

**Institutional Reckless Disregard for Truth in Public
Defamation Actions Against the Press**

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I. Introduction:
Revisiting Actual Malice and Reckless Disregard
at the Enterprise Level

*New York Times v. Sullivan*¹ was decided in 1964 when the media landscape was markedly different. Only one newspaper company was then publicly traded, and it had “gone public” the previous year. Today hundreds of newspapers, accounting in the aggregate for 40 percent of daily and half of Sunday circulation, are owned by public companies.²

In a sense, 1964 could be regarded as “the good old days” in that there was much less concentration of media ownership. Ben Bagdikian chronicled the rapidity of change. His groundbreaking study, *THE MEDIA MONOPOLY*, reported that in 1983 most of the major media were concentrated in 50 corporations but that just nine years later the control formerly in the hands of those 50 dominant companies was wielded by a mere 20 “and the number of companies controlling most of the national daily circulation” had shrunk from 20 to 11.³ A single broadcaster, Clear Channel Communications, currently owns 1,200 radio stations, a scale unthought of in 1964.

¹ *New York Times Co. v. Sullivan*, 376 U.S. 254(1964).

² For historical data and financial information, see G. CRANBERG, R. BEZANSON & J. SOLOSKI, *TAKING STOCK: JOURNALISM AND THE PUBLICLY TRADED NEWSPAPER COMPANY* (2001).

³ *The Media Monopoly*, (Fourth Edition) Ben Bagdikian, Beacon Press

The combination of consolidation and public ownership has powerfully concentrated the minds of media managers on maximizing profits. Veteran Washington Post journalists Leonard Downie Jr. and Robert G. Kaiser described the consequences:

Too much of what has been offered as news in recent years has been untrustworthy, irresponsible, misleading or incomplete....Most newspapers have shrunk their reporting staffs, along with the space they devote to news, to increase their owners' profits. Most owners and publishers have forced their editors to focus more on the bottom line....If most newspapers have done poorly, local television stations have been worse....The national television networks have trimmed their reporting staffs and closed foreign reporting bureaus to cut their owners' costs...Most newspapers, television networks and local television and radio stations belong to giant, publicly owned corporations far removed from the communities they serve. They face the unrelenting quarterly profit pressures from Wall Street now typical of American capitalism. Media owners are accustomed to profit margins that would be impossible in most traditional industries.⁴

⁴ The News About the News, Leonard Downie Jr. and Robert G. Kaiser, Alfred A. Knopf, 2002.

Indeed, when newspaper companies opted to go public, they declared in essence that they wanted to be treated in the marketplace the same as any other enterprise, as they are.⁵

It has become almost a cliché among journalists to observe that, while the press is a business, it is a different kind of business because of the informing role it plays in a democratic society. Increasingly, however, media companies resemble and behave the same as any other business, the composition of their boards of directors indistinguishable from other corporate boards, their compensation incentives no different from the proverbial manufacturer of widgets. The CEO of Gannett, the nation's largest newspaper chain, receives \$1,600,000 in salary, \$2,250,000 in bonus, and 400,000 stock options.⁶ The compensation, which is certainly not out of the norm for large consolidated media companies, is justified by "company performance,"⁷ which means shareholder return on investment, return on assets, return on equity, operating cash flow, operating income, stock price, and market value. Gannett's operating margins are lauded as "among the best in the industry."⁸ Nowhere in this list is the quality and strength of journalism practiced in the newsrooms owned by Gannett even mentioned. And as Gannett applauds its investment performance, the Project for Excellence in Journalism describes, in its annual report on journalism, "a difficult environment: more pressure on people, less time to

⁵ G. CRANBERG, R. BEZANSON & J. SOLOSKI, *TAKING STOCK: JOURNALISM AND THE PUBLICLY TRADED NEWSPAPER COMPANY* (2001).

⁶ Gannett proxy statement 2004

⁷ *Id.* at

⁸ *Id.* at

report stories....”⁹ Journalism is contributing to the bottom line of the large companies, not by improving journalism’s quality, but by sacrificing it.

Since its beginning, the actual malice test first announced in 1964 in *New York Times v. Sullivan*,¹⁰ has met with criticism from some quarters. The test’s demand that the mind of the reporter be proved “with convincing clarity”¹¹ has proven difficult, invasive, and so expensive that often the losers can’t be distinguished from the winners in public libel cases.¹² End runs around the subjective state of mind inquiry by plaintiffs have become more common.¹³ And the actual malice test’s predictability, its capacity as a standard of liability to yield consistent and coherent results across a body of cases, remains a hollow promise. As Robert Sack famously put it, successful libel plaintiffs “resemble the remnants of an army platoon caught in an enemy crossfire.”¹⁴

⁹ The State of the News Media 2004: An Annual Report on American Journalism, <<http://www.stateofthenewsmedia.org>>, Project for Excellence in Journalism (2004).

¹⁰ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

¹¹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-286 (1964).

¹² R. Bezanson, G. Cranberg & J. Soloski, *LIBEL LAW AND THE PRESS: MYTH AND REALITY* 4-5 (1987).

¹³ *E.g.*, *Mason v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991)(comparing implicit or inferential meaning with text); *Harte-Hanks Communications Inc. v. Connaughton*, 491 U.S. 657 (1989) (noting circumstantial proof of purposeful avoidance of the truth).

¹⁴ Robert Sack, *LIBEL, SLANDER AND RELATED PROBLEMS* xxvi (P.L.I. 1980).

Perhaps the central flaw in the subjective malice/recklessness test, however, is its exclusive focus on individual rather than corporate conduct,¹⁵ a shortcoming so fundamental that, in our judgment, the test should be supplemented, in the press setting at least, with what we call an institutional reckless disregard standard that would be applicable to actions brought not against the reporter and editor but against the corporation and based on corporate business decisions made in the face of known risks of falsity. The product-liability-like tort action would rest on a largely objective assessment of the corporate decisions that affect journalism when they manifest knowing indifference to the risk of defamatory falsehood that flow from the decisions.¹⁶ Why would such a standard be preferable in such cases?

First, the actual malice/reckless disregard standard focuses on the state of mind of a reporter or editor instead of on the underlying factors that can give rise to defamatory publication, and over which writers and editors may have little or no control.¹⁷ Liability thus is often divorced from the very decisions and policies at the institutional level that produce, facilitate or influence the harmful conduct.

¹⁵ By this we mean that the actual malice test by definition focuses on the state of mind of one or more individuals (perhaps a reporter, or an editor) about an identified factual statement prior to the time of publication, *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964); *St. Amant v. Thompson*, 390 U.S. 727, 728 (1968), rather than on the contribution of corporate policies, generalized procedural judgments, and incentives within an organization, where knowledge of falsity of a fact before publication would be a meaningless and futile standard. *See Tavoulareas v. Piro*, 817 F.2d 762 (D.C. Cir. 1987)(en banc).

¹⁶ *See infra* notes 61-78 and accompanying text.

¹⁷ *See New York Times v. Sullivan*, 376 U.S. at 280 *St. Amant v. Thompson*, 390 U.S. at 728; R. BEZANSON, ET AL., *LIBEL LAW AND THE PRESS: MYTH AND REALITY* (1987).

Second, the actual malice/reckless disregard standard is blunt-edged. It exacts heavy and often vengeful damage penalties on news organizations based only on misbehavior by the author of a defamation.¹⁸ It thus exacts a disguised form of strict liability of news organizations for the behavior of their writers and editors, but with no determination that the news organization was in any way at fault for the harm. And it exacts misdirected liability on an often huge scale, with damage verdicts way out of proportion to harm, and explainable only on the ground that the quite possibly faultless news organization should be deterred from conduct in which it played no causative role.

Third, while libel actions may be traumatic for journalists, the shift of financial liability to the business as a whole insulates journalists from responsibility for knowing and false misbehavior, thus in effect making them more indifferent to the risks their behavior imposes on others.

Fourth, by exacting punishment based on conduct of journalists, not on organizational recklessness, the actual malice/recklessness inquiry frees news organizations to adopt risky practices without fear of consequences. At a time when market-based forces are placing great financial pressure on newsrooms and the publicly traded organizations that own most of them,¹⁹ a rule that frees journalistically dangerous corporate decisions from cost or consequence is likely, perversely, to facilitate the very choices that the law should discourage. If a central purpose of tort law is to deter and shape harmful behavior, the malice test does precisely the opposite.

¹⁸ Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

For these reasons we propose a different approach to defamation caused by news organizations, one that rests liability on corporate decisions that are known to present a heightened risk of falsity and defamation because of the impact of such decisions on staffing, training, editorial oversight, copyediting and related factors that affect the reliability of the news product and that cannot be justified on grounds related to the quality or journalistic performance of the news organization. We believe that decisions that are knowingly, indeed often calculatedly, taken to increase profits or personal wealth at the cost of slipshod journalism should not be relieved, as they are now by the actual malice privilege, from consideration in establishing liability. They should be sheltered by the First Amendment from excessive measures of liability and extremes of intrusion into editorial processes, but they should not be absolutely protected from liability as they are today.²⁰

We do not recommend disbanding the existing actual malice standards of knowing or reckless falsity. Actual malice should remain the constitutional standard in cases challenging the editorial decisions of *individual reporters or editors* to publish a false and defamatory story. The *news organization's* liability, however, should be subject to a distinct standard based on proof that decisions at the institutional level were made knowing that they would produce a journalistically unjustified heightened *risk* of false and defamatory publication.²¹

¹⁹ See, e.g., GENE ROBERTS, LEAVING READERS BEHIND (2001); G. CRANBERG, AL., TAKING STOCK: JOURNALISM AND THE PUBLICLY TRADED NEWSPAPER COMPANY (2001).

²⁰ New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

²¹ An additional benefit of this approach is that the kinds and measures of damages might be better and more reasonably allocated, and the winner-take-all quality of punitive damages in libel

In the pages that follow we will, first, present the evidence upon which our proposal, as a matter of journalistic practice and public policy, rests, including particularly the changes in the forms of journalism and the market forces now bearing strongly on the journalistic practices rewarded in the large and often publicly traded news organizations. These are developments which, in our judgment, warrant revisiting the actual malice standard with explicit attention to liability for defamation caused by forces and choices within the organization itself, not just its reporters and editors. We will then develop the standard of institutional reckless disregard in greater detail, distinguishing it from reckless disregard of the truth now applied under the heading of the actual malice privilege. Finally, we will turn to the Constitution, where we will demonstrate that the institutional recklessness test we propose is not only constitutional under the First Amendment, but indeed that it is fully consistent with developments in tort law and constitutional theory over the past 25 years.

