kinds of activity in part because of the perceived social benefits it produces.[102] These social benefits cannot be fully internalized[103] by publishers for various reasons: for example, once information is in the public domain it is impossible to fully compensate the original publisher for its re-use by others.[104] This aspect of defamation law featured prominently in the analysis of the *Sullivan* Court. The Court believed that the common law strict liability approach, by forcing publishers to internalize the social costs of their activity without their being able to internalize its social benefits, would lead to over-deterrence of speech.[105] As a result, society would lose the benefit of the over-deterred speech.[106]

This was the essence of the Supreme Court's reasoning in *Sullivan* – the common law strict liability standard was inappropriate because it did not sufficiently account for the social benefit of the defendant's activity.[107] The Court mandated a more relaxed fault standard to give greater

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Wohlschlegel, *Environmental Liability Under Uncertain Causation*, 28 EUR. J. L. ECONS. 133 (2009). The focus of these papers is on standards of proof, rather than fault standards, but the basic point holds for the latter.

101. Schauer, *supra* note 4, at 687-88.

102. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266, 269, 271 (1964); *see also* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 7-10 (1982); Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 563 (1991) (noting the particular social benefits produced by political speech).

103. That is, publishers cannot recover the value of these externalities by including it in the price charged to consumers.

104. *See* Hollander, *supra* note 26, at 260; Farber, *supra* note 102, at 558-59.

105. Bar-Gill & Hamdani, *supra* note 21, at 2; ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 325-27 (2002); Farber, *supra* note 102, at 568-70. As noted, our focus in this paper is on traditional media publishers – other publishers, such as citizen journalists and bloggers, may also be subject to the chilling effect of defamation law, but the effect may not operate in precisely the same way. For example, research in England suggests that internet publishers are more likely to abandon stories because of libel law when they have better access to legal advice. Judith Townend, *Online Chilling Effects in England and Wales*, 3(2) INTERNET POLICY REV. 4-5 (2014). Traditional publishers may be more likely to self-censor because of their greater understanding of the legal risks of publication.

106. Bar-Gill & Hamdani, *supra* note 21, at 2-3.

107. *Id.*

"breathing space"[108] to probabilistic statements about public officials, and thereby to avoid over-deterring publications that would, if true, provide a social benefit.

C. Verification

The above discussion describes in economic terms the *Sullivan* Court's belief that the common law strict liability standard over-deterred the publication of statements about public officials, and explains its reasons for attempting to increase publication incentives by altering that standard. The Court believed that the social benefit of true speech required a more relaxed approach to liability than existed under the common law if socially optimal publication decisions were to be induced.[109] But law and economics literature investigates not only defendants' *activity* levels, but also their *care* levels, that is, the level of care the actor takes to avoid injury to others while carrying out the activity in question.[110] The applicable fault standard in a given area of law can affect potential defendants' incentives to act with a particular level of care, as well as their incentives to act at all.

Economists studying defamation law have argued that the approach taken in *Sullivan* "overlooks the effect of liability on the verification decision,"[111] that is, the steps a publisher takes to verify the accuracy of a statement before publication. Verification is the closest equivalent in the defamation context to the concept of care used in the law and economics literature on torts.

The effect of defamation law on publishers' incentives to verify statements is potentially important given that the social benefit of their publications is clearer and more significant if they are accurate.[112] As Hollander puts it, "once we have decided that defamation law must be tailored to accommodate the public need for information, it seems inescapable that we must also be concerned with the effect defamation law has on accuracy."[113] As such, several economists have sought to redress the

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108. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 272 (1964) (citing NAACP v. Button, 371 U.S. 415, 433 (1963)).

109. Bar-Gill & Hamdani, *supra* note 21, at 1-2.

110. SHAVELL, *supra* note 95, at 41.

111. Bar-Gill & Hamdani, *supra* note 21, at 2.

112. *Cf.* JOHN STUART MILL, ON LIBERTY AND THE SUBJECTION OF WOMEN 23 (Penguin Classics 2006) (1839) (arguing for the social value of false, as well as true, speech). But, Mill's argument is more persuasive in respect of mistaken opinions than false statements of fact. Frederick Schauer, *Social Foundations of the Law of Defamation: A Comparative Analysis*, 1 J. MEDIA L. & PRAC. 3, 10 (1980) [hereinafter Schauer, *Social Foundations*].

113. Hollander, *supra* note 26, at 269.

omission of care incentives from the *Sullivan* Court's reasoning: their analyses have been concerned with the law's effect not only on the *quantity* of speech produced, but also on its *quality*.[114]

Alain Sheer and Asghar Zardkoohi investigate the effect of the *Sullivan* ruling on both the incentive to publish and the incentive to invest in verification.[115] According to their analysis, both strict liability and the actual malice standard produce inefficient publication incentives: the *Sullivan* standard "induces too little self-censorship while the common law approach induces too much."[116] However, while the strict liability rule induces efficient verification of the publications that it does not deter,[117] the actual malice rule induces less investment in verification than is socially optimal. As such, under that rule, "the probability of truth of those statements that are published will be undesirably low."[118] Hollander, similarly, argues that the *Sullivan* fault standard "will result in lower accuracy than would be [induced] under negligence or strict liability."[119]

If true statements provide more value to society than false statements, then the social benefit of a statement increases with the probability that it is true. Ideally, publishers would continue to invest in verification until the cost of additional investigation outweighs the benefit to society of the resulting increase in the probability of the statement being true.[120] The actual malice standard under-induces verification because, once the low level of care required to escape liability has been reached, the publisher does not benefit from additional verification even if it would benefit society.[121]

Other aspects of the *Sullivan* decision designed to increase publication incentives may also come at the expense of reduced accuracy. For example, Baum, Feess and Wohlschlegel's analysis of confidential sources' incentives to leak information to the press suggests that the decision to

114. *Id.* at 261.

115. Sheer & Zardkoohi, *supra* note 22, at 207.

116. *Id.* at 223-24.

117. *Id.* at 119-20.

118. *Id.* at 223.

119. Hollander, *supra* note 26, at 263.

120. Sheer & Zardkoohi, *supra* note 22, at 215-16.

121. *Id.* at 222-23. The use of a fault standard may also induce a publisher to waste costs on verifying stories that it would be certain to publish anyway, to insure itself against liability. Manoj Dalvi & James F. Refalo, *An Economic Analysis of Libel Law*, 34 EASTERN ECON. J. 74, 87 (2008).

place the burden of proving falsity on plaintiffs increases the amount of true information made public, but also increases the publication of falsehoods.[122]

D. The Trade-Off between Accuracy and Quantity of Publications

The above economic analysis implies the existence of a fundamental trade-off in the incentives produced by potential reforms to defamation law. Reforms designed to ameliorate the law's chilling effect on true speech will also decrease its deterrent effect on false speech. Conversely, reforms intended to prevent the flow of falsehoods will also prevent the publication of truths. The *Sullivan* Court aimed to encourage socially beneficial speech, but it did so at the expense of encouraging the publication of more false statements causing reputational harm to individuals who would likely be denied a remedy for that harm. Similarly, although to a lesser extent, it has been noted that the English *Reynolds* defence, by design, allows some false allegations against public figures to go uncorrected and uncompensated.[123]

The existence of this trade-off makes intuitive sense: holding publishers to a more exacting standard of care will not only increase their expected liability costs, and thereby reduce their activity incentives, but will also impose the costs of meeting the required standard of care, making the activity more expensive and further reducing activity levels. This conclusion also aligns with those reached in the legal and theoretical literature on the chilling effect. The appropriate resolution of the trade-off is a more difficult question and will depend to some extent on the legal and cultural values of each jurisdiction.[124]

According to the First Amendment scholar Frederick Schauer, "[t]he *New York Times* decision is, at bottom, a finding that an erroneous penalization of a publisher is more harmful than a mistaken denial of a remedy for an injury to reputation."[125] The Supreme Court has recognized this explicitly: in *Gertz*, Justice Powell wrote that "[t]he First Amendment requires that we protect some falsehoods in order to protect speech that matters."[126] Implicitly, its refusal in *Sullivan* to create an *absolute* privilege

122. Ido Baum, Eberhard Feess & Ansgar Wohlschlegel, *Reporter's Privilege and Incentives to Leak*, 5 REV. L. & ECON. 701-03 (2009).

123. Jonathan Coad, Reynolds *and Public Interest – What About Truth and Human Rights?*, 18(3) ENT. L. REV. 75, 76, 84 (2007).

124. Schauer, *Social Foundations*, *supra* note 112, at 10.

125. Schauer, *supra* note 4, at 709.

126. Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974).

for statements about public officials[127] recognized that, to some degree, the deterrence of falsehoods was socially beneficial.[128] The *Sullivan* decision "contains no analysis of the circumstances under which self-censorship is desirable or tolerable,"[129] but the Court adopted rules that suggest a strong preference for ensuring the quantity of speech over its accuracy.

The English courts have also recognized this trade-off. In developing the requirements imposed on the media by the *Reynolds* defence, the Court of Appeal reasoned that if standards of responsible journalism were set too low, they "would inevitably encourage too great a readiness to publish defamatory matter," but if set too high they "would deter newspapers from discharging their proper function of keeping the public informed."[130] The English courts, while agreeing with the U.S. Supreme Court that the common law struck the wrong balance, have disagreed with the balance chosen in the U.S., opting instead for rules that place comparatively greater value on ensuring the accuracy of potentially defamatory publications.

