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FREE SPEECH AND CHEAP TALK

Daniel Hemel and Ariel Porat***

ABSTRACT

We present a new framework for analyzing defamation liability that serves both to clarify and complicate understandings of the law's consequences for speakers, victims, and the marketplace of ideas. In addition to the familiar deterrence and chilling effects, we show how defamation liability can generate a "warming effect," making statements more credible and potentially raising both the quality and quantity of speech. We also explain how a more plaintiff-friendly liability regime may exacerbate harms to defamation victims. We end by considering the possibility of "self-tailored" defamation law, with victims or speakers selecting the defamation liability regime that applies to them.

> I'm going to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money. We're going to open up those libel laws. So when *The New York Times* writes a hit piece which is a total disgrace or when *The Washington Post*, which is there for other reasons, writes a hit piece, we can sue them and win money instead of having no chance of winning because they're totally protected.
>
> — Donald J. Trump, at a campaign rally in Fort Worth, Texas, February 26, 2016

1. INTRODUCTION

With his campaign-trail vow to "open up" American libel laws, then-candidate Donald Trump thrust the topic of defamation liability into the national

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spotlight.[1] And since his election and inauguration, President Trump has continued to float the idea of changing libel laws to make it easier for plaintiffs to prevail.[2] This desire to "open up" libel laws appears to stem from President Trump's identification with potential and actual defamation plaintiffs.[3] A lower bar to recovery, he has said, would allow "a person like me" who is the victim of a false statement to "bring lawsuits to have it corrected."[4]

President Trump's remarks regarding libel law have drawn sharp criticism from scholars, journalists, and activists alike. Law professor Robert McChesney has said that Trump's "completely outrageous" proposal is a threat to "a diverse marketplace of ideas."[5] The *New York Times* editorial board warns that Trump's libel proposals would "undermine the press."[6] The nonprofit Committee to Protect Journalists cautions that Trump's proposal could threaten "the free flow of information to citizen" that is "essential to American democracy."[7]

For those who have tracked debates over defamation liability in the past, the controversy over President Trump's amorphous libel law proposal follows familiar lines. On the one hand, those who—like Trump—want to lower the bar to recovery generally say they seek to protect the victims of false statements (or

1 Hadas Gold, Donald Trump: We're Going To 'Open Up' Libel Laws, *Politico* (Feb. 26, 2016), http://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866.

2 Donald J. Trump (@realDonaldTrump), *Twitter* (Mar. 30, 2017; 11:27 AM), https://twitter.com/realDonaldTrump/status/847455180912181249 ("The failing @nytimes has disgraced the media world. Gotten me wrong for two solid years. Change libel laws?"); Nicki Rossol, White House Official Says 'We've Looked at' Changes to Libel Laws That Would Restrict Press Freedom, *ABC News* (Apr. 30, 2017), http://abcnews.go.com/Politics/white-house-official-weve-looked-libel-laws-restrict/story?id=47114566 (quoting White House Chief of Staff Reince Preibus as saying that Trump aides had "looked at" the possibility of crafting a constitutional amendment that would lower the bar to recovery in libel lawsuits).

3 See, e.g., Full Transcript: President Donald Trump's News Conference, *CNN* (Feb. 17, 2017), http://www.cnn.com/2017/02/16/politics/donald-trump-news-conference-transcript; Donald J. Trump (@realDonaldTrump), *Twitter* (May 15, 2016; 4:26 PM), https://twitter.com/realdonaldtrump/status/731928825500717057.

4 Donald Trump, Ted Cruz, and Marco Rubio, Weigh in Ahead of Super Tuesday, *Fox News* (Feb. 28, 2016), http://www.foxnews.com/transcript/2016/02/28/donald-trump-ted-cruz-and-marco-rubio-weigh-in-ahead-super-tuesday.html.

5 Trump Vows to Sue New York Times in Latest Show of Disregard for Freedom of Press, *Democracy Now!* (May 19, 2016), https://www.democracynow.org/2016/5/19/trump_vows_to_sue_new_york; accord Chapin Cimino, The Tool of Totalitarianism, *U.S. News & World Report* (Nov. 18, 2016), https://www.usnews.com/opinion/op-ed/articles/2016-11-18/stephen-bannon-and-donald-trump-are-a-serious-threat-to-the-free-press (arguing that Trump's proposal would endanger "the unfettered exchange of ideas").

6 Editorial, The True Damage of Trump's Fake News, *NY Times* (Apr. 4, 2018), https://www.nytimes.com/2018/04/04/opinion/trump-washington-post-amazon.html.

7 Committee to Protect Journalists, CPJ Chairman Says Trump Is a Threat to Press Freedom (Oct. 13, 2016), https://cpj.org/2016/10/cpj-chairman-says-trump-is-threat-to-press-freedom.php.

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persons who perceive themselves to be victims of false statements). On the other hand, supporters of a higher bar to recovery—like Trump's critics—generally argue that limits on liability promote the free flow of information and ideas. This tradeoff between the interest in protecting victims and the interest in promoting free flow of information and ideas animates the constitutional law of defamation in the USA.[8] Supreme Court decisions on the subject frequently refer to the "balance" between victims' interests, which weigh in favor of a lower bar, and the interests of speakers and audiences, which weigh in the opposite direction.[9] Most recently, Justice Thomas invoked this same idea of "balance" in a controversial February 2019 concurrence calling for the Court to reconsider its defamation jurisprudence. "The States are perfectly capable of striking an acceptable balance between encouraging robust discussion and providing a meaningful remedy for reputational harm," Thomas wrote, suggesting throughout his opinion that the two values are in tension (*McKee v. Cosby*, 139 S. Ct. 675, 682 (2019) (Thomas, J., concurring in the denial of certiorari)).

This conventional account of the interests at stake in defamation law—and the widely shared understanding of the directions in which these values weigh—certainly captures important truths regarding the effects of liability on victims' interests and the free flow of information. But the standard account also oversimplifies—and in some cases misidentifies—the winners and losers from defamation law reform. In particular, the standard account overlooks the possibility that under certain circumstances, a lower bar to recovery may exacerbate the injuries to false-statement victims while a higher bar may lead to less, rather than more, speech. Raising or lowering the bar to recovery in defamation cases can have consequences for victims and speakers—and for the broader marketplace of ideas—that are quite different from those that the standard account anticipates.

This article presents a new account of defamation law that serves both to clarify and to complicate our understanding of the effects of liability on potential speakers, potential victims, and audiences. (Our analysis applies both to

8 See Sunstein (1984, p. 891) ("On the one hand is the interest in free speech. Fear of liability for defamation may have a significant deterrent effect on free expression. On the other hand is the interest in protecting reputation." (footnote omitted)).

9 See, e.g., *Gertz v. Robert Welch*, 418 U.S. 323, 343 (1974) (discussing "the balance between the needs of the press and the individual's claim to compensation for wrongful injury"); *id.*, p. 403 (White, J., dissenting) (discussing the "precarious balance" between the reputational interests of victims and the societal interest in the free flow of information); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 63 (1971) (Harlan, J., dissenting) (noting the "need to balance" free speech values against interest in protecting libel victims); *Curtis Pub'g Co. v. Butts*, 388 U.S. 130, 153 (1967) (emphasizing importance of "strik[ing] a fair balance between the interests of the community in free circulation of information and those of individuals in seeking recompense for harm done by the circulation of defamatory falsehood").

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libel, which is defamation by written or published statement, and to slander, which is defamation by spoken word, and so we will use the catch-all term "defamation" from here on out.) We begin our analysis on the speaker side. Most straightforwardly, lowering the bar to recovery in defamation cases has both an intended *deterrence effect* and a (usually unintended) *chilling effect*. The intended deterrence effect is the impact on potential speakers who would have made false statements in the absence of defamation law but refrain from doing so because of the specter of liability. The chilling effect is the impact on potential speakers who would have made true statements in the absence of defamation law but refrain from doing so—perhaps because they fear that courts will mistakenly hold them liable for true statements or that statements they believe to be true may turn out not to be, and perhaps because they are deterred by the costs of the precautions they may have to take to avoid litigation or the fees that they may incur in defending against a lawsuit.

So far, we have said nothing that will surprise adherents to the standard account, which takes note of both the deterrence and chilling effects (e.g., Renas et al. 1983; Bar-Gill & Hamdani 2003; Garoupa 1999). Our first novel claim is that in addition to these two effects on speakers, defamation liability also generates what we call a *warming effect*.[10] Because defamation liability raises the cost of false statements relative to true statements, it generally leads listeners and readers to accord greater credence to the statements they hear or read. And for that same reason, potential speakers who care whether audiences take their statements as true will have more to gain from making such statements with defamation liability in the background. When truthful speech is costly—as may be the case for media outlets that invest in gathering and disseminating news or for survivors of sexual assault and harassment who risk stigmatization when they speak about their experiences—the warming effect of defamation liability may partly or wholly offset the chilling effect.