II. Enterprise Liability in News Organizations

Falsehoods bedevil journalism. In multiple surveys, the public consistently gives the press low marks for accuracy. Typical is a 1998 national poll reporting that 86 percent of respondents believed stories “often” or “sometimes” contained factual errors.²² The public’s perception jibes with academic studies that find as many as half or more of newspaper stories

cases might finally be put to rest. R. Bezanson & G. Cranberg, *Punitive Damages: Muzzled Press?*, New York Times Op-Ed, June 13, 1988, at 23).

²² Robert J. Haiman, “Best Practices for Newspaper Journalists,” The Freedom Forum, available at www.freedomforum.org/templates/document.asp?documentID=13087 (viewed on April 4, 2004.)

contain at least one mistake.²³ Newspaper editors confirm that inaccuracy is a major journalistic problem. By all accounts, little has changed since executive editor David Lawrence of the *Detroit Free Press* wrote in 1984:

“After being interviewed many times in the past decade as a newspaper editor, ‘damage control’ is the way I approach the media. I try to talk slowly enough, and ‘quotably’ enough to get my point across and the facts right.... I try to minimize the damage from reporters who have preconceived notions about the ‘truth’... Sometimes I know I’d be better off being less accessible to people I know have made up their minds about the story, but that hardly seems right for someone in the business of asking questions and seeking access. What a shame I feel this way.”²⁴

Roger Tatarian, then editor of United Press International, had expressed a similar sentiment two years earlier when he described being jolted by misquotes. “I had spoken from a written text,” he complained, “I knew exactly what I had said, and I knew exactly what had come before and after the key quote. And now I saw how it had come out and [I] could have cried. I began to wonder how often this sort of thing happened, and in talking with editors and publishers...over the years, I got an uncomfortable answer: Almost of all of them testified, off

²³ Scott Maier, “Getting It Right? Not in 59 Percent of Stories,” 23 *Newspaper Res. J.* 10, (2002); Michael Singletary, *Accuracy in News Reporting: A Review of the Research*, ANPA News Research Report No. 25, Jan. 25, 1980.

²⁴ David Lawrence Jr., “From the Harvard Business School, Lessons on Newspaper Accuracy”, *The Bulletin of the American Society of Newspaper Editors*, March 1984, at 7.

the record, that they too had been left shaken at one time or another at how their remarks had come out in print.”²⁵

Obviously, the error problem is not news to newspaper executives. Indeed, they have collectively bemoaned the low state of press credibility, and the American Society of Newspaper Editors periodically has searched for remedies.²⁶ There is often a disconnect, however, between the problem decried by editors and the policies adopted by their corporate superiors. Instead of expenditures to launch a war on error, the latter frequently insist on measures that exacerbate the problem.

Errors usually are categorized as either objective or subjective. The former includes purely factual miscues, such as misspelled names or errant addresses. Subjective errors in stories distort, misrepresent or mislead because, while the facts cited may be true, omissions and imbalance or emphasis create a false impression.

Errors of both kinds are bound to occur in an enterprise with deadlines that relies on human beings with all of their foibles and shortcomings. While the sources of error usually can be pinpointed and responsibility fixed on one or more individuals, journalists do not work in a vacuum. Often the conditions under which they work are major contributing factors, if not chiefly responsible for, errant reporting and editing. We believe mistakes due in substantial part to company policies adopted while knowing they carried a likely risk of induced falsity should be regarded as “institutional error.”

²⁵ Roger Tatarian, “How Do You Teach Accuracy?,” *The Bulletin of the American Society of Newspaper Editors*, Sept. 1982, at 21.

²⁶ See Michael Singletary, *Accuracy in News Reporting: A Review of the Research*, ANPA News Research Report No. 25, Jan. 25, 1980.

An example would be the newsroom downsized to meet profit targets where overburdened staffers must scramble to fill space without sufficient time to verify their work. All newspapers are labor-intensive; many also are profit-driven. Efforts to improve balance sheets almost unavoidably affect staffing. Whether managements opt for layoffs, buyouts or trims by attrition, the net effect of downsizing is to diminish the newsroom's ability to ride herd on error. Ironically, the most caring and generous of the measures, the buyout, may be the riskiest because of the way it encourages departure of the most experienced employees -- the senior staffers with institutional memory and familiarity with the community that make them especially effective bulwarks against error.

Newsrooms have lost about 2,200 employees since 1990.²⁷ The observation by veteran former editor Gene Roberts that, while he has heard of papers with reduced staff that improved, he's never seen one, is telling.²⁸ So is the comment by Howard Tyner, former editor of the *Chicago Tribune*, about the effect of belt-tightening at his paper: "There's always a price for being lean.... I have top people who are terrific, and here and there I have deputies who are good, but it thins out real fast. And you can see that in the paper. We make more mistakes than we did before...[*The Tribune*] would be edited...much better if we had more people there."²⁹

Washington Post editors Leonard Downie and Robert Kaiser described the critical importance of adequate staffing in their book, "The News About the News." They explained:

²⁷ Table A, American Society of Newspaper Editors survey, "Newsroom Employment Survey." (2003). Available at www.asne.org/index.cfm?ID=1138 (visited April 5, 2004.)

28 Gene Roberts

²⁹ Leonard Downie & Robert Kaiser, *THE NEWS ABOUT THE NEWS: AMERICAN JOURNALISM IN PERIL* 84 (2002).

“Adding employees allows a paper’s ambitions to rise and gives all staff members more time to do their job more carefully. Management that supports its journalists with resources will bring out their very best. Managements that cut and squeeze demoralize their people as they shortchange their readers.”³⁰

The newspaper companies that are publicly traded must be mindful both about the return to their investors and about the economic performance of their peers. Although few papers face newspaper competition in the communities where they publish, their parent corporations compete for investors in the marketplace. Thus, profit margins are watched closely by stock analysts, and comparisons are made. As Knight Ridder CEO Anthony Ridder ruefully noted, “...they [the analysts] would be much happier if we had Gannett margins; they’d jump for joy if we said we had Gannett margins...”³¹

The upshot is that the most profit-hungry companies, the ones most heedless of the adverse consequences of cost-cutting on editorial standards, affect not only their own newsrooms but also newsrooms elsewhere.

The bonuses and stock options at publicly traded newspaper companies, which account for about 50 percent of daily and Sunday circulation, are heavily weighted toward rewarding the achievement of financial targets rather than improving quality or circulation. When Geneva Overholser was editor of the Gannett-owned *Des Moines Register* in the 1990s, her bonus objectives included this one established for her by corporate:

“Help the company make budget by staying within extremely tight expense budgets,

³⁰ *Id.* at 68.

³¹ Randall Bezanson, Gilbert Cranberg and John Soloski, *TAKING STOCK: JOURNALISM AND THE PUBLICLY TRADED NEWSPAPER COMPANY* 58 (2001).

conserving newsprint and participating in intracompany efforts to become more efficient. Stay within budgeted amounts for payroll (eliminating two positions and saving \$100,000).”³²

That seems almost benign compared to what consultants recommended for the *Winston-Salem (NC) Journal*, owned by the publicly traded Media General company. The money-saving formula the consultants devised directed that “a [front-page] story should be six inches or less. A reporter should use a press release and/or one or two ‘cooperative sources.’ He or she should take 0.9 hours to do each story and should be able to produce 40 of these in a week”³³ The formula was widely derided, and it was scrapped, but the consultant did succeed in trimming 20 percent of the paper’s 600-person workforce.³⁴

While the Winston-Salem paper’s experience with by-the-numbers-journalism may have been an aberration, editors nowadays face heavy bottom-line pressure. Downie and Kaiser described their predicament:

³² Downie and Kaiser, *supra* note 6, at 94.

³³ *Id.* at 97.

³⁴ *Id.*

“...most of the corporations that own newspapers are focused on profits, not journalism. Editors who once spent their days working with reporters and editors on stories now spend more of their time in meetings with the paper’s business-side executives, plotting marketing strategies or cost-cutting campaigns. Chain editors now routinely have two titles: editor *and* vice president of a big corporation.”³⁵

³⁵ *Id.* at 68.

Advertising is the prime source of newspaper revenue.³⁶ It tends to be cyclical, ebbing and flowing with the economy. Newspapers often reduce staff in response to economic downturns, but many times do not recoup all of the staff losses during recovery, thereby creating more or less permanent and heightened risk of institutional error.

The proverbial last line of newsroom defense against error traditionally has been the copy desk, but at many papers it has become a porous defense. When page make-up formerly done in composing rooms shifted to newsrooms, the task of electronic composition known as pagination frequently fell to copy editors, who became primarily paginators (electronic page designers) and only incidentally, if at all, guardians against error.³⁷ The switch to pagination enabled newspaper companies to wipe out whole composing rooms, whose employees usually were union members, while the newsroom employees who replaced them usually were not organized.

Pagination increases the workload. By one estimate, it adds between a shift and five shifts of staff time daily, depending on the size of the paper. Unless staff is added to compensate for pagination, copy editing, and thus accuracy, is bound to suffer.³⁸ Flawed heads and error-laden copy that emerge from copy desks too busy paginating to flag the errors and raise questions about stories because the companies chose to improve the bottom line rather than add staff are classic forms of institutional error.

Turnover explains much about what is wrong in newspapers. The managing editor of the *Sarasota Herald-Tribune* admitted in a Dec. 24, 2000 column to readers, “For the fourth time in

36 Taking Stock at

37 Id.

³⁸ Bezanson, Cranberg and Soloski, supra note 8, at 53-55.

five years, this newspaper is looking for a new Manatee County government reporter.” The editor related how a school board member complained. “In the four years I’ve been on the board, we’ve had seven different education writers from the Sarasota Herald-Tribune. By the time one figured out what was going on, they were gone, and somebody else was in there. We knew what was going on (with school budget problems). We talked about it, and it did not get reported.”³⁹

Turnover limits experience, which is compounded when reporters are inadequately trained to begin with. As Robert J. Haiman reported in a study for The Freedom Forum, “Business, community and civic leaders say they and their organizations often are covered by reporters who simply do not know enough about the subjects they are trying to report on. Inability to report with authority was cited repeatedly as a problem....”⁴⁰

Various sources told Haiman:

³⁹ Rosemary Armao, Editorial, “Herald-Tribune Is Trying Hard To Keep Continuity of Coverage,” Sarasota Herald-Tribune, Dec. 24, 2000 at BS3.

⁴⁰ Haiman, supra note 1, at 23.

