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

Randall P. Bezanson[*] *& Gilbert Cranberg*[**]

* Charles E. Floete Professor of Law, University of Iowa.

** Gallup Professor of Journalism Emeritus, University of Iowa; former Editorial Page Editor, Des Moines Register & Tribune Company. The authors would like to express their appreciation to Dan Gulya and Lisa Williams for the very able research assistance they provided.

I. INTRODUCTION: REVISITING ACTUAL MALICE AND ADDRESSING RECKLESS DISREGARD AT THE ENTERPRISE LEVEL

The Supreme Court decided *New York Times Co. v. Sullivan*[1] in 1964 when the media landscape was markedly different. Only one newspaper company was publicly traded, and it had "gone public" the previous year. Today hundreds of newspapers, accounting in the aggregate for forty 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." Ben Bagdikian chronicled the rapidity of subsequent change in his groundbreaking study, *The Media Monopoly*. He reported that in 1983 most of the major media outlets were concentrated in fifty corporations but that just nine years later the control formerly in the hands of those fifty dominant companies was wielded by a mere twenty "and the number of companies controlling most of the national daily circulation" had shrunk from twenty to eleven.[3] By Bagdikian's latest count, the fifty dominant media companies had been further reduced to just five.[4] A single broadcaster, Clear Channel Communications, currently owns nearly 1,200 radio stations, a scale unthought of in 1964.[5]

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' cost. 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

1. 376 U.S. 254 (1964).

2. For historical data and financial information, see GILBERT CRANBERG ET AL., TAKING STOCK: JOURNALISM AND THE PUBLICLY TRADED NEWSPAPER COMPANY 17–39 (2001).

3. BEN BAGDIKIAN, THE MEDIA MONOPOLY 27 (4th ed. 1992).

4. BEN BAGDIKIAN, THE NEW MEDIA MONOPOLY 4 (2004).

5. THE PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2004: AN ANNUAL REPORT ON AMERICAN JOURNALISM (2004), *at* http://www.stateofthenewsmedia.org/narrative_radio_ownership.asp?cat=5&media=8 (on file with the Iowa Law Review).

> pressures from Wall Street now typical of American capitalism. Media owners are accustomed to profit margins that would be impossible in most traditional industries.[6]

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. But when newspaper companies opted to go public, they declared in essence that they wanted to be treated the same as any other enterprise in the marketplace.[7]

Increasingly, media companies resemble and behave the same as any other business; the compositions of their boards of directors are indistinguishable from other corporate boards, and their compensation incentives are 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.[8] The compensation, which is certainly not out of the norm for large consolidated media companies, is justified by "company performance,"[9] 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."[10] The company's proxy statement does not even mention the quality and strength of journalism practiced in the newsrooms owned by Gannett. And as Gannett applauds its investment performance, the Project for Excellence in Journalism, in discussing the state of journalism generally, describes "a difficult environment: more pressure on people, less time to report stories . . . ."[11] Journalism is contributing to the bottom line of the large companies, not by improving journalism's quality, but by sacrificing it.

Since its creation, the actual malice test first announced in 1964 in *Sullivan*,[12] has met criticism from some quarters. The test's demand that the mind of the reporter be proved with "convincing clarity"[13] has proven difficult, invasive, and so expensive that often the losers are

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6. LEONARD DOWNIE JR. & ROBERT G. KAISER, THE NEWS ABOUT THE NEWS: AMERICAN JOURNALISM IN PERIL 9–10 (2002).

7. *See* GRANBERG ET AL., *supra* note 2, at 17–76 (comparing publicly traded newspaper companies with organization, incentives, and goals of other publicly traded companies).

8. GANNETT CO., PROXY STATEMENT: 2004 ANNUAL MEETING OF SHAREHOLDERS 16 (2004), http://media.corporate-ir.net/media_files/irol/84/84662/reports/2004proxy.pdf (on file with the Iowa Law Review).

9. *Id.* at 11.

10. *Id.*

11. THE PROJECT FOR EXCELLENCE IN JOURNALISM, *supra* note 5, *at* http://www.stateofthenewsmedia.org/narrative_overview_newsinvestment.asp?media=1 (on file with the Iowa Law Review).

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

13. *Id.* at 285–86.

indistinguishable from the winners in public libel cases.[14] End runs around the subjective state of mind inquiry by plaintiffs have become more common.[15] 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."[16]

Perhaps the central flaw in the actual malice test, however, is its exclusive focus on individual rather than corporate conduct.[17] This shortcoming is so fundamental that the test should be supplemented, in the press setting at least, with an institutional reckless disregard standard. This standard would apply to actions brought not against the reporter and editor but against the corporation and would be based on corporate business decisions made in the face of known risks of falsity. This 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 flows from the decisions.[18] Why would such a standard be preferable?

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.[19] Liability thus is often divorced from the very decisions and policies at the institutional level that produce, facilitate, or influence the harmful conduct.

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.[20] It thus exacts a

14. *See* RANDALL P. BEZANSON ET AL., LIBEL LAW AND THE PRESS: MYTH AND REALITY 4–5 (1987) (listing problems libel plaintiffs face with the current system).

15. *E.g.*, Masson v. New Yorker Mag., Inc., 501 U.S. 496, 511–13 (1991) (comparing implicit or inferential meaning with text); Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 692 (1989) (noting circumstantial proof of purposeful avoidance of the truth).

16. ROBERT D. SACK, LIBEL, SLANDER AND RELATED PROBLEMS xxxvii (3rd ed. 1999).

17. 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, St. Amant v. Thompson, 390 U.S. 727, 728 (1968), *Sullivan*, 376 U.S. at 285–86, 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, 793–98 (D.C. Cir. 1987) (en banc) (discussing facts about the publication process as evidence of actual malice).

18. *See infra* notes 70–74 and accompanying text.

19. *See Sullivan*, 376 U.S. at 280 (explaining that a plaintiff must prove the defamatory statement "was made with actual malice"); *see also St. Amant*, 390 U.S. at 728 (same); BEZANSON ET AL., *supra* note 14, at 2 (describing the actual malice privilege).

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

disguised form of strict liability on 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. It also 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, in effect making them more indifferent to the risks their behavior creates for others.

Fourth, by exacting punishment based on the 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 many of them,[21] 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.

For these reasons, we propose a different approach to defamation caused by news organizations. This approach would rest liability on corporate decisions that are known to present a heightened risk of falsity and defamation because of the impact of such decisions on 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.[22] We believe that decisions that are knowingly made 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.

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 executives made institutional decisions knowing that they would produce a

21. *See generally* LEAVING READERS BEHIND (Gene Roberts et al. eds., 2001) (discussing these forces); CRANBERG ET AL., *supra* note 2, at 56–76.

22. Factors such as staffing, training, editorial oversight, and copy editing, among others.

journalistically unjustified heightened *risk* of false and defamatory publication.[23]

In Part II, we will present the evidence upon which our proposal, as a matter of journalistic practice and public policy, rests. This includes, particularly, the changes in the forms of journalism and the market forces that now bear strongly on the journalistic practices rewarded in the large and often publicly traded news organizations. These are developments that 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. In Part III, we develop the standard of institutional reckless disregard in greater detail, distinguishing it from the reckless disregard of the truth standard now applied under the actual malice privilege. In this Part we also turn to the Constitution, where we demonstrate that the institutional recklessness test is constitutional under the First Amendment. We analyze this test by looking at the Supreme Court's First Amendment treatment of incitement and commercial speech. In Part IV, we look at how this tort is consistent with developments in other areas of tort law, taking a close look at the developments in the area of products liability. We also discuss the economic justifications for our proposal. Finally, in Part V, we conclude.