Economists differ in their assessments of the appropriate balance between the two sides of this trade-off. Sheer and Zardkoohi suggest that the imbalance in favor of speech that was preferred in *Sullivan* "may be a useful second-best solution, because of the importance of the self-government external benefit implicated by publications concerning public officials and public figures."[131] Michael Passaportis, on the other hand, argues that properly taking into account the social harm caused by false publications should lead to the conclusion that "any regime of punishment more lenient than negligence necessarily causes social harm."[132]

Some economists have suggested that this trade-off might be resolved by using reforms to fault standards and damage awards in combination. Oren Bar-Gill and Assaf Hamdani argue that socially optimal decisions with respect to both verification and publication can be induced if the extent of publishers' liability in defamation varies depending on whether it would have been efficient to invest in verification before publication,[133] and on the

127. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 293 (1964) (Black, J., concurring) (proposing an absolute privilege for such statements).

128. Michael Passaportis, *A Law and Norms Critique of the Constitutional Law of Defamation*, 90 VA. L. REV. 1985, 2018 (2004).

129. David A. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 428 (1975).

130. Loutchansky v. Times Newspapers Ltd. [2001] EWCA (Civ) 1805, (No. 2) [2002] QB 783 at 809 (CA) [41].

131. Sheer & Zardkoohi, *supra* note 22, at 224.

132. Passaportis, *supra* note 128, at 2030.

133. Verification is efficient unless it would be overly expensive, or unless the initial evidence for an allegation is sufficiently strong to make such verification unnecessary. Bar-Gill & Hamdani, *supra* note 21, at 3-4.

expected social benefit of publication.[134] Manoj Dalvi and James Refalo, similarly, focus on the effect of both fault standards and damages on the media's incentives to verify and publish stories.[135] Their conclusions favour using strict liability, and varying the level of damages according to the externalities associated with the publication.[136]

But it is difficult to assess the extent of the various positive and negative externalities caused by varying the quantity or quality of speech in such a way as to actually induce these incentives.[137] In general, altering the level of damages awarded to successful plaintiffs will affect publication and verification incentives in comparable ways to altering fault standards.[138] Higher damages will promote accuracy at the expense of lower publication; lower damages will have the opposite effect.[139] The difficulty of measuring externalities also suggests that the role of economic analysis in resolving a straight trade-off between quality and quantity may be fairly limited.[140]

III. LITIGATION COSTS

To this point, we have discussed the economics of defamation law and the chilling effect in a general sense, suggesting that reforms to the substantive law, such as those adopted in *Sullivan* and *Reynolds*, imply a trade-off between inducing increased activity and inducing increased care.[141] Clearly, substantive reforms that are favorable to defendants, as well as incentivizing publication generally, should be expected to reduce the effectiveness of attempts by public figures to weaponize defamation lawsuits against the media. Publishers will be less concerned about being sued if they are more likely to be able to defend the suit successfully. But

134. *Id.* at 4. This finding effectively provides support for using the actual malice standard in respect of statements on matters of public interest.

135. Dalvi & Refalo, *supra* note 121, at 87.

136. *Id*. at 85-87.

137. Hollander, *supra* note 26, at 270; Passaportis, *supra* note 128, at 2027, 2031.

138. Hollander, *supra* note 26, at 273-74.

139. *Id.* at 273, 275.

140. *But see infra* Part VI (discussing some possible negative consequences of choosing a balance as favorable to speech as that adopted in *Sullivan*).

141. Our interpretation of "substantive" reform loosely refers to reforms relating to the legal tests against which the existence or extent of liability is measured. We use the term "procedural" reform to denote reforms relating to the processes through which the substantive law is applied. The distinction is not clearly defined, and there is overlap between the two categories. *See* Scott M. Matheson, Jr., *Procedure in Public Person Defamation Cases: The Impact of the First Amendment*, 66 TEX. L. REV. 215, 222-25 (1987).

other aspects of the libel regime may have a more significant bearing on this particular issue.

Arguably, the feature of defamation law that most effectively allows plaintiffs to weaponize claims against media organizations is the high cost of litigation. In this Part, we discuss procedural features of the law of defamation, with a more explicit emphasis on their implications for the issue of weaponized lawsuits. After first outlining the significance of litigation costs to the chilling effect, we consider the cost implications of the substantive reforms discussed in Part II above, and then turn to the purely procedural issue of the allocation of liability for litigation costs. Those discussions will be built on in Part IV, which discusses parties' litigation incentives in the context of defamation law.

A. Costs and the Chilling Effect

The problems caused for publishers by the high cost of defamation litigation have been recognized on both sides of the Atlantic. In England, Alastair Mullis and Andrew Scott argue that: "The problem with libel has always been and remains the harm caused by threats and bullying in the shadow of the law. Such threats rely on the fear of the cost of embroilment in libel proceedings, not on the expectation that a case would necessarily be lost."[142]

These commentators consider the issue of litigation costs to be so important that, during the debates leading to the 2013 reforms, they declared themselves "highly sceptical as to whether the substantive law of libel contributes at all directly to the existence of the perceived problems" with the chilling effect.[143] Only procedural reform would be sufficient to address those problems. Mullis and Scott were by no means the only voices in this debate emphasizing the central importance of litigation costs to the

142. Alastair Mullis & Andrew Scott, *The Defamation Bill 2012: Missing the Wood (With No Excuses)*, THE INT'L FORUM FOR RESPONSIBLE MEDIA BLOG (June 6, 2012), https://inforrm.wordpress.com/2012/06/06/the-defamation-bill-2012-missing-the-wood-with-no-excuses-alastair-mullis-and-andrew-scott/.

143. Alastair Mullis & Andrew Scott, *Something Rotten in the State of English Libel Law? A Rejoinder to the Clamour for Reform of Defamation*, 14 COMMS. L. 173, 173 (2009).

chilling effect;[144] the issue was also highlighted in Parliamentary Committees contributing to the debate on statutory reform.[145]

Similarly, in the U.S., the attorney David Boies has argued that: "[T]he process by which [defendants] get to judgment, even summary judgment, is a very large and expensive process . . . that discourages some in the media from undertaking stories (or undertaking approaches to stories) they know may engender litigation, whether [or not] they believe they can actually win that litigation."[146]

Nevertheless, the cost of litigation is an aspect of the law of defamation that has to date remained under-theorized in the economics literature. There are, however, two particular contexts in which the high cost of libel litigation could have a significant impact on economic analyses of the law. The following discussion begins with the impact on costs of substantive reforms, such as those adopted in *Sullivan* and *Reynolds*, before considering the different approaches taken in the U.S. and England to apportioning litigation costs between the parties to a lawsuit.

B. The Impact of Substantive Reforms on Litigation Costs

Both the *Sullivan* and *Reynolds* reforms primarily altered substantive components of defamation law.[147] That is, their main effect was to reduce the likelihood that courts would resolve certain categories of defamation claims in favor of the plaintiff by changing the legal tests applied to the determination of liability. The economic rationale for this kind of substantive reform is that it will reduce publishers' expected liability costs in respect of a given publication and thereby increase the incentive to

144. *See, e.g.*, DUNCAN BLOY & SARA HADWIN, LAW AND THE MEDIA: FOR PRINT, BROADCAST AND ONLINE JOURNALISM 93 (2011); Mr. Justice Gillen, *"Everything Should Be as Simple as Possible but Not Simpler": Practice and Procedure in Defamation Proceedings*, 63 NILQ 137, 144 (2012). *Contra* David Howarth, *The Cost of Libel Actions: A Sceptical Note*, 70 CAMBRIDGE L.J. 397 (2011).

145. CULTURE, MEDIA AND SPORT COMMITTEE, PRESS STANDARDS, PRIVACY AND LIBEL REPORT, 2009-10, HC 362-I, ¶ 115, 236-37; JOINT COMMITTEE ON THE DRAFT DEFAMATION BILL, REPORT, 2010-12, HL 203, HC 930-I, ¶ 26 (UK). Despite the emphasis given to the issue of costs by these committees, the 2013 Act contained very little in the way of procedural reform. That omission has been criticized by commentators. *E.g.*, Alastair Mullis & Andrew Scott, *Tilting at Windmills: the Defamation Act 2013*, 77 MOD. L. REV. 87, 88 (2014); Howard Johnson, *The Defamation Act 2013 – Reform or Tinkering?*, 19 COMMS. L. 1 (2014).

146. David Boies, *The Chilling Effect of Libel Defamation Costs: The Problem and Possible Solution*, 39 ST. LOUIS U. L.J. 1207, 1208 (1995).

147. A number of procedural reforms were also adopted in *Sullivan*. *See* Susan M. Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation*, 58 OHIO ST. L.J. 1753, 1755-56 (1998).

publish.[148] If the expected cost of liability consists of the likely cost of a finding of liability (including litigation costs and damages awards) multiplied by the probability of such a finding, then reforms that reduce that probability will reduce publishers' expected liability costs overall.

However, one of the strongest criticisms of both reforms is that they do not sufficiently account for the potential cost of *successfully* defending a defamation claim. If being sued for defamation harms a media organization in expectation even if the lawsuit is likely to fail, then it will need to take this into account in its publication decisions.