“The reporters just come and go; by the time they learn something about us they are shifted to another beat.” . . . “The stories she writes about us are so oversimplified and distorted we’d rather not have any coverage at all.” . . . “Surely there must be one business reporter who majored in economics instead of English.” . . . “The sports reporters seem to be experts about sports; how come the business reporters aren’t experts about business?” . . . “Too often, reporters haven’t bothered to do their homework; they’re unprepared and we’re spending all of our time getting them up to speed on an issue.” . . . “I know this stuff can get a little complicated at times, but if he doesn’t understand it, how can he make it understandable to readers?”⁴¹

Yet papers persistently downsize payroll, and thus encourage turnover, even as they fail to invest sufficiently in training those who stay. When poorly paid and trained reporters who lack background in the subjects they cover produce stories riddled with errors, and they are insufficiently checked by copyeditors and inadequately supervised by overworked editors, that is a recipe for institutional error, not to mention libel suits. In those suits, it is the hapless reporter or editor immediately responsible for the damaging error who will be cited in the complaint, whose work is scrutinized and who will be grilled in depositions. Almost always missing from this scene are the publishers, CEOs and CFOs who in a real sense determine the quality of

⁴¹ *Id.* at 23-24.

journalism and who ought to be answerable for it. It is they, after all, whose priorities decided the size and competence of the staff by the budgets they imposed.

So when a damaging falsehood is published, and the injured party looks to the courts for redress, it seems to us reasonable for the legal system to address the issue of institutional error. Among the relevant questions: Who set the final newsroom budget? How much inquiry was made of its likely impact on accuracy? If staff or payroll was downsized, what assurances were sought that it would not lead to heightened risk of error? How much was budgeted for training? What is the staff's experience level? What has been done to minimize turnover? What editing procedures are in place to guard against error?

In other words, if you are harmed by a mistake, you should have the right to inquire whether the mistake was the result of a company policy or decision adopted knowingly or in reckless disregard of the likelihood of error, and if so, to hold the institution responsible.

III. Institutional Reckless Disregard and the First Amendment

In *New York Times v. Sullivan*⁴² the Supreme Court held that the First Amendment prohibits public officials from recovering damages for libel in the absence of proving that the defendant published the libelous statement with actual malice. Actual malice, the Court thereafter held, means that the publisher knew the libelous statement was false at the time of publication, or actually entertained serious doubts about the statement's truth and published

⁴² 376 U.S. 254 (1964).

recklessly in the face of those doubts.⁴³ Actual malice, in short, requires that a libel plaintiff prove the publisher's subjective state of mind in relation to the falsity of a specific and known statement that would produce known harm to a known person. Without requiring proof of such fact- and circumstance-specific subjective knowledge, the publisher's freedom to publish would not enjoy the breathing space – the margin for error – that the First Amendment requires in order to preserve a “robust, uninhibited, and wide-open” marketplace of expression.

Over the course of the nearly 40 years since *Sullivan* was decided, the essential quality of actual malice has remained unchanged. The inquiry has focused on a known factual statement in relation to a known person and a known harm.⁴⁴ Gross irresponsibility or recklessness unattached to known falsity of a specific statement will not suffice to support liability.⁴⁵ The malice standard, therefore, places control over liability for defamation in the hands of the reporter and editor, whose own state of mind must be established; it does not subject them to liability pursuant to the less predictable vicissitudes of reasonable journalistic practices or changing journalistic standards. This feature of the malice rule reflects an assumption that the institutions of journalism within which reporters and editors operate share certain common and minimum standards and procedures deserving of respect under the First Amendment and, therefore, warranting shelter against intrusive judicial inquiry through libel suits.⁴⁶

Over the 40 years since *Sullivan*, however, the confidence that was once felt about the basic qualities of journalistic institutions has been eroded. Profit pressures, financial market

43 St. Amant v. Thompson, 390 U.S. 727 (1968).

44 St. Amant v. Thompson, 390 U.S. 727 (1968).

45 Id. at

⁴⁶ Quote from Gertz or *Sullivan*; CRANBERG, ET AL., *supra* note 8.; Randall P. Bezanson, *The Developing Law of Editorial Judgment*, 78 Neb. L. Rev. 754 (1999).

incentives, and often dramatic changes in practice and process have made it more difficult to entertain a baseline confidence in news organizations,⁴⁷ which are more commonly than not subsidiaries of large and publicly held companies. Staffing in the newsroom has been significantly reduced.⁴⁸ Copyediting departments and functions have been reassigned and effectively eliminated.⁴⁹ Editorial layers have been stricken.⁵⁰ The business side of news organizations has often merged with the editorial side; the wall of separation has broken down.⁵¹ Editors (and occasionally star reporters) are paid in generous measure by incentive compensation arrangements based on revenues, operating margins, efficiency, and performance of the company's stock on the financial markets, not on the quality of the journalism practiced.⁵² Circulation has been cut or reshaped through socioeconomic shaping and redlining.⁵³

These and other changes in the basic character of the news organization⁵⁴ have begun to place significant stress on the application of the actual malice test. In some cases courts' focus has begun to shift from what a reporter knew about the falsity of a particular statement about a particular person, to what the publisher or editor knew about the *risks* of error.⁵⁵ The malice question has also begun to focus on whether the publisher or editor was *subjectively aware of high risks of error* that would result systematically from editorial and policy decisions made in

⁴⁷ ROBERTS, *supra* note 8; CRANBERG ET AL., *supra* note 8.

48 Taking Stock, at

49 Id.

50 Id.

51 Id.

52 Id.

53 See Cranberg, Colum. Journ. Rev. (); Bezanson, The Atomization of the Newspaper: Technology, Economics and the Coming Transformation of Editorial Judgments About News, 3 Commun. Law & Policy 175 (1998).

54 See note *supra*.

the newsroom.⁵⁶ As the Supreme Court explained in the *Harte-Hanks Communication, Inc. v. Connaughton* decision:

⁵⁵ See *Tavoulareas v. Piro*, 817 F.2d 762, 771 (D.C. Cir. 1987)(en banc); *Harte-Hanks Commun., Inc. v. Connaughton*, 491 U.S. 657 (1989).

⁵⁶ *Tavoulareas v. Piro*, 817 F.2d 762, 771 (D.C. Cir. 1987)(en banc).

It is ... undisputed that Connaughton [the plaintiff] made the tapes of the Stephens interview available to the *Journal News* and that no one at the newspaper took the time to listen to them. Similarly, there is no question that the *Journal News* was aware that Patsy Stevens was a key witness and that they failed to make any effort to interview her. Accepting the jury's determination that [the editor's and reporter's] explanations for these omissions were not credible, it is likely that the newspaper's inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of Thompson's charges. Although failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category."⁵⁷

57 491 U.S. at .

The *Connaughton* decision, in the view of many,⁵⁸ states a formulation of actual malice that focuses on subjective state of mind regarding falsity but that rests in part on policies and behavior that produce *risk* of harmful error, and not exclusively on known falsity of a fact being published. It reflects, on the one hand, a continued commitment to the idea that the First Amendment should protect against liability for publication in the absence of proof of “guilty” state of mind, yet it reflects as well a new attitude that the process of journalism may not in every case deserve the strong presumptive respect that was incorporated into the original actual malice idea. The *Connaughton* test, in short, represents a first step toward a separation of the reporter’s liability for falsehood, on the one hand, and an institution’s liability for decisions and policies that produce high *risks* of defamatory falsehood, on the other. It places the institutional recklessness standard that we proposed in clearer relief, making easier its legal definition and justification, to which we will now turn, and sharpening the constitutional questions it raises, to which we will thereafter turn.

A. The Meaning of the Recklessness Standard

The institutional reckless disregard question asks whether, at the level of a publisher or in the higher corporate reaches of a holding company, often a publicly traded company with news operations as subsidiaries, decisions were made for financial and financial market-based reasons unrelated to journalism in the face of known risks of falsity that would result from reduction, reorganization, or reorientation of the news operations. The question, in other words, is not

⁵⁸ Critical articles re: *Connaughton*.

whether the editors or news staff disagreed or were substantially hampered by the decisions, but whether those persons animated by the financial and market forces were aware of the consequences and acted without journalistic justification nonetheless. For purposes of liability, therefore, the question is not focused on the particular false and defamatory statement that was published, but on whether the statement was a product of the changed policy or procedure that caused a heightened risk of falsity, and whether the decision to adopt the policy or procedure was made knowing of its systematic consequences, and without journalistic justification. The claim is much like a product liability claim based on knowledge that a defective and dangerous product is being produced.

While ordinary product liability or strict liability claims could be based on a finding that a company should have known of the defect, we believe a higher standard of proof should be required in recognition of the fact that the decisions to be examined, while purely economic and financial in character, produce consequences for published expression protected by the First Amendment. Thus, we suggest that the decision makers themselves – the publisher, the executive(s) responsible in the holding company, for example – must have actually been aware of the heightened risk of falsity and attendant compromises in the journalistic process and acted nonetheless without journalistic (as opposed to financial) justification. The inquiry about actual knowledge of risk and justification will focus not on the reporter or the editor responsible for the defamatory story, but on the information available to and motives of the corporate decision maker. The inquiry will be intrusive, but not into the specific newsroom decisions in the course of reporting the news, as is the case now with the actual malice test.

Is there a precedent in the law for such a standard and inquiry? As it turns out, the closest analogy (and an analogy that confirms our assertion that a high standard should be set in the interest of the First Amendment) is to be found in the law of corporate criminal responsibility. When can a corporation be found guilty of a crime, and on the basis of what proof of knowledge and intent, on whose part? Two leading cases on these questions are very instructive – and indeed yield the conclusion that our proposed standard of actual knowledge by the decision maker is higher even than the criminal law requires.

In the first case, *United States v. Bank of New England*,⁵⁹ the question involved the proof necessary to establish a bank's criminal liability for failing to report certain currency transactions under federal law.⁶⁰ The federal statute attaches criminal liability for a bank (as a corporation) only when the financial institution "willfully" violates the reporting requirements. Willfulness "must be supported by 'proof of the defendant's knowledge of the reporting requirements and his specific intent to commit the crime.'"⁶¹ In the case of a corporation's criminal liability, the court held that "knowledge" could be inferred "if a defendant consciously avoided learning about the reporting requirements,"⁶² and the corporation's knowledge would be established by proof of such knowledge on the part of "individual employees acting within the scope of their employment."⁶³ The employees' knowledge would be "imputed" to the corporation as the corporation's own knowledge.⁶⁴ Specific intent, similarly, could be shown by proof of "flagrant

59 821 F.2d 844 (1st Cir. 1987).

60 31 U.S.C. sec. 5322.

61 821 F.2d at 854, quoting *U.S. v. Hernando Ospina*, 798 F. 2d 1570, 1580 (11th Cir. 1986).

62 821 F.2d at 855.