II. INSTITUTIONAL CONTRIBUTIONS TO FALSE REPORTING

Falsehoods bedevil journalism. The public consistently gives the press low marks for accuracy.[24] Typical is a 1998 national poll reporting that eighty-six percent of respondents believed news stories "often or sometimes contained factual errors."[25] The public's perception parallels academic studies that find as many as half or more of newspaper stories contain at least one mistake.[26] Newspaper editors confirm that inaccuracy is a major

23. 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 cases might finally be put to rest. Randall Bezanson & Gilbert Cranberg, Editorial, *Punitive Damages: Muzzled Press?*, N.Y. TIMES, June 13, 1988, at A19.

24. *See* MICHELE MCLELLAN, AM. SOC'Y OF NEWSPAPER EDITORS, THE NEWSPAPER CREDIBILITY HANDBOOK (2002) (citing the ASNE survey that found a high percentage of Americans were skeptical of the accuracy of newspaper reports), *at* http://www.asne.org/credibilityhandbook/detailsmatter.htm (on file with the Iowa Law Review).

25. ROBERT J. HAIMAN, FREEDOM FORUM, BEST PRACTICES FOR NEWSPAPER JOURNALISTS: A HANDBOOK FOR REPORTERS, EDITORS, PHOTOGRAPHERS AND OTHER NEWSPAPER PROFESSIONALS ON HOW TO BE FAIR TO THE PUBLIC 9 (2000) (citing a 1998 Media Studies Center poll), http://www.freedomforum.org/publications/diversity/bestpractices/bestpractices.pdf (last visited Feb. 1, 2005) (on file with the Iowa Law Review).

26. Scott Maier, *Getting It Right? Not in 59 Percent of Stories*, NEWSPAPER RES. J., Winter 2002, at 10, 11; MICHAEL SINGLETARY, ACCURACY IN NEWS REPORTING: A REVIEW OF THE RESEARCH 2–3 (ANPA News Research Report No. 25, 1980).

journalistic problem. By all accounts, little has changed since 1984 when executive editor David Lawrence, then of the *Detroit Free Press*, wrote:

> [A]fter 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.[27]

Roger Tatarian, then editor of United Press International, 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 all of them testified, off the record, that they too had been left shaken at one time or another at how their remarks had come out in print . . . .[28]

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.[29] 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 are usually 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, imbalance, or emphasis can create a false impression.

Errors of both kinds are bound to occur in an enterprise that has deadlines and relies on human beings, with all of their inherent foibles and shortcomings. While people usually can pinpoint the sources of error and fix responsibility on one or more individuals, journalists do not work in a

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27. David Lawrence Jr., *From Harvard Business School, Lessons on Newspapers, Accuracy*, BULL. AM. SOC'Y NEWSPAPER EDITORS, March 1984, at 7.

28. Roger Tatarian, *How Do You Teach Accuracy?*, BULL. AM. SOC'Y NEWSPAPER EDITORS, Sept. 1982, at 21.

29. *See generally* SINGLETARY, *supra* note 26.

vacuum. The conditions under which they work are often major contributing factors to, if not chiefly responsible for, errant reporting and editing.[30] We believe that courts should regard mistakes as institutional in nature when they are due in substantial part to company policies that executives adopt with knowledge that they carry a likely risk of induced falsity.

A. STAFFING

An example of such a decision or policy would be the newsroom that is downsized to meet profit targets where over-burdened staffers must scramble to fill space without sufficient time to verify their work. All newspapers are labor-intensive; many are also profit-driven. Efforts to improve balance sheets almost unavoidably affect staffing. Whether management opts 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 it encourages departure of the most experienced employees—the senior staffers with the institutional memory and familiarity with the community that make them especially effective bulwarks against error.

Newsrooms have lost about 2,200 employees since 1990.[31] The observation by veteran former editor Gene Roberts that, while he has heard of papers with reduced staff that improved, he has never seen one, is telling.[32] 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."[33]

In *The News About the News*, Leonard Downie and Robert Kaiser described the critical importance of adequate staffing: "Adding employees

30. CRANBERG ET AL., *supra* note 2, at 57.

31. AM. SOC'Y OF NEWSPAPER EDITORS, NEWSROOM EMPLOYMENT SURVEY tbl.A (2003), *at* http://www.asne.org/index.cfm?ID=4456#TableA (on file with the Iowa Law Review). Advertising is the prime source of newspaper revenue. It tends to be cyclical, ebbing and flowing with the economy. Newspapers often reduce staff in response to economic downturns, but many times they do not recoup all of the staff losses during recovery, thereby creating a more or less permanent and heightened risk of institutional indifference to journalism. CRANBERG ET AL., *supra* note 2, at 11–12.

32. Interview with Gene Roberts, Editor and Publisher, Philadelphia Inquirer (Dec. 28, 1996), *in* CRANBERG ET AL., *supra* note 2, at 55. *See generally* LEAVING READERS BEHIND (Gene Roberts et al. eds., 2001) (exploring the effects corporatization of newspaper ownership has on the quality of news).

33. LEONARD DOWNIE, JR. & ROBERT G. KAISER, THE NEWS ABOUT THE NEWS: AMERICAN JOURNALISM IN PERIL 84 (2002).

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."[34]

B. DEMANDS AND INCENTIVES OF THE FINANCIAL MARKETS

Publicly traded newspaper companies 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, stock analysts closely watch profit margins and make comparisons.[35] As Knight Ridder CEO Anthony Ridder ruefully noted, the analysts would "be much happier if we had Gannett margins; they'd jump with joy if we said we'd have Gannett margins."[36] 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.

Compensation packages for editors of newspapers can also increase the risk of false publication. The bonuses and stock options at publicly traded newspaper companies are heavily weighted toward rewarding the achievement of financial targets rather than improving quality.[37] Editors are often compensated by financial-performance bonuses and stock options as much as by cash salary.[38] When Geneva Overholser was editor of the Gannett-owned *Des Moines Register* in the 1990s, her bonus objectives established by corporate included: "Help the company make budget by staying within extremely tight expense budgets, conserving newsprint and participating in intracompany efforts to become more efficient. Stay within budgeted amounts for payroll (eliminating two positions and saving $100,000)."[39] That seems almost benign compared to what consultants recommended for the *Winston-Salem (North Carolina) 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."[40] The formula was widely derided

34. *Id.* at 100.
35. CRANBERG ET AL., *supra* note 2, at 57.
36. *Id.* at 58.
37. *Id.* at 87–88.
38. *Id.* at 86.
39. DOWNIE & KAISER, *supra* note 33, at 94.
40. *Id.* at 97 (quoting a DeWolf, Boberg, & Associates efficiency study).

and was scrapped, but the consultant did succeed in trimming twenty percent of the paper's 600-person workforce.[41]

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:

> [M]ost 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.[42]

C. *COPYEDITING*

The proverbial last line of newsroom defense against error traditionally has been the copy desk—the copyeditors who ride herd on errors—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.[43] 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.[44]

Pagination also increases the workload on copy editors. By one estimate, it adds between a shift and five shifts of staff time daily, depending on the size of the paper.[45] Unless the newspaper adds staff to compensate for pagination, copy editing—and thus accuracy—is bound to suffer.[46] Because the companies chose to improve the bottom line rather than add staff, however, misleading or otherwise inaccurate headlines and error-laden copy emerge from copy desks that are too busy paginating to flag the errors and raise questions about stories. This is a classic form of institutional indifference to journalistic values.

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41. *Id.*

42. *Id.* at 68.