One common criticism of the *Sullivan* actual malice rule is that it shifts the focus of defamation trials from falsity to the defendant's conduct. Randall Bezanson notes that as a result of *Sullivan*, "[a]s a practical matter, the truth or falsity of the challenged statement is no longer pertinent to the libel action."[149] This shift can be criticized on the grounds that the veracity of disputed statements is probably what matters most in a defamation claim, both to the parties and to the public, and the focus on fault means that there is often no need for the courts to rule on this issue.[150] But the shift in emphasis from the statement itself to the defendant's conduct in publishing also has side effects that bear more directly on economic analysis of the law. In particular, it risks substantially increasing the cost of defending a defamation action, whether the defendant is successful or not.[151] Hollander argues that the problem with the substantive rules set down in *Sullivan* and subsequent cases is that they "were designed on the assumption that damage awards, rather than litigation costs, were the primary burden on defendants."[152]

Put simply, the presumption of malice at common law meant that the defendant's conduct was normally irrelevant to liability. It might in some cases be relevant to the quantum of damages,[153] but in most cases there would be no need to enquire into the circumstances of publication or the defendant's state of mind.[154] Introducing these factors as relevant, or even central, to liability substantially increases the burden on litigants of, for example, gathering evidence about the decision to publish and presenting

148. *See supra* Section II.B.

149. Randall P. Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 230 (1985).

150. *Id.*; David A. Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 CALIF. L. REV. 847, 855 (1986).

151. Anderson, *supra* note 129, at 435-37; LEWIS, *supra* note 53, at 201.

152. Hollander, *supra* note 26, at 271.

153. Rookes v. Barnard [1964] AC 1129 (HL) 1221.

154. *See supra* notes 27-29 and accompanying text.

arguments as to how that evidence should be interpreted in light of the relevant legal standard of fault.

In addition to directly increasing legal costs by increasing the complexity of defamation litigation, the focus on defendants' conduct may also impose additional costs on media defendants through plaintiffs using the discovery process to gather evidence relating to the publication decision. For example, publishers may not want the courts, plaintiffs, or the public to scrutinize their newsgathering processes too closely;[155] or the time and labor of journalists and editors may be lost while they are engaging in the discovery process, imposing opportunity costs.[156]

The Supreme Court has acknowledged these side effects of its *Sullivan* decision. In *Herbert v. Lando*, the Court noted that "*New York Times* and its progeny made it essential to proving liability that the plaintiff focus on the conduct and state of mind of the defendant."[157] The Court went on: "If plaintiffs, in consequence, now resort to more discovery, it would not be surprising; and it would follow that the costs and other burdens of this kind of litigation would escalate and become much more troublesome for both plaintiffs and defendants."[158]

However, the Court rejected the defendant's claim to a privilege protecting against the plaintiff's inquiries into the editorial process leading to the disputed publication.[159] The Court explicitly rejected the defendant's argument that the increased expense of the litigation process would aggravate the chilling effect of the law.[160]

Similar criticisms were made of the English *Reynolds* defence. Shortly after the House of Lords' decision, it was predicted that the defence "may be dysfunctional [in reducing the chilling effect] if it makes libel litigation more likely, more protracted, and outcomes less predictable."[161]

The prediction turned out to be prescient. Commentators argued that the defence was costly and difficult for media defendants to run, and that its

155. Jane E. Kirtley, *Vanity and Vexation: Shifting the Focus to Media Conduct*, 4 WM. & MARY BILL RTS. J. 1069, 1106-07 (1996).

156. Gilles, *supra* note 147, at 1780.

157. Herbert v. Lando, 441 U.S. 153, 160 (1979). *But see* Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (encouraging summary judgment on the issue of actual malice in defamation claims).

158. *Herbert*, 441 U.S. at 176.

159. *Id.* at 160.

160. *Id.* at 176.

161. Kevin Williams, *Defaming Politicians: The Not So Common Law*, 63 MOD. L. REV. 748, 753 (2000).

likelihood of success was unpredictable.[162] Trial courts were criticized for applying Lord Nicholls' ten factors[163] as a rigid checklist of requirements that defendants needed to satisfy to qualify for the defence, rather than as an indicative list of things to be considered in coming to a more holistic judgment on whether the defendant had acted responsibly.[164]

The House of Lords agreed with these criticisms of the way in which the *Reynolds* defence worked in practice. Just seven years after its *Reynolds* decision, it felt it necessary in *Jameel v. Wall Street Journal Europe* to "restate the principles" of the defence in order to encourage lower courts to apply it more flexibly.[165] Andrew Scott has reported that, at the time of *Jameel*, the defence had succeeded at trial in only three cases, out of almost twenty in which it had been pleaded.[166] Despite the *Jameel* judgment, the perception remained that lower courts were applying the *Reynolds* defence too rigidly,[167] and the Supreme Court[168] again felt it necessary to encourage a more flexibile approach in *Flood v. Times Newspapers Ltd*.[169]

These criticisms led Parliament, in the Defamation Act 2013, to replace *Reynolds* with a broader statutory defence for statements on matters of public interest.[170] But the extent to which this new defence will solve these problems remains unclear – particularly because the Explanatory Notes accompanying the relevant provision suggest that courts should continue to use the *Reynolds* factors when applying the new defence.[171]

A more intense focus on defendants' conduct in defamation litigation may also have implications for the press's ability to rely on confidential sources to reveal information on matters of public interest. Baum, Feess and Wohlschlegel analyse sources' incentives to leak information to the press under U.S. and English defamation laws.[172] They focus on the

162. ANDREW KENYON, DEFAMATION: COMPARATIVE LAW AND PRACTICE 226 (2006).

163. See *supra* note 74 for the ten factors described in Reynolds v. Times Newspapers Ltd. [2001] 2 AC 127 (HL) 205 (appeal taken from Eng.).

164. Jason Bosland, *Republication of Defamation under the Doctrine of Reportage – The Evolution of Common Law Qualified Privilege in England and Wales*, 31 OXFORD J. LEG. ST. 89, 90-91 (2011).

165. Jameel v. Wall Street Journal Europe S.P.R.L. [2006] UKHL 44, [38].

166. Andrew Scott, *The Same River Twice?* Jameel v. Wall Street Journal Europe S.P.R.L., 12 COMMS. L. 52, 54 (2007).

167. David Tan, *The* Reynolds *Privilege Revitalised*, 129 L.Q. REV. 27, 27-28 (2013).

168. The House of Lords was replaced with the Supreme Court in 2009 as a result of the Constitutional Reform Act 2005, c. 4.

169. *See generally* Flood v. Times Newspapers Ltd. [2012] UKSC 11, [80].

170. Defamation Act 2013, c. 26, § 4 (UK). *See supra* text accompanying notes 57-58.

171. Defamation Act 2013, c. 26, Explanatory Notes ¶ 35 (UK).

172. Baum, Feess & Wohlschlegel, *supra* note 122.

allocation of the burden of proof with respect to the veracity of defamatory statements, but the insight that sources will be more reluctant to come forward with information where the libel regime makes them more likely to believe that they will be identified in court is also pertinent here. Clearly, discouraging sources from revealing true information is undesirable in that it prevents the public from being informed about important stories.[173] If the reforms adopted to prevent publishers from self-censoring public interest stories increase the scrutiny given to the sources of such stories, they may risk chilling the flow of information before it even reaches the press. In *Jameel*, the trial court's rejection of the public interest defence was based in part on concerns about the veracity of the defendant's claim to have had a number of sources, whose identities it would not reveal, corroborating its allegations against the plaintiff.[174] It would not be surprising if the pivotal importance placed on anonymous sources in cases like this, such that revealing the identity of a source could allow a defendant to avoid the huge costs of liability, made potential sources more wary of revealing defamatory information to the press.[175]

Reforms to the substantive law of defamation clearly have the potential to affect the cost of litigation. When assessing a given reform proposal that seeks to address the chilling effect of defamation law by reducing the probability with which defendants will be held liable in court, its likely impact on costs should be borne in mind. If the mechanism through which the reform operates makes the process of avoiding liability significantly more expensive or onerous for defendants, then the goal of reducing the chilling effect may be undermined. Even if a publisher is less likely to be liable for damages, increasing the expense of successfully defending a defamation suit may reduce, neutralize, or even counteract the benefit of the decreased probability of a finding of liability.[176]

Despite the criticisms above, commentators have argued that the impact of *Sullivan* and subsequent decisions has been to effectively

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173. *E.g.*, Ashworth Hospital Authority v. MGN Ltd. [2002] 4 All ER 193 (HL) 210. *But cf.* Branzburg v. Hayes, 408 U.S. 665, 693-95 (1972) (doubting the extent of the chilling effect on the flow of information that would be caused by requiring journalists to identify anonymous sources to a grand jury).

174. Jameel v. Wall Street Journal Europe S.P.R.L. [2004] EWHC 37 (QB); *see also* James Gilbert Ltd. v. MGN Ltd. [2000] EMLR 680 (QB) 700-01.

175. *But see* Reynolds v. Times Newspapers Ltd. [2001] 2 AC 127 (HL) 205 (appeal taken from Eng.). "In general, a newspaper's unwillingness to disclose the identity of its sources should not weigh against it" in the application of the defence. *Id.*

176. Schauer, *Social Foundations*, *supra* note 112, at 11.

neutralize the chilling effect of defamation on the U.S. press.[177] If *Sullivan* has in fact been broadly successful in this respect, the most likely reason is that it reduces plaintiffs' chances of recovery sufficiently to outweigh, on average, the increase in litigation costs and damages awards that came with it. As such, despite these unwanted side effects, journalists' expected litigation costs with respect to any given publication are still lower than they would have been under the pre-existing law. This approach, as noted above, has its attendant disadvantages, in terms of the very low protection for reputation and decreased accuracy of publications.[178] And, as will be seen in the following section, the financial threat of defamation suits against the media has not been entirely removed by the *Sullivan* doctrine.[179]

If libel reforms, even those favoring defendants, make the successful defence of a defamation lawsuit sufficiently costly for publishers, then they present an opportunity for public figures to weaponize claims against the media. This is obviously undesirable, as David Boies has argued: "A situation in which well-heeled corporate, political or social interests can discourage reporting adverse to their interests or agenda, not by the threat of successful litigation but by the threat of imposing enormous costs even if the defendant ultimately prevails, should and does raise fundamental concerns."[180]

This is the subject to which we now turn our attention.