63 *Id.*

64 *Id.*

indifference” of the corporations toward its legal obligations⁶⁵ – “a disregard for the governing statute an an indifference to its requirements.”⁶⁶

In an earlier criminal antitrust case involving a *per se* violation of the Sherman Antitrust Act,⁶⁷ the circuit court fully explained the rationale for corporate criminal liability and its proof through the actions and knowledge of the corporation’s employees, imputed to the principal decision makers in the corporation.⁶⁸

Sherman Act violations are commercial offenses. They are usually motivated by a desire to enhance profits. They commonly involve large, complex, and highly decentralized corporate business enterprises, and intricate business processes, practices, and arrangements. More often than not they also involve basic policy decisions, and must be implemented over an extended period of time.

Complex business structures, characterized by decentralization and delegation of authority, commonly adopted by corporations for business purposes, make it difficult to identify the particular corporate agents responsible for Sherman Act violations. At the same time it is generally true that high management officials, for whose conduct the corporate directors and stockholders are the most clearly responsible, are likely to have participated in the policy decisions underlying Sherman Act violations, or at least to have become aware of them.

Violations of the Sherman Act are a likely consequence of the pressure to maximize profits that is commonly imposed by corporate owners upon managing agents and, in turn, upon lesser employees. *** In sum, identification of the particular agents responsible for a Sherman Act violation is especially difficult, and their conviction and punishment is peculiarly ineffective as a deterrent.

65 *Id.*

66 *Id.* quoting *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 127 & n. 20 (1985).

67 15 U.S.C. sec. 1.

68 *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Circuit 1973).

For these reasons we conclude that as a general rule a corporation is [criminally] liable under the Sherman Act for the acts of its agents in the scope of their employment, even though contrary to general corporate policy and express instructions to the agent.⁶⁹

These cases illustrate the breadth of potential corporate criminal liability and the factual grounds on which it can be based or imputed. Our proposal for institutional reckless disregard, however, would sweep considerably more narrowly, requiring proof that the responsible corporate officer made a business decision with actual knowledge of its consequences to the company's news organizations, for specific profit-seeking and financial market-based reasons, and without justification in journalistic values.

B. Incitement

⁶⁹ *Id.* at 1006-1007.

If we look to areas outside defamation and corporate criminal liability for guidance on whether institutional recklessness can fit into the larger first amendment picture, the law of incitement comes immediately to mind.⁷⁰ Incitement involves the directness of a causal link between speech and harm.⁷¹ First Amendment protections for inciting speech turn on subjective state of mind as well as objective measures of harm and immediacy, much like actual malice.⁷² The clear and present danger test for incitement is the most exacting and speech protective first amendment test.⁷³ Thus, if our proposed standard of institutional reckless disregard in defamation cases would satisfy the constitutional demands placed on incitement, the conclusion would follow that institutional reckless disregard is likewise a constitutionally adequate standard of liability for defamation.

*Brandenburg v. Ohio*⁷⁴ is the paradigm incitement case. Its test, the culmination of fifty years of judicial crafting by many of the great jurisprudential minds of the 20th Century,⁷⁵ immunizes advocacy of unlawful acts unless the speech is intended to and likely to produce specific imminent lawless action. The test breaks down into a set of objective and subjective elements.

⁷⁰ *Brandenburg*; Jeffries article *Brandenburg v. Ohio*, 395 U.S. 444 (1969);

⁷¹ *Brandenburg*, 395 U.S. at 447-48.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ 395 U.S. 444 (1969).

⁷⁵ Justices Warren, Brennan, Marshall, and White were just some of the individuals involved in creating the incitement standard.

Objective inquiry focuses principally on the words (or images, etc.) used by the speaker. Did the speech concern serious illegal acts and was it directed to the production of such acts? Was the speech sufficiently specific in the harms advocated to tie the speaker to subsequent lawless actions? The Supreme Court, in *Claiborne Hardware*,⁷⁶ held that even though the Field Secretary of the National NAACP, Charles Evers, had stated in a speech “if we catch you going in any of them racists white stores, we're gonna break your ... neck,”⁷⁷ the NAACP was not liable for acts of damage done by the ‘enforcers’ of a boycott in Claiborne County, Mississippi.⁷⁸

The *Brandenburg* standard is also subjective and contextual. Like the determination of whether defamatory material is published with “actual malice” – knowing a statement’s falsity at the time and in the context of its publication – the determination of whether the speech is (a) *intended* to produce; and (b) likely to produce; (c) *imminent* lawless action depends on context. The classic example is from J.S. Mill’s *On Liberty*, where Mill defines the difference between appropriate and inappropriate advocacy in the context of a corn dealer: violence-threatening denunciation of a merchant on the street-corner is different from delivering the same statement to an angry, starving mob gathered with torches outside the merchant’s house.⁷⁹ The focus is on the immediacy and probability of the risk, and knowledge, indeed specific intention, that it

⁷⁶ N. A. A. C. P. v. Claiborne Hardware Co., 458 U.S. 886 (1982).

⁷⁷ *Id.* at 900.

⁷⁸ *Id.* at 931.

⁷⁹ JOHN STUART MILL, ON LIBERTY 56 (Stefan Collini ed., Cambridge University Press 1989)(1859).

follow from the speech; if there is time to intervene between the speech and the harm, or if there is little likelihood of action being taken, the speech does not satisfy the *Brandenburg* standard.

Both *Brandenburg* and *Sullivan* set demanding standards for liability. It has been rare for courts applying either test to permit liability. Unlike *Sullivan*, few incitement cases have reached the Supreme Court since *Brandenburg* itself.⁸⁰ Thus, the incitement standard has not experienced much evolutionary change. Change in incitement doctrine has only been a recent phenomenon. This also means, however, that there has been little discussion of the precise scope of the doctrine. Unlike libel, where questions on the edges of the doctrine have reached the high court on a regular basis,⁸¹ the tensions around the boundaries of incitement doctrine have not been until very recently. This leaves an interesting mix of cases at the Circuit Court of Appeals level that skirt the edges of *Brandenburg*. As we look at them, we can see the sources of tension that have led the circuit courts to seek alternative theories, and possible analogies for institutional reckless disregard, in the analysis that they used.⁸² This is a trend that has been confirmed

⁸⁰ See *Claiborne Hardware*, 458 U.S. 886; *Hess v. Indiana*, 414 U.S. 105 (1973). Excluding threat cases these two cases round out the totality of the substantive examples.

⁸¹ See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Harte-Hanks Commun., Inc. v. Connaughton*, 491 U.S. 657 (1989).

⁸² See, e.g., *Rice v. Paladin Enters.*, 128 F.3d 233 (4th Cir. 1997); *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017 (5th Cir. 1987); *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1059 (9th Cir. 2002).

recently in the United States Supreme Court’s cross-burning (hate speech and incitement) decision in *Virginia v. Black*.⁸³

When we compare incitement cases with our institutional reckless disregard standard of awareness of unjustified risk of harm, we will see courts using the same type of analysis to adjust and refocus the *Brandenburg* incitement test. In the incitement setting this is accomplished through subcategorization – the creation of smaller, more specific categories of incitement (racial versus political threats, for example) which emphasize the altered probability of harm from a certain type of speech. In the process, the more general Brandenburg standard has been altered and recast, reflecting the judges’ impression of the difference in characteristics between speech ‘X’ and ‘mere advocacy.’

Watts and ‘True Threats’

One of the earliest boundary markers for the new incitement doctrine was handed down during the same term as *Brandenburg*. In *Watts v. United States*⁸⁴ the Supreme Court stated, almost off-handedly, the concept of a ‘true threat,’ a curiously undefined term that has since been embraced by lower courts as an intuitive limitation on free speech rights. Watts was an antiwar protester who stated at a rally that were he drafted, “If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.”⁸⁵ The Court, calling this ‘political hyperbole,’ not a

⁸³ 538 U.S. 343 (2003).

⁸⁴ *Watts v. U.S.*, 394 U.S. 705 (1969).

⁸⁵ *Id.* at 706.

‘true threat,’ held that Watts was not liable under a statute punishing threats against the President.⁸⁶

The true threat doctrine, as it has come to be called, is generally thought of as related to *Brandenburg*.⁸⁷ But it differs quite materially in content and in its lower *mens rea* requirement.⁸⁸ The Court’s distinction in *Watts* between ‘threats’ and ‘hyperbole’ was not based on any specifically articulated idea, but seems to have been largely intuitive,⁸⁹ and it was unaccompanied by any definition of a ‘true threat.’

In the absence of direction from the Supreme Court, however, the circuit courts have given the term substantive content, though adopting differing definitions of what qualifies as a ‘threat.’⁹⁰ A common feature of the definition is a lower *mens rea* requirement, typified by the Ninth Circuit’s statement that the “only intent requirement for a true threat is that the defendant

⁸⁶ *Id.* at 708. While Watts’ words were protected by the First Amendment, the decision left the statute intact, suggesting that at least in some contexts threatening remarks were beyond the protection of the First Amendment.

⁸⁷ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁸⁸ *See supra* notes 28-32 and accompanying text.

⁸⁹ *See R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

⁹⁰ *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996)(holding that statements made to an abortion doctor constituted true threats even though the statements never outright threatened the doctor’s life or safety); *United States v. McMillan*, 53 F. Supp. 2d 895 (S.D. Miss. 1999)(holding that the statement ‘where’s a pipebomber when you need one’ constituted a true threat when made repeatedly to a doctor who performs abortions); *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002)(holding that “wanted-type” posters identifying a specific doctor who provided abortions constituted a true threat).

intentionally or knowingly communicate the threat.”⁹¹ There is no requirement that the person intend to threaten or to carry out a threat, or a particular act of violence toward a known person, but merely that they intend to say something that would be interpreted as a threat.

The Ninth Circuit’s decision in the “Nuremburg Files” case, *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists (ACLA)*,⁹² illustrates this process of distinguishing and reshaping facts. The ACLA’s “Nuremburg Files” web site, among other things, listed the names and addresses of doctors performing abortions, indicating by various shadings who had already been killed, who had been injured, who had stopped performing abortions, and in the brightest lettering those who continue to perform abortions without apparent consequence (so far, by implication).⁹³ In the *Planned Parenthood* case the 9th Circuit held the web site to be a ‘threat,’ though the threat was only implied, not expressly stated, and the content of the “Nuremburg Files” was enjoined under the Free Access to Clinics Act and, according to the majority, without violation of the First Amendment.

The court was strongly divided, with the majority emphasizing the difference between intimidation by threat and the general advocacy doctrines. Judge Rymer stated that the case was a threat case, not an advocacy case,⁹⁴ by redescribing the characteristics of the speech⁹⁵ and the

⁹¹ *Planned Parenthood*, 290 F.3d at 1072.