43. CRANBERG ET AL., *supra* note 2, at 53–55.

44. *Id.*

45. John T. Russial, *Pagination and the Newsroom: A Question of Time*, NEWSPAPER RES. J., Winter 1994, at 98, 98.

46. CRANBERG ET AL., *supra* note 2, at 54.

D. TRAINING AND EXPERIENCE

Turnover also explains much about what is wrong in newspapers. The managing editor of the *Sarasota Herald-Tribune* admitted in a column to readers, "[f]or the fourth time in five years, this newspaper is looking for a new Manatee County government reporter."[47] 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.[48]

Turnover limits experience, which is compounded when reporters are inadequately trained to begin with. As Robert J. Haiman reported, "[b]usiness, 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."[49]

Various sources told Haiman:

> 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 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 for his readers?[50]

Despite these problems, papers persistently downsize payroll, and thus encourage turnover, even as they fail to invest sufficiently in training for those employees who stay. When poorly paid and trained reporters who lack background in the subjects they cover produce stories riddled with errors, and the stories are insufficiently checked by copy editors and inadequately supervised by overworked editors, it is a recipe for institutional malpractice, not to mention libel suits. In those suits, it is the hapless reporter or editor

47. Rosemary Armao, Editorial, *Herald-Tribune Is Trying Hard To Keep Continuity of Coverage*, SARASOTA HERALD-TRIB., Dec. 24, 2000, at BS3.

48. *Id.*

49. HAIMAN, *supra* note 25, at 23.

50. *Id.* at 23–24.

immediately responsible for the damaging error who will be cited in the complaint, whose work will be 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 journalism and who ought to be answerable. After all, it is their priorities that 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 responsibility. Among the relevant questions: Who set the final newsroom budget? How much inquiry was made into 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. The following Part lays the groundwork for such a right.

III. INSTITUTIONAL RECKLESS DISREGARD AND THE FIRST AMENDMENT

In *New York Times Co. v. Sullivan*,[51] the Supreme Court held that the First Amendment prohibits public officials from recovering damages for libel in the absence of proof that the defendant published the libelous statement with actual malice.[52] Actual malice, the Court thereafter held, means that the reporter or editor knew that the libelous statement was false at the time of publication, or actually entertained serious doubts about the statement's truth and published recklessly in the face of those doubts.[53] Actual malice, in short, requires that a libel plaintiff prove the reporter's or editor'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 press's freedom to publish would not enjoy the breathing space—the margin for error—that the First Amendment requires to preserve an "uninhibited, robust, and wide-open" marketplace of expression.[54]

Over the course of the forty years since *Sullivan*, the essential quality of actual malice has remained unchanged. The inquiry has focused on whether there was a known factual statement in relation to a known person and a

51. 376 U.S. 254 (1964).

52. *Id.* at 270, 283.

53. St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

54. *Sullivan*, 376 U.S. at 270.

known harm.[55] Gross irresponsibility or recklessness without proof that the defendant knew the statement was false will not suffice to support liability.[56] The actual malice standard, therefore, places control over liability for defamation in the hands of the reporter and editor whose own states 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 actual 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, warrant shelter against intrusive judicial inquiry through libel suits.[57]

Over the forty years since *Sullivan*, however, the confidence the public once felt about the basic qualities of journalistic institutions has eroded. As discussed in Part II, above, profit pressures, financial market incentives, and often dramatic changes in practice and process have made it more difficult to maintain a baseline confidence in news organizations.[58]

These and other changes in the basic character of the news organization[59] 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 a reporter or editor knew about the *risks* of error.[60] The malice question has also begun to focus on whether the reporter or editor was *subjectively aware of high risks of error* that would result from editorial and policy decisions made in the newsroom.[61] As the Supreme Court explained in *Harte-Hanks Communications, Inc. v. Connaughton*:

> 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

55. *See, e.g.*, Masson v. New Yorker Mag., 501 U.S. 496, 510 (1991); *St. Amant*, 390 U.S. at 731.

56. *St. Amant*, 390 U.S. at 731–32.

57. *See* Randall P. Bezanson, *The Developing Law of Editorial Judgment*, 78 NEB. L. REV. 754, 763–71, 853–57 (1999) (discussing the assumptions about journalism that justify limits on judicial inquiry into editorial judgment).

58. *See generally* CRANBERG ET AL., *supra* note 2, at 6–13; LEAVING READERS BEHIND, *supra* note 32.

59. *See* CRANBERG ET AL., *supra* note 2, at 77–113 (outlining how the firm is altered by marketing and financial pressures).

60. *See* Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 692 (1989); Tavoulareas v. Piro, 817 F.2d 762, 771 (D.C. Cir. 1987) (en banc).

61. *Piro*, 817 F.2d at 771.

> 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.*[62]

The *Connaughton* decision centers on *risk* of error, not just on actual knowledge about falsity. It states a formulation of subjective state of mind regarding falsity 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 a "guilty" state of mind, yet it also reflects a new attitude that the process of journalism may not always 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 knowingly publishing a false statement, on the one hand, and an institution's liability for decisions and policies that produce high *risks* of defamatory falsehood on the other. Its focus on *risk* places the proposed institutional recklessness standard in clearer relief, making its legal definition and justification easier, and sharpening the constitutional questions it raises.

A. THE MEANING OF THE INSTITUTIONAL RECKLESSNESS STANDARD

We propose a public defamation action that plaintiffs would bring against the publisher or parent company of a news organization rather than the reporter or editor of the story. The action would be a common law defamation claim that would require a plaintiff to prove the common law elements of defamation and would also require the plaintiff to overcome a First Amendment privilege by showing that the publisher, parent company, or its agents contributed to the defamation by acting in institutional reckless disregard of the truth.[63] The institutional reckless disregard question, in turn, is whether, at the level of a publisher or in the higher corporate reaches of a parent company, decisions were made for financial and

62. *Connaughton*, 491 U.S. at 692 (emphasis added).

63. Our proposal concerns only public libel claims, or those subject to the actual malice standard. There may be good reason, however, to allow the same institutional recklessness claim to be brought in libel actions by private persons, which are subject to a negligence rather than an actual malice privilege. *Gertz v. Welch*, 418 U.S. 323, 347 (1974). We do not, however, believe that the privilege of knowing recklessness applied to our proposed institutional reckless disregard claims should be altered in such actions because liability based on negligent or inadvertent indifference by the publisher or parent company would deter creativity and change in news operations.

financial-market-based reasons unrelated to journalism in the face of known risks of falsity that would result from the decision.

The question, in other words, is not simply whether the editors or news staff disagreed or were substantially hampered by the decisions, but whether the persons making the financial and market-based decisions were aware of the consequences and nonetheless acted without journalistic justification. For purposes of liability, therefore, the question is not exclusively focused on the particular false and defamatory statement that was published, but on whether that statement was causally related to the changed policy or procedure that caused a heightened risk of falsity, and whether the decision to adopt the policy or procedure was made without journalistic justification, but with knowledge of its systematic consequences.

The causal relationship is not whether the particular defamatory statement was caused by knowingly reckless or risky decisions or policies, but rather whether such decisions or new policies had been made knowing that they would produce an increased risk or incidence of defamatory publication. Common law did not require a showing of cause other than the fact of publication by the defendant publisher. Strict liability for harms resulting from publication was the general rule.[64] We propose instead a privilege requiring proof that institutional policy or operating decisions were made by the publisher with knowledge of a heightened risk of falsity, in the service of strictly financial and business aims, without journalistic justification, and in the face of known journalistic costs. In our view, this requirement of proving "institutional recklessness" is an exact counterpart in the institutional setting of actual malice by a reporter or editor.

The institutional reckless disregard claim would be much like a product liability claim, which requires knowledge that a defective and dangerous product is being produced.[65] While plaintiffs could base ordinary product liability or strict liability claims on a finding that a company *should* have known of the defect,[66] we believe courts should require a higher standard of proof 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 or 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. This inquiry into actual knowledge of risk and justification will focus not on the reporter or the editor responsible for the

64. DANIEL B. DOBBS, THE LAW OF TORTS 1119–20 (2000); W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 810 (5th ed. 1984).

65. *See infra* notes 182–94 and accompanying text (explaining a product-liability claim).

66. *Id.*

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 made in the course of reporting the news, as is the case now with the actual malice test.