C. Allocation of Litigation Costs

It has been suggested above that substantive reform to defamation law implies a trade-off between increasing publishers' activity and care incentives. But defamation reform may not simply be a question of choosing a position on the spectrum between the quantity and quality of speech. A variety of mechanisms could be employed to attempt to ensure the optimal balance, and each may affect incentives in different ways. If mechanisms can be found that do not require such a stark choice between different categories of error – that is, mechanisms that are capable of reducing the chilling effect without simultaneously reducing the deterrence of falsity – then, intuitively, those mechanisms would be preferable options for reform.[181] One possible avenue to explore is the rules governing the allocation of liability for litigation costs between the parties to a lawsuit.

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177. Anderson, *supra* note 49, at 865-66.
178. *See supra* notes 83-93 and accompanying text.
179. *See infra* notes 201-09.
180. Boies, *supra* note 146, at 1208.
181. Hollander, *supra* note 26, at 270.

David Hollander analyses the effects of three different legal reform mechanisms on publication incentives and accuracy of reporting: fault standards, damage awards, and the apportionment of liability for litigation costs.[182] He argues that using either of the first two of these options to increase publication incentives will induce undesirably low care incentives as a side effect, but sees litigation costs as a promising area for reforms that might avoid this trade-off between activity and care incentives.[183]

Given the substantial impact that litigation costs can have on the media's publication incentives, the rules used to determine who should be liable to pay those costs are obviously important. Although there are complications to each, the basic rule differs sharply between the English and U.S. legal systems. In the U.S., each party to litigation is, in general, liable for its own costs; in England, prevailing parties will normally be entitled to recover some or all of their litigation costs from their opponents.[184]

Typically, economic analysis of the effect of costs on litigation incentives suggests that the English rule is better suited to deterring plaintiffs from filing suits with a low chance of succeeding,[185] although it may make these claims more likely to go to trial (as opposed to being settled) once they have been filed.[186] Such plaintiffs expect with greater probability to be liable to pay the defendants' costs in addition to their own, and as such their risk of suing is greater.[187] However, by increasing the risk associated with litigation, the English rule can deter less wealthy or more risk averse plaintiffs, or those with legitimate but low-value claims, from filing suit.[188]

Of course, the increased financial risk to plaintiffs under the English rule also cuts the other way: defendants who are held liable may be required to pay legal costs far in excess of the damages awarded to the plaintiff. This risk is illustrated by a recent case heard by the U.K. Supreme Court,

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182. *Id.*

183. *Id.* Hollander also recognizes the failure of substantive reform to sufficiently deter abusive lawsuits (*id.* at 272), also discussed *infra* text accompanying notes 188-91.

184. James Windon, *Fee Shifting in Libel Litigation: How the American Approach to Costs Allocation Inhibits the Achievement of Libel Law's Substantive Goals*, 3 J. INT'L MEDIA & ENT. L. 175, 180-83 (2010).

185. Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 59 (1982).

186. A. Mitchell Polinsky & Daniel J. Rubinfeld, *Does the English Rule Discourage Low-Probability-of-Prevailing Plaintiffs?*, 27 J. LEGAL STUD. 141, 143 (1998).

187. Brandon Chad Bungard, *Fee! Fie! Foe! Fum!: I Smell the Efficiency of the English Rule – Finding the Right Approach to Tort Reform*, 31 SETON HALL LEGIS. J. 1, 37 (2006).

188. Hollander, *supra* note 26, at 274.

Flood v. Times Newspapers Ltd.[189] The plaintiff in that case was awarded £60,000 in damages in respect of the continued publication of defamatory allegations on the *Times*'s website after it had been informed that they were false.[190] In addition, however, the defendant was ordered to pay the plaintiff's litigation costs of approximately £1.6m.[191]

Clearly, the English costs rule can impose enormous financial burdens on unsuccessful defendants. Its main benefit is that it can reduce the burden on successful defendants and, in theory, thereby reduce the chilling of true speech. Assuming that courts are sufficiently able to distinguish between suits brought in respect of true and false statements, so that plaintiffs in the latter have a lower prospect of success, the English rule should decrease the risk of publishing true statements by making litigation less likely to result and less costly if it does.

Hollander analyses the two rules in the specific context of defamation law, and considers that the increased deterrence of nonmeritorious claims induced by the English rule "should result in a unambiguous social gain,"[192] given the chilling effect that such claims can have on speech. As such, he recommends adopting the English rule requiring the losing party to pay the winning party's costs, with some alterations designed to facilitate suits brought by plaintiffs with meritorious but low-value claims.[193] Similarly, James Windon argues that despite the significant reforms to U.S. libel law aimed at reducing the chilling effect, the American costs rule "has operated to undermine the incentivizing effect that these substantive changes were designed to create."[194] He also recommends the adoption of the English costs rule in U.S. law.[195]

However, even publishers that are certain of the truth of a given statement would still need to account for the possibility of an erroneous judgment against them when deciding whether to publish.[196] The greater this probability of the defendant being found liable in respect of a true publication, the less effective the English rule will be in ameliorating the chilling effect.[197]

189. Flood v. Times Newspapers Ltd. [2017] UKSC 33.

190. *Id.* at [14]-[17].

191. Bryan Heaney, *Huge Costs Bills Had to Be Paid Despite ECtHR Decision*, 135 CIV. P. B. 6 (2017).

192. Hollander, *supra* note 26, at 274.

193. *Id.* at 274-76.

194. Windon, *supra* note 184, at 191. *See also supra* Section III.B.

195. Windon, *supra* note 184, at 194.

196. Schauer, *supra* note 4, at 695-96.

197. It may also be the case that risk-aversion heightens the effect of this threat on media organizations. Lili Levi has suggested that the "challenging environment in which modern media

Further, even where a suit is successfully defended, the English rule is inevitably imperfect in shifting all of the defendant's costs to the plaintiff. One example of the imperfection of English cost-shifting measures is the case of *British Chiropractic Association v. Singh*,[198] which was "widely regarded as one of the main drivers" of the 2013 reforms.[199] Although the lawsuit was dropped by the plaintiff after an unfavorable Court of Appeal ruling on a point of law, the defendant reported that avoiding liability had cost £200,000 that would not be recovered from the unsuccessful plaintiff.[200] For an individual defendant or a smaller media company, the prospect of losing this kind of sum to *win* in court – all the while risking even greater losses if the plaintiff were to prevail – might simply make it impossible to avoid caving to the pressure of threatened litigation, and suppressing or retracting important publications.

If a plaintiff's purpose is to weaponize a defamation suit to harass or punish the defendant rather than to prevail in court, then an unsuccessful suit is more likely to achieve those objectives under the American rule, by imposing the costs of defence on the media.[201] Douglas Vick and Linda Macpherson suggest that, for this reason, the American costs rule presents the opportunity for libel litigation to be "cynically manipulated to further goals unrelated to the vindication of an unfairly maligned reputation."[202] While the English rule is imperfect in a number of respects, the American rule makes it easier for plaintiffs to impose significant costs on the media by filing frivolous claims.

D. Current Issues Relating to Costs

The argument that the U.S. costs rule can facilitate weaponized claims against the media is illustrated by the concerns that have recently been expressed about third-party funding of lawsuits against media organizations. Commentators have noted the potential for exceptionally wealthy individuals to weaponize civil claims against the media by funding

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operate amplifies the hazards posed by lawsuits" brought to chill reporting. Lili Levi, *The Weaponized Lawsuit Against the Media: Litigation Funding as a New Threat to Journalism*, 66 AM. U. L. REV. 761, 765 (2017).

198. British Chiropractic Association v. Singh [2010] EWCA (Civ.) 350 (Eng.).

199. Descheemaeker, *Three Errors*, *supra* note 83, at 30.

200. *See Science Writer Simon Singh Wins Libel Appeal*, BBC NEWS, http://news.bbc.co.uk/1/hi/uk/8598472.stm (last updated Apr. 10, 2010, 2:04 PM).

201. *See* Douglas W. Vick & Linda Macpherson, *Anglicizing Defamation Law in the European Union*, 36 VA. J. INT'L L. 933, 967 (1996).

202. *Id.*

lawsuits brought by others and pursuing them aggressively in a way that imposes huge litigation (and, potentially, liability) costs on publishers.[203] To date, the most high profile example of this kind of litigation is *Bollea v. Gawker*,[204] in which a lawsuit brought by former wrestler Hulk Hogan against the media company Gawker Media was secretly funded by billionaire Peter Thiel, who was motivated by a desire to seek revenge against Gawker for having revealed that he was gay several years before.[205] The litigation eventually ended with the jury awarding the plaintiff damages of $140m and, as a result, Gawker was forced to declare bankruptcy.[206]

Lili Levi argues that "Clandestine third-party litigation funding in media cases is likely to enhance the chilling effect of lawsuits against the press."[207] Similarly, Nicole Chipi points out that, in the context of third-party litigation funding, the higher costs imposed by the American rule on successful defamation defendants mean that the cost of being subject to even meritless suits causes a chilling effect on reporting.[208] As such, third-party litigation funders intent on harassing media organizations or causing them financial difficulties can succeed in those aims without even needing to identify a plaintiff with a significant probability of prevailing. Instead, they can employ a "death by a thousand cuts" litigation strategy, weaponizing a large number of meritless claims against a particular publisher.[209] Even if the publisher successfully defends every claim, the costs of such repeated litigation could be crippling.