⁹² 290 F.3d 1058 (9th Cir. 2002)

⁹³ *Id.* at 1065.

⁹⁴ *Id.* at 1072.

⁹⁵ *Id.* at 1072. (“Because of context, we conclude that the Crist and Deadly Dozen posters are not just a political statement.”)

harm justifying regulation of the speech in a way unfamiliar to the standard *Brandenburg* analysis. Under *Brandenburg*, harm originates from the speech's effect of producing specific non-speech harm to third parties. Under the *Planned Parenthood* analysis, the threat *itself* – the fear instilled in third parties by the threat of other harm – is described as a harm. Judge Rymer then links this logic to the holding in *Watts* that certain threats constitute a type of speech whose characteristics overcome the standard presumption against government prohibition of speech. This logic reconceptualizes the speech, emphasizing certain 'threatening' characteristics of the speech that are themselves harmful (or risky), thus redirecting the focus away from the linkage between the speech some *actual harm produced by the speech*. Once the threat itself is seen as a harm, the *Planned Parenthood* majority employ a (circular) 'clear and present danger'-like analysis without seeming to apply a lower standard than the First Amendment dictates.

Instructional speech

Another offshoot from incitement is a category that can best be described as 'instructional speech.'⁹⁶ In contrast to advocacy or threats, 'instructional speech' consists of express

⁹⁶ "Indeed, one finds in *Hit Man* little, if anything, even remotely characterizable as the abstract criticism that Brandenburg jealously protects. *Hit Man*'s detailed, concrete instructions and adjurations to murder stand in stark contrast to the vague, rhetorical threats of politically or socially motivated violence that have historically been considered part and parcel of the impassioned criticism of laws, policies, and government indispensable in a free society and rightly protected under Brandenburg. ... Ideas simply are neither the focus nor the burden of the book. To the extent that there are any passages within *Hit Man*'s pages that arguably are in the nature of ideas or abstract advocacy, those sentences are so very few in number and isolated as to be legally of no significance whatsoever." *Rice v. Paladin Enters.*, 128 F.3d 233, 262 (4th Cir. 1997).

instructions on how to carry out illegal activity.⁹⁷ The standard applied in such cases differs from the *Brandenburg* test because there is no required proof that specifically defined and intended illegal activity will occur immediately.⁹⁸ The standard is akin to the *dicta* in an older set of cases that distinguished certain speech from advocacy, stating that “preparing a group for violent action and steeling it to such action”⁹⁹ is not protected speech.

A paradigmatic modern example of instructional speech is *Rice v. Paladin Enterprises, Inc.*¹⁰⁰ *Paladin Press* published “Hit Man,” a book purporting to instruct would-be assassins. *Paladin* was sued after one of its readers performed a three-murder contract killing in accordance with the book’s advice.¹⁰¹ The Fourth Circuit ruled that the book was not fully protected First Amendment speech, but instead ‘instructional speech’ subject to a different regime than advocacy.¹⁰² Judge Luttig subtly altered the clear and present danger analysis, reconceptualizing the speech not as incitement but as “aiding and abetting.”¹⁰³ The speech, thus, was no longer deemed ‘mere advocacy;’ it was something different and more sinister. There was no longer a separation between the speech and the subsequent harmful action produced by the speech;

⁹⁷ See for example the list of prior restraints approved on tax abuse instruction books, *U.S. v. Schiff*, 269 F.Supp.2d 1262, 1273 (D. Nev. 2003).

⁹⁸ See *Rice v. Paladin Enters.*, 128 F.3d 233, 262 (4th Cir. 1997).

⁹⁹ *Noto v. United States*, 367 U.S. 290 at 298 (1960).

¹⁰⁰ 128 F.3d 233 (4th Cir. 1997).

¹⁰¹ *Id.* at 241.

¹⁰² *Id.* at 244-45.

¹⁰³ “In particular as it concerns the instant case, the speech-act doctrine has long been invoked to sustain convictions for aiding and abetting the commission of criminal offenses. *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 245 (4th Cir. 1997).

instead, in this conception, the action and speech are conceptually joined as the harm (aiding and abetting crime), with the harm not a specific subsequent act produced imminently by the speech, but instead the risk that such an act would occur. There is also an attempt to build the roots of this analysis out of other ground than *Brandenburg*, following instead Judge Rymer’s reliance on *Watts* in the *Planned Parenthood* case. Judge Luttig describes his decision as resting on a wider principle found “in a case [*Watts*] indistinguishable in principle from that before us.”¹⁰⁴

*Virginia v. Black*¹⁰⁵

It has only been recently that the Supreme Court has again spoken on the subjects of incitement, clear and present danger analysis, and what now appears to be a separate category of less protected, intrinsically harmful speech, of which cross burning is the paradigm. In *Virginia v. Black* the Court recast *Brandenburg*’s dividing line between threats and advocacy, and created a new analytical framework through which to assess the constitutionally required relationship between speech and harm – a framework, it appears, the bears a close resemblance to that employed in *Planned Parenthood* and *Palladin*.¹⁰⁶

Virginia v. Black involved the placement of a burning cross, the symbol of the KKK and of racial violence in the South, about 500 feet back from a well-traveled rural road in Northern

¹⁰⁴ *Id.* at 245.

¹⁰⁵ 123 S. Ct. 1536 (2003).

¹⁰⁶ *Id.* at 1549.

Virginia.¹⁰⁷ Persons driving by would be hard pressed not to see the cross. African Americans who so witnessed it would be, the Court said, struck with fear – intimidated, in the language of the Virginia statute.¹⁰⁸ The cross stood for racial violence, though it did not expressly advocate it in any way or time or to any specific persons. Like *Brandenburg*, also a cross-burning case, application of the traditional clear and present danger test would almost certainly have barred the State from regulating or prohibiting the burning flag. The causal link between the speech (a burning cross) and resulting harm – actual racial violence – was simply too vague, unspecific, and attenuated to satisfy the First Amendment.

But in *Black* the Supreme Court leapfrogged the *Brandenburg* analysis by creating a category of speech in which the “harm” is not a concrete act *produced by* the expression. Instead, the Virginia law at issue in *Black* criminalized intimidation, thus making the speech itself a harm.¹⁰⁹ Intimidation is not a threat backed up by an intent and probability that a harmful act will be imminently carried out. Intimidation is instead the fear actually felt by those who see the burning cross and interpret it as a threat – a terrible, though belief-based and non-physical, risk of harm.¹¹⁰ Under *Black*, in short, intimidation by words need not *cause* the harm; it *is* the harm. *Black* thus endorses the trend away from *Brandenburg*’s requirements of specific intent, harm produced by speech, and likelihood of specified harm, and toward reconceptualized harm

¹⁰⁷ *Id.* at 1542.

¹⁰⁸ *Id.* at

¹⁰⁹ *Id.* at 1541-42.

¹¹⁰ *Virginia v. Black*, 123 S. Ct. 1536, 1547-48 (2003); *see also American Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985).

in categories of cases. As the likelihood (risk) of harm increases, it seems, the level of and specificity of intent and harm are lowered to compensate.

Virginia v. Black represents the acceptance of the ‘true threat’ doctrine and all that it implies. The Court baldly states that threats are unprotected speech.¹¹¹ This statement elevates threat doctrine to an integral place in First Amendment doctrine. As recently as *Claiborne Hardware*, the Court had held that speech that looked much like today’s ‘true threats’ was instead protected advocacy. But the two concepts of threat and advocacy are largely irreconcilable; a threat is harm, and advocacy may produce harm, according to the Court, but the divide between the two is unspecified. Once speech is termed a ‘threat,’ the speech is placed in a category of speech with a higher risk of harm and, thus, a lower level of scrutiny. This is precisely what institutional reckless disregard would do, though it would still also require knowledge of the risk of harm and the absence of journalistic justification.

The relationship between advocacy, instructional speech, and threats

All of the doctrinal tests in the incitement area (advocacy, threats, instructional speech) are permutations of Holmes’ and Hand’s original work on incitement – a combination of the elements that went into *Masses*¹¹² and ‘clear and present danger.’ They use as factors intent, the nature of the speech, and the context in which the speech is delivered. Because the original tests were aimed at assessing a wide range of speech, the tests were general and mutable. For

¹¹¹ *Id.* at 1548.

example, it seems clear that Holmes' *Schenck* dissent, which provides us with the canonic phrasings of his 'clear and present danger' test, would not have been produced by a case involving an anarchist randomly distributing instructions on how to build bombs.

The years since *Brandenburg* have recognized this difference, which is manifested today in a trend towards subcategorization. The current doctrinal tests subdivide the area into discrete types of speech, each with its own standard for liability. Each of these areas of content has a certain level of 'concreteness.' Advocacy is the least concrete of these content areas; it involves ideas and rhetoric, vague and slippery. *Brandenburg* itself describes the Klan speech at issue as 'abstract advocacy.' There is no expression of anything beyond a generalized ill will towards various groups in society – nothing to indicate the targeting of a particular group at a particular time.¹¹³

In the *Watts* line of cases, the speech at issue differs from the 'advocacy' in *Brandenburg* by its concrete nature.¹¹⁴ Threats are concrete; the ill will is directed toward a specific person or group. To the extent that there is a coherent threat doctrine, it requires that threats be made to specific targets, and have a concrete and direct message – "You will be harmed." Threat cases use an objective intent standard;¹¹⁵ advocacy cases require specific intent. The categories of speech present different points on a scale contrasting concreteness against requisite *mens rea*.

¹¹² *Masses Publishing Co. v. Patten*, 244 F. 535 (D.C.N.Y. 1917).

¹¹³ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

¹¹⁴ *Watts v. U.S.*, 394 U.S. 705 (1969).

¹¹⁵ *Id.*

In the instructional speech cases, the speech at issue need not differ in its target audience from advocacy (i.e., the audience need not be specific). The difference is the content of the speech: concrete and specific instruction on how to commit a crime. A paradigm example is *United States v. Buttorff*,¹¹⁶ a tax evasion case from Iowa. Buttorff was convicted because his tax protest speeches went beyond mere advocacy when he “explained how to avoid withholding and [his] speeches and explanations incited several individuals to activity that violated federal law and had the potential of substantially hindering the administration of the revenue.”¹¹⁷ The concrete nature of instructions eliminates some of the uncertainty in the causal chain between speech and harm, making the probability of the speech causing a type of harm greater.