Our proposed defamation action against a parent company for libel based on institutional reckless disregard would be a separate claim from one against the paper via the reporter or editor for defamation based on actual malice. The two claims might be filed together, but there are reasons (prejudice from evidence in one case considered by a jury in deciding the other) for the plaintiff to try the two claims separately. A given plaintiff might bring one or the other or both. It is possible that a plaintiff might prevail on both, though we think that unlikely since a finding of actual malice by the reporter would ordinarily mean that any bad corporate decisions had no legally material effect on the particular story. This would be the case unless, of course, the corporate decision was that reporters need not worry about the truth or should publish big and profitable stories even if the reporter doubts the truth of those stories.

If, in a rare case, a plaintiff prevails on both claims, he or she will recover from the parent on the intentional reckless disregard claim. In all likelihood he or she will also collect on the actual malice claim from the parent. Likewise, success on one or the other claim will, in the end, result in a payment for damages by the parent or at least the wholly owned newspaper company, which will cost the parent just the same.

Is there a precedent in the law for such a standard and inquiry? Would such a standard survive analysis under the First Amendment? The following section discusses this new standard in relation to three existing areas of law: (1) corporate criminal responsibility, (2) incitement, and (3) commercial speech.

B. INSTITUTIONAL RECKLESSNESS AND EXISTING LEGAL DOCTRINE

1. Conformity with the Law of Corporate Criminal Responsibility

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? 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,* the question involved the proof necessary to establish a bank's criminal liability for failing

to report certain currency transactions under federal law.[67] The federal statute attached criminal liability for a bank (as a corporation) only when the financial institution "willfully" violated reporting requirements.[68] Willfulness "must be supported by 'proof of the defendant's knowledge of the reporting requirements and his specific intent to commit the crime.'"[69] 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,"[70] 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."[71] The employees' knowledge would be "imputed" to the corporation as the corporation's own knowledge.[72] Plaintiffs could show specific intent, similarly, by proof of "flagrant indifference" of the corporation toward its legal obligations[73]—"a disregard for the governing statute and an indifference to its requirements."[74]

In an earlier criminal antitrust case involving a *per se* violation of the Sherman Antitrust Act,[75] the Ninth Circuit 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.[76]

> 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

67. 821 F.2d 844 (1st Cir. 1987).

68. 31 U.S.C § 5322 (2000).

69. *Bank of New England*, 821 F.2d at 854 (quoting United States v. Hernando Ospina, 798 F.2d 1570, 1580 (11th Cir. 1986)).

70. *Id.* at 855.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Bank of New England*, 821 F.2d at 855–56 (quoting Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 127, 127 n.20 (1985)) (internal quotation marks omitted).

75. 15 U.S.C. § 1 (2000).

76. United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1973).

> 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. . . . 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.[77]

These cases illustrate the breadth of potential federal 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 a 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.

2. Relationship to the Supreme Court's Incitement Doctrine

If we look to areas outside defamation and corporate criminal liability for guidance as to whether institutional recklessness can fit into the larger First Amendment picture, the law of incitement comes immediately to mind.[78] Incitement involves the directness of a causal link between speech and harm.[79] First Amendment protections for incitement turn on the speaker's subjective state of mind as well as objective measures of harm and immediacy, much like actual malice.[80] The clear and present danger test for incitement is the most exacting and speech-protective First Amendment test.[81] 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.

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77. *Id.* at 1006–07.

78. *See generally* John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409 (1983) (examining what role the doctrine of prior restraint should play in First Amendment law).

79. Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969).

80. *Id.*

81. *Id.*

Brandenburg v. Ohio[82] is the paradigmatic incitement case. Its test, the culmination of fifty years of judicial crafting by many of the great jurisprudential minds of the twentieth century,[83] immunizes advocacy of unlawful acts unless the speech is *intended to* and *likely to* produce *specific imminent* lawless action.[84] The test breaks down into a set of objective and subjective elements.

The 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? Applying this priniciple, the Supreme Court, in *NAACP v. Claiborne Hardware Co.*,[85] held that even though the Field Secretary of the National NAACP, Charles Evers, had stated in a speech that "if we catch you going in any of them racists white stores, we're gonna break your . . . neck,"[86] the NAACP was not liable for acts of damage done by the "enforcers" of a boycott in Claiborne County, Mississippi.[87] In context, the statement was deemed hyperbole only.[88]

Second, the *Brandenburg* standard is also subjective and contextual. Like the determination of whether defamatory material is published with "actual malice"—knowing that a statement is false 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.[89] 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.[90] The focus is on the immediacy and probability of the risk, and knowledge—indeed specific intention—that harm 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.

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82. 395 U.S. 444 (1969).

83. *See generally* Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975) (discussing the role played, particularly, by Judge Hand and Justice Holmes).

84. *Brandenburg*, 395 U.S. at 447–48.

85. 458 U.S. 886 (1982).

86. *Id.* at 902.

87. *Id.* at 931.

88. *Id.*

89. *Brandenburg*, 395 U.S. at 447.

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

Both *Brandenburg* and *Sullivan* set demanding standards for liability. It has been rare for courts applying either test to permit liability. Unlike defamation cases governed by *Sullivan*, few incitement cases have reached the Supreme Court since *Brandenburg*.[91] Thus, the incitement standard has not experienced much evolutionary change. This also means that there has been little discussion of the precise scope of the doctrine. Therefore, unlike libel, where questions on the edges of the doctrine have reached the high court on a regular basis,[92] the tensions around the boundaries of incitement doctrine have not been addressed until very recently. This leaves an interesting mix of recent cases at the appellate 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.[93] The circuit courts' efforts to break out of the highly protective incitement model have been legitimated recently in the United States Supreme Court's cross-burning (hate speech and incitement) decision in *Virginia v. Black*.[94]

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 as the *Connaughton* Court used to refocus defamation.[95] In the incitement setting, this is accomplished through subcategorization—the creation of smaller, more specific categories of incitement (racial versus political threats, for example) that emphasize the altered probability of harm from a certain type of speech. In the process, courts have altered and recast the more general *Brandenburg* standard, reflecting the judges' impression of the difference in characteristics between speech "X" and "mere advocacy." We next discuss this process of subcategorization before turning to the relationship between it and institutional reckless disregard.

a. 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*

91. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982); Hess v. Indiana, 414 U.S. 105 (1973). Excluding threat cases, these two cases round out the totality of the substantive examples.

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

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

94. 538 U.S 343 (2003).

95. *See* text accompanying notes 63–66 (discussing *Connaughton*).

States,[96] the Supreme Court mentioned, almost off-handedly, the concept of a "true threat," a curiously undefined term that has recently been embraced by lower courts as an intuitive limitation on free speech rights.[97] Watts was an antiwar protester who stated at a rally that "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J."[98] The Court, calling this "political hyperbole," not a "true threat," held that Watts was not liable under a statute punishing threats against the President.[99]

The true threat doctrine, as it has come to be called, is related to *Brandenburg*.[100] It differs quite materially, however, in content and in its lower *mens rea* requirement.[101] The Court's distinction in *Watts* between "threats" and "hyperbole" was not based on any specifically articulated idea. It seems to have been largely intuitive,[102] 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 they have adopted differing definitions.[103] 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 intentionally or knowingly communicate the threat."[104] 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.[105]

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96. 394 U.S. 705 (1969).

97. *See Planned Parenthood*, 290 F.3d at 1072 (applying the true threat concept to a web site listing doctors performing abortions).

98. *Watts*, 394 U.S. at 706.

99. *Id.* at 708. While Watts's 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.

100. *E.g.*, *Planned Parenthood*, 290 F.3d at 1079 (holding that "wanted-type" posters identifying a specific doctor who provided abortions constituted a true threat); United States v. Dinwiddie, 76 F.3d 913, 925 (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, 906 (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 performed abortions).

101. *See supra* notes 82–84 and accompanying text (requirement that speaker specifically intend to produce a particular imminent harm by speech).

102. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 388–91 (1992).