The English press at present have separate concerns related to litigation costs in civil suits brought in respect of their reporting. In 2013, Parliament enacted legislation that would make significant changes to the normal cost-shifting rules applicable in English civil litigation, which were to operate in most civil claims brought against press defendants,[210] as part of its response to the Leveson Inquiry into the unethical practices of some sections of the

203. *See id.*

204. Bollea v. Gawker Media, LLC, No. 522012CA012447, 2016 WL 4073660 (Fla. Cir. Ct. June 8, 2016); *see* Levi, *supra* note 197, at 771-72.

205. *See* Levi, *supra* note 197, at 769-79.

206. Paul Farhi, *Gawker Files for Chapter 11 Bankruptcy Protection*, WASH. POST (June 10, 2016), https://www.washingtonpost.com/lifestyle/style/gawker-files-for-chapter-11-bankruptcy-protection/2016/06/10/45ef7420-2f2e-11e6-9b37-42985f6a265c_story.html?utm_term=.566ee3b8aedb.

207. Levi, *supra* note 197, at 784-85.

208. Nicole K. Chipi, Note, *Eat Your Vitamins and Say Your Prayers:* Bollea v. Gawker, *Revenge Litigation Funding, and the Fate of the Fourth Estate*, 72 U. MIAMI L. REV. 269, 296 (2017).

209. Levi, *supra* note 197, at 785-87.

210. Crime and Courts Act 2013, c. 22, § 40 (Eng.), http://www.legislation.gov.uk/ukpga/2013/22/section/40/enacted.

British press.[211] The new measures were controversial and have not yet been brought into force, but in theory they could take effect at any time the Government chooses,[212] and it has been urged by some to do so sooner rather than later.[213]

The provisions, which are contained in section 40 of the Crime and Courts Act 2013, were designed to incentivize publishers to join a regulatory body that met a certain set of criteria considered to be necessary to ensure effective regulation.[214] Their effect, subject to various complications, would be to make the allocation of costs in claims against the press dependent not on the outcome of the litigation, but on whether or not the defendant was a member of such a regulator.[215] Defendants that were not members of an approved regulator would normally be liable to pay the costs of both parties regardless of the outcome of litigation, whereas defendants that were members of an approved regulator would be entitled to recover their costs from the plaintiff, again regardless of the outcome of the trial.[216] The incentive that this would create to join an approved regulator is clear. But the Independent Press Standards Organisation, which regulates a large majority of the British press, has stated that it will not seek approval.[217] As such, bringing section 40 into force would leave most British press organizations facing far greater litigation costs than at present, regardless of whether they succeed in court. Intuitively, this reform is likely to significantly increase the chilling effect of threatened litigation.

While these particular debates are too complex to be resolved here, they do make one thing clear: the huge potential cost of defending a defamation lawsuit is a substantial factor in the chilling effect that the law has on publication. Although substantive reforms that favor defendants will

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211. AN INQUIRY INTO THE CULTURE, PRACTICES AND ETHICS OF THE PRESS, REPORT, 2012, HC 780-II.

212. The provisions can be brought into force, under § 61 of the Act, by an order made by the Secretary of State for Digital, Culture, Media and Sport. *See* Crime and Courts Act 2013, c. 22, § 61 (Eng.), http://www.legislation.gov.uk/ukpga/2013/22/section/61/enacted.

213. *See* Anna Doble, *Leveson Hubbub*, 28(3) ENT. L. REV. 84 (2017).

214. The criteria are set out in the Royal Charter on Self-Regulation of the Press 2013. ROYAL CHARTER ON SELF-REGULATION OF THE PRESS, 2011 (Eng.), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/254116/Final_Royal_Charter_25_October_2013_clean__Final_.pdf.

215. Crime and Courts Act 2013, c. 22, § 40-42 (Eng.), http://www.legislation.gov.uk/ukpga/2013/22/section/40/enacted.

216. *Id.*

217. Jane Martinson, *Ipso Considers Arbitration Scheme Covering Defamation and Privacy*, THE GUARDIAN (June 15, 2015), https://www.theguardian.com/media/2015/jun/15/ipso-arbitration-scheme-defamation-privacy.

go some way to alleviating that chilling effect, the financial risk of being sued can still place an undesirable chill on speech when publishers expect to prevail in court. This has implications for the role that economic analysis can play in assessing defamation law: once it is recognized that the chilling effect is driven not by publishers' expected costs of *liability* as much as by their expected costs of *litigation* more generally, the importance of studying plaintiffs' incentives to file defamation lawsuits against the media becomes apparent. Part IV discusses these incentives.

IV. LITIGATION INCENTIVES

If, as argued above, the cost of defending against libel lawsuits is a significant factor in the chilling effect of defamation law, then the factors that influence plaintiffs' decisions as to whether to file suit against the media will obviously be important. This Part considers those factors and, in particular, identifies features of defamation law that seem to incentivize public figures to file weaponized lawsuits against the media.

A. Nonfinancial Litigation Incentives

One significant way in which defamation lawsuits differ from those in most other areas of law is the peculiar prevalence of litigation incentives that are not financial in nature. Bezanson, Cranberg and Soloski suggest that, in terms of the various incentives at play in libel litigation, "cost – at least in its conventional [financial] sense – is not determinative, and . . . nonfinancial considerations of an individual and ideological character may dominate the libel suit."[218] Their work on the Iowa Libel Research Project identified a range of nonfinancial factors that influenced defamation plaintiffs' litigation decisions.[219]

In common with the issue of third-party litigation funding discussed above, the prevalence of nonfinancial litigation incentives in defamation law may aggravate the chilling effect on publishers because, like plaintiffs who are bankrolled by the wealth of a third party, plaintiffs with high nonfinancial stakes are "not significantly constrained by the economic calculus familiar to traditional plaintiffs" when determining their litigation

218. Randall P. Bezanson, Gilbert Cranberg & John Soloski, *The Economics of Libel: An Empirical Assessment*, *in* THE COST OF LIBEL, *supra* note 22, at 21. *See also* Boies, *supra* note 146, at 1208.

219. RANDALL P. BEZANSON, GILBERT CRANBERG & JOHN SOLOSKI, LIBEL LAW AND THE PRESS: MYTH AND REALITY (The Free Press & Collier Macmillan Publishers, 1987).

strategies.[220] This, again, may be a factor in defamation law's particular conduciveness to weaponization by plaintiffs.[221]

Economic analysis can help to assess what impact the dominance of nonfinancial litigation incentives might have because litigants can be presumed to pursue litigation strategies that maximize their welfare even where the measurement of welfare is not limited to financial considerations. Ronald Cass, for example, attempts "to incorporate into an economic analysis the First Amendment claims that much more is at stake in libel litigation than the possible transfer of damage payments from defendant to plaintiff."[222]

In the course of this analysis, Cass makes an interesting argument about how the prevalence of nonfinancial litigation incentives might shape the impact of the *Sullivan* reforms. The argument is based on his assessment that public officials, for various reasons, are in general likely to have greater nonfinancial incentives to sue for defamation than other categories of plaintiffs.[223]

The effect of *Sullivan* and subsequent cases was to significantly reduce defamation plaintiffs' likelihood of success at trial.[224] One of the Court's reasons for doing so, and for differentiating between classes of plaintiff, was to prevent the weaponization of defamation lawsuits by public officials seeking to silence criticism of their conduct.[225] But, by reducing plaintiffs' chances of recovering damages, Cass argues that *Sullivan* "promotes a shift toward increased use of libel litigation for other purposes."[226] In other words, making the financial prospects of a defamation lawsuit less appealing to plaintiffs will have a greater influence on the litigation decisions of potential plaintiffs who are more concerned about the financial impact of litigation. As a result, "one would expect . . . relatively more

220. Levi, *supra* note 197, at 785.

221. The media's publication incentives may also have nonfinancial elements: publishers may be motivated by "a professional ethic that encourages them to seek to inform the public, even at the risk of libel litigation." Anderson, *supra* note 129, at 434. However, as Anderson points out, libel law should not be designed in such a way that the incentives it induces "rely on the press to subordinate economic self-interest to the abstract principle of free speech. The only reliable method of maximizing discussion is to reduce the economic pressures that constrict it." *Id.* at 433.

222. Ronald A. Cass, *Principle and Interest in Libel Law after* New York Times: *An Incentive Analysis*, *in* THE COST OF LIBEL, *supra* note 22, at 73.

223. *Id*. at 84-91.

224. David A. Anderson, *Defamation and Privacy: An American Perspective*, *in* SIMON DEAKIN, ANGUS JOHNSTON & BASIL MARKESINIS, MARKESINIS AND DEAKIN'S TORT LAW 873 (6th ed. 2008).

225. *See supra* notes 40-41 and accompanying text.

226. Cass, *supra* note 222, at 80; *see also* Hollander, *supra* note 26, at 272.

litigation by those plaintiffs who . . . have substantial non-award interests at stake,"[227] including by public officials.

This is not to say that the *Sullivan* doctrine does not deter some public officials from filing defamation suits. But the counter-intuitive implication of Cass's analysis is that the reduced likelihood of success for plaintiffs at trial will have a *smaller* deterrent effect on the number of lawsuits brought by public officials than on the number brought by other plaintiffs, despite the potential abuse of libel laws by public officials having particularly concerned the *Sullivan* Court.

B. Repeated Litigation Games

The existing economics literature on defamation law shares a significant feature with the majority of law and economics scholarship on litigation incentives: defamation litigation is treated as a one-off event. A plaintiff and a defendant compete with no prior knowledge of each other's litigation behavior and no expectation that they will meet in court again in the future. This structure makes sense when analysing areas of law involving encounters between perfect strangers: for example, drivers would not be expected to be familiar with the previous behavior of the road users around them when deciding on the level of care they should use while driving. But this is not always an accurate reflection of defamation litigation, where "frequently it is the most prominent members of society – public officials and public figures – who sue media defendants."[228] As noted by Richard Epstein, "it is the rare defamation action where the words spoken just happen to defame a person of whom the defendant has no knowledge."[229] In a substantial proportion of defamation cases – those brought by public figures – the defendant can reasonably be assumed to have some knowledge of the plaintiff's previous litigation behavior when making publication decisions. These cases are also those in which the chilling of legitimate speech is likely to be of greater concern.

The fact that libel litigation often involves repeat players has occasionally been noted. For example, Cass identifies the fact that "the expected effect of [current] litigation on future suits involving [a repeat-playing] party" will influence that party's litigation incentives.[230] However,

227. Cass, *supra* note 222, at 80.

228. ROY L. MOORE & MICHAEL D. MURRAY, MEDIA LAW AND ETHICS 361 (Routledge 4th ed. 2012) (1994).

229. Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. 782, 805 (1986).

230. Cass, *supra* note 222, at 73. *See also* Marc A. Franklin, *The Financial Impact of Libel Reform on Repeat Players*, in THE COST OF LIBEL, *supra* note 22, at 171.

his focus was on the institutional media – the defendant – as a repeat player in litigation, rather than on the public figure plaintiff.[231] To date, neither plaintiff nor defendant has been treated as a repeat player in any of the models of defamation law in the economics literature.

We introduce repeated play into a model of libel litigation, with results that are relevant to the issue of weaponized defamation lawsuits.[232] The model consists of a series of steps, repeated over two periods, in each of which a public figure interacts with a different journalist.[233] In each period, the public figure chooses whether to engage in some wrongdoing;[234] the journalist may, if he receives some evidence of wrongdoing,[235] publish a story exposing it; and, if a story is published, the public figure chooses whether to sue for defamation. We analyse incentives at each of these stages of the game: journalists' publication incentives, as well as public figures' incentives to engage in wrongdoing and to bring a lawsuit if exposed in the press.

The driving force behind our analysis is that the public figure may be one of two "types," and that her expected net benefit from suing differs depending on which of these types she is. If she is a "high-type," then her expected net benefit from suing is greater than it would be if she is a "low-type." Different public figures may have different incentives to file lawsuits for a wide variety of reasons. For example, a high-type public figure may have cheaper or more convenient access to high-quality legal advice, or may place greater value on the potential for a lawsuit to vindicate her reputation independent of its outcome, or to act as a punishment for the

231. Cass, *supra* note 222, at 73-74.

232. Acheson & Wohlschlegel, *supra* note 28. *See infra* notes 217-23 and accompanying text.

233. For clarity, the public figure is referred to using feminine pronouns, and the journalists using masculine pronouns (one of us flipped a coin to decide which player would be which gender).

234. "Wrongdoing" here need not be defined with great precision, but can be understood as reflecting the legal standard for assessing whether a statement is "defamatory." In other words, "wrongdoing" would encompass any action by the public figure which, if publicly revealed, would lower her in the estimation of the community or deter third persons from associating or dealing with her. Sim v. Stretch [1936] 2 All ER 1237 (HL) 1240; RESTATEMENT (SECOND) OF TORTS § 559 (AM. LAW INST. 1977).

235. We presume that this evidence may be a false positive (i.e. the journalist may receive evidence indicating wrongdoing even if the public figure has not done wrong) to reflect our concern with the chilling effect, which has to do with the deterrence of probabilistic statements on matters of public interest. Journalist's uncertainty about the veracity of his evidence, and about the possibility that a court will deem it to be false, is part of what drives the chilling effect.

journalist.[236] Conversely, the low-type public figure may place more emphasis on the nonfinancial disutility of a lawsuit, for example the anticipated stress of the litigation process. We assume that the public figure's type is her private information; that is, it cannot be directly observed by journalists. The peculiar prominence of nonfinancial litigation incentives in defamation law makes it plausible that, in this area of law, the expected net benefit of filing suit would vary significantly between public figures, and that a public figure's type would not be directly observable.[237]

The central focus of our model is on one particular effect of extending the litigation game over more than one period. A public figure deciding whether to sue for libel will take into account not only her expected benefit from the litigation in question (as is the case in existing single-period models), but also the effect that her lawsuit is likely to have on future journalists considering publishing critical stories about her. A journalist is less likely to publish a story if he believes its subject is a high-type public figure because he anticipates that type to be more likely to sue, and takes his expected cost of litigation into account in deciding whether to publish. In a game extended over two periods, a low-type public figure can induce the second-period journalist to believe that she is a high-type by suing in the first period. In other words, she can develop a reputation for litigiousness that makes journalists less likely to publish allegations about her in the future. Even if she expects to incur a net cost from suing initially, that cost may be outweighed by the benefit of deterring publication in the second period and the additional opportunity that this deterrence would offer her to benefit from wrongdoing without being exposed.

The model thus accommodates the intuitively plausible idea that a public figure may have an incentive to bring negative-value defamation suits against the media to establish a reputation for litigiousness that may deter journalists from criticizing her conduct in the future. Given the high cost of defending a defamation suit, Hollander argues that "it seems implausible that [the media] do not take into account the risk of being sued when deciding what to publish."[238] Similarly, it seems implausible that potential plaintiffs would not anticipate this; and, indeed, "plaintiffs with a continued interest in discouraging public criticisms of them have made very frequent use of the nuisance value of the defamation laws."[239] These

236. Some research suggests that a significant proportion of libel litigants (almost a third) have punishment of the press as a primary motivation of the decision to sue: BEZANSON, CRANBERG & SOLOSKI, *supra* note 219, at 79.

237. *See supra* notes 182-85 and accompanying text.

238. Hollander, *supra* note 26, at 258.

239. *Id.* at 266.

claims, brought in part to deter future publications about the plaintiff's conduct, could be considered to be a kind of weaponized defamation lawsuit.

The notion of an incentive to appear litigious driving public figures to file negative-value defamation suits against media defendants fits with a range of anecdotal evidence, as well as with intuition. Evidence from England, pre-dating the 2013 reforms, suggested that some publishers based their editorial decisions partly on the perceived litigiousness of the subjects of stories, being aware of "individuals or groups or kinds of material where they or their newspaper 'had to be extra careful.'"[240] The names of certain individuals appear relatively frequently in discussions of notorious libel litigants.[241] Most prominent is Robert Maxwell, the former owner of the Mirror Group newspaper company. Maxwell's biographer Tom Bower (who Maxwell also sued for libel)[242] noted that "[d]espite the millions spent in legal fees over the years, he . . . won few victories in the courts, yet his threats of litigation often served his purpose [of] silencing enemies."[243] Even after Maxwell's death, it has been suggested that "the English media continues to be sensitive about its coverage of particularly litigious individuals."[244]

Other individuals or organizations perceived in England as being risky to publish stories about have included the Police Federation, which funded a large number of libel actions brought by police officers in the late 1990s;[245] McDonald's Corporation, which – again in the 1990s – had a reputation for litigiousness;[246] the former owner of Harrods department store, Mohamed Al Fayed;[247] and the Russian oligarch Roman Abramovich.[248]

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240. ERIC BARENDT ET AL., LIBEL AND THE MEDIA: THE CHILLING EFFECT 68 (1997).

241. *See generally id.*

242. *See* Bower v. Maxwell, 1989 WL 1720340 (C.A. May 8, 1989) (Eng.). This citation is to a separate defamation claim brought by Bower against Maxwell, but Woolf LJ's judgment also includes details of Maxwell's suit against Bower.

243. TOM BOWER, MAXWELL: THE FINAL VERDICT 78 (Harper Collins Publishers, 1995).

244. RUSSELL L. WEAVER ET AL., THE RIGHT TO SPEAK ILL: DEFAMATION, REPUTATION AND FREE SPEECH 233 (2006).

245. David Hooper argues that this "willingness to sue" produced a "chilling effect, particularly on provincial papers wishing to publish criticism of the police." DAVID HOOPER, REPUTATIONS UNDER FIRE: WINNERS AND LOSERS IN THE LIBEL BUSINESS 134 (2000).

246. *Id.* at 153.

247. *See id.* at 69.

248. 2 CULTURE, MEDIA AND SPORT COMMITTEE, HOUSE OF COMMONS, PRESS STANDARDS, PRIVACY AND LIBEL: ORAL AND WRITTEN EVIDENCE, HC 362-II, Ev. 101 at Q333 (2010).