Recognition of the warming effect suggests that the impact of defamation liability on the total quantity of speech is ambiguous. The impact of defamation liability on the total quality of speech is likewise uncertain. By "quality" of speech, we refer to the share of all statements that are truthful. While one might think that defamation liability would deter a higher percentage of false

10 The term "warming effect" has been used limitedly in case law and legal scholarship to identify phenomena distinct from the one we describe here. See, e.g., *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 401 (S.D.N.Y. 2004) (per curiam) ("The warming effect is a sociological phenomenon where creating a competitive district with a solidified minority community promotes participation in the political process and raises turnout rates."); Antonovics & Sander (2013, p. 259) (suggesting that Proposition 209, which prohibited state colleges and universities in California from considering race, sex, and ethnicity in admissions and other decisions, had a "warming effect" on applications to those schools from underrepresented minorities).

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statements than true ones, and therefore increase the overall accuracy of speech, this conclusion overlooks the possibility of a *substitution effect*: defamation law may lead speakers to substitute away from negative statements, which bring with them the prospect of liability, and toward positive statements, which carry little risk of liability even when they amount to puffery or downright lies. For example, a lower bar for defamation liability may lead politicians to make fewer negative statements about their opponents but more positive statements about themselves. In some cases, positive statements will have the same truth value as the negative statements for which they substitute, but speakers also may substitute lies for truths and vice versa. The possibility of substitution tempers any claim we can make regarding the net effect of defamation liability on quantity and quality.

After analyzing the speaker-side effects of defamation liability, we turn to the "victims" of speech—the individuals or entities about whom negative statements are made. Obviously, many victims of false statements fare better when defamation laws are strong: not only are liars more likely to be deterred, but victims of false statements are more likely to recover damages from liars. Furthermore, defamation law potentially exerts a *corrective effect* to the benefit of victims: the threat of liability may induce a speaker to retract a defamatory statement, and a judgment in a victim's favor may help to clear that victim's name. There is, however, another way that defamation liability may affect—and in this case, cause harm to—the subjects of defamatory statements: what we call an *intensification effect*. Recall that with a robust regime of defamation liability in the background, audiences ascribe greater credibility to allegations than they would if defamation laws were weak. Thus, in the immediate aftermath of a defamatory statement, the temporary harm experienced by the victim may be more severe when defamation laws are stronger. Defamation liability also may intensify the long-term harm to victims of false statements who face barriers to filing suit under certain circumstances, because the fact that a victim does not file a lawsuit may lead audiences to conclude that the statement in question is true. Moreover, the inevitability of court error and problems of proof mean that some victims of false statements will sue and lose, notwithstanding the falsity of the statement in question. Defamation law makes these losing victims worse off, not only because of the litigation costs they incur, but also because of the implied inference that the statement in question was true. So while defamation liability leaves many potential and actual victims of false statements better off, the victim-side effects of defamation liability are heterogeneous and not entirely positive.

The victim-side effects of defamation law, moreover, may be felt long before any potentially defamatory statement is made—and even before any potential speaker contemplates such a statement. Defamation law also may affect the

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decisions of individuals and entities to engage in behaviors that put them at heightened risk for becoming the subjects of negative speech, true or false. For this purpose, we distinguish between *wrongdoing* and *rightdoing*. Wrongdoing is behavior that is socially harmful and that is likely to make an actor the subject of a true statement that harms the actor's reputation. Rightdoing is behavior that is socially beneficial and that it is likely to make an actor the subject of a false statement that harms the actor's reputation. The effects of defamation law on both wrongdoing and rightdoing are complicated and context-dependent. For example, stronger defamation laws may lead to more corrupt behavior by government officials (an obvious form of wrongdoing) because those officials expect that the prospect of liability will chill potential accusers from speaking out. Alternatively, stronger defamation laws may have the opposite effect because public officials now know that if whistleblowers go public with allegations of corruption, those allegations are more likely to be believed. Stronger defamation laws also may induce individuals to participate in civic life—thus exposing themselves to negative speech—because those individuals now know that defamation laws will protect them against false accusations. But while stronger defamation laws may make false accusations less likely, those laws also potentially intensify harms to victims, which may cause some citizens to stay out of public life.

The heart of our article is a positive analysis of defamation liability's consequences for all the actors involved, but we also consider the normative implications that might be drawn from this analysis. While the effects of defamation liability on all the actors involved are theoretically ambiguous, that ambiguity itself might give rise to a policy prescription. Because the welfare effects of potential changes to defamation law are answerable only empirically, if at all, one might reasonably conclude that state- and local-level experimentation should be embraced rather than squashed. The constitutionalization of defamation law in the USA might therefore be criticized for having short-circuited the experimental process—ostensibly for the purpose of protecting the free flow of information but without any assurance that the effect would be as imagined.

Yet, the case for defamation law experimentalism is, at best, uneasy. For one, the flow of individuals and information across jurisdictional lines potentially contaminates the results from defamation law "experiments." For another, the success or failure of any such experiment would be extraordinarily difficult to discern. If, for example, lowering the bar to recovery results in fewer allegations of wrongdoing, would that mean that the chilling effect is stronger than the warming effect, or that wrongdoers have been deterred by the knowledge that reports of wrongdoing will be given more credence? Unless the observer is

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omniscient and can detect all wrongdoing—reported and unreported—either conclusion would be tentative at best.

Other approaches might involve tailoring defamation liability standards by topic, by victim, or by speaker. Victim-side tailoring already exists to some extent under U.S. law: by choosing whether to become public figures, individuals exert at least some control over what defamation liability regime applies to them. Under speaker-side tailoring, it would be the potential defendant—rather than the potential plaintiff—who exercises choice over the applicable liability regime. We conclude that the case for speaker-side tailoring is strong: it would likely promote the free flow of information without necessarily harming the reputational interests of potential false-statement victims. In this respect, our analysis might provide some support for "open[ing] up" defamation law, but it would be a very different sort of "opening up" than President Trump appears to desire. The defamation liability regime that we envision entails openness to speaker-side choice—and ultimately, we think, a more open and robust exchange of information and ideas.

Our article proceeds as follows. Section 2 sets the stage with a primer on the common law of defamation, the U.S. Supreme Court's interventions, and the interactions between the common law system and the USA's constitutionalized regime. We go on to consider the effects of defamation liability on potential speakers (Section 3) and victims (Section 4). We then in Section 5 evaluate proposals to allow for greater variation in defamation liability across jurisdictions, across topics, across victims, and across speakers. We consider, in particular, a regime we call "speaker-side self-tailoring," in which speakers can specify ex ante the liability rules that will attach to the statements they make. Speaker-side self-tailoring will not be recognized as normally desirable by all, but it will be especially attractive to those who believe that the value of a vibrant marketplace of ideas outweighs concerns regarding victims' reputational interests.

2. COMMON LAW AND CONSTITUTIONAL PRINCIPLES

Defamation is first and foremost a matter of state common law, but the federal constitution—and specifically, the First Amendment—limits the states' freedom to craft their own defamation liability rules. This part outlines the elements of defamation and explains how the First Amendment, as interpreted by the U.S. Supreme Court, alters the state common law landscape. It then examines the interactions between the USA's increasingly constitutionalized defamation regime and the defamation regimes of other common law countries.

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2.1 The Common Law of Defamation

Defamation is traditionally defined as malicious harm to the reputation or good name of another by making a false statement to a third person.[11] The traditional definition, however, obscures as much as it reveals. Three common law presumptions significantly expand the scope of defamation liability beyond what the bare definition would suggest (see Acheson & Wohlschlegel 2018, pp. 340–342).

First, at least by the beginning of the 20th century, proof of the defendant's malice had ceased to be an element of a defamation plaintiff's prima facie case. The rule that has developed in common law jurisdictions is that a defendant who defames a plaintiff is presumed to have acted with malice. The presumption is generally irrebuttable: a defendant cannot excuse herself from malice even if she wrote or spoke "in the most benevolent spirit" (*E. Hulton & Co v. Jones* [1910] A.C. 20). Second, at common law (at least as it developed in England and the majority of U.S. states), the falsity of a defamatory statement is presumed. Truth is an affirmative defense, and the burden of proving the truth of a statement rests on the defendant (Restatement (Second) of Torts 1977, section 581 A cmt. a). Third, the common law presumes harm in a variety of circumstances rather than requiring the plaintiff to prove injury. Harm is presumed in all libel cases (Restatement (Second) of Torts 1977, section 569, reporter's note 1) and a subset of slander cases. Specifically, slander is actionable "per se" (i.e., without proof of harm) when the defendant's statements impute the plaintiff a criminal offense, "loathsome" disease, matter incompatible with her business or profession, or "serious" sexual misconduct (*id.*, §§ 570–574). With the Slander of Women Act 1891, the UK Parliament extended the presumption of harm to statements that impute unchastity or adultery to female plaintiffs, though—as discussed below—this extension has since been rescinded (54 & 55 Vict. c.51).