All of these areas of incitement law can trace their pedigree to Oliver Wendell Holmes and Learned Hand, as they involve a multipart balancing: an assessment of the harm, the likelihood of the harm, and the intent of the speaker. *Brandenburg* stakes out the strong version of this balancing, emphasizing the harm of suppression and requiring that regulations on speech meet a number of requirements, all of which, if proved, increase the likelihood of concrete harm resulting from the speech. The new subcategories take a less protective approach, as demonstrated at the Supreme Court level in *Virginia v. Black*.¹¹⁸

Incitement and Institutional Reckless Disregard

¹¹⁶ 572 F.2d 619 (8th Cir. 1978).

¹¹⁷ *United States v. Buttorff*, 572 F.2d 619, 624 (8th Cir. 1978).

The analogy that we can take from incitement is that courts have generally required lower standards of intent in laws regulating speech perceived to present a higher probability of harm (though a less specific definition of it).¹¹⁹ Threats and instructional speech, treated as potential harms justifying regulation without regard to the likelihood of the ultimate act occurring, depart downward from advocacy's specific intent standard, decreasing the level of intent necessary for liability.¹²⁰ The basis for that change is the change in the content of the speech from abstract to concrete (although there is a corresponding change in the harm from concrete to abstract – intimidation, aiding and abetting through speech). There is less uncertainty about the causal chain between an instruction about how to accomplish an act than with advocacy of that action, though the form of the harm and its object and timing are perhaps more uncertain with instructional speech than with advocacy. As the probability of harm from the speech grows, the standard of intent for liability – its specificity as to harm and object – becomes less stringent.

The judgment underlying the movement away from incitement and the *Brandenburg* clear and present danger test appears to be that very risky instructional speech is not speech deserving of 'breathing room;' that the definite and higher *risk* justify a legal standard that is not premised on a mistrust of overinclusiveness. Since there is little direct harm from the speech in

¹¹⁸ 123 S.Ct. 1536 (2003).

¹¹⁹ *See supra* notes 15-27.

¹²⁰ "While the requirement that the consequence be "imminent" is justified with respect to mere advocacy, the same justification does not necessarily adhere to some speech that performs a teaching function. As our cases have long identified, the First Amendment does not prevent restrictions on speech that have "clear support in public danger.'" Statement of Justice Stevens respecting the denial of the petition for writ of certiorari, *Stewart v. McCoy*, 123 S.Ct. 468, 469-70 (2002), citing *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

Brandenberg-style advocacy, the standard for liability is high. The judgment is that there usually will be little inadvertent harm proceeding directly from the speaker's words. There will almost always be some sort of thought between hearing and acting, which is what the First Amendment is supposed to foster.

In 'instructional speech' and 'threats,' however, the requisite intent drops as the uncertainty in the causal chain diminishes – as the risk of underinclusiveness is reduced by a greater risk, or inevitability, of harm is found, or as the risk of harm is virtually certain because the speech itself is seen as the harm. Both the instructional speech and the true threat doctrines have a different causal 'look' than advocacy. In advocacy, there is an attenuated causal link between the speech and any ultimate harm. The concrete nature of threats and instructional speech shrinks (or eliminates) that gap, cutting out the indeterminacy between the speech and a harm. As the attenuation between speech and illegal act lessens, the level of protection from the First Amendment decreases. Advocacy gets a demanding intent standard; the law demands less intent in situations involving other (more inherently dangerous) types of speech.

This relationship between causality and intent has parallels in libel doctrine. In incitement, the *mens rea* changes with the type of speech: the more concrete the chance of harm associated with the speech, the lower the bar. Libel does not currently draw lines between different types of speech within libel, so that distinction is not precisely relevant. In order to draw an analogy here, we must have some sort of risk continuum. There must be some 'more to less' relationship that we can look at to parallel the change in concreteness found in incitement. We cannot alter the number of links in the chain, but we can see a similar effect by seeing an increase in the number of chains. We can draw that parallel in libel by looking at institutional

malice as action that creates a higher probability of overall harm from an action because of the number of future events that an institutional practice might cause,¹²¹ much like the instructions in *Palladin* might be unlikely to produce a specific type of harm in a specific time or place, yet its repeated publication makes the fact of harm almost inevitable (somehow, someone, sometime, someplace).¹²²

In malice there is an analogous distinction between individual acts and institutional acts, and how much risk a certain behavior creates. Single acts by single actors produce little probability of harm. The world is not repeatedly bombarded with problems if we set the bar high in those situations by demanding specific intent for liability. However, once we move past individuals and individual acts, we reach a set of actions with a greater potential impact. As one moves up the chain in the news organization, risky decisions are increasingly likely to affect a greater number of stories. An act at the institutional level increasing the error rate does not affect one story; it affects many.

Institutional recklessness deals with institutional disregard of knowingly risky behavior. In incitement, redefinition and subcategorization have changed our conceptions of what constitutes proscribable speech. Similarly, institutional recklessness is a subtype of the reckless disregard that has always been bundled into actual malice along with intentional malfeasance. While actual malice and institutional recklessness are both addressed at the same field of speech, the focus is on different actors in the production of that speech. Institutional recklessness, like the newer subcategories of incitement, focuses on a category of speech while emphasizing

¹²¹ ROBERTS, *supra* note 8; CRANBERG ET AL., *supra* note 8.

certain characteristics within that field of speech that make harm more probable, justifying a different legal standard for liability. By taking that approach, institutional recklessness encompasses more in the reckless disregard area than the law traditionally has. If the harm that libel regimes are intended to prevent can be re-conceptualized from defamatory publication to the *risks* that a media organization takes when it makes institutional corporate decisions, the field of inquiry can be broadened beyond the individual actors and focused more on those practices that can affect a greater range of situations.

The demanding and subjective standards of ‘actual malice’ and “reckless disregard for the truth” make sense in the context of one reporter, one story. There, actual malice and reckless disregard require, quite rightly, that the reporter know of, or seriously believe, the falsity of a particular story in advance of its publication. There can be, and will be, a million little individualized factors that will affect any one story. Where the factors involved reflect individualized decisions in a particular context, the law should give reporters breathing room, lest we create a de facto code of conduct for journalism through the courts.¹²³

However, where the same factors appear again and again as influences, the notion of stepping back and not pre-judging is less attractive. The rationale behind a broad protection is to save journalistic flexibility and freedom. If, however, the same practice appears again and again with a negative outcome, it should not be shrugged off. As the balance of factors that create the need for the original rule changes, so should the standard.

¹²² Rice v. Palladin, 128 F.3d 233 (4th Cir. 1997).

¹²³ Brian C. Murchison et al., *Sullivan’s Paradox: The Emergence of Judicial Standards of Journalism*, 73 N.C.L. Rev. 7, 98-99 (1994).

Occasionally, courts have seen the types of behavior that might qualify as institutional recklessness. Without that particular lens, the courts have not always chosen the outcome that would address the media practices that contributed to the problem. By reexamining these cases, however, we can see how institutional recklessness might be applied in some of the more famous libel cases.

The cases of *Curtis Pub. Co. v. Butts*,¹²⁴ and *Associated Press v. Walker*,¹²⁵ are interesting because the two suits were decided in one opinion, with different results. Because of this the cases serve neatly as an illustration of the bounds of libel and privilege. In *Butts* the Court examined a newspaper story accusing the athletic director of the University of Georgia of ‘throwing’ a game. Wally Butts was, at that time, being considered for a professional coaching job which he did not receive. He sued successfully, and the *Saturday Evening Post* appealed. The Court eventually found against the *Saturday Evening Post*.¹²⁶ Justice Harlan listed a number of factors revealed at trial that could logically have led the jury to find that there was a reckless lack of regard for the truth of the publication: the writer assigned to the story could have, and did not, seek more information; the *Saturday Evening Post*’s knowledge of the potential lack of veracity of George Burnett, the source of most of the information in the story;¹²⁷ and a policy of “sophisticated muckraking” adopted by the *Saturday Evening Post*.¹²⁸ Justice Harlan indicated

¹²⁴ *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975 (1967).

¹²⁵ *Associated Press v. Walker*, 388 U.S. 130 (1967).

¹²⁶ *Id.* at 157-58.

¹²⁷ *Id.* at 156-57.

¹²⁸ *Id.* at 158, (1993) .

his own ambivalence toward the *Sullivan* actual malice standard,¹²⁹ noting that different points in the libel universe argued for rules striking different balances between privacy interests and the interest in robust discourse. This is precisely the point that we make. While institutional recklessness is not the same as the standard that Justice Harlan formulated (a test tied to ‘journalistic standards’), it is an alternative way of trying to rebalance the tests.

The D.C. Circuit decision in *Tavoulaeos v. Piro*¹³⁰ is a close analog to *Butts*. Indeed, the *Piro* court expressly recognized that the fact patterns were very similar. In both cases there was an editorial policy in place that promoted sensational stories. Both courts indicated that there was at least some impact from this emphasis on the ultimate newspaper product. While the *Piro* court ultimately did not see this as actual malice, it provided an interesting contrast between two approaches to institutional malfeasance: Justice Harlan’s professional standards approach, and the demanding actual malice approach.

Between the two poles, *Piro*¹³¹ contains a more in-depth analysis of the impact of editorial decisions and policies on reporter actions. The majority opinion did not choose to characterize the *Washington Post*’s action toward Tavoulaeos as actual malice. As there was ample evidence that the *Washington Post* knew that its procedures were affecting its reporters’ judgments, *Piro* stands for the proposition that such behavior usually will not constitute ‘actual malice.’

¹²⁹ “...the rigorous federal requirements of New York Times are not the only appropriate accommodation of the conflicting interests at stake.” *Curtis Pub. Co. v. Butts*, 388 U.S. 130, (1967).

¹³⁰ 817 F.2d 762 (D.C. Cir. 1987)(en banc).

The point is reversed in the *Piro* dissent, which appears much more willing to consider the newspaper’s general practices as a part of the reckless disregard inquiry.¹³² The dissent notes that the *Post* had already run an editorial about a fabricated story, noting that the ‘holy shit’ atmosphere was a significant contributing factor to the mindset of the reporter. This is not enough under the typical individualized actual malice test. The dissent instead points to the Harlan test – “highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.”¹³³ This test is usually dismissed as ambiguous and less protective than necessary, but the dissent’s conclusion that the paper *knew that it was generating problems and did not move to ‘fix’ them* indicates that an alternative form of recklessness – the knowing creation of a risk of falsity – might be appropriate in this setting. Institutional pressures had already led to one spectacular instance of falsity in reporting, a Pulitzer Prize-winning fabrication, as Judge McKinnon noted in dissent.¹³⁴ The *Washington Post* had indicated that it was aware that there were institutional pressures to produce spectacular stories, which could and did lead to false news reports and provided an incentive to behave badly. Institutional knowledge of the effect that the institution’s policies had produced, coupled with an apparent lack of reaction to the previous incident, would appear to be reckless disregard of the risk that encouraging this “holy shit” culture of aggressive reporting

¹³¹ *Piro*, 817 F.2d 762 (D.C.Cir.1987).

¹³² *Id.* at 834.

¹³³ *Id.* at 835 (quoting *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967)).

¹³⁴ *Id.* at 834 (fn. 46).

embodied when not accompanied by scrupulous attention to detail. But in our view it could only be relevant if coupled with non-journalistic purposes to be served by the risky behavior.

C. Commercial Speech

“Commercial speech” is typically thought to justify more active legislative intervention and regulation of speech than is possible with non-commercial, often political, and fully protected speech.¹³⁵ The overlap in spheres of influence of commercial and noncommercial speech, and the deviation of commercial speech from the standard justifications for First Amendment freedoms of speech (individual autonomy and freedom, self-government), bring commercial speech more substantially within the legislature’s purview.

It also suggests a further development: the same functional/normative infirmities that push commercial speech into the legislature’s power should also bring it within the judiciary’s common-law powers. Commercial speech’s First Amendment infirmity is not that it is ‘not-speech.’ It falls within first amendment speech.¹³⁶ Rather, the argument is that it falls within those categories of speech that the various branches of government have the power to restrict.

¹³⁵ *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Central Hudson Gas and Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) (Jeffries Article, other articles)

¹³⁶ There may be an argument that it is speech without a speaker, if we view the media organization and not the author as the speaker in these cases. Certainly it is the organization, and not the individual, who is inevitably sued. There’s something to work through there- why is a collective communicative choice sometimes speech and sometimes not?

If there is some characteristic of commercial speech that renders it ‘less protected’ against legislative regulation, surely that lower level of protection carries over to lawsuits. Aren’t the two merely two different ways of controlling behavior, one public [governmental] and the other private [individual]? The legislature would normally be able to regulate speech [as speech] only under strict scrutiny. Why do we not protect commercial speech from legislative intrusion? Because although it may meet many of the tests we lay for ‘speech’ under the First Amendment, it is not the type of speech that the Framers intended to protect and it is not the type of speech that supports the self-governing and autonomy values that we have come to ascribe to protected speech in general.¹³⁷ It may be speech, but it’s not motivated to contribute to the public dialogue.¹³⁸ And if it’s not contributing to the public consciousness about what is and is not important, then it lays outside the protected core of speech freedom. If commercial speech is less protected from legislative regulation and lawmaking, then it is also less protected from judicial, common law, lawmaking, including the tort of defamation.

Why is institutional recklessness arguably commercial speech?

What we define as “institutional recklessness” carries with it an implicit statement that the activities are justified on grounds unrelated to the ends of freedom of speech or press.¹³⁹ If institutional recklessness is, as we suggest, the result of speech decisions that are motivated by purely economic concerns, shouldn’t it be excluded from the realm of public-discourse driven

¹³⁷ Jeffries article

¹³⁸ *Virginia State Board of Pharmacy v. Virginia Citizen’s Consumer Council, Inc.*, 425 U.S. 748 (1976).

protections? The only reason we tolerate false fact is that, supposedly, the process that spawned the false statements was motivated by the intent to engage in public discourse.¹⁴⁰ If we remove that intent, we remove the justification for shielding it with the First Amendment. There is no constitutional protection for false fact.¹⁴¹ The constitutional protection surrounds the attempt to engage in public discourse. When that enterprise is left behind, so are the protections of *Sullivan*.

Robert Post has rightly criticized the *Central Hudson* test for protection of commercial speech because it is abstract and judicially unworkable.¹⁴² When he attempts to break it down into something usable, he proposes a conception of First Amendment (non-commercial) speech that coincides with personal, democratic-involvement speech and speech that is within the press-as-public information-institution.¹⁴³ Institutional recklessness lies within neither of these categories. It is not an instance of a person individually contributing to the public dialog, and it is not an instance of a media institution contributing information that will help individuals join in the public dialogue.

In commercial speech doctrine, and more generally in free speech doctrine as applied to less protected forms of expression, motivation plays a key role in how speech is categorized and judged. This is the case with fighting words,¹⁴⁴ libel,¹⁴⁵ advocacy/incitement,¹⁴⁶ commercial

¹³⁹ See text accompanying notes *supra*.

¹⁴⁰ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

¹⁴¹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 384 (1974).

¹⁴² Robert Post, *The Constitutional Status of Commercial Speech*, 48 U.C.L.A. L. Rev. 1 (2000).

¹⁴³ *Id.* at

¹⁴⁴ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

speech,¹⁴⁷ and indecent speech.¹⁴⁸ In all of these areas, intent of the speaker plays a significant definitional role. These types of non-first amendment speech are usually close to First Amendment speech: it is not the valuable content that the law looks at, but rather the presence or absence of the contaminating non-speech element of intent or purpose.¹⁴⁹ If it is there, the speech is entitled to reduced first amendment protection.¹⁵⁰ That should be the case with institutional recklessness. If the institution as a whole can be said to be at fault for recklessness, and the reason for the institution's action bears no relation to journalistic purposes, the speech at issue crosses into a less protected and more regulable field of expression.

Post's account, of course, is not the conventional account of commercial speech. It is in some respects artificially narrowing of protected speech, but it does provide a coherent and constitutionally grounded theory explaining why institutional recklessness constitutes a type of expressive choice yielding false fact that should be more susceptible to liability for resulting harm, and it ties together two areas of the law that are ultimately related.

D. Product Liability and News Enterprise Liability

¹⁴⁵ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 384 (1974).

¹⁴⁶ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

¹⁴⁷ *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

¹⁴⁸ *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

¹⁴⁹ *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

¹⁵⁰ *Id.* at

Over the past half-Century tort law has witnessed a profound change from a system that imposed liability strictly and only¹⁵¹ on the basis of the fault of an individual, toward a system that now often assigns responsibility at the enterprise level and shifts risks of harm and loss in recognition of the responsibilities that today's large and complex corporate organizations must bear¹⁵² Institutional reckless disregard for truth is consistent with this fundamental trend toward risk distribution and assignment of liability in terms of non-fault-based ideas of social responsibility. It is a trend most clearly seen, perhaps, in the fields of strict and product liability for manufacturers and distributors of defective or dangerous products.

To prevail in a product liability case a plaintiff must at least prove two things. First, the plaintiff's harm must have resulted from a product defect.¹⁵³ Second, the product must have been defective when it left the hands of the defendant.¹⁵⁴ Before 1960, a plaintiff also had to prove that the defendant was negligent either in manufacturing the product or distributing the product.¹⁵⁵ Under current law, however, a plaintiff is not always required to show negligence. Instead, a strict liability standard is used to determine fault.¹⁵⁶ For strict liability to apply a

¹⁵¹ With few exceptions, for example, libel. Richard A. Epstein, Torts 381-95 (1999).

¹⁵² *Id.*

¹⁵³ JAMES A. HENDERSON, JR. & AARON D. TWERSKI, PRODUCTS LIABILITY: PROBLEMS AND PROCESS, 3 (4th ed. 2000).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

plaintiff only needs to show that the product does not conform to the manufacturer's intended design.¹⁵⁷

This is the basic theory behind products liability.¹⁵⁸ Elaborations on this basic theory, starting with the concept of negligence, also exist. First, a plaintiff who must prove negligence can do so in various ways. A plaintiff could show that the manufacturer performed inadequate safety testing on the product.¹⁵⁹ A plaintiff could challenge the quality control process, or claim that an employee executed the quality control process incorrectly.¹⁶⁰ Under the doctrine of respondeat superior the manufacturer will be responsible for the negligence of its employees.¹⁶¹

These examples of negligence apply to a manufacturer of a product. A plaintiff can also prove that a wholesaler or retailer is negligent and thus liable under a products liability theory.¹⁶² The *Restatement of Torts Second*¹⁶³ states that at the very least a wholesaler/retailer is required to

¹⁵⁷ HENDERSON & TWERSKI, *supra* note 98 at 3.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 6. *See also* Ford Motor Co. v. Zahn, 265 F.2d 729 (8th Cir. 1959).

¹⁶⁰ HENDERSON & TWERSKI, *supra* note 98 at 7. *See also* Jenkins v. General Motors Corp., 446 F.2d 377 (5th Cir. 1971).

¹⁶¹ For example, a plaintiff could show that the manufacturer was negligent in obtaining the raw materials necessary to create the product, or that the manufacturer was negligent in shipping the product. *See* HENDERSON & TWERSKI, *supra* note 98 at 7; RESTATEMENT (SECOND) OF TORTS § 395 cmt. g (1965).

¹⁶² HENDERSON & TWERSKI, *supra* note 98 at 7.

¹⁶³ RESTATEMENT (SECOND) OF TORTS § 401 (1965). *See e.g.*, Haymore v. Thaw Shovel Co., 446 S.E.2d 865 (N.C. App. 1994); Sears Roebuck and Co. v. Black, 708 S.W.2d 925 (Tex. Ct. App. 1986; Sabloff v. Yamaha Motor Co., Ltd., 113 N.J. Super. 279 (1971).

prevent distribution of products they know, or in the exercise of reasonable care should know, are defective.¹⁶⁴

But negligence is not always required to be proved. In Henningsen v. Bloomfield Motors, Inc.,¹⁶⁵ and Greenman v. Yuba Power Products, Inc.,¹⁶⁶ the courts eliminated the requirement that a plaintiff prove negligence. Instead, strict liability was adopted. Strict liability evolved out of the concept that under the Uniform Sales Act (later the U.C.C.) there was an implied warranty that accompanied the sale of any good.¹⁶⁷ This warranty guaranteed that the product was reasonably fit for the ordinary purpose for which it would be used. A defective product could not be used for the purpose it was intended; therefore, the manufacturer violated its implied warranty.¹⁶⁸ Strict liability was believed to “better enhance social utility by reducing the costs associated with accidents and promote fairness.”¹⁶⁹ It does this by satisfying four main

¹⁶⁴ The most common way a plaintiff proves negligence is through the use of *res ipsa loquitur*. *Res ipsa loquitur* allows an inference of negligence to be drawn from the occurrence of an accident involving an instrumentality (the product) within the defendant’s control under circumstances where such an accident would not ordinarily occur in the absence of negligence. However, *res ipsa loquitur* only applies if a defendant has exclusive control of the thing that caused the injury and the accident is of such a nature that it ordinarily would not occur in the absence of negligence by the defendant. Fleming James, Jr., *Proof of Breach in Negligence Cases*, 37 Va. L. Rev. 179 (1951); *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453 (1944). See also HENDERSON & TWERSKI, *supra* note 98 at 11.

¹⁶⁵ 161 A.2d 69 (N.J. 1960)

¹⁶⁶ 377 P.2d 897 (Cal. 1963)

¹⁶⁷ HENDERSON & TWERSKI, *supra* note 98 at 81-82.

¹⁶⁸ *Id.*

¹⁶⁹ Henderson, *Coping with the Time Dimension in Products Liability*, 69 Cal. L. Rev. 919, 931 (1981).

objectives: “encouraging investment in product safety, discouraging consumption of hazardous products, reducing transaction costs, and promoting loss spreading.”¹⁷⁰

In spite of strict liability, a plaintiff still needs to prove that a defect in the product was a cause of the plaintiff’s harm and that the product was defective when it left the hands of the defendant.¹⁷¹ To show that a product was defective when it left the hands of the defendant, the Restatements would allow a plaintiff to use circumstantial evidence that would support an inference of a defective product.¹⁷² The courts have reasoned that while a seller should not be

¹⁷⁰ *Id.*

¹⁷¹ *See supra* note 98 and accompanying text.

¹⁷² Restatement of Torts, Third: Product Liability, Tentative Draft No. 2 (1995) states: It may be inferred that the harm sustained by the plaintiff was caused by a product defect, without proof of the specific nature of the defect when:

- (a) the incident resulting in the harm was of a kind that ordinarily would occur only as a result of product defect; and
- (b) evidence in the particular case supports the conclusion that more probably than not:
 - (1) the cause of the harm was a product defect rather than other possible causes, including the conduct of the plaintiff and third persons; and
 - (2) the product defect existed at the time of sale or distribution.

The Restatement of Torts, Second §402A (1965) states the strict liability standard:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumers, or to his property, if
 - (a) the seller is engaged in the business of selling such a product, and
 - (b) it is expected to and does reach the user or consumers without substantial change in the condition in which it is sold.
 - (2) The rule stated in Subsection(1) applies although
 - (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not brought the product from or entered into any contractual relation with the seller.

Comment (I) elaborates on what is meant by unreasonably dangerous. To be unreasonably dangerous “the article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.” However, unreasonably dangerous is no longer a

liable for all harm resulting from its product, a seller should be liable from all harm resulting from a defect in a product.¹⁷³

As stated earlier, not everyone who places a product in the market will be held strictly liable for product defects. For example, state legislation in 49 states protects sellers of blood (hospitals, blood banks, etc.) from strict products liability if the blood they are selling is tainted with HIV or Hepatitis.¹⁷⁴ A manufacturer can be immune if a consumer never formed an intent to buy the product. For example, a woman was harmed when a glass lid shattered on her hand when she picked it up in the store, but because she had not yet formed the intent to buy the lid, strict liability did not apply.¹⁷⁵ Courts also refuse to extend strict liability to cover financial lessors.¹⁷⁶ Suppliers who provide “pure services” are not accountable under strict liability.¹⁷⁷ These include health care providers, architects, attorneys, and engineers.

requirement in some jurisdictions. In California, a plaintiff does not have to prove that the defective condition made the product unreasonably dangerous to the consumer. *Cronin v. J.B.E. Olson Corp.*, 501 P.2d 1153 (1972).

¹⁷³ The Restatement of Torts, Third: Products Liability §1 refines this standard by stating:

- (a) One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the product defect.
- (b) A product is defective if, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. Section 2 defines different categories of product defects; however, the section does not require that a manufacturing defect render the product not reasonably safe.

¹⁷⁴ Products L. Rep. (CCH) ¶ 1630.

¹⁷⁵ *McQuiston v. K-Mart Corp.*, 769 F.2d 1346 (11th Cir.-1986)

¹⁷⁶ *Abco Metals Corp. v. J.W. Imports Co., Inc.*, 560 F.Supp. 125 (N.D. Ill. 1982).

¹⁷⁷ *Clancy v. Oak Park Village Athletic Center*, 364 N.W.2d 312 (Mich. 1985).

There have been some, though comparatively few, instances of product liability suits brought against publishers for errors in a publication. Perhaps the most relevant case for our purposes is a Ninth Circuit case, *Winter v. G. P. Putnam's Sons*,¹⁷⁸ in which the plaintiffs purchased a book, “The Encyclopedia of Mushrooms,” to help them collect and eat wild mushrooms. Using the book, the plaintiffs collected and consumed wild mushrooms. They fell ill and required liver transplants. Putnam neither wrote nor edited the book, but rather acted solely as the publisher. The Court refused to award damages to the plaintiff.

The Court began its discussion by noting that “the language of products liability law reflects its focus on tangible items . . . The purposes served by products liability law also are focused on the tangible world and do not take into consideration the unique characteristics of ideas and expressions.”¹⁷⁹ The court believed that strict liability was not a question of fault, but rather a determination of how society wants to allocate certain costs that come from the creation of products in an environment where the consumer cannot always protect herself. Claims based on ideas and expression should be litigated through copyright, libel, misrepresentation, mistakes, etc. The Court was concerned that imposing strict liability on publishers would have a chilling effect on speech. The Winter holding has been adopted in other jurisdictions.¹⁸⁰

Yet product liability for publishers, like incitement, has experienced change. Not only is enterprise liability for highly risky behavior based strictly on stock market and financial concerns

¹⁷⁸ *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033 (9th Cir. 1991).

¹⁷⁹ *Id.* at 1034.

¹⁸⁰ *Garcia v. Kusan, Inc.*, 39 Mass. App. Ct. 322 (1996); *Birmingham v. Fodor's Travel Publications, Inc.*, 833 P.2d 70 (Haw. 1992); Note, *Read at Your Own Risk: Publisher Liability for Defective How To Books*, 45 Ark. L. Rev. 699 (1992).

more akin to commercial speech, and fully consistent with the evolution of ideas of incitement and harm, but the function of liability in shaping and altering speech – in encouraging or discouraging incentives within a firm toward better or lesser orders of expression – is perhaps uniquely important in the case of the modern press institutions. A form of liability that would encourage more and better expression in the news setting can easily be seen as powerfully consistent with the purposes of the First Amendment.

V. Conclusion

As I write this, I'm down a city government reporter, under a hiring freeze and a no overtime edict from above and just found out that one of my newsroom positions I hoped to fill this year will be a budget casualty rather than an anticipated big moment. My budget is several percentage points less than it was when I took over in October '98 and my staff is down three people from that time as well - even though we reinstated a Sunday edition in 1999.

Oh, and did I mention I'm supposed to be growing circulation and readership? I hope I don't sound whiney. I don't intend to be that way. However, I am exhausted - without the exhilaration that one gets from a big story or project - and wonder every day if the grass isn't greener some place else.¹⁸¹

The actual malice rule, we believe, is an essential protection for journalists. It protects against liability for the honest mistake. It facilitates the “wide open, uninhibited, and robust

181 An anonymous editor of a newspaper owned by a publicly owned newspaper company, 2004 (on file).

debate” upon which the First Amendment relies, and the equally robust press upon which democracy ultimately relies. The actual malice rule does this by disallowing second-guessing by a court or jury on the accuracy of a particular story, absent proof that the reporter and editor *knew at the time of publication of the specific story* that it was false and defamatory in some particular, or that the reporter or editor actually entertained serious doubts about truth and nevertheless published the story without taking easily available steps to confirm or corroborate the known defamatory fact.

But it must also be said that the very premise on which the actual malice rule rests is that of a functioning press engaged in journalism and its aims of truthful and important and professionally judged information widely disseminated to a public audience – a press in which judgments about coverage, editorial process and policy, and organization are made with journalism and its values in mind. Such policies may be controversial. They may involve sacrifice of long-embraced editorial processes or journalistic standards in order to preserve a news organization, or to strengthen it in the long run, or to participate in its constant and dynamic changes over time.

But what about changes in process or production or organization or incentives in the newsroom that have nothing to do with journalism and everything to do with the parent company’s financial interests in the stock market, or the value of options, or the unbroken string of quarters and years in which revenues and margins have increased? What about decisions about process and production and incentive and newsroom resources that take no serious account of journalistic quality (or the consequences of its loss), and that are made with awareness of and indifference to the sacrifice of truth? Should decisions made about the newsroom in the face of

known and material increases in the risk of error and indifferently to journalism be protected by actual malice, an ill-fitting standard that focuses on the particular story and not on its systematic cause, and that rests on the assumption that the institution to be benefitted by actual malice's protective shield is one devoted first and foremost to journalism?

It is our view that actual malice does not fit such "institutional" choices to foster falsehood by reckless corporate policies or processes. We also believe that the stakes for the First Amendment are infinitely greater with institutional reckless disregard for the truth, at a systematic level, than for the occasional falsehood published even with knowledge of its falsity. The latter may condemn the reporter and editor as sloppy or worse. But if specifically focused actual malice is all that exists – if errors spawned systematically by policy choices are always free from liability because the errors cannot by definition be assigned to the writer's actual knowledge about truth – then actual malice operates perversely to absolutely immunize *and thus to encourage and reward* choices at the corporate level.

It is important to remember what freedom of the press is all about. A free press is, to be sure, a source of countervailing authority and a means of "checking" government exercises of power. But its fundamental place is more basic and democratic, as the Peoples' Charter Union expressed it years ago in the midst of the fight against the Stamp Tax:

We are told that Englishmen are too ignorant to be entrusted with that franchise which is now nearly universal in Western Europe; we demand, then, that ignorance should no longer be compulsory. It is not always easy to know who are our real friends; but we think we are safe in denouncing as our enemies all those who desire to perpetuate our ignorance. By the penny stamp not only are we debarred from the expression of our thoughts and feelings, but it is made impossible for men of education or of capital to employ themselves in instructing

us, as the price of their publication would be enhanced by the stamp to an amount which we cannot pay. A cheap *stamped* newspaper cannot be a good one. And if we are asked why we cannot be satisfied with the elegant and polite literature which may be had cheaply, we reply that we can no longer exist upon the earth without information on the subjects of politics and political economy.... And we say to those who are within the pale of the Constitution, "if you cannot give us this knowledge, at least do not prevent us from seeking it ourselves; to tax the light of knowledge was ever a crime...."¹⁸²

Exclusive and across-the-board application of the actual malice test in press cases would not only protect the reporter and editor of a story from liability; it would also, and more significantly, immunize all corporate and business decisions in a news organization, including those that seriously and knowingly damage the journalism practiced in the newsroom. Such an incentive to compromise journalism and its quality, as long as it is done at wholesale, would be deeply tragic. It would compromise the very purposes of the First Amendment, in whose name the organizations are supposed to function.

182 Collet Dobson Collet, *History of the Taxes On Knowledge: Their Origin and Repeal*, 42-46 (facsim. Reprint 1971) (1933).