It is easy to imagine how being perceived as litigious by news editors in this way might benefit a public figure. Studies drawing on interviews with journalists indicate that where individuals are "particularly litigious . . . editors are less inclined to take risks"[249] in reporting on their conduct. These studies suggest that, in making publication decisions, "British editors routinely considered whether the subject of the article was someone who was likely to sue."[250] If so, they "withheld items that would have been aired against someone who was less litigious."[251]

Similar research reveals that the picture is somewhat different in the U.S.: "Is there a Maxwell parallel in the United States – a particularly litigious individual who scares newspapers and stunts their coverage of him? The simple answer is no. . . . [The U.S. media] do not seem to fear any particular individual like the British media feared Maxwell."[252]

However, even in the U.S., the potential still exists for speech to be chilled where it concerns individuals known to be particularly litigious. For example, towards the end of the 2016 presidential election campaign, a slightly bizarre story emerged about the American Bar Association refusing to publish a report which concluded that Donald Trump was a "libel bully," because of concern about the possibility that Trump would sue for libel.[253] As this paper was being written, the *New York Times* published a story about now-President Trump threatening to seek "substantial monetary damages and punitive damages" in libel against the publisher of a book about his administration.[254]

In the 1990s, David Boies also identified:

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249. Russell L. Weaver & Geoffrey Bennett, *Is the* New York Times *"Actual Malice" Standard Really Necessary? A Comparative Perspective*, 53 LA. L. REV. 1153, 1173 (1993).

250. Russell L. Weaver, *British Defamation Reform: An American Perspective*, 63(1) N.I.L.Q. 97, 108-09 (2012).

251. *Id.* at 109.

252. Weaver & Bennett, *supra* note 249, at 1186.

253. Mark Joseph Stern, *American Bar Association Produces Report Calling Trump a Libel Bully, Censors It Because He's a Libel Bully*, SLATE (Oct. 25, 2016, 1:05 PM), http://www.slate.com/blogs/the_slatest/2016/10/25/american_bar_association_libel_bully_report_on_donald_trump_is_censored.html. The report itself is available at http://www.medialaw.org/index.php?option=com_k2&view=item&id=3470.

254. Peter Baker, *After Trump Seeks to Block Book, Publisher Hastens Release*, N.Y. TIMES (Jan. 4, 2018), https://www.nytimes.com/2018/01/04/us/politics/trump-threatens-sue-fire-fury-publisher.html. Trump also filed a defamation suit in 2006 against the author Timothy O'Brien. Although the claim was unsuccessful on its merits, Trump told *The Washington Post* in an interview, "I spent a couple of bucks on legal fees, and they spent a whole lot more. I did it to make his life miserable, which I'm happy about." Paul Farhi, *What Really Gets under Trump's Skin? A Reporter Questioning His Net Worth*, WASH. POST (Mar. 8, 2016), https://www.washingtonpost.com/lifestyle/style/that-time-trump-sued-over-the-size-of-hiswallet/2016/03/08/785dee3e-e4c2-11e5-b0fd-073d5930a7b7_story.html?utm_term=.e6e434afd3ce.

> [O]rganizations like Synanon or the Church of Scientology which have, as a matter of deliberate policy, brought lawsuits to deter serious criticism. They won few, if any, actual judgments, but they also knew that people did not like to be sued, and once they made it clear that they were going to sue people that criticized them, there were going to be fewer people that criticized them.[255]

There is no systematic evidence that the propensity of a given public figure to sue in defamation has an effect on the media's publication decisions. But both intuition and a reasonable amount of anecdotal evidence support the idea that plaintiff litigiousness is potentially important and that developing a reputation for being litigious could be of sufficient value to a public figure to incentivize the filing of negative value lawsuits against the media.

C. Implications of the Litigiousness Incentive

Analysis of the litigation model described above provides support for many of the insights generated by previous economic analyses of defamation law. It also suggests that some of the incentive effects discussed above may be intensified when libel litigation is recognized as involving repeated interactions rather than one-off disputes.

Firstly, and most simply, the incentive to appear litigious on which our model focuses, which arises from the repeating nature of libel litigation, aggravates the general chilling effect of defamation law. Journalists' anticipation of the litigation incentives of public figures, even those for whom a lawsuit has a negative financial value, leads them not to publish stories that they otherwise would.

The litigiousness incentive also affects public figures' wrongdoing incentives, through a similar mechanism to that analysed by Nuno Garoupa.[256] Libel laws that induce a greater incentive to appear litigious will also induce a correspondingly greater incentive to do wrong. In part, this is because a public figure pursues a reputation for litigiousness in order to decrease the likelihood that journalists will publish defamatory allegations about her in the future. This has the benefit of minimizing the immediate costs of future criticism, but it also means that she is less likely to be exposed if she engages in wrongdoing, thereby decreasing the risk associated with misconduct. As such, in some circumstances, the incentive

255. Boies, *supra* note 146, at 1209.

256. *See supra* notes 69-70 and accompanying text.

to appear litigious will induce more wrongdoing from public figures, as they anticipate being better able to hide that wrongdoing from the public.

Robert Maxwell, who was discussed above,[257] provides a concrete example that illustrates how a reputation for litigiousness could be used to hide significant wrongdoing from the public. Vick and Macpherson note that Maxwell's "staggering financial improprieties went largely unreported until after his death" and suggest that his "misdeeds would have been exposed earlier but for the reluctance of the British press to make allegations against him."[258] Maxwell's weaponization of libel laws allowed him to continue to reap the benefits of his wrongdoing by decreasing his risk of being exposed by the media.

It should be noted that, while these lawsuits could be weaponized to deter the exposure of a public figure's future wrongdoing, they are not necessarily abusive or undesirable. The litigiousness incentive increases as the costs imposed on publishers by being sued become less dependent on the truth of their statements. In these circumstances, the probability of being sued is comparatively more important to the publisher than the veracity of a statement and, as such, a public figure who chose to refrain from suing would expose herself to a greater risk of being falsely defamed in the future.

D. Assessing Potential Reforms

Substantive reforms favoring defamation defendants, such as those introduced in *Sullivan*, decrease the law's chilling effect on publication incentives at the expense of reducing the accuracy of the statements that are published. These reforms will, in general, disincentivize litigation against the media by reducing plaintiffs' expected net benefit from suing.

However, by significantly decreasing plaintiffs' chances of recovery, the *Sullivan* decision leads to a higher proportion of suits being brought by plaintiffs for whom nonfinancial litigation incentives are dominant.[259] Our analysis suggests that reforms that have this effect would also increase the incentive to appear litigious, because they would increase the difference between the expected benefit of litigation for high- and low-type plaintiffs. In other words, substantive reforms like *Sullivan* that reduce the probability of plaintiffs prevailing disproportionately deter lawsuits from being filed by plaintiffs who care sufficiently about obtaining financial compensation for their injuries. These reforms will be less effective at deterring lawsuits

257. *See supra* notes 203-05 and accompanying text.

258. Vick & Macpherson, *supra* note 201, at 967.

259. *See supra* notes 187-90 and accompanying text.

from being filed by plaintiffs with other motivations. Those other motivations need not necessarily be undesirable, but could include plaintiffs' hopes of suppressing legitimate criticism of their conduct in the future.

The litigiousness incentive is driven by the media's anticipation of the cost of being sued and so will be more extreme when defendants' litigation costs are high. The preceding analysis suggests that the American costs rule can facilitate weaponized lawsuits against the media:[260] when "defendants must bear their costs even if they win, libel litigation is an effective tool to harass the press."[261] Our model suggests that the rule also aggravates the litigiousness incentive specifically because, by allowing plaintiffs to impose substantial costs on publishers through both meritorious and nonmeritorious claims, the probability of being sued over a statement assumes greater importance to the publication decision than the likely outcome of the lawsuit. To the extent that the outcome of litigation is determined by the veracity of the statement, this implies that the publication decision will be driven more by the likelihood of a lawsuit than by the probability that the publisher's statement is true.[262] As such, a reputation for litigiousness has a greater deterrent effect on publication under the American costs rule.

The most effective way to reduce the litigiousness incentive would be through reforms that better distinguish between true and false publications. Where defendants' litigation outcomes are more closely linked to whether or not a statement is true, publishers' anticipation of the likelihood of being sued will be comparatively less important to their publication decisions than their assessment of a statement's veracity. As described above, some commentators have suggested that adopting an English-style costs rule would achieve this objective.[263]

It has been observed elsewhere that, although libel laws in England are, in substantive terms, more plaintiff-friendly than those in the U.S., "they do not seem to produce the level of self-censorship that American courts have

260. *See supra* notes 169-75 and accompanying text.

261. Hollander, *supra* note 26, at 266.

262. *Contra* Andrew T. Kenyon & Tim Marjoribanks, *Chilled Journalism? Defamation and Public Speech in US and Australian Law and Journalism*, 23 NEW ZEALAND SOCIOLOGY 18, 25-26 (2008) (suggesting that Australian publishers' concern over the litigiousness of subjects of their reporting "did not override" their concern with the accuracy of their reporting); *but see supra* note 221 (stating that the law should not rely on journalists' professional ethics to mitigate the chilling effect).

263. *See supra* notes 160-63 and accompanying text.

assumed the common law of defamation would generate."[264] Our analysis suggests that part of the explanation for this may lie in the effect of English cost-shifting measures, which should reduce the chilling effect on publishers as long as they can expect to be successful in court if sued.

But the effectiveness of the English rule in this respect relies on publishers being sufficiently certain that they will prevail under the applicable substantive law, because of the much greater costs imposed by a finding of liability. The greater prevalence in England of both the general chilling effect of defamation law, and of specific instances of chilling caused by weaponized lawsuits, have both been revealed by empirical studies.[265] This suggests that English law is sufficiently uncertain for defendants that publishers are chilled despite the effect that the cost-shifting rule should have.[266]

In other words, the goal of substantive reform adopted in the U.S. to reduce the chilling effect on publication has been undermined to some extent by the fact that the American costs rule allows the effective weaponization of meritless lawsuits against the media. Conversely, the benefits that should result from the English cost-shifting rules have been undermined by the lack of certainty publishers face with respect to their probability of prevailing under the substantive law in England. The implication is that both substantive and procedural measures are necessary to effectively address the chilling effect of defamation law.

However, we would caution against the conclusion reached elsewhere that introducing cost-shifting measures to U.S. libel litigation could resolve the trade-off between publication and accuracy that is implicated by substantive reforms.[267] Firstly, because plaintiffs in the U.S. are unlikely to prevail even in respect of false statements, introducing an English-style costs rule would aggravate the law's disincentive effect on the verification of statements.[268]

Secondly, as indicated by the experience of the English media, cost-shifting measures are only effective if the legal process is sufficiently predictable to allow publishers some certainty about the outcome of litigation against them. But the imperfect accuracy of the legal process is one of the main factors that contributes to the chilling effect, and gives rise to the trade-off between publication and verification incentives, in the first

264. Anderson, *supra* note 49, at 866.

265. *See supra* notes 210-12 and accompanying text.

266. This uncertainty appears to have been a problem with the *Reynolds* defence at least. *See* KENYON, *supra* note 162, at 226.

267. *See supra* notes 160-63 and accompanying text.

268. Windon, *supra* note 184, at 194.

place.[269] Given that the lower costs for successful defendants under the English rule are offset by the higher costs imposed on unsuccessful defendants, the chilling effect of uncertainty as to the outcome of potential litigation may be aggravated by the increased financial risk of erroneous judgments against publishers.

V. CONCLUSION

The chilling effect that defamation law has on legitimate expression has been recognized as a problem in a range of jurisdictions. The imperfect ability of the legal process to distinguish true statements from falsehoods leads to publishers being uncertain of their potential liability costs, even in respect of statements that are probably true. This risk of the erroneous imposition of legal costs for the publication of true statements induces lower incentives to publish than would be socially optimal, particularly where those statements are on subjects of public interest. As well as inducing a general over-cautiousness from publishers, this uncertainty can also be leveraged by public figures who can effectively chill valid criticism of their conduct through the threat of a lawsuit.

Most of the legal reforms introduced in response to this problem have altered the substantive law, increasing incentives to publish by making defendants less likely to be held liable for publishing probabilistic statements that turn out to be false, or that cannot be shown to be true in court. These reforms, however, are likely to come at the expense of decreased incentives to verify statements before publication. In other words, they are likely to increase the quantity of publications at the expense of the quality of public discourse.

Reforms that focus on defendants' substantive chances of success can also be criticized for failing to sufficiently acknowledge the impact of litigation costs, as opposed to the cost of liability alone. Where reforms that make defendants more likely to prevail at trial also make the costs of defence more expensive, they may undermine their own effectiveness in mitigating the chilling effect.

It has been suggested that changing the rules determining the allocation of litigation costs between parties to a lawsuit might avoid the trade-off between publication and verification incentives that is implicated by substantive reforms. This approach should work to some extent, but the effectiveness of English-style cost-shifting measures is limited by the same

269. *See supra* notes 74-76 and accompanying text.

uncertainty as to litigation outcomes that helps to create the chilling effect in the first place.

As such, the task of designing a libel regime will require a choice to be made about the relative desirability of the incentives to publish statements and to verify them before publication. This is a complex problem to which courts and legislators in different jurisdictions will propose different solutions. Economic analysis can help to assess the effectiveness of those proposed solutions in inducing the desired incentives but has little to say about the underlying decision as to which incentives the law should seek to promote.

On the specific issue of weaponized defamation lawsuits, at least where those lawsuits are clearly frivolous, the solution seems to be simpler: it should be easy, quick, and inexpensive for publishers to successfully defend libel suits. Reforms that impose additional costs on successful defendants are likely to increase the desirability of filing suit to plaintiffs who are motivated by factors other than the prospect of prevailing in court.

VI. CODA: THE SOCIAL COST OF FALSITY AND THE "FAKE NEWS" PHENOMENON

The subject of this Symposium has two component parts: "fake news" and "weaponized defamation." Our contribution has been limited to a discussion of the latter topic, but we will end our paper with a short section suggesting intuitive mechanisms by which the two phenomena may be linked. In particular, our conjecture is that reforms to defamation law intended to address the chilling effect caused by weaponized lawsuits against the media may have longer-term implications that are relevant to the issue of fake news. As will be seen, the analysis offered in this section is speculative – much more would need to be done to properly investigate its plausibility. It also clearly fails to account for the full spectrum of the fake news phenomenon, focusing only on defamatory falsehoods about public figures. Nevertheless, it offers some intuitive reasons to think that defamation reforms aimed at reducing the chilling effect may have unintended consequences on democratic processes further down the line.

It was argued above that economic analysis may be capable of making only a limited contribution to resolving the trade-off between publication and accuracy that is implied by substantive reform of defamation law. However, some economists have disputed the *Sullivan* Court's attitude to the respective importance to be placed on the social benefit of true speech,

on the one hand, and the social cost of false speech, on the other.[270] An intuitively plausible argument could be advanced that the tolerance of defamatory falsehoods in U.S. law, intended to preserve the social benefits of true speech, may in the longer term actually undermine those benefits. The argument, presented here mainly as a provocation, would be along the following lines.

The U.S. law of defamation since *Sullivan* under-deters the publication of defamatory falsehoods by the media.[271] This price was considered worth paying by the Court to better incentivize the publication of truths, and thereby to secure the self-governance benefits of free and open discussion of public issues.[272] In the Court's analysis, the harm caused by those false statements consisted of an increase in the number of reputational injuries in respect of which public figures would have no legal remedy.[273]

However, the over-publication of falsehoods may impose additional social costs that were not explicitly considered by the *Sullivan* Court.[274] It is possible that, in the long term, the decrease in accuracy induced by the *Sullivan* reforms may contribute to an erosion of public trust in the media (or, as President Trump would have it, the "fake news media").[275] If this is the case, then the social benefit of encouraging the publication of *true* statements, which provided the rationale for tolerating excessive injuries to individual reputation, could be diminished: a public that is distrustful of the media is less likely to believe or be influenced by the stories it publishes. In other words, the self-governance benefits of increasing the flow of information about public figures, which was the main driving force behind the *Sullivan* decision, may in fact be undermined by the decreased accuracy of that information that is simultaneously induced.

This line of argument could be extended, even more speculatively, in a way that may chime with the current political climate in the U.S. particularly, and which is lent support by at least one existing analysis of defamation law's incentive effects.[276] One of the justifications for

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270. *See supra* note 103 and accompanying text.

271. *See supra* Section II.C.

272. *See supra* Section II.D.

273. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273 (1964).

274. *See* Passaportis, *supra* note 128, at 2019-21.

275. Hollander, *supra* note 26, at 269. Of course, the problem of declining public trust in the media has far more complicated causes than just defamation reforms.

276. Passaportis, *supra* note 128. *See also* Blasi, *supra* note 89, at 586 (arguing against an absolute privilege for statements about public officials: "if the public knows that critics of official conduct are subject to absolutely no standards of accountability regarding the accuracy of their

protecting expression in defamation law is to safeguard the media's watchdog role by preventing public figures from weaponizing the law in order to hide their misconduct. But if reforms protecting expression contribute to a decline in public trust of the media as described above, then the reputational penalty suffered by public figures whose wrongdoing is exposed by the media will be less severe, because fewer people will believe the allegations. As such, the possibility of exposure will provide less of a disincentive for the public figure to do wrong. Reducing the chilling effect on publication, if it comes too much at the expense of accuracy, may in the long term increase public figures' wrongdoing incentives.

Michael Passaportis frames this argument differently, focusing on the role of reputation in maintaining community norms.[277] He argues that social norms which are policed by reputational incentives require an effective mechanism for identifying norm-breakers; the mechanism that communities most often use is gossip.[278] False rumors make that mechanism less effective by reducing the reliability of accusations against community members.[279] In doing so, they reduce the probability or extent of reputational harm that can be expected to result from breaking a norm and so erode the incentive to abide by the norm.[280] Although framed differently, this is effectively the same argument as tentatively advanced above. Putting the argument in less abstract terms, public figures only need to be concerned about news coverage that the public will actually believe. If the incentives induced by libel laws lead people to put less trust in the media's reporting, then public figures have less to fear from their misconduct being exposed.

It is likely that mechanisms other than reforms to defamation law will be better suited to addressing the problem of fake news, given that the phenomenon is not limited to statements capable of attracting liability in defamation. We offer no analysis of the potential effectiveness of any particular mechanisms. The intention of the above discussion is simply to provoke consideration of the ways in which these two topics may be linked and to suggest that, when designing defamation reforms with the intention of addressing the weaponization of libel litigation, or the chilling effect more generally, it would be prudent to bear in mind the potential longer-term ramifications of those reforms. The structure of defamation law

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charges, these critics may not retain the credibility necessary to perform their checking function effectively.")

277. Passaportis, *supra* note 128, at 1986-87.

278. *Id.* at 1994-95.

279. *Id.* at 1997.

280. *See id.* at 1994-2004.

clearly has significant consequences on the nature of public discourse, and it is worth recognizing that some of those consequences may be unpredictable, counter-intuitive, or dysfunctional in the long term.