The concept of "absolute privilege" limits the scope of common law defamation. Absolute privilege applies to "any courtroom statement relevant to the subject matter of the proceeding"—whether by judges, witnesses, or attorneys—as well as briefs and pleadings (*Imbler v. Pachtman*, 424 U.S. 409, 426 n.23 (1976)). Absolute privilege applies as well to lawmakers' statements in the course of legislative proceedings (e.g., *Harlow v. State Dep't of Human Servs.*, 883 N.W.2d 561, 575 (Minn. 2016)), and to some statements by executive

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11 See, e.g., Black's Law Dictionary, 10th edn, s.v. "defamation."

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branch officials (though the contours of executive branch absolute privilege vary from jurisdiction to jurisdiction).[12]

A defense of "fair comment" also has emerged in common law jurisdictions, though its contours are contested. The privilege of fair comment applies to statements of opinion regarding matters of public concern that are based upon true or commonly known facts. Fair comment is, importantly, not an absolute defense. In cases of fair comment, a plaintiff still can recover if she is able to prove actual malice (Nicholson 2000, pp. 39–40).

To sum up so far: Although defamation technically entails malice, harm, and falsity, plaintiffs in common-law regimes rarely have to prove all three of those elements—and sometimes need not prove any of the three. Malice is presumed—without opportunity for rebuttal—in all cases except those involving fair comment. Falsity is likewise presumed, albeit rebuttably. And a rebuttable presumption of harm applies to a wide swath of speech, including all written and published statements (libel) and a subset of spoken statements (slander per se). For all of these reasons, the common law of defamation is fairly characterized as "plaintiff-friendly" (Acheson & Wohlschlegel 2018, pp. 339–340), though as we shall soon see, developments in U.S. constitutional law have tempered that plaintiff friendliness quite a bit.

2.2 The Constitutional Law of Defamation in the USA

Since the mid-20th century, U.S. courts—and in particular, the U.S. Supreme Court—have transformed the law of defamation by relaxing and in some contexts eliminating the presumptions of malice, falsity, and harm.

The landmark case on malice is the U.S. Supreme Court's 1964 decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). At issue in that case was an advertisement printed in the *New York Times* and paid for by a group of civil rights activists who had formed the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South." The ad stated, among other assertions, that "[i]n Montgomery, Alabama, after students sang "My Country, 'Tis of Thee' on the State Capitol steps . . ., truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus" (*id.*, p. 257).

12 See, e.g., *Shearer v. Lambert*, 547 P.2d 98, 101 (Ore. 1976) (noting that "cases in other jurisdictions are in conflict," with "some courts limiting the privilege to the governor, the attorney general and the heads of state departments whose rank is the equivalent of cabinet rank in the federal government, whereas other courts have extended the privilege to inferior state officers no matter how low their rank or standing"); *Isle of Wight Cty. v. Nogiec*, 704 S.E.2d 83, 88 (Va. 2011) (absolute privilege for executive branch limited to "communications by military and naval officers"). The Supreme Court has held that federal law defines the scope of absolute privilege for federal officials, and that the privilege extends to inferior executive branch officers. See, e.g., *Howard v. Lyons*, 360 U.S. 593, 597–598 (1959).

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Montgomery city commissioner L.B. Sullivan took issue with the ad, arguing (among other bones of contention) that although the ad did not mention him by name, it attacked his reputation because he was in charge of the city's police. Sullivan also said that police were not called to the historically African-American college in connection with the Capitol protest and that they did not "ring" the campus. Because these were untrue statements of fact, the common law privilege of fair comment did not apply (*id.*, p. 267). Sullivan sued the *Times* and four individual members of the Committee to Defend Martin Luther King. An all-white jury awarded Sullivan $500, 000 in damages, and the Alabama Supreme Court affirmed the judgment (*id.*, pp. 256–259).[13]

A unanimous Supreme Court reversed the Alabama court's judgment. Justice William Brennan, writing for the Court, acknowledged that "some of the statements" in the *Times* ad "were not accurate descriptions of events which occurred in Montgomery" (376 U.S. at 258). But falsity, in the Supreme Court's view, was not enough to justify liability: "erroneous statement is inevitable in free debate" and "must be protected if the freedoms of expression are to have the breathing space they need to survive" (*id.*, pp. 271–272 (internal quotation marks omitted)). Brennan's opinion went on to quote—approvingly—from a D.C. Circuit decision:

> Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors.... The protection of the public requires not merely discussion, but information.... Errors of fact ... are inevitable. Whatever is added to the field of libel is taken from the field of free debate (*id.*, p. 272 (quoting *Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C. Cir. 1942))).

Brennan's opinion then considered the reputational interests of defamation victims. The Court found those interests to be uncompelling—at least when the victims are public officials. "[G]overnment officials, such as elected city commissioners," must "be treated as men of fortitude, able to thrive in a hardy climate," the Court observed (*id.*, p. 273 (internal quotation marks omitted)). These observations led the Court to conclude that a "defense for erroneous statements honestly made" is "essential" (*id.*, p. 278). The Court held that:

> The constitutional guarantees [in the First and Fourteenth Amendments] require ... a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his

13 See Bruce Weber, M. Ronald Nachman, Lawyer in Times v. Sullivan Libel Case, Dies at 91, *N.Y. Times* (Dec. 4, 2015), https://www.nytimes.com/2015/12/05/us/m-roland-nachman-lawyer-in-times-v-sullivan-libel-case-dies-at-91.html (noting that jury was all-white).

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> official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not (*id.*, pp. 279–280).[14]

The *New York Times* opinion is, as Kermit Hall writes, "the product of a place in time" (Hall 1991, p. 344). The Warren-era Supreme Court quite clearly was concerned that predominantly white juries in southern states would be biased in favor of segregationist leaders and against civil rights activists—and would use defamation law to squelch efforts to achieve racial equity. University of Chicago law professor Harry Kalven, Jr., in a commentary on the case in the 1964 *Supreme Court Review*, observed that "even a cursory examination of the case reveals that the decision was responsive to the pressures of the day created by the Negro protest movement" (Kalven 1964, p. 192). This is not a criticism as much as a statement of fact—indeed, Kalven concluded that the opinion "may prove to be the best and most important" that the Court "has ever produced in the realm of freedom of speech" (*id.*, p. 194). Members of the Court acknowledged the significance of the civil rights backdrop as well, with Justice Arthur Goldberg writing in a concurrence that "[t]he opinion of the Court conclusively demonstrates the chilling effect of the Alabama libel laws on First Amendment freedoms in the area of race relations" (*New York Times Co.*, 376 U.S. at 300-01 (Goldberg, J., concurring in the result)).

Yet, while the *New York Times* case is bound up in the context of the civil rights movement of the 1960s, it also is an enduring landmark of American constitutional law. The Court has repeatedly reaffirmed—and extended—*New York Times v. Sullivan*'s central holding that malice must be proven rather than presumed in cases involving the alleged defamation of public officials. Three years after *New York Times*, in *Associated Press v. Walker* and its companion case *Curtis Publishing Co. v. Butts*, the Court held that malice must be proven rather than presumed when the plaintiff—though not a public official—is a "public figure." (The plaintiff in the *Associated Press* case was Edwin Walker, a white Army veteran who was an outspoken opponent of federally-enforced integration at the University of Mississippi and sued the national news service for its allegedly inaccurate reporting about anti-integration riots on the campus (*Curtis Publishing Co.*, 388 U.S. 130, 140–42, 155 (1967) (plurality opinion); *id.*, p. 162 (Warren, C.J., concurring in the result)). In subsequent cases, the Court has clarified that this category of "public figures" includes all-purpose public figures (i.e., individuals who achieve such "pervasive fame or notoriety"

14 Some members of the Court would have gone further. Justices Black and Goldberg, both joined by Justice Douglas, would have recognized an unconditional freedom to criticize government officials—at least for official conduct—even if the official can prove actual malice (*New York Times Co.*, 376 U.S. at 293 (Black, J., concurring); *id.*, p. 297 (Goldberg, J., concurring in the result)).

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that they lose the benefit of the malice presumption any time they sue for defamation) and limited-purpose public figures (i.e., individuals who "inject" themselves or are "drawn in" to a "particular public controversy," and thus lose the benefit of the malice presumption only with respect to that subject) (*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974)).