103. *Planned Parenthood*, 290 F.3d at 1063 (holding that "wanted-type" posters identifying a specific doctor who provided abortions constituted a true threat); *Dinwiddie*, 76 F.3d at 925 (holding that statements made to an abortion doctor constituted true threats even though the statements never outright threatened the doctor's life or safety); *McMillan*, 53 F. Supp. 2d at 907 (holding that the statement "where's a pipebomber when you need one" constituted a true threat when made repeatedly to a doctor who performed abortions).

104. *Planned Parenthood*, 290 F.3d at 1075.

105. *Id.*

The Ninth Circuit's decision in the "Nuremburg Files" case, *Planned Parenthood, Inc. v. American Coalition of Life Activists* ("ACLA"),[106] 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 boldest relief those who continue to perform abortions without apparent consequence (so far, by implication).[107] In *Planned Parenthood*, the Ninth Circuit held the web site to be a "threat," though the threat was only implied, not expressly stated.[108] The content of the "Nuremburg Files" was thus enjoined under the Free Access to Clinics Act without violation of the First Amendment.[109]

The *Planned Parenthood* court was strongly divided, with the majority emphasizing the difference between intimidation by threat and the general advocacy doctrines.[110] Judge Rymer stated that the case was a threat case, not an advocacy case,[111] by redescribing the characteristics of the speech[112] and the 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 linked 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.[113] 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 and some *actual non-speech harm produced by the speech.* Once the threat itself was seen as a harm, the *Planned Parenthood* majority employed a (circular) "clear and present danger"-like analysis without seeming to apply a lower standard than the First Amendment dictates.[114]

106. 290 F.3d 1058 (9th Cir. 2002).

107. *Id.* at 1065.

108. *Id.*

109. *Id.* at 1088.

110. *Id.* at 1072.

111. *Planned Parenthood*, 290 F.3d at 1079.

112. *Id.* at 1079 ("Because of context, we conclude that the Crist and Deadly Dozen posters are not just a political statement.").

113. *Id.* at 1072.

114. *Id.*

b. Instructional Speech

Another offshoot from incitement is a category that can best be described as "instructional speech."[115] In contrast to advocacy or threats, "instructional speech" consists of express instructions on how to carry out illegal activity.[116] The standard applied in such cases differs from the *Brandenburg* test because it does not require proof that specifically defined and intended illegal activity will occur immediately.[117] 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"[118] is not protected speech.

A paradigmatic modern example of instructional speech is *Rice v. Paladin Enterprises, Inc.*[119] 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.[120] The Fourth Circuit ruled that the book was not fully protected First Amendment speech, but was instead "instructional speech" subject to a different regime than advocacy.[121] Judge Luttig subtly altered the clear and present danger analysis, reconceptualizing the speech not as incitement, but as "aiding and abetting."[122] 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

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115. Rice v. Paladin Enters., 128 F.3d 233, 262 (4th Cir. 1997). In describing "instructional speech," the Fourth Circuit stated:

> 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.

Id.

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

117. *See Rice*, 128 F.3d at 262 (noting *Brandenburg*'s "imminence" and "likelihood" requirements).

118. *See* Noto v. United States, 367 U.S. 290, 297–98 (1960) (distinguishing such actions from merely teaching).

119. *Rice*, 128 F.3d at 233.

120. *Id.* at 239–41.

121. *Id.* at 264–65.

122. "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." *Id.* at 245.

harmful action produced by the speech; 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 was also an attempt to build the roots of this analysis out of ground other than *Brandenburg*, following instead Judge Rymer's reliance on *Watts* in the *Planned Parenthood* case. Judge Luttig described his decision as resting on a wider principle found "in a case [*Watts*] indistinguishable in principle from that before us."[123]

c. Virginia v. Black

The Supreme Court has only recently spoken again 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*[124] the Court recast *Brandenburg's* dividing line between incitement and advocacy and created a new analytical framework with which to assess the constitutionally required relationship between speech and harm—a framework, it appears, that bears a close resemblance to that employed in *Planned Parenthood* and *Rice*.[125]

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 from a well-traveled rural road in Northern Virginia.[126] People driving by would have been hard pressed not to see the cross. African Americans who witnessed it would be, the Court said, struck with fear—intimidated, in the language of the Virginia statute.[127] The cross stood for racial violence, though it did not expressly advocate it in any way or time or against any specific persons. Like *Brandenburg*, which was 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 burning a cross. 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.[128] Instead, the Virginia law at issue in *Black* criminalized *intimidation*, thus making the speech itself a harm.[129] Intimidation is not a threat backed up by an intent and probability that a

123. *Id.* at 244–45.
124. 538 U.S. 343 (2003).
125. *Id.* at 361.
126. *Id.* at 349.
127. *Id.*
128. *Id.* at 349.
129. *Black*, 538 U.S. at 348.

harmful act is imminent. 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.[130] 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 specific harm, and toward reconceptualized harm in categories of cases. As the likelihood (risk) of harm increases, it seems, the level and specificity of intent and harm are lowered to compensate.

Black represents the acceptance of the "true threat" doctrine and all that it implies. The Court baldly stated that threats are unprotected speech.[131] 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.[132] 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 deemed a "threat," courts place the speech in a category with a higher risk of harm and, thus, a lower level of scrutiny. This is precisely what the institutional reckless disregard standard would do, though it would still require knowledge of the risk of harm and the absence of journalistic justification.

d. 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's and Hand's original work on incitement—a combination of the elements that went into *Masses Publishing Co. v. Patten* [133] and the "clear and present danger" test.[134] 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 example, it seems clear that Holmes's *Abrams v. United States* dissent,[135] which provides the canonic phrasings of his "clear and present danger" test,[136] would not have been produced by a case involving an anarchist randomly distributing instructions on how to build bombs.

130. *Id.* at 357–58; *see also* Am. Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 328–29 (7th Cir. 1985).

131. *Black*, 538 U.S. at 359.

132. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 929 (1982).

133. 244 F. 535 (S.D.N.Y. 1917).

134. Schenk v. United States, 249 U.S. 47, 52 (1919).

135. 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

136. *Id.* at 628, 630.

In the years since *Brandenburg*, courts 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, which are vague and slippery. *Brandenburg* itself describes the Klan speech at issue as "mere advocacy."[137] There is no expression of anything beyond a generalized ill-will toward various groups in society—nothing to indicate the targeting of a particular group at a particular time.[138]

In the *Watts* line of cases, the speech at issue differs from the "advocacy" in *Brandenburg* by its concrete nature.[139] Threats are concrete; the ill-will is directed toward a specific person or group. To the extent that there is a coherent true threat doctrine, it requires that threats be made to specific targets and that they have a concrete and direct message such as, "You will be harmed." Threat cases use an objective intent standard;[140] advocacy cases require specific intent.[141] The categories of speech represent different points on a graph contrasting concreteness against the requisite *mens rea*.

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 paradigmatic example is *United States v. Buttorff*,[142] 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."[143] The concrete nature of instructions eliminates some of the uncertainty in the causal chain between speech and harm, making the probability that the speech will cause a type of harm greater.

As mentioned above, all of these areas of incitement law can trace their pedigree to Oliver Wendell Holmes, Jr. and Learned Hand, as they involve 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.

137. Brandenburg v. Ohio, 395 U.S 444, 448–49 (1969).
138. *Id.* at 447, 448–49.
139. Watts v. U.S., 394 U.S. 705 (1969).
140. Virginia v. Black, 538 U.S. 343, 558–60 (2003); *Watts*, 394 U.S. at 707–08.
141. *Brandenburg*, 395 U.S. at 447–48.
142. 572 F.2d 619 (8th Cir. 1978).
143. *Id.* at 624.

The new subcategories take a less protective approach, as demonstrated at the Supreme Court level in *Virginia v. Black*.[144]

e. Incitement and Institutional Reckless Disregard

The lesson 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).[145] Threats and instructional speech, treated as potential harms justifying regulation without regard to the likelihood of a specific ultimate act occurring, depart downward from advocacy's specific-intent standard, decreasing the level of intent necessary for liability.[146] The basis for this departure is the change in the content of 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 and the resulting harm 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 rationale underlying the movement away from incitement and the *Brandenburg* clear and present danger test appears to be that high-risk instructional speech is not speech deserving of "breathing room"; that the definite and higher *risk* of harm justify a legal standard that is not premised on a mistrust of overinclusiveness. Since there is little direct harm from the speech in *Brandenburg*-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.

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

144. *Black*, 538 U.S. at 358–59.

145. *See supra* notes 78–132 and accompanying text.

146. Stewart v. McCoy, 537 U.S. 993, 995, *denying cert. to* 282 F.3d 626 (9th Cir. 2002). Addressing the decreased level of intent, the Supreme Court has stated:

> 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."

Id. (citing Thomas v. Collins, 323 U.S. 516, 530 (1945)).

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 receives 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 posit a risk continuum; a "more to less" relationship that parallels the change in concreteness found in incitement. The number of links in the chain between speech and harm cannot be altered, but the causal issue can be reframed in terms of an increase in the number of chains. The reframing can be seen in libel by viewing institutional reckless disregard of truth as an act that creates a higher probability of overall harm from an action because of the number of future events (chains) that an institutional practice might produce. Much like the instructions in *Rice* and the listing of doctors in *Planned Parenthood*, the practice might be unlikely to produce a specific type of harm in a specific time or place, yet repeated publication makes the fact of harm almost inevitable (somehow, someone, sometime, someplace).[147]

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. If we set the bar high in those situations by demanding specific intent for liability, the impact will not be significant. However, once we move past individuals and individual acts to institutional policies and procedures, 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. A knowing act at the institutional level that increases 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 certain characteristics within that field of speech that make harm more probable,

147. *See supra* text accompanying notes 106–23123.

thus justifying a different legal standard for liability. By taking this approach, institutional recklessness encompasses more in the area of reckless disregard than the law traditionally has. If the harm that libel regimes are intended to prevent can be re-conceptualized from defamatory publication to the known *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.[148]

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 broad protection is to respect journalistic flexibility and freedom. If, however, the same practice occurs again and again with a negative outcome, and if that practice was established with knowledge of its high probability of harm, it should not be shrugged off. As the balance of factors that create the need for deference to journalism changes, so should the standard.

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 case of *Curtis Publishing Co. v. Butts*[149] is interesting because it serves neatly as an illustration of the boundaries of libel and privilege. In *Butts*, the Court examined a newspaper story in the *Saturday Evening Post* accusing the athletic director of the University of Georgia of "throwing" a game.[150] Wally Butts was, at that time, being considered for a professional coaching job that he did not ultimately receive.[151] He sued successfully and the *Saturday Evening Post* appealed. The Court eventually ruled against the *Saturday*

148. Brian C. Murchison et al., Sullivan's *Paradox: The Emergence of Judicial Standards of Journalism*, 73 N.C. L. REV. 7, 98–99 (1994) (arguing that in defining malice and negligence privileges, judges are creating a set of legal standards of journalism).

149. 388 U.S. 130 (1967).

150. *Id.* at 135.

151. *Id.* at 136.

Evening Post.[152] Justice Harlan listed a number of factors that were revealed at the trial that could logically have led the jury to find that there was a reckless disregard for the truth of the publication: the writer assigned to the story could have, but did not, seek more information; the *Saturday Evening Post* had knowledge of the potential lack of veracity of George Burnett, the source of most of the information in the story;[153] and the *Post* had a policy of "sophisticated muckraking."[154] Justice Harlan indicated his own ambivalence toward the *Sullivan* actual malice standard, noting that different points in the libel universe argued for rules striking different balances between privacy interests and the interest in robust discourse.[155] This is precisely the point that we are making. 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 *Tavoulareas v. Piro*[156] is a close analogue to *Butts*. Indeed, the *Piro* court expressly recognized that the fact patterns were very similar.[157] In both cases, there was an editorial policy in place that promoted sensational stories. Both courts indicated that this emphasis had at least some impact on the ultimate newspaper product.[158] While the *Piro* court ultimately did not find 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* 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 Tavoulareas as actual malice.[159] As there was ample evidence that the *Washington Post* knew that its procedures were affecting its reporters' judgments,[160] *Piro* stands for the proposition that such behavior usually will not constitute "actual malice."

This point is disputed in the *Piro* dissent, which appears much more willing to consider the newspaper's general practices as a part of the reckless disregard inquiry.[161] The dissent noted that the *Post* had already run an editorial about a fabricated story, noting that the "holy shit" atmosphere was

152. *Id.* at 161–62.

153. *Id.* at 156–57.

154. *Butts*, 388 U.S. at 158.

155. *Id.* at 155 ("[T]he rigorous federal requirements of *New York Times* are not the only appropriate accommodation of the conflicting interests at stake.").

156. 817 F.2d 762 (D.C. Cir. 1987) (en banc).

157. *Id.* at 797–98.

158. *Curtis Publ'g*, 388 U.S. at 156–58; *Piro*, 817 F.2d at 797–98.

159. *Piro*, 817 F.2d at 797–98.

160. *Id.*

161. *Id.* at 834 (MacKinnon, J., dissenting).

a significant contributing factor to the mindset of the reporter.[162] This is not enough under the typical individualized actual malice test. The dissent instead pointed to the Harlan test—"highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[163] This test has usually been dismissed as ambiguous and less protective than necessary, but the dissent's conclusion that the paper *knew that its policies were 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 MacKinnon noted in dissent.[164]

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.[165] Institutional knowledge of the effect produced by the institution's policies, coupled with an apparent lack of reaction to the previous incident, would appear to be reckless disregard of the risk produced by encouraging this "holy shit" culture of aggressive reporting without 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.

3. Institutional Recklessness and Commercial Speech

Just as institutional reckless disregard comports with the doctrine of incitement, it is consistent with the Supreme Court's treatment of 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.[166] 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.

The overlap also suggests a further development: the same functional/normative infirmities that push commercial speech within 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

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162. *Id.*

163. *Id.* at 834 (quoting *Curtis Publ'g*, 388 U.S. at 158) (internal quotation marks omitted).

164. *Piro*, 817 F.2d 797, 834 n.46 (MacKinnon, J., dissenting) (referring to an earlier prize-winning *Post* story that had later been found to be fabricated in material respects).

165. *Id.* at 834.

166. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561–64 (1980); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761–74 (1976).

"not-speech." It falls within First Amendment speech. Rather, the argument is that it falls within those categories of speech that the various branches of government have the power to restrict.

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 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 values of self-governing and autonomy that we have come to ascribe to protected speech in general.[167] It may be speech, but it is not motivated to contribute to the public dialogue.[168] If it is not contributing to the public consciousness about what is and is not important, and if it creates a broad risk of harm through falsity or deception, then it lies 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.

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.[169] If institutional recklessness is, as we suggest, the result of speech decisions that are motivated by purely economic concerns at the expense of journalistic concerns about truth, shouldn't it be excluded from the realm of public-discourse-driven protections? The only reason we tolerate false publication is that, supposedly, the process that spawned the false statements was motivated by the intent to engage in public discourse.[170] If we remove that intent, we remove the justification for shielding it with the First Amendment. There is no constitutional protection for false fact.[171] The constitutional protection only exists when there is an 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[172] for its protection of commercial speech because it is abstract and judicially

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167. *Va. State Bd.*, 425 U.S. at 761–74; Thomas H. Jackson & John Calvin Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979).

168. *Va. State Bd.*, 425 U.S. at 761–74.

169. *See supra* text accompanying note 63.

170. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

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

172. *Central Hudson* defines commercial speech as "expression related solely to the economic interests of the speaker and its audience." Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561 (1980). Commercial speech can be regulated if it is

unworkable.[173] 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.[174] 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,[175] libel,[176] advocacy/incitement,[177] commercial speech,[178] and indecent speech.[179] In all of these areas, the 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.[180] If it is there, the speech is entitled only to reduced First Amendment protection.[181] That should be the case with institutional recklessness. If the institution as a whole is at fault for recklessness, and the reason for the institution's action bears no relation to journalistic purposes, the speech at issue should cross into a less protected and more regulable field of expression.

Post's account, of course, is not the conventional account of commercial speech. In some respects it artificially narrows 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. Like commercial speech, institutional reckless disregard yields speech less conducive to democratic involvement and to informational usefulness to the public. It treats journalists' speech as a means of business success, not public enlightenment.

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misleading or related to unlawful activity, or if the government's regulatory interest is substantial and the means used to achieve it directly advance the interest and are not unreasonably overbroad. *Id.* at 563–64.

173. Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 37–41 (2000).

174. *Id.* at 13–26.

175. Chaplinsky v. New Hampshire, 315 U.S. 568, 573–74 (1942).

176. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347–48 (1974).

177. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

178. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561–64 (1980).

179. FCC v. Pacifica Found., 438 U.S. 726, 747 (1978).

180. *Cent. Hudson*, 447 U.S. at 561–64.

181. *Id.*

IV. NEWS ENTERPRISE LIABILITY IN TORT LAW

In the last section, we argued that the tort of institutional reckless disregard for the truth comports with traditional First Amendment analysis. Here, we explore how this tort also fits within the changing landscape of tort law. More specifically, we argue that institutional reckless disregard is consistent with evolving judicial approaches in the product liability context.

A. STRICT AND PRODUCT LIABILITY

Over the past half-century, tort law has witnessed a profound change from a system that imposed liability strictly and imposed it only on the basis of the fault of an individual,[182] 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 bear.[183] 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 prove at least two things. First, the plaintiff's harm must have resulted from a product defect.[184] Second, the product must have been defective when it left the hands of the defendant.[185]

Elaborations on this basic theory of product liability start with the concept of negligence. Negligence can be shown by proving that a manufacturer or distributor knew, or in the exercise of reasonable care should have known, that the product was defective.[186] This is accomplished by proving that the product was inadequately tested for safety,[187] or that the quality control process was inadequate or improperly executed.[188]

However, proving negligence is not always required. In *Henningsen v. Bloomfield Motors, Inc.*[189] and *Greenman v. Yuba Power Products, Inc.*,[190] the courts eliminated the requirement that a plaintiff prove negligence. Instead, the courts adopted strict liability. Strict liability evolved out of the concept

182. With few exceptions, such as libel. RICHARD A. EPSTEIN, TORTS 389–94 (1999).

183. *Id.*

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

185. *Id.*

186. *Id.* at 11.

187. *Id.* at 6; *see also* Ford Motor Co. v. Zahn, 265 F.2d 729, 731–32 (8th Cir. 1959).

188. HENDERSON & TWERSKI, *supra* note 184, at 7; *see also* Jenkins v. Gen. Motors Corp., 446 F.2d 377, 379–81 (5th Cir. 1971).

189. 161 A.2d 69 (N.J. 1960).

190. 377 P.2d 897 (Cal. 1963).

that under the Uniform Sales Act (later the U.C.C.) there was an implied warranty that accompanied the sale of any good.[191] This warranty guaranteed that the product was reasonably fit for the ordinary purpose for which it would be used. If a defective product could not be used for the purpose it was intended, the manufacturer would have violated its implied warranty.[192] Strict liability was believed to "better enhance[] social utility by reducing the costs associated with accidents . . . and promot[ing] fairness,"[193] objectives accomplished by "encouraging investment in product safety, discouraging consumption of hazardous products, reducing transaction costs, and promoting loss spreading."[194]

In spite of strict liability, a plaintiff still needs to prove that a defect in the product was the cause of the plaintiff's harm and that the product was defective when it left the hands of the defendant.[195] To show that a product was defective when it left the hands of the defendant, the *Restatements* allow a plaintiff to use circumstantial evidence that would support an inference of a defective product.[196] The courts have reasoned that while a seller should not

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191. HENDERSON & TWERSKI, *supra* note 184, at 81–82.

192. *Id.* at 325.

193. James A. Henderson, Jr., *Coping with the Time Dimension in Products Liability*, 69 CAL. L. REV. 919, 931 (1981).

194. *Id.*

195. HENDERSON & TWERSKI, *supra* note 184, at 3.

196. The *Restatement (Third) of Torts* 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.

RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 3 (Tentative Draft No. 2, 1995).

The *Restatement (Second) of Torts* 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.

be liable for all harm resulting from its product, a seller should be liable for all harm resulting from a *defect* in a product.[197]

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 is *Winter v. G.P. Putnam's Sons*,[198] in which the plaintiffs purchased a book, *The Encyclopedia of Mushrooms*, to help them collect and eat wild mushrooms.[199] 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.[200] The Court refused to award damages to the plaintiffs.[201]

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."[202] 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.[203] Claims based on ideas and expression should be litigated through copyright, libel, misrepresentation, mistakes, and other

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RESTATEMENT (SECOND) OF TORTS § 402A (1965).

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." *Id.* § 402A cmt. i. However, unreasonably dangerous is no longer a 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, 1163 (1972).

197. The *Restatement (Third) of Torts* 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.

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §1 (Tentative Draft No. 2, 1995).

Section 2 defines different categories of product defects; however, the section does not require that a manufacturing defect render the product not reasonably safe. *Id.* § 2.

198. 938 F.2d 1033 (9th Cir. 1991).

199. *Id.* at 1034.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Winter*, 938 F.2d at 1035.

tort actions.[204] Imposing strict liability on publishers, the court said, would have a chilling effect on speech.[205]

Liability for institutional reckless disregard, however, does not principally focus on the speech. It focuses instead on decisions made about the processes that yield speech, the care with which the speech is produced, and on the strictly business choices underlying those decisions. The institutional decision-maker is not a speaker, but is instead a profit-induced compiler and disseminator of others' expression. In this sense, liability for high-risk behavior based strictly on stock market and financial concerns is more akin to regulation of commercial speech.

Most importantly, 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 modern press institutions. A form of liability based on strict liability or negligence, but narrowed by a privilege of knowing reckless disregard for the truth, would encourage more and better expression in the news setting and can easily be seen as powerfully consistent with the purposes of the First Amendment.

B. THE ECONOMICS OF NEWS ENTERPRISE LIABILITY

If the focus of institutional reckless disregard is shifted away from the First Amendment to tort law questions of efficiency and other tort rationales, the issue of news enterprise liability can be framed as a question of internalization of costs versus externalization of costs. What is the most economically efficient way to accomplish the objectives of tort law?

The law and economics school holds that tort law is concerned about the distribution of the costs of an activity.[206] The costs of a given activity can be spread among a variety of parties—internalized or externalized. Tort law typically requires costs to be internalized, or borne by their creator, if a reasonable person would think that the cost is a foreseeable result of the activity.[207] In this way, the foreseen costs can be measured, imposed on the entity that creates the costs, and passed on to the ultimate consumers as part

204. *Id.* at 1034.

205. *Id.* at 1035. Other jurisdictions have adopted the *Winter* holding. *E.g.* Garcia v. Kusan, Inc., 655 N.E.2d 1290 (Mass. App. Ct. 1995); Birmingham v. Fodor's Travel Publ'ns, Inc., 833 P.2d 70 (Haw. 1992). *See generally* Brett Lee Myers, Note, *Read at Your Own Risk: Publisher Liability for Defective How To Books*, 45 ARK. L. REV. 699 (1992).

206. Boomer v. Atl. Cement Co., 257 N.E.2d 870, 872–74 (N.Y. 1970). *See generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (linking property and torts and applying them to the problem of pollution).

207. *See generally* Calabresi & Melamed, *supra* note 206.

of the true cost of the activity. The internalization of costs is a basic part of most efficiency explanations of torts.[208]

In contrast, if the costs of an activity remain externalized, the persons harmed by the activity—in libel, the defamed individual and the readers who are harmed by false information—bear all of the costs.[209] Such a result is efficient if the costs cannot be foreseen and if the harm-producing activity is of sufficient value that it should not, as a matter of policy, be borne by the initial actor—the publisher, in the case of news.[210]

Of course, there is some measure, some dollar figure, that can be assigned to a given paper or media organization that reflects how much it would cost to cut the error rate at a newspaper.[211] However, to determine whether it would be more efficient (less expensive) for the organization to change its behavior or to just pay off claims, the organization's cost of reducing damaging errors would be compared to the compensation to be paid victims through the tort process—in this case, the damages that a libel plaintiff claims.[212]

When the organization does not change its behavior, the actual malice standard determines which actors should bear the costs of any subsequent libelous publications. If the harms from libel are foreseeable, normal tort principles would dictate that they should be assigned to the creators of the costs (e.g., newspapers) so that they can be redistributed to the beneficiaries of the activity (the general public) as a part of the true cost of the activity. However, actual malice does not follow this rule. By setting such a high standard for liability, the actual malice standard effectively externalizes all of the costs of harmful error. The costs are not assigned to the publisher and internalized and redistributed to readers. Instead, in most cases the high standard of fault creates an externality, forcing the harmed party—who derives little individual benefit (and much personal harm) from an error—to bear the whole of the costs.

This result is not grounded in tort law, as it reflects no attempt to discern whether it is the most efficient way to produce the desired results. It reflects no individualized assessment of the costs to the newspaper versus the costs to the individual libelees as a means of determining whether internalization or externalization of costs is the most efficient course. The "privilege" of actual malice instead rests on a judgment that harmful errors—up to the point of knowing falsity—are socially valuable, in First

208. *Id.*

209. In libel, the costs are the errors in a media organization's product—the news story—and the harms the errors cause to specific individuals

210. *See generally* Calabresi & Melamed, *supra* note 206.

211. *See generally* Dorsey D. Ellis, Jr., *Damages and the Privacy Tort: Sketching a "Legal Profile,"* 64 IOWA L. REV. 1111 (1979) (discussing the tort of disclosure and proposing a theory of damages).

212. *Id.*

Amendment terms. It is thus a conscious decision to *not* return the costs of libel to the publishers in order to avoid deterring publishers from carrying out newsgathering actions that produce great benefit for the public.

The actual malice privilege is economically problematic, however, because there are two types of conduct bound up in the term "libel." Libelous publication describes an end result and includes both negligent and deliberate conduct. While the *Sullivan* Court wanted to protect negligent mistakes from being subjected to tort liability, it did not want to foreclose damage awards for deliberate conduct.[213] This is the reasoning behind the dichotomous standard at the heart of *Sullivan*.

Institutional reckless disregard, however, is distinct from knowing or negligent error in a publication. It does not focus on a particular editorial decision to publish a factual statement, but on general practices known to produce risk of future harm, and on harms that are less random and much more foreseeable than the harms at issue in *Sullivan*. It involves risky behavior that will surely produce harm; the only questions are when, where, and with what consequences.[214]

The particular set of legal boundaries that *Sullivan* put in place—very limited liability except in the case of a deliberate act—attempts to encourage, not discourage, press actions that run closer to the line between responsible and irresponsible acts. In the course of reducing the deterrent effect, however, this regime eliminated any compensatory effect. While the *Sullivan* Court wanted to protect the minor, inadvertent error, it produced a regime in which *possibly* acceptable behavior is the norm. Without the possibility of libel awards, there is no legal principle to shift costs of inadvertent errors, as opposed to deliberate harms, to the news publisher. By exempting such a large class of errors—including those arising at the institutional level—the Court effectively removed any possibility of compensatory awards. Without those compensatory awards, there is no legal tool to reinforce social norms of good newspaper behavior.

Actual malice, in short, alters the normal tort paradigm so that there is no deterrent effect before the imposition of sanctions, no matter the source or nature of the error. Actual malice says that while mistakes are foreseeable, they stem from behaviors that society should not want to change; the mistakes are a natural offshoot of acceptable and indeed necessary *individual* reporting practices.

Institutional malice, however, is based on the intuition that there are two legally distinguishable types of behaviors that produce error: atomized and story-based decisions of reporters and editors; and non-journalistic

213. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–83 (1964).

214. For analogous cases addressed in terms of the First Amendment, see *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233 (4th Cir. 1997), and *Virginia v. Black*, 538 U.S. 343 (2003), discussed *supra* notes 119–23, 126–32, respectively.

business decisions that alter processes, policies, and practices at a general level, not at the level of a specific editorial choice about a fact or story.

A tort action based on institutional reckless disregard for truth would permit the cost of some *business* decisions to be internalized. Business decisions too often have little to do with the exercise of editorial judgment, except perhaps to erode the frequency and depth of its application. In a market that values efficiency as an end in itself, that rewards increasing profits and margins in the interest of stock price, and that sees news as a malleable product by which consumers are drawn to advertisers, few business decisions are likely to redound to the benefit of the public in a First Amendment manner. The benefits produced by the institutional press are produced by more, not less: more press freedom, more time, more energy, more effort. Institutional choices that knowingly affect the practice of journalism reflect a clash between two value systems: quantity versus quality and efficiency versus value.

News business decisions are often decisions *not* to internalize the costs of newsmaking. Indeed, in the world created by *Sullivan*, such decisions, being institutional and not editorially specific, *are by definition always externalized*—freed from the risks that the publisher will ever have to internalize the costs of decisions. The cost of good news, of Mill's "truth," is editing, copy-editing, and journalist-*hours* devoted to a story instead of a journalist-*hour*. Each part of the news business costs money and has a procedural function. When procedural steps are eliminated in the interests of business, the result can be error that represents costs to society in terms of "bad" news and to individuals in reputational harm. Under the common-law libel tort, these costs were generally borne by the media, with the exception of narrow and focused privileges. The costs are represented in the salaries of copy-editors and fact-checkers and compensation for the victims of libel. Without those cost-shifting measures, the costs of media business decisions that result in libelous publication are borne by everyone *but* the press. Recognition of institutional reckless disregard will shift some of the costs of these decisions back to the institutions that create them.

V. CONCLUSION

> *Many editors I talk to are wary of being hammered for circulation figures and told to cover more local news when staffs and budgets are cut, newshole is reduced and staffers are overworked. My own budget and staff have shrunk, and I just found out that a newsroom position I hoped to fill will be a budget casualty rather than an anticipated big moment. 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.*[215]

The very premise on which the current 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 processes and policy, and organization are made with journalism and its values in mind. Such policies may be controversial. They may involve the sacrifice of long-embraced editorial processes or journalistic standards in order to preserve a news organization, to strengthen it in the long run, or to participate in its constant and dynamic changes over time.

But what about changes in process, production, 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 about the newsroom made in the face of known and material increases in the risk of error and with indifference 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 incorrect assumption that the institution to be benefited 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 corporate policies or processes instituted in reckless disregard of truth and of the values and standards of journalism. We believe that the First Amendment itself would be better served by a rule of liability for institutional reckless disregard for the truth. It would require that journalism and its values be placed in the balance when business decisions are made by news enterprises. It would allow editors as news professionals to be full participants in such choices, not simply designated implementers of decisions made elsewhere. It would permit persons harmed by institutionally reckless falsehoods to seek compensation for corporate acts that bear no relation to the First Amendment. It would require institutional decision-makers to internalize—to feel directly—the costs that their decisions impose on the press and the values of the First Amendment.

If, instead, liability based on 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, and the defamation tort with it,

215. E-mail from an anonymous editor, to Gilbert Cranberg, 2004 (on file with the author).

will operate perversely to absolutely immunize *and thus to encourage and reward* unacceptable choices at the corporate level. Such an *incentive* to compromise journalism and its quality, as long as it is done wholesale, would be deeply tragic. It would compromise the very purposes of the First Amendment, in whose name the organizations are supposed to function.