

# California Law Review

---

VOL. 74

MAY 1986

No. 3

---

Copyright © 1986 by California Law Review, Inc.

## Foreword: The Sociological Tort of Defamation

Jerome H. Skolnick†

Defamation is a distinctively sociological tort. "It is to be observed," writes Veeder, "that it is reputation, not character, which the law aims to protect. Character is what a person really is; reputation is what he seems to be."<sup>1</sup> The protection defamation law affords is to the individual's projection of self in a society. Individuals, however, constitute themselves in various milieus—business associations, communities, families—and in differing ways. Part of defamation law's complexity may be attributed to judicial efforts to remedy different harms in a variety of social settings. Remedies that seem reasonable and proper at one time, in one community, may appear legally and morally flawed in another.<sup>2</sup>

As a sociological tort defamation also invites a more comprehensive sociological analysis, suggesting four sorts of research. One approach would focus on the social history of defamation law, examining how political and economic change influences doctrinal developments. Another analysis would investigate how these changes are tied to refashioned conceptions of what the law was supposed to accomplish. A third would analyze the practices and policies developed by various forms of media in response to legal change. Finally, a sociological researcher

---

† Professor of Law (Jurisprudence and Social Policy), Boalt Hall School of Law, University of California, Berkeley. B.B.A. 1952, City College of New York; Ph.D. 1957, Yale University. I wish to thank Alan Childress for research, assistance, and good advice in the preparation of this Foreword. I also wish to thank Robert Post for his comments, his collegiality, and the intellectual excitement he has generated in me and in our students.

1. Veeder, *The History and Theory of the Law of Defamation II*, 4 COLUM. L. REV. 33, 33 (1904).

2. *Flood v. News & Courier Co.*, 71 S.C. 112, 50 S.E. 637 (1905) (South Carolina Supreme Court held it clearly libelous to publish newspaper story describing a white man as a negro).

could examine the impact of defamation law on litigation and the trial courts.

Although the papers in this Symposium do not amount to a full fledged sociological overview of defamation law, various articles do address different aspects of the sociology of defamation law, which has become an extraordinarily controversial and lively subject.<sup>3</sup>

Robert Post's Article makes an original and significant contribution to the sociology of defamation law by examining its social foundations. Post offers a trenchant consideration of the social meaning of the reputational interest.<sup>4</sup> The word "reputation," he points out, can signify at least three different things. First, reputational harm can suggest property loss. "One's good name," writes Veeder, "is . . . as truly the product of one's efforts as any physical possession; indeed, it alone gives to material possessions their value as sources of happiness."<sup>5</sup> Loss of reputation can also mean loss of honor; or loss of dignity. A corporation falsely accused of bankruptcy might lose property, but it cannot lose dignity, a distinction that judges do not always appreciate.<sup>6</sup> A doctor reputed to have been convicted of malpractice can lose both. Although public officials accused of corrupt practices may dishonor the office as well as themselves, the Constitution is less concerned with protecting the honor of public officials, which had been the principal function of the law of seditious libel, than with ensuring the freedom of the citizenry to check the misconduct of public officials.<sup>7</sup> Post offers a compelling sociological account of this major turnaround in defamation doctrine.

Sociologist Robert Bellah, however, adopts a rather different stance toward the significance of defamation law. Bellah argues that the press

---

3. Some of the intensity of scholarly interest in this subject can be gauged by the origins of the articles in this issue. The articles by Robert Bellah, Marc Franklin, James Reston, and Martin Shapiro, for example, were based on papers originally presented at a conference on Protection of Reputation in a Democratic Society: The News Makers vs. The News Media, on November 1 and 2, 1985, sponsored by the School of Journalism and the Center for the Study of Law and Society at the University of California, Berkeley. The articles by Frederick Schauer and Cass Sunstein, on the other hand, were first submitted to a symposium to commemorate the 200th anniversary of the trial of John Peter Zenger on October 26, 1985, sponsored by the University of Pennsylvania Law School, the Philadelphia Bar Association, and the Annenberg School of Communications. The organization of at least two major conferences on the subject of defamation law within a month of each other is some indication of the level of controversy sparked by this subject.

4. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691 (1986).

5. Veeder, *supra* note 1, at 33.

6. Justice Powell refers to a "strong and legitimate" state interest in the protection of human dignity in a case involving a credit agency's false report that a company was bankrupt. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2945 (1985) (plurality opinion). But that is not sociologically possible. A corporation enjoys neither the "private personality" that Justice Stewart refers to in *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) nor any sort of human dignity.

7. Blasi, *The Checking Valuc in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

too often fails to understand that the reputation of public officials is also a *public* good and that the media sometimes overlook such interests in their search for official accountability.<sup>8</sup> Bellah's is a nostalgic vision of a golden age—the Lincoln-Douglas debates are his example—when the “politics of principle” was dominant.<sup>9</sup> His argument is an entreaty to the press to aspire to that vision. Bellah therefore suggests a more communitarian rather than individualistically orientated interpretation of the “reputation” interest.

Bellah's interpretation seems almost at an opposite pole to that of *The New York Times* columnist James Reston. Reston broadly adopts the view that “criticism of public officials is a journalistic imperative.”<sup>10</sup> There is, however, some common ground. Like Bellah, Reston affirms the communal importance of high public officials. He quotes Walter Lippman to the effect that they are “the custodians of the nation's ideals . . . of the faith which makes a nation out of a mere aggregation of individuals.”<sup>11</sup> Thus, like Bellah, Reston perceives the *constitutive* potential of high officials.

Nor would Reston disagree with Bellah that official reputation is a public good. But, he would argue, such reputations are only a public good insofar as they are true. The nation also has a need, he argues, for a press that reveals the predilections of those who are “complacent, evasive, and acquisitive.”<sup>12</sup> At the same time, Reston does not discuss which remedy should apply when the press does not get the story right—that, of course, is what so many of the delicate balancings of defamation law are about.

The empirical research on libel plaintiffs reported by Randall Bezanson of the Iowa Libel Research Project informs Bellah's comments. The Iowa researchers found that few public-figure plaintiffs contemplate collecting monetary damages. Rather, such plaintiffs seek to restore reputation, to correct what they see as falsity, and to avenge themselves. “[T]he libel suit,” writes Bezanson in his Article, “represents an official engagement of the judicial system on the plaintiff's behalf, and the act of suing represents a legitimation of their claims of falsehood.”<sup>13</sup> The formal recourse to the courts is thus symbolically significant. The plaintiff perceives the judiciary as a fair, competent, and impartial arbiter of the dis-

---

8. Bellah, *The Meaning of Reputation in American Society*, 74 CALIF. L. REV. 743, 745 (1986).

9. *Id.* at 747.

10. Reston, *Reputation and the Journalistic Imperative*, 74 CALIF. L. REV. 753, 757 (1986).

11. *Id.* at 754.

12. *Id.*

13. Bezanson, *The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get*, 74 CALIF. L. REV. 789 (1986).

pute—the only societal institution capable of destigmatizing, of restoring the plaintiff's lost dignity.

Marc Franklin and David Barrett advance specific proposals based on these findings. Both focus on the declaratory judgment as a libel remedy, an idea that Professor Franklin first presented in a 1983 lecture.<sup>14</sup> In 1985, Congressman Charles Schumer introduced H.R. 2846 as a "study bill," intended to stimulate discussion of alternatives to damage actions for libel.<sup>15</sup> Franklin's Article is essentially a response to the Schumer bill, and Barrett's Comment is a response to Franklin. Both agree that empirical research on the impact of libel law is important. Both, for instance, value research on plaintiffs' motives,<sup>16</sup> the type of research Professor Bezanson presents and Professor Franklin pioneered.<sup>17</sup>

There is also considerable common doctrinal ground between Franklin and Barrett. They both agree on abolishing punitive damages,<sup>18</sup> on standardizing libel statutes of limitation,<sup>19</sup> and on shifting attorneys' fees so that the loser pays.<sup>20</sup>

Both also agree on the major innovation of the Schumer bill, the substitution of the declaratory judgment on truth for the damages remedy.<sup>21</sup> The main disagreement is over the Schumer bill's provision giving the defendant discretion to invoke the declaratory judgment action,<sup>22</sup> thus preventing the plaintiff from receiving monetary damages. Franklin argues that such discretion would effectively leave without remedy the plaintiff who has suffered an identifiable property loss. Such a plaintiff, he argues, is entitled to recover both property and dignity loss.<sup>23</sup> Barrett, by contrast, sees "truth," or repair of dignity, not property damage, as the gravamen of the defamation action. Moreover, he points out that under the actual malice standard only a very small percentage of plaintiffs are able to collect monetary damages.<sup>24</sup> That two such like-minded

14. See Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. REV. 1 (1983).

15. See H.R. 2846, 99th. Cong., 1st. Sess. (1985) (reprinted *infra* at p. 832). (hereinafter Schumer bill).

16. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CALIF. L. REV. 809, 809-10 (1986); Barrett, *Libel Reform and Declaratory Judgments: A Better Alternative*, 74 CALIF. L. REV. 847, 862, 867 (1986).

17. Franklin, *Suing Media for Libel: A Litigation Study*, 1981 AM. B. FOUND. RES. J. 795; Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RES. J. 455.

18. Franklin, *supra* note 16, at 813; Barrett, *supra* note 16, at 850.

19. Franklin, *supra* note 16, at 813; Barrett, *supra* note 16, at 850.

20. Franklin, *supra* note 16, at 813; Barrett, *supra* note 16, at 850.

21. Franklin, *supra* note 16, at 813; Barrett, *supra* note 16, at 847-48.

22. Franklin, *supra* note 16, at 836; Barrett, *supra* note 16, at 850.

23. Franklin, *supra* note 16, at 836.

24. Barrett, *supra* note 16, at 866-67.

reformists can disagree on so fundamental an issue perhaps shows how difficult it is to obtain a policy consensus on doctrinal shifts in defamation law.

One reason for the difficulty is that the perspectives from which to view libel law are both conflicting and interdependent. If we want to reorder libel law along the lines of either the Barrett or the Franklin proposal, we have to have some preliminary agreement as to the law's purpose. If its main purpose is to offer truth to the community in order to rehabilitate the defendant's social standing, we should be disposed to accept the Barrett position. If, on the other hand, the primary purpose of libel law is to remedy economic damage to reputation, then we should move toward the Franklin proposal. Barrett's proposal values "truth" as the major goal of libel law in light of free speech and dignitarian concerns. Franklin is a strong free speech advocate, but sympathizes with the victim who has suffered economic as well as dignitary harm because of falsity.

Both papers show, however, how the kind of empirical research undertaken by the Iowa group can inform legal policy. If the major purpose of the libel remedy is to protect dignity, then the declaratory judgment would seem to be enough. On the other hand, the declaratory judgment alone would be unfair to the plaintiff who has suffered pocket-book losses. The reader can decide after considering the Franklin and Barrett analyses which is more persuasive.

Political scientist Martin Shapiro provides a somewhat different libel "victim" perspective. To be analytically provocative, Shapiro argues that the press should be viewed as an industry, one that could profit from the type of regulatory analysis normally applied to the products of private industries.<sup>25</sup> Basically, Shapiro argues, there are two public interest regulatory strategies: one seeks to control process, the other, performance. The latter, he argues, is generally preferable. Society is more interested in the quality of products than in how they were manufactured. Besides, Shapiro argues, the press should be particularly concerned about regulatory intrusions into the processes by which its product is "produced." Thus, Shapiro concludes, press performance, in this case "truth," should be the regulatory standard.

But the "marketplace" theory of the first amendment suggests values that weigh against a regulatory approach to libel law. Society, under a marketplace theory, may best be served if the citizens do not *rely* on the truth of defamatory statements appearing in print, but rather consider these statements skeptically. Speech is *not* a proper subject for administrative regulation. From this perspective it is impermissible to regard

---

25. Shapiro, *Libel Regulatory Analysis*, 74 CALIF. L. REV. 883, 887-88 (1986).

words as widgets. We may want to warranty certain kinds of public information—for example, statements about chemical composition appearing on packages of nonprescription drugs. We might also prefer to warranty the results of credit checks. But we may not wish to warranty whether Dr. Martin Luther King Jr. was arrested four, five or seven times in the context of a political clash.

In any case, the first amendment does not permit us to regard political speech as a warranted consumer product. In *New York Times Co. v. Sullivan*,<sup>26</sup> Justice Black went so far as to argue, in his concurring opinion, that the first amendment does not protect public officials at all: “[T]he First and Fourteenth Amendments [do] not merely ‘delimit’ a State’s power to award damages to ‘public officials against critics of their official conduct’ but completely prohibit a state from exercising such a power.”<sup>27</sup> Writing for the majority, Justice Brennan tried to strike a moderate balance in favor of the journalistic imperative, imposing liability only for those statements that the plaintiff can prove the defendant has made “with knowledge that it was false or not.”<sup>28</sup>

In spite of the “actual malice” standard of *New York Times*, juries have tended to favor plaintiffs.<sup>29</sup> Jurors appear to care less about process (how the story was written) than about product (whether the story was true or false)—regardless of the “actual malice” rule. In this sense, it could be said that juries have often implicitly adopted Shapiro’s administrative regulation model.

Frederick Schauer’s Article focuses on the jury and its role as part of the larger issue of “The Role of the People in First Amendment Theory.” Schauer argues that we have not paid enough attention to majorities in our development of first amendment theory.<sup>30</sup> He is not opposed to judicial review, nor does he assert that minority rights cannot trump “the wishes of temporary majorities and passions.”<sup>31</sup> Schauer does, however, compare the famous Zenger jury, which nullified a clear case for a seditious libel conviction, with the contemporary jury—which often favors plaintiffs in libel cases. This issue raises for Schauer “the paradox of sovereignty.” That is, if the public wants less speech, how can we advocate more in the name of the public interest?<sup>32</sup> In the libel context, this question might be asked as follows: If we affirm the principle of jury nullification in the Zenger case, aren’t we obliged to offer greater defer-

---

26. 376 U.S. 254 (1964).

27. *Id.* at 293 (Black, J., concurring).

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

29. Bezanson, *supra* note 13, at 789.

30. Schauer, *The Role of the People in First Amendment Theory*, 74 CALIF. L. REV. 761, 768-69 (1986).

31. *Id.* at 782.

32. *Id.* at 780.

ence to jury determinations in contemporary libel cases? Schauer answers in the affirmative, in light of "the full panoply of other first amendment inspired considerations and standards," to restrict communication or to check an official decision to limit information.<sup>33</sup>

Cass Sunstein's Article is related—it deals with the government's control of its own information. Sunstein criticizes the so-called "equilibrium theory" of the first amendment.<sup>34</sup> This theory postulates that the government and the press are roughly equal power centers. An equilibrium or balance between these power centers presumably results in the most desirable balance of free expression. Sunstein examines the underlying assumptions of the theory and finds them flawed. The theory does not take into account the complexity of the institutions that supposedly are balanced against each other; it does not sufficiently account for the actual power discrepancies between the two institutions; and it fails to tell us how to decide whether the conflict between the institutions is producing a desirable result—a Jeffersonian understanding of free expression stressing the value of citizen deliberation. Dean Casper, who comments on Sunstein's critique of the equilibrium theory of the first amendment, agrees with it. He adds, however, that other provisions of the Constitution such as the journal secrecy clause<sup>35</sup> and the statement and account clause<sup>36</sup> can also inform analysis of government control of information.<sup>37</sup>

Scholarly first amendment discussions, such as those undertaken by Sunstein and Schauer, adopt a characteristic stance. They review abstract models or theories, such as the "equilibrium model," which are offered as justifications for the first amendment. They then examine the theory and some of its underlying empirical assumptions, question the assumptions without actually studying the affected institutions, and draw conclusions about the inadequacy of the theory.

Discussions about the first amendment may also rely on other quasi-empirical propositions about "chilling effects" and their impact upon various forms of media. Rarely do scholars or courts ever test such propositions, which would require sophisticated methodologies to offer some sense of their reality. That courts actually rely on such factual understandings suggests, however, that we need to know how defamation law actually operates. What role the jury actually plays in defamation law might make considerable difference in advocating directions for doctrinal development. Two of the papers present quite conflicting visions of how

---

33. *Id.* at 784.

34. Sunstein, *Government Control of Information*, 74 CALIF. L. REV. 889, 890 (1986).

35. U.S. CONST. art. I, § 5.

36. U.S. CONST. art I, § 9.

37. Casper, *Comment: Government Secrecy and the Constitution*, 74 CALIF. L. REV. 923, 924 (1986).

to evaluate the role of the jury. Schauer envisions the jury as a representative of majoritarian interests. Indeed, his Article assumes that the jury represents popular sentiment, while the judiciary represents minority views when it overturns jury verdicts or awards.

Robert Post, however, presents a contrary interpretation of the jury. Post sees the jury as a representative of *local* community interests, which may be quite different from those of the majority. If we consider the *New York Times* case, Post is clearly right. In that case, the jury award surely represented the interests of the white majority of Montgomery, Alabama, but did not represent the interests of the vast majority of American citizens.<sup>38</sup> Schauer may be right in other cases; the jury may sometimes reflect broad popular sentiment. The actual representational role played by the jury should certainly alter our understanding of the relationship between the first amendment and libel.

It also makes a difference if we find that first amendment defenses of actual malice seem to have made it easier for a public figure than for a private figure to vindicate his or her reputation. The Iowa study suggests that this surprising and paradoxical outcome<sup>39</sup> is actually what happens.<sup>40</sup> The reports of private plaintiffs demonstrate that they are less likely to sue again even though they face lesser doctrinal obstacles to success than public figures.<sup>41</sup> Private plaintiffs are much more likely than public plaintiffs to experience significant economic harm from libel.<sup>42</sup> Since they seek an economic return (and rarely receive it), the litigation experience frustrates them.<sup>43</sup> They are dissatisfied with their lawyers and probably must pay the lawyer's bill out of their own pockets.<sup>44</sup>

By contrast, public plaintiffs report being generally satisfied with their lawyers and with the litigation process.<sup>45</sup> They are inclined to say that they would sue again.<sup>46</sup> They may be subsidized in paying legal bills and may even be insured for bringing suit.<sup>47</sup> Because their harm is primarily reputational rather than economic, the very act of engaging in

---

38. Post, *supra* note 4, at 732.

39. This sort of problem was considered 50 years ago. See, R. MERTON, *The Unanticipated Consequences of Social Action*, in *SOCIOLOGICAL AMBIVALENCE AND OTHER ESSAYS* 145 (1976). As Merton notes, the phrase is "in a measure self-explanatory," by which, obviously, he means to suggest that the best-conceived policies of rodents, men, and judges can go awry in quite unexpected ways.

40. Bezanson, *supra* note 13, at 795.

41. *Id.* at 798.

42. *Id.* at 795.

43. *Id.*

44. *Id.* at 798.

45. *Id.* at 795.

46. *Id.* at 798.

47. *Id.* at 799.



litigation under an actual malice standard apparently benefits them.<sup>48</sup>

Finally, it also makes a considerable difference if reputation is thought to be a public good, as Bellah asserts, or as a private good, as Franklin and most legal commentators believe. We may envision the function of libel law as primarily the protection of the individual. Furthermore, we may want to break down the idea of protection of the individual's reputation, as Post does, into reputation as property, honor, and dignity. All of these might call for different theories—and empirical research—with respect to first amendment concerns.

If reputation is a public good, in Bellah's terms, then the reputations of achieving and respected individuals are important for the constitution of the community. In that case, first amendment theories based upon public information and the "checking value"<sup>49</sup> are less compelling. But is Bellah's "public good" that of the entire polity, or of a subcommunity? If the latter, we may be addressing a very different sort of "public good." Much of the discussion of first amendment theory fails to distinguish between the concepts of polity and community.<sup>50</sup> By polity here I mean to suggest the *gesellschaft*, the larger society, rather than the *gemeinschaft*, the locality.<sup>51</sup> In United States political terms I refer to the nation, rather than the locality. The respective interests of these "publics" may be conflicting, as they were in *New York Times*, and therefore their "goods" may be dissimilar.<sup>52</sup> Thus it is important that we understand the sort of "public good" we contemplate when we ask for changes of law to develop on the basis of it.

The Bezanson, Barrett, and Franklin Articles show how important empirical research can be to our conceptual thinking about defamation and the first amendment. We now have data illuminating plaintiff motivations to sue and plaintiff feelings about the experience of a libel suit. At the same time, we have little systematic information about the operation of the institutions the first amendment characteristically seeks to

---

48. Of course, these are self-reported data, and it might have been in the self-interest of public-figure plaintiffs to say what they said, since they invested so much in their lawsuits. At the same time, their satisfaction seems plausible. Since the "actual malice" doctrine requires proof of reckless or deliberate falsity, even when public-figure plaintiffs lost, they could claim, both paradoxically and reasonably, that the statements made about them were in fact false. Thus, their reputation could be rescued even if they lost the case.

49. See Blasi, *supra* note 7.

50. This is true of most communitarian theorists. See, e.g., M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

51. The classic discussion of this distinction may be found in Toennies, *Gemeinschaft and Gesellschaft*, in *THEORIES OF SOCIETY* 191 (T. Parsons, E. Shils, K. Naegle and J. Pitts eds. 1961).

52. The opinion of the Alabama Supreme Court below is instructive on this point. See *New York Times Co. v. Sullivan*, 273 Ala. 656, 144 So. 2d 25 (1962), *rev'd.*, 376 U.S. 254 (1964). An excellent discussion comparing the local and national community interests demonstrated in this case may be found in Kalven, *The New York Times Case: A Note on the "Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 195-200.

protect. James Reston, for example, distinguishes between the press as a conduit for information and as a means of correcting the misconduct or miscues of government officials. Martin Shapiro sees the press as a major and profitable set of corporations—an industry. Obviously, both are correct. But which is the more compelling characterization? Surely our answer should alter how we think about the purposes of libel law and first amendment protections.

The differing underlying visions the authors present in this Symposium suggest that we need further inquiry into the social purpose of libel law. Is it primarily to compensate victims for their losses? Or is it the purpose to “regulate” the press as Shapiro suggests? The authors of the eighth edition of *Gatley on Libel*, the leading English treatise, aver that a major purpose of libel law is “the community interest in knowing the truth of a defamatory charge.”<sup>53</sup> England, of course, never adopted the first amendment to the United States Constitution. From the common law perspective, the so-called “chilling effect” can be interpreted as libel law’s equivalent of criminal law’s “deterrence.” Under this theory, through libel law, we seek to insure that offenders are themselves deterred from committing libel in the future (specific deterrence);<sup>54</sup> and to warn others that similar sanctions will be imposed upon those who publish untruths (general deterrence). The regulatory perspective is also “communitarian” in that it locates the purpose of libel law in the interest of the broader community’s knowledge rather than the individual’s reputation alone. At the same time, however, it could be argued that the “chilling effect” differs from deterrence in that all speech is chilled to an extent (and not just false speech), whereas in criminal law only crimes are deterred.

Even more broadly, we should ask what is the community interest in reportage? Is it in “truth” about community members? Or is it the Supreme Court’s now-famous *New York Times* concern for promoting an “uninhibited, robust and wide-open” marketplace of ideas and information?<sup>55</sup> The Court’s view is both similar to and different than *Gatley*’s. It is similar in that it places no value in *deliberate* falsity.<sup>56</sup> It is different, however, insofar as it is willing to accept *negligently* false speech about public officials. Under the *New York Times* compromise there is less

---

53. P. LEWIS, *GATLEY ON LIBEL AND SLANDER* ix (8th ed. 1981); see also *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) (“New Hampshire has clearly expressed its interest in protecting such persons from libel, as well as in safeguarding its populace from falsehoods.”).

54. See generally Andenaes, *Deterrence and Specific Offenses*, 38 U. CHI. L. REV., 537 (1971).

55. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

56. See *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (extending actual malice rule to cases of criminal libel) (“For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.”)

community interest in knowing the actual truth of a defamatory allegation than in promoting an information "marketplace."

The *New York Times* doctrine assumes that consumers of information are supposed to *question*, not necessarily to *believe*, what they read and hear. Under this theory, consumers are assumed to buy and believe what they think most plausible, depending on the source's reputation for veracity, and on whether they find the story persuasively reported.

### CONCLUSION

Overall, this Symposium's articles suggest the usefulness of a sociological approach to defamation law and other first amendment-related subjects, such as privacy. The "actual malice" rule of *New York Times* offers a helpful illustration of the level of analysis I am proposing. The rule, even under a relaxed conception of precedent, has constrained the behavior of judges in defamation cases involving public (and public figure) plaintiffs, and will continue to do so unless the rule is explicitly overturned.<sup>57</sup> But the "actual malice" rule also involves a policy, that is, an intention to shape the behavior of institutions and persons outside the courtroom. Thus, courts may formulate legal doctrine based partly on an underpinning of political philosophy establishing a purpose for the rule and partly on an empirical prediction that the rule will engender behavior to fulfill that purpose. The philosophical underpinning of *New York Times* has to do with the conviction that the Constitution forbids the crime of seditious libel, and the theory of governance upon which it is based.<sup>58</sup> Sir James Fitzjames Stephen elegantly states this theory of governance:

Two different views may be taken of the relation between rulers and their

---

57. The articles in this Symposium underscore the inherent connectedness of what Ronald Dworkin calls the "internal" and "external" views of law. See R. DWORKIN, *LAW'S EMPIRE* 13 (1986). The internal view refers to the practice of law and legal argument. The "external" view is the point of view of the sociologist or historian, who asks why certain patterns of legal argument develop in some periods or circumstances rather than others. For example, a social or political historian could undertake a remarkably rich study of the development of libel law; or even more narrowly, of the watershed case of *New York Times*. Dworkin continues that, although his writings are mainly from the internal perspective, both perspectives "are essential, and each must embrace or take account of the other." *Id.* at 13-14. Dworkin calls for a social theory of law grounded in jurisprudence, because the external observer "cannot understand law as an argumentative social practice, even enough to reject it as deceptive . . . until he has his own sense of what counts as a good or bad argument within that practice." *Id.* at 14.

Dworkin is right. I would add, however, that good or bad "within the practice" depends both on a judgment of moral considerations—for example, should an inheritance statute be interpreted to permit the beneficiary to inherit from his murder victim?—and also on social facts. Thus, it seems to have made considerable difference in *New York Times* that several other lawsuits were outstanding in which juries had already assessed, or potentially would assess, huge verdicts against newspapers reporting on the civil rights movement. See Kalven, *supra* note 52, at 200.

58. For an elaboration of the importance of this idea, see generally Kalven, *supra* note 52, at 204.

subjects. If the ruler is regarded as the superior of the subject, as being by the nature of his position presumably wise and good, the rightful ruler and guide of the whole population, it must necessarily follow that it is wrong to censure him openly, that even if he is mistaken his mistakes should be pointed out with the utmost respect.

If on the other hand the ruler is regarded as the agent and servant, and the subject as the wise and good master who is obliged to delegate his power to the so-called ruler because being a multitude he cannot use it himself, it is obvious that this sentiment must be reversed.<sup>59</sup>

Under the Constitution, the rulers are the servants, and the people are the masters. The "actual malice" rule is intended to discourage public officials from bringing libel suits except under extreme and provocative circumstances. The rule thus attempts to fulfill the Constitutional conception of the relationship between ruler and ruled. The law will provide a remedy only when the official can bear the burden of proving, by clear and convincing evidence, that the writer wrote a deliberate falsehood or recklessly disregarded the truth or falsity of the statement regarding the official. In short, the doctrine involves an empirical prediction that public officials will in fact be discouraged.

But that prediction appears to have been quite wrong. Although the "actual malice" standard was intended to deter public figures and officials from filing lawsuits, it did not.<sup>60</sup> Apparently, public figures sometimes won and won big.<sup>61</sup> Public-figure plaintiffs sued even when they believed they could not win.<sup>62</sup> Failure to file somehow suggested that they acquiesced in the "falsity" of what was said about them. Moreover, after *Herbert v. Lando*<sup>63</sup> a public-figure plaintiff could, through discovery, investigate the *process* by which the false statement came to be written or said.<sup>64</sup> Even if the plaintiff were to lose an appeal because she could not meet the "actual malice" standard, but required the defendant to disclose the secrets of the newsroom, take time to defend the case, and to pay substantial lawyers' fees — she would have avenged herself.

Had this policy been embodied in a statute, it might have been changed more easily. But as a constitutional doctrine, the rule as policy "trumps" a statute. Any statute such as the Schumer bill, or Franklin's alternative to it, must work itself around the constitutional restraints the "actual malice" rule imposes. But perhaps the most interesting lesson to be drawn from the Barrett and Franklin Articles is the authors' recognition of the significance of the Iowa group's empirical studies. These stud-

---

59. 2 J.F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 299 (1883).

60. See Bezanson, *supra* note 13, at 795.

61. *Id.*

62. *Id.* at 211.

63. 441 U.S. 153 (1979).

64. *Id.* at 175-76.

ies indicate, rather clearly, that it makes no sense blindly to assume that policy promulgated through legal doctrine will actually have the consequences anticipated.

Empirical studies of other first amendment doctrines might find that, just as with libel law, first amendment protections work differently depending upon how we regard the purpose of such protections and upon how they affect large and small newspapers, television stations, and independent book publishers. Studies of how “safety valves,” “market-places of ideas,” “chilling effects,” and “self-censorship” actually operate could inform such theories, which often are based on little more than catchy metaphor. It is obvious that the courts—flying blind—have developed defamation doctrines that seem to have produced incongruous and paradoxical outcomes. It would be more than interesting to know whether similar incongruities are found flowing from other important first amendment decisions.