The "actual malice" requirement might accomplish little in the way of controlling jury bias if malice were a question of fact left up to the jury to resolve. It is not. In the 1971 case of a white Chicago police officer who sued *Time* magazine over its reporting on police brutality toward African-American residents of the city, the Supreme Court held that "actual malice" was a question of law to be decided on appeal *de novo* (i.e., without deference to the findings of the jury or the lower court) (*Time, Inc. v. Pape*, 401 U.S. 279, 280–82, 284 (1971)). The actual malice rule thus became a way for courts of appeals—including the Supreme Court—to guard against jury bias in defamation cases. The Court later held that the burden of proof with respect to actual malice is not the "preponderance of the evidence" standard that is generally applied in torts, but the higher bar of "clear and convincing" evidence (*Gertz*, 418 U.S. at 342). And while the Court has declined to extend the requirement of actual malice to cases brought by private figures, who are presumed to have lesser access to "channels of effective communication" by which they can combat falsehoods via "self-help," the Court has held that a private-figure plaintiff must show at a minimum that the defamation defendant was negligent in verifying the false claim (*Gertz*, 418 U.S. at 347).

Malice is not the only common law presumption that the Supreme Court has altered. In the 1986 case *Philadelphia Newspapers v. Hepps*, the Court held that—"at least" where speech relates to a "matter of public concern"—a private-figure plaintiff "must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant" (*Phila. Newspapers v. Hepps*, 475 U.S. 767, 768–69, 777–78 (1986)). The Supreme Court has yet to address whether states can continue to apply the presumption of falsity in cases involving private figures, non-media defendants, and private concern. Courts in some states have held that the burden of proving falsity lies with the plaintiff in all defamation cases (e.g., *Benson v. Nw. Airlines*, 561 N.W.2d 530, 537 (Minn. App. 1997)); others have said that the burden shifts to the plaintiff whenever speech pertains to a matter of public concern (e.g., *Pearce v. E.F. Hutton Grp., Inc.*, 664 F. Supp. 1490, 1518 (D.D.C. 1987)); and still other courts have maintained that the presumption of falsity still applies when a private-figure plaintiff sues a non-media defendant—even when speech pertains to a matter of public concern (e.g., *Cummins v. Bat World Sanctuary*, No. 02-12-00285-CV, 2015 Tex. App. LEXIS 3472, at *28 (Tex. App. Apr. 9, 2015)). Any effort to distinguish between "media" and

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"non-media" defendants, unsurprisingly, raises a whole new raft of questions regarding the line between "media" and "non-media," where blogs fall, what constitutes a "blog," and so on (see, e.g., *Bierman v. Weier*, 826 N.W.2d 436, 469 (Iowa 2013))).

Finally, the Court has relaxed the presumption of harm in a subset of defamation cases, though here again, the Court's case law is less than pellucid. In the 1974 case *Gertz v. Robert Welch Co.*, the Court held that states may not apply the presumption of harm unless the plaintiff proves actual malice (418 U.S. at 349). In other words, *Gertz* implies that a private-figure plaintiff must prove actual malice or actual harm in order to recover for defamation. (Recall that a public-figure plaintiff always has to show actual malice.) Yet, the Court appears to have retreated from this position eleven years later, holding in *Dun & Bradstreet v. Greenmoss Builders* that a state can apply the presumption of harm absent a showing of actual malice if the plaintiff is a private figure and the speech does not involve a matter of public concern (472 U.S. 749, 761 (1985)).

To summarize: the presumption of malice no longer applies to defamation claims in the USA: a public-figure plaintiff must prove actual malice and a private-figure plaintiff must prove—at the very least—negligence. The presumption of falsity also does not apply to cases involving public-figure plaintiffs or to cases involving media defendants and matters of public concern—though there is still some question as to whether and when it applies to private-figure plaintiffs suing non-media defendants. Finally, the presumption of harm persists in limited form: a state can constitutionally apply that presumption only when the plaintiff is a private figure and either (1) the speech does not involve a matter of public concern or (2) the plaintiff also proves actual malice.[15]

2.3 Interactions between Common Law and U.S. Defamation Regimes

In an era when potentially defamatory communications often pass across international lines, the divergence between the common law of defamation and the USA's heavily constitutionalized regime creates inevitable choice-of-forum and conflict-of-law issues. The dominant concern is that defamation liability regime in effect everywhere will be whichever one is most plaintiff-friendly, because plaintiffs will always choose to sue in the jurisdiction where their chances of success are strongest. Indeed, forum-shopping concerns were not far from the surface in *New York Times v. Sullivan*, where—of the 650,000 published copies

15 As Geoffrey Stone has perceptively observed, the Supreme Court's protections for false speech in the defamation context are in many ways *less* robust than its protections for false speech in other contexts. Cf. *United States v. Alvarez*, 567 U.S. 709, 567 U.S. 709 (2012) (plurality opinion) (rejecting false-statement exception to First Amendment).

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of the *Times* containing the advertisement in question—only 35 were circulated in Montgomery County, Alabama and fewer than 400 were distributed in the state (Kalven 1964, p. 197).

In the early 2000s, England—which still generally applies the common law presumptions of malice, falsity, and harm, and which for the most part follows a set of jurisdictional rules that make its courts relatively open to foreign plaintiffs—emerged as a hub for so-called "libel tourism" (Staveley-O'Caroll 2009). One prominent case involved a New York-based writer, Rachel Ehrenfeld, who published a book on international terrorist financing with a Los Angeles publishing house in 2003. Saudi businessman Khalid bin Mahfouz, who was accused in the book of funding the terrorist group Al Qaeda, sued Ehrenfeld in a court in England, where the book had not been published but around 20 copies had been purchased online. Ehrenfeld did not show up in a court, and bin Mahfouz walked away with a $225,000 default judgment plus a court order requiring Ehrenfeld to destroy existing copies of the book and apologize.[16]

Both the USA and the UK responded legislatively to the Ehrenfeld case and the outrage over "libel tourism" that followed. In 2010, Congress passed and President Obama signed the SPEECH Act, which prohibits U.S. courts from recognizing or enforcing any judgment for defamation issued by a foreign court unless the foreign jurisdiction provides at least as much protection for free speech as the USA does or the defendant would have been found liable under U.S. law (see Securing the Protection of our Enduring and Established Constitutional Heritage Act ("SPEECH Act"), Pub. L. No. 111-223, 124 Stat. 2480 (2010) (codified at 28 U.S.C. §§ 4101–4105)). Three years later, the UK Parliament passed the Defamation Act 2013, which bars a court in England or Wales from exercising jurisdiction over a defamation action unless the plaintiff is domiciled in the UK, European Union, or certain other European countries or "the court is satisfied that . . . England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement" (Defamation Act 2013 (2013 c.26), § 9). The same statute made a number of other important changes to UK defamation law. For one, it created a new defense for statements on "a matter of public interest" if the defendant "reasonably believed" that publishing the statement "was in the public interest" (*id.*, § 4(1)). For another, it eliminated the presumption of malice for peer-reviewed statements in academic and scientific journals (*id.*, § 6). And finally, it repealed

16 See Doreen Carvajal, Britain, a Destination for "Libel Tourism," *N.Y. Times* (Jan. 20, 2008), https://www.nytimes.com/2008/01/20/technology/20iht-libel21.1.9346664.html; Ari Shapiro, On Libel and the Law, U.S. and U.K. Go Separate Ways, *NPR: Weekend Edition Saturday* (Mar. 21, 2015), https://www.npr.org/sections/parallels/2015/03/21/394273902/on-libel-and-the-law-u-s-and-u-k-go-separate-ways.

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the Slander of Women Act 1891 and eliminated the presumption of harm for statements imputing that the plaintiff suffers from a contagious or infectious disease (*id.*, § 14).

The SPEECH Act in the USA and the Defamation Act 2013 in the UK have not, however, brought concerns about libel tourism to an end. Other common law jurisdictions that still generally apply the common law presumptions of malice, falsity, and harm—including Australia and Ireland—have become potential libel tourism hotspots (Law Reform Commission 1991; Rolph 2012). Even before the UK Parliament moved to crack down on libel tourism, a U.S.-based online games company chose an Australian court as its forum to sue an English blogger who had made allegedly defamatory statements about one of the company's games. (The company ultimately dropped the case.[17]) More recently, the Australian-born, New York-based actress Yael Stone drew attention to Australia's plaintiff-friendly defamation laws when, in a *New York Times* interview, she accused Australian actor Geoffrey Rush of sexual misconduct. Stone told the *Times* that she "worried that Australia's defamation laws will drag her into a legal and financial quagmire."[18] (Rush had not filed suit against Stone as of this writing, though he did win a $2 million judgment in May 2019 against an Australian tabloid owned by media magnate Rupert Murdoch.[19]) Ireland, for its part, is where American singer–songwriter Justin Timberlake and his American actress spouse Jessica Biel chose to file suit against the London-based *Heat* magazine for defamation after the magazine reported that Timberlake's flirtation with another woman at a Paris nightclub had "rocked" the couple's marriage. (The parties settled, with the magazine issuing an apology and retraction.)[20]

The phenomenon of libel tourism illustrates the challenge of decentralized defamation law in a globalized world. We explore this subject in depth in Section 5; for now, the important point is that the most plaintiff-friendly jurisdiction is likely to become the default defamation liability regime absent

17 See Charles Arthur, Evony Drops Libel Case Against British Blogger Bruce Everiss, *The Guardian* (London) (Mar. 21, 2010), https://www.theguardian.com/technology/2010/mar/31/evony-libel-case-bruce-everiss.

18 See Bari Weiss, The Cost of Telling a #MeToo Story in Australia, *N.Y. Times* (Dec. 16, 2018), https://www.nytimes.com/2018/12/16/opinion/metoo-defamation-geoffrey-rush-yael-stone.html.

19 See Clarissa Sebag-Montefiore, Geoffrey Rush Awarded $2 Million in Defamation Case, a Record in Australia, *N.Y. Times* (May 23, 2019), https://www.nytimes.com/2019/05/23/world/australia/geoffrey-rush-defamation.html. Given that Rush's suit against the Murdoch paper involves a defamation claim by an Australian plaintiff against an Australian-based publication regarding events that allegedly occurred in Australia, it is difficult to describe Rush's suit as "tourism" of any sort.

20 Justin Timberlake and Jessica Biel Settle Heat Lawsuit, *The Guardian* (London) (Oct. 21, 2014), https://www.theguardian.com/media/2014/oct/21/justin-timberlake-jessica-biel-heat-lawsuit.

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stringent rules regarding forum shopping and choice of law. The contrast between the USA's constitutionalized law of defamation and the common law regimes that remain in place elsewhere in the English-speaking world also suggests that the high bar for defamation liability set by *New York Times v. Sullivan* and its progeny is not the only way to protect free speech in a constitutional democracy. To be sure, many journalists and activists in countries with more plaintiff-friendly defamation regimes have called for reform, indicating that the common law presumptions are not viewed as ideal by all who live under them. The search for an "optimal" defamation liability regime may be futile, but careful analysis of defamation law's effects on potential speakers, victims, and audiences may yield insights that can inform future efforts to modify or overhaul defamation law in the USA and abroad.

3. SPEAKER-SIDE EFFECTS

As noted at the outset, defamation liability may affect potential speakers in multiple ways. First, it may generate a *deterrence effect*: the specter of liability for false statements may deter potential speakers from telling lies. Second, it may lead to a *chilling effect*: the risk of a court imposing liability erroneously may dissuade some potential speakers from making true statements. Third, defamation liability may produce a *warming effect*, where the added credibility that comes from having defamation law in the background induces individuals to make statements that they would not have made in a liability-free world. Fourth, defamation liability may yield a *substitution effect*: speakers who otherwise would have made negative statements may shift toward positive statements—including puffery and outright lies—when positive statements can function as substitutes for negative ones. This part examines the speaker-side effects of defamation law in further depth.

3.1 The Deterrence Effect

We begin our analysis of defamation liability with a subject that, for students and scholars of tort law, will be quite familiar: deterrence. Deterrence of undesirable behavior is, at least on one view, a principal objective of the law of torts (Schwartz 1997), and this proposition applies to the tort of defamation as well. As Stanley Ingber writes, "a successful defamation suit can act as a public rebuke and as an economic penalty for the publishers of defamatory statements," and so "[a]nticipation of such suits presumably will deter individuals from making false statements that cause ridicule and loss of reputation" (Ingber 1979, p. 792). We refer to this as the *deterrence effect* of defamation law: the

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specter of liability deters potential speakers from making false and injurious statements.

The economic logic of the deterrence effect in defamation law is straightforward. A rational actor will engage in speech if the benefits exceed the costs. The nature of the benefit will depend upon the context. For a publisher or broadcaster, it may be the benefit of selling more copies or ads. For a politician, it may be the benefit of electoral victory when a statement attracts supporters or drives votes away from an opponent. For an academic, it may be the benefit of improving one's scholarly reputation. For, say, a victim of sexual harassment or assault speaking out about her or his experience, the benefits may be emotional and psychological (speech may help the victim to overcome trauma) as well as altruistic (the victim may derive some utility from knowing that her or his speech makes it less likely that the harasser or assailant will reoffend). Whatever the benefit, we will use the letter B to denote it.

The costs of speech also vary across contexts. Start with the non-liability costs, which we will denote as C. These costs may include the cost of printing a monograph, producing a video, recording a podcast, or buying airtime. The costs of speech also may include the cost of acquiring information (e.g., the cost to a newspaper of conducting an investigation, or the cost to a scholar of rummaging through archives). For certain types of speech, the costs may be emotional, psychological, reputational, and social—think of a sexual harassment or assault victim who risks retaliation or stigma by speaking out.

In a world without defamation liability, a rational actor will speak if the benefits exceed the non-legal costs: $B > C$. Defamation law adds an additional term, L, which is the expected legal cost associated with a statement. Let $L(false)$ be the expected legal cost associated with a false statement and $L(true)$ be the expected legal cost resulting from a true statement. L is, to be more precise, the product of the probability that a court will impose liability times the damages if it does, plus, possibly, attorneys' fees and additional costs of investigation that a potential speaker might incur in order to verify accuracy and avoid liability.[21] For algebraic ease, we will collapse those terms into one term, L, reflecting the expected cost to the speaker arising from legal action for defamation (or its prospect).

The potential for liability changes the basic speech equation. Now, a rational actor will engage in speech if $B > C + L$, or in other words, if the benefits from speech exceed both the non-legal and legal costs. If courts are accurate and unbiased, such that they impose liability for false statements but never for true

21 Thus, a straightforward way to adjust L downwards is to impose a damages cap, while a way to adjust L upwards is to provide for enhanced damages.

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ones, and if plaintiffs never file meritless suits in order to saddle truthtellers with legal costs, then *L(false)* will be positive and *L(true)* will be zero. Under those circumstances, defamation law will deter lies when $C < B < C + L(false)$. In those cases, a rational actor will choose to tell a lie when there is no prospect of defamation liability but will be deterred from lying once defamation law enters the picture. Meanwhile, there will be no cases in which defamation law deters *truthful* speech, because $L(true) = 0$ and thus the set of statements for which $C < B < C + L(true)$ is empty.

Inaccuracy and bias alter the deterrence calculus. By inaccuracy, we refer to random errors in adjudication. By bias, we refer to systematic errors (e.g., juries in the U.S. South ruling in favor of segregationist plaintiffs and against national news organizations in the era of *New York Times v. Sullivan* and *Associated Press v. Walker*). When adjudication is inaccurate, the cost of true statements rises and the cost of false statements falls relative to a baseline of perfect accuracy. We therefore expect inaccuracy to have a negative effect on the *quality* of speech (i.e., the percentage of statements that are true), though not necessarily a negative effect on the *quantity* of speech (true statements are now costlier, but false statements are less so). Bias also reduces the difference between the cost of true statements and the cost of false statements, as a speaker who is the target of bias faces a high probability of liability regardless of whether her statement is true, and a speaker who is the beneficiary of bias faces a low probability of liability in either event. Thus, bias—like inaccuracy—will have a negative effect on the *quality* of speech. Moreover, bias—like inaccuracy—will have ambiguous effects on the *quantity* of speech: targets of bias are likely to make fewer statements, while beneficiaries of bias are likely to make more.

By relaxing the common law presumptions, the USA's constitutionalized regime of defamation liability likely dulls the deterrence effect of defamation law. Some speakers may make false statements with the expectation that the actual malice requirement (for public figures) or the negligence requirement (for private figures) will shield them from liability. Others may make false statements in circumstances where they expect that the burden of proving falsity will be placed on the victim and that the victim will be unable to carry that burden. Still others may make false statements under circumstances where they know that a presumption of harm will not apply and that the victim will be unable to prove actual harm. This is not to say that the U.S. approach is necessarily mistaken, however: relaxing the common law presumptions reduces defamation law's (presumably desirable) deterrence effect, but it also reduces potential undesirable effects of defamation law, to which we next turn.

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3.2 The Chilling Effect

While defamation liability likely generates the intended deterrence effect in some circumstances, it also may lead to a *chilling effect*.[22] By this, we refer to the effect on speakers who choose not to make true statements because of the extant liability regime (*Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986)). Speakers may be discouraged from making true statements because they fear honest errors by finders of fact (inaccuracy) or because they fear that outcomes will be skewed in a pro-plaintiff direction (a form of bias). Moreover, the potential cost of defending against a meritless defamation suit may discourage speakers from making true statements even if they anticipate that they will prevail at trial. So too, speakers who believe that the information that they possess is likely to be true might refrain from making statements because they fear liability if they turn out to be wrong and cannot or choose not to bear the additional costs of verifying their statements ex ante.[23]

With respect to this last set of speakers, a requirement of fault or malice may mitigate the chilling effect, though there remains the risk that a jury will erroneously impose liability on a faultless defendant or that a speaker who genuinely believes that her statement is true will turn out to have been negligent in verifying its accuracy. And even where adjudication is accurate and speakers correctly anticipate the results, a fault requirement may induce potential speakers to invest more in ex ante verification so as to avoid potential liability. In some circumstances, an individual who otherwise would have spoken and not invested in ex ante verification may decide that—with defamation liability in the background—the additional cost of verifying the accuracy of statements ex ante renders the particular speech act in question not worthwhile.

For all of these reasons—the risk of speaker error, court error, court bias, meritless lawsuits, and the additional costs of ex ante verification—it seems likely that $L(true)$ will be greater than zero. That is, the expected legal cost associated with a true statement (including the cost of attorneys' fees and additional precautions) will be positive. Thus, the set of statements for which $C < B < C + L(true)$ is almost certainly not empty. Defamation liability is likely to chill at least some true statements.

Theory alone does not allow us to estimate the relative magnitudes of the deterrence and chilling effects. We can, however, derive potentially useful conclusions from economic analysis of deterrence and chilling. One important

22 This effect is not unique to defamation liability but applies, at least to a certain extent, to tort liability more broadly (Kaplow 2012).

23 Defamation liability also may deter speakers from making statements that they believe to be false but that turn out to be true. This, too, is arguably a component of the chilling effect, though some may see it as an operation of the intended deterrence effect.

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consideration is whether the expected legal cost of false statements exceeds the expected legal cost of true statements: $L(false) \stackrel{?}{=} L(true)$. If the court system is reasonably accurate and not seriously biased, then we can anticipate that $L(false) > L(true)$. All else equal, that inequality suggests that the deterrence effect on liars will be stronger than the chilling effect on truthtellers. Note that this is not the same as saying that the number of lies deterred by defamation liability will exceed the number of true statements chilled. That will depend not only on the relative magnitudes of $L(false)$ and $L(true)$, but also on the underlying distribution of potential false and true statements. For example, if there are just a few potential lies that fall into the set $C < B < C + L(false)$ but many potential true statements for which $C < B < C + L(true)$, then the number of true statements chilled by defamation law may exceed the number of lies deterred, even if the expected legal cost of a false statement is larger than the expected legal cost of a true statement.

* * *

So far our analysis of speaker-side effects is in line with the conventional wisdom among courts and commentators, who understand that defamation law both deters lies and chills truthful speech. Summarizing this widespread view, the British-based legal scholars David Acheson and Ansgar Wohlschlegel write that the "fundamental trade-off in the incentives produced by potential reforms to defamation law" is between the "deterrent effect on false speech" and the "chilling effect on true speech" (2018, p. 353). Acheson and Wohlschlegel characterize this as a "straight trade-off between quality and quantity," with an easier-to-meet threshold for liability like in England leading to more accurate (i.e., higher quality) speech, and a harder-to-meet threshold for liability along the lines of *New York Times* and its progeny producing more total speech (*id.*, p. 355).

Even this speaker-side trade-off between more true speech and more total speech turns out to be far from straightforward. We have said nothing yet about the social value of true statements or the social harm from lies. Just as a picture is—according to the familiar adage—worth a thousand words, some true words may be worth a thousand false ones. Consider a statement such as "Nixon ordered the cover-up of the Watergate burglary"; the value that society derived from that truthful statement (which led to the resignation of a criminal president and later to broad ethics reforms) may exceed the harm it incurred from a large number of false reports. Meanwhile, the harm from some false statements (e.g., "Dreyfus is a German spy") may far outweigh the benefits from many truths. Simply tallying up the number of false statements deterred and true

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statements chilled does not capture the full extent of the complicated welfare effects of defamation liability.

Further analysis reveals that the tradeoffs inherent in defamation law are even more complicated than the previous two sections let on. As this part goes on to show, some or all of the quantity reduction resulting from defamation liability may be offset by what we call the *warming effect*, which obtains when defamation liability increases the credibility and thus the benefits of speech. Defamation law also may produce a *substitution effect*, with speakers shifting from negative statements to positive statements (and with ambiguous effects on overall accuracy). We examine each in turn.

3.3 The Warming Effect

Why might defamation law lead, counterintuitively, to an increase in the quantity of speech? The logic of the warming effect is as follows: In the absence of defamation liability, talk is "cheap"—in the sense that there is no (legal) cost to false statements and so no difference between the cost of making a false statement and the cost of making a true statement. (We consider the reputational and other non-legal costs of false statements momentarily.) And because talk is cheap, listeners and readers may give little credence to the statements they hear and read. After all, if there is no cost to telling a lie, why take the statements one encounters as true, especially if the speaker would have some self-interested motivation for uttering falsehoods? Introducing or increasing liability for defamation potentially alters the situation. Audiences may have more reason to believe a statement when defamation liability looms in the background than when talk is cheap.[24] Insofar as speakers derive a benefit from audiences believing their statements, the enhanced credibility generated by defamation liability may lead to a stronger incentive to engage in speech. This enhanced credibility must be weighed, of course, against the additional costs of liability, litigation, and ex ante verification. While some individuals who otherwise would have spoken may be deterred or chilled by additional liability, still other individuals who would have remained silent may be induced to speak because of the enhanced credibility that additional liability brings.

Framing this point in algebraic terms, the insight underlying the warming effect is that the benefit of speech, B, is endogenous to the liability regime. For at least some speakers, $B(liability) > B(no\ liability)$ because of the credibility that liability brings. That added benefit may induce an individual to speak even

24 This assumes that the share of lies deterred by defamation law exceeds the share of true statements that are chilled (or, more precisely, that audiences *believe* that the share of lies deterred exceeds the share of true statements chilled, and so the prior probability that audiences assign to a statement being true increases).

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though the same individual would have remained silent in a liability-free world. Specifically, the warming effect generates additional speech where the following two conditions obtain: (1) $C > B(no\ liability)$; and (2) $B(liability) > C + L$. Put differently, a speaker's choice of whether to make a statement is affected by her costs and benefits. Higher liability under defamation law not only increases the speaker's (legal) costs but also increases the benefits of speech (again, because audiences are more likely to believe the speaker's statements).

How plausible is the warming effect that we posit? We can imagine a number of realistic scenarios in which the effect might operate. Consider, for example, an upstart news website that is deciding whether to invest resources in investigative journalism. The website may decide not to make the investment because even if its investigate efforts yield significant scoops, potential readers are unlikely to believe the website's reporting, and so the scoops are unlikely to generate large flows of traffic or ad revenue. If the prospect of defamation liability leads audiences to ascribe more credibility to the statements they encounter, then defamation liability may alter the website's calculus and induce it to invest more in investigative work.

Other potential speakers for whom the warming effect might outweigh the chilling effect include victims of sexual harassment and assault. Many victims who choose not to report their experiences say they are dissuaded from speaking because they fear that others will not believe their accounts (see, e.g., Boland 2005, pp. 85–86). For them, the non-legal costs of speech—potentially including professional retaliation, social ostracization, and the emotional and psychological costs of revisiting a past trauma—exceed the benefits when their reports are likely to be dismissed as not credible. Defamation liability, by adding credibility, may raise the benefits of speech enough so that the benefits now outweigh the costs.

To be sure, defamation liability chills as well as warms. We would need to know more about the incentive structures of the news website and the sexual harassment or assault victim before we could determine that the warming effect will outweigh the chilling effect (or vice versa). We can, however, develop reasonable hypotheses as to the circumstances in which warming is most likely.

Most clearly, the warming effect hinges upon the assumption that $B(liability) > B(no\ liability)$. This condition is most likely to obtain when potential speakers derive benefits from having their statements believed. This will be true in a wide range of contexts: news organizations likely care whether readers trust their reporting; political candidates likely care whether voters believe their attacks on opponents; businesses likely care whether customers believe their comparative statements about rivals; and so on. But it will not be true in all contexts. We sometimes speak—and derive value from engaging in speech acts—regardless of whether anyone hears us (see, e.g., Redish 1982, p. 604). To use a trivial

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example, think of singing in the shower. So too, we sometimes speak so that others hear us regardless of whether anyone believes us. Much of the popularity of Facebook and Twitter might be attributable to this phenomenon.

Liability also can enhance the benefits of speech for the related reason that it raises the signaling value of certain speech acts. Eduardo Peñalver and Sonia Katyal identify one example of this phenomenon in the history of the Civil Rights Movement: sit-ins at segregated lunch counters in the U.S. South in the 1960s. As Peñalver and Katyal observe, the expressive value of sit-ins *depended* upon them being illegal. The act of law-breaking communicated both the extent of African-American dissatisfaction with the segregationist status quo and the depth of the protesters' moral commitment to the integrationist cause (Peñalver and Katyal 2010, pp. 64–65; Peñalver and Katyal 2007, pp. 1114–1115). This is not quite the same as saying that liability increases audience members' confidence in the probability that a statement is true—the issues in the sit-in context were primarily moral rather than factual. What it illustrates, rather, is that liability can lead to warming when the benefits of speech depend on audiences perceiving the speech to be costly.[25]

Another way in which liability can "warm" is by raising the signaling value of expression within a particular community. Eric Posner illustrates this phenomenon through the example of flag burning. If flag burning is illegal, then members of an ideological-minority subgroup may "show their commitment to each other by desecrating the flag." The very fact that flag desecration exposes individuals to punishment makes this action "an effective commitment mechanism," as it binds members to the group. Posner points out that laws imposing liability for flag desecration therefore may have the (unintended) consequence of increasing the overall frequency of flag-burning (1998, pp. 780–781).[26] Again, this is not the same as saying that liability "warms" by increasing the cost of false speech—flag-burning is not a true/false proposition. It is to emphasize, more generally, that *B(liability)* may be greater than *B(no liability)* across different contexts for a range of reasons.

A further factor affecting the difference between *B(liability)* and *B(no liability)* is the extent to which mechanisms other than defamation liability will allow speakers to convey information credibly. Some of these alternative mechanisms may be legal: for example, the prospect of a perjury prosecution may induce witnesses at trial to speak truthfully even in the absence of defamation liability.

25 We thank Lee Fennell for this insight.

26 See also *United States v. Eichman*, 496 U.S. 310, 312 (1990) (noting that defendant in flag-burning prosecution burned flag in order to protest flag-burning ban, which in turn suggests that the ban may have "warmed"—rather than "chilled"—flag-burning).

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The common-law absolute privilege for witness statements might be understood as an acknowledgement that, with the penalty of perjury hanging overhead, the additional deterrent of defamation liability is unnecessary or excessive (see 54 & 55 Vict. c.51; *Imbler*, 424 U.S. at 426 n. 23). Other mechanisms facilitating credible communication are reputational. Speakers rich in reputational capital—say, a well-respected newspaper like the *New York Times* or the *Washington Post*—already have much to lose from printing untruths, because their reputations depend upon the accuracy of their reporting.[27] Accordingly, the warming effect for these reputation-rich speakers may be minimal.

Contrast the *Times* and the *Post* with a lone individual or upstart publication that lacks a vast store of reputational capital. For speakers in this category, the credibility enhancement associated with defamation liability might be much more significant. A speaker with nothing to lose from a false statement also may have little to gain from a true one (aside from the self-realization benefits described above) because the speaker's cheap talk, though true, will not be believed. Defamation liability confers upon such low-reputation speakers an ability that high-reputation speakers already enjoy: the ability to engage in talk that is not cheap. In this respect, defamation liability arguably serves a democratizing function because it allows a broader set of speakers to exert persuasive power over audiences.

The notion that defamation liability confers a greater benefit on less established speakers may strike some as surprising, because it cuts against the conventional wisdom on the subject. Other authors have argued that the chilling effect of defamation liability is particularly severe with respect to smaller media outlets (Franklin 1986; Smolla and Gaertner 1989). Our analysis suggests that the warming effect of defamation liability may be greater with respect to upstart publications that lack the reputational capital of media organizations like the *Times* and the *Post*. Defamation liability for this reason may have procompetitive consequences for the marketplace of ideas.

The warming effect of liability interacts with financial capital as well as reputational capital. Speakers who are observably judgment-proof might not gain credibility as a result of defamation liability because their talk, too, remains as cheap as before. The credibility-enhancing effects of defamation liability

27 Indeed, both newspapers have been stained by fabrication scandals in the past: the *Post* returned a Pulitzer Prize in 1981 after reporter Janet Cooke was found to have made up the story of an eight-year-old heroin addict; the *Times* underwent an organizational overhaul after reporter Jayson Blair was revealed to have made up sources and plagiarized material. In neither case was the newspaper held liable in court for printing false stories. In both cases, the newspaper in question suffered harm to its reputation that took years to heal. See See Sager (2016); Margaret Sullivan, Public Editor: Repairing the Credibility Cracks, *N.Y. Times* (May 4, 2013), http://www.nytimes.com/2013/05/05/public-editor/repairing-the-credibility-cracks-after-jayson-blair.html.

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apply to speakers with observable assets and (though less so) to speakers whose financial position is unobservable. With respect to the latter category, the unobservably judgment-proof will free-ride on—and drag down—the unobservably wealthy. The introduction of defamation liability leads audiences to ascribe greater credibility to the statements of speakers whose financial position is unobservable, knowing that some fraction of those speakers do in fact have the resources to pay a judgment, though audiences still will presumably ascribe less credibility to the statements of speakers whose financial position is unobservable than to speakers with observable wealth.[28] This, in turn, may incentivize speakers with wealth that is not apparent to reveal their assets so as to enhance their credibility. Note, though, that claims about one's own wealth may be cheap talk, because one is unlikely to face legal liability for overstating one's own wealth.

Importantly, the warming effect potentially applies to liars as well as truth-tellers, that is, if liability enhances credibility, then defamation law potentially increases the benefits of speech for all potential speakers who care whether their statements are believed, regardless of whether those statements are actually true or false. At first glance, one might expect the warming effect to induce more truthful statements than falsehoods so long as the court system is reasonably accurate and not seriously biased, but this turns out to be less obvious on further inspection. Recall that speakers will make true statements against a backdrop of liability when $B(liability) > C + L(true)$ and will make false statements against a backdrop of liability when $B(liability) > C + L(false)$. If $L(false) > L(true)$, then the first set is wider than the second, but that does not necessarily mean that the number of statements in the first set is larger than the number in the second. Whether the warming effect induces more true statements or false statements will depend upon the underlying distribution of potential true and false statements, which theory alone cannot tell us.[29]

The common law presumptions potentially add to defamation law's warming effect. Where the presumptions of malice and falsity apply, the choice by an individual or entity to speak signals that the speaker is prepared to prove the

28 Speakers with unobservable wealth who seek to enhance the credibility of their statements may therefore opt for bonding strategies discussed in Section 5.

29 To elaborate: imagine that in the absence of defamation liability, 4 false statements and 1 true statement would be made. Imagine as well that defamation liability deters 1 false statement and chills no true statements. Finally, imagine that the increased credibility that comes with liability leads to 2 more false statements and 1 more true statement through the warming effect. Thus on net, the number of false statements rises from 4 to 5, and the number of true statements rises from 1 to 2. Accuracy increases, inasmuch as the fraction of all statements that are true rises from 1/5 to 2/7. Yet, the total number of falsehoods rises from 4 to 5, and the statements specifically induced by the warming effect are twice as likely to be false as true.

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truth of her statement in court; limiting or eliminating those presumptions is likely to reduce the value of that signal. The interaction between the warming effect and the presumption of harm is particularly interesting, especially with regard to slander. For example, the statement "X is a murderer" is more likely to trigger liability than the statement "X is an atheist," because murder is a serious crime to which the presumption of harm applies whereas atheism is (at least in most countries) not. But for that very reason, audiences are arguably more likely to credit the statement "X is a murderer" than "X is an atheist," because the speaker who makes the former claim signals that she is prepared to defend the truth of that assertion in court. Insofar as speech is costly and the benefit of speech to the speaker depends upon whether audiences believe her, the additional credibility bestowed by the presumption of harm may induce the speaker to make the statement "X is a murderer" where she otherwise would not.

The harm presumption's potential warming effect has important implications for arguments over the scope of slander per se. For example, courts are split as to whether the presumption of harm applies to imputations of homosexuality in private-figure cases.[30] The rationale for applying the presumption is that homophobia remains widespread, even if more muted than it once was. A jurisdiction may therefore have a particular interest in deterring allegations of homosexuality and thereby shielding victims from the harm that such allegations can bring. Recognition of defamation law's warming effect reveals, however, that applying the presumption of harm to imputations of homosexuality may have the opposite of its intended effect—inducing rather than deterring such allegations. (We return to this point in Section 4.2, where we discuss the possibility that the presumption of harm will actually intensify the harm that victims of defamation suffer.)

Finally, adjudicative accuracy and bias interact with the warming effect in potentially counterintuitive ways. Where adjudication is inaccurate (i.e., random errors are frequent), the warming effect is dulled, because the difference between the cost of a false statement and the cost of a true statement is narrowed. The consequences of biased adjudication are potentially more mixed. For bias beneficiaries (i.e., speakers who are likely to escape defamation liability for false negative statements because of jurors' sympathies), bias detracts from defamation law's warming effect: if a speaker is likely to prevail in a defamation lawsuit regardless of her statement's veracity, then the shadow of a lawsuit does little to enhance her credibility. For bias targets (e.g., a civil rights activist who

30 Compare *Gallo v. Alitalia—Linee Aeree Italiane—Societa Per Azioni*, 585 F. Supp. 2d 520, 549 (S.D.N.Y. 2008) (noting split among courts within New York, collecting cases, and applying the presumption), with *Stern v. Cosby*, 645 F. Supp. 2d 258, 273–276 (S.D.N.Y. 2009) (also noting split and declining to apply presumption).

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accuses a segregationist official of misconduct in the pre-*New York Times v. Sullivan* South), bias can either enhance or detract from credibility. It can enhance credibility (and thus strengthen the warming effect) if audiences interpret the bias target's speech as a signal not only that she can prove the truth of her allegation, but that she can prove it even when the deck is stacked against her due to bias. Alternatively, bias may reduce the bias target's credibility—and thus weaken the warming effect—if audiences reason as follows: because the bias target is likely to lose on a defamation claim against her regardless of her statement's accuracy, she has little incentive to engage in true rather than false speech.

3.4 The Substitution Effect

Our analysis up to this point has assumed that potential speakers are making a binary choice between speech and silence. Defamation liability raises the cost of false and true speech through the deterrence and chilling effects, respectively, and increases the benefits of false and true speech through the warming effect. There is yet a fourth way in which potential speakers may respond to defamation liability: by shifting from negative and potentially actionable statements to positive statements that function as close substitutes. We term this the *substitution effect*, and it turns out to complicate our predictions regarding defamation law's impact on both quality and quantity.

There are a number of contexts in which positive statements may function as close substitutes for negative ones. A business enterprise—instead of disparaging a competitor—may trumpet the merits of its own product. To use an entirely hypothetical example, if defamation liability deters Pepsi from claiming that "Coke causes cancer," Pepsi may respond by claiming that "Pepsi cures cancer." Similarly, a political candidate—instead of launching an attack on an opponent—may talk up her own achievements. For example, "my opponent is a draft dodger" and "I am a war hero" may serve more or less the same purpose. Newspapers and TV stations may substitute from hard-hitting investigative reports toward human interest stories and "puff pieces" about celebrities or entrepreneurs.

In other cases, negative—and thus potentially defamatory—statements have no obvious positive substitute. A sexual harassment victim who wants to publicly accuse her or his harasser but is chilled by defamation liability cannot easily achieve the same end by making a positive statement about someone else or herself. Meanwhile, the non-legal costs of positive and negative statements may differ. A political candidate likely knows more about her own background than her opponent's, and so may be able to make two truthful positive statements about herself for one truthful negative claim about a rival. Alternatively, a

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political candidate may respond to defamation liability by making false positive statements about herself, thinking that the chilling effect will discourage her rival from challenging the veracity of those claims.

Note that the substitution effect can run in either direction: defamation liability may lead speakers to shift from negative to positive statements (on account of the deterrence and chilling effects) or from positive to negative statements (on account of the warming effect). Note as well that substitution may occur *between* negative statements. If the deterrence and chilling effects outweigh the warming effect, then the presumption of harm in all libel and some slander cases may cause some speakers to shift from statements that are actionable per se ("X is a murderer") to statements for which proof of actual harm is required ("X is an atheist"). If the warming effect outweighs the deterrence and chilling effects, then substitution may occur in the opposite direction. All in all, the possibility of substitution renders the net effect of defamation liability on speech—in terms of its quantity and quality as well as its subject matter—even more ambiguous.

* * *

To sum up so far: defamation liability may deter lies and chill truthful statements, or it may—through the warming effect—induce additional speech (of uncertain truth value) by enhancing credibility and thus increasing speech's benefits. All of these effects may operate simultaneously and may be joined by a substitution effect, with speakers shifting from negative statements to positive statements (sometimes substituting truths for lies and sometimes vice versa). The supposedly "straight trade-off between quality and quantity" (Acheson & Wohlschlegel 2018, p. 353) turns out not to be so straightforward after all.

At this point, one might throw up one's hands and conclude that economic analysis of defamation law can tell us nothing about desirable reforms, because the net effects of any legal change on quality and quantity are indeterminate. We are somewhat more optimistic, as we explain in Section 5. But before explaining our reasons for cautious optimism, we turn toward the victims and potential victims of defamatory speech.

4. VICTIM-SIDE EFFECTS

Speakers and potential speakers are not the only actors affected by defamation law. The victims and potential victims of negative statements clearly have a stake in the defamation liability regime as well. (We use "victim" here to refer to all subjects of negative statements—false as well as true.) Some of the effects on victims and potential victims are mirror images of the speaker-side effects. For

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example, if defamation law reduces the quantity of negative speech, then victims and potential victims of negative speech presumably benefit; if, in contrast, defamation law increases the quantity of negative speech via the warming effect, then the victims and potential victims of negative speech likely suffer additional harm. Yet upon closer inspection, the victim-side effects of defamation liability turn out to be varied and nuanced, further complicating efforts to identify the winners and losers from defamation law reform or to evaluate overall welfare impacts.

We begin our victim-side analysis with the *corrective effect* of defamation law—the effect on the victim of negative speech who secures a favorable resolution of a defamation claim. One might think of defamation law's corrective effect as the ex-post analogue to the ex-ante deterrence effect: before a false statement is made, the threat of liability has the potential to deter; after a false statement is made, liability has the potential to heal some of the harm. While the corrective function of defamation law has long been recognized, the *intensification effect* of defamation law has gone overlooked. The intensification effect on victims is a corollary to the warming effect on speakers: insofar as liability bestows credibility, defamation law leads readers and listeners to put greater stock in negative statements, thus deepening the harm to victims of those statements. After considering the tradeoff between correction and intensification, we turn toward defamation law's ex ante effects on the primary behavior of potential victims. There, we distinguish between the effect on *wrongdoing* (socially undesirable behavior) and the effect on *rightdoing* (socially desirable behavior). We explain how defamation law may under some circumstances deter—and in other cases encourage—both wrongdoing and rightdoing.

4.1 The Corrective Effect

As noted above, defamation law may deter false statements and chill truthful ones—and in these respects, may benefit the potential victims of negative speech ex ante. Ex post (i.e., after a negative statement has been made), defamation liability may benefit victims through its corrective effect. A verdict in the victim's favor serves to signal that the relevant claim was false and will thus go some way toward repairing the victim's reputation. And where a defamatory statement leads to economic loss, monetary damages may help to restore the victim to her prior position. Defamation law's corrective effect also may manifest prior to—or even in the absence of—a verdict in the victim's favor (though still after the defamatory statement is made). The prospect of defamation liability may induce a speaker to retract a negative statement after it is uttered, thus reducing (though not necessarily eliminating) the harm of the initial speech. A potential defamation defendant may be particularly motivated to

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retract a negative statement because the retraction can be introduced to negate actual malice at the liability stage[31] or to mitigate damages once liability has been determined.[32] And the courtroom provides a public forum in which the victim of a defamatory statement can challenge its truth, potentially persuading members of key audiences regardless of whether the jury ultimately finds in the victim's favor.

While the common law presumptions of malice, falsity, and harm generally strengthen defamation law's speaker-side effects, they interact with the corrective effect in a complicated fashion. Most straightforwardly, the presumption of malice strengthens defamation law's corrective effect: by allowing recovery against defendants who were merely negligent or even faultless, the presumption of malice increases the number of potential victims who can benefit from the corrective effect of a favorable judgment. The presumption of harm operates similarly: where it applies, it serves to expand the range of potential victims who can be corrective-effect beneficiaries. The relationship between the presumption of falsity and the corrective effect is more nuanced. In common law jurisdictions that still apply the presumption of falsity, a judgment for defamation does not necessarily signal that the court found the disputed statement to be false. It suggests, rather, that the court could not conclude that the disputed statement was true. Defamation victims who cannot prove the falsity of the allegedly defamatory statement stand to benefit from this presumption, but victims who *can* prove falsity are potentially harmed. The reason for such harm is that the signaling value of a judgment in favor of a defamation victim is degraded, at least somewhat, by the availability of the falsity presumption.[33] The interaction between the falsity presumption and the corrective effect is a further illustration that defamation law involves much more than a straight tradeoff between the interests of victims and speakers.

The corrective effect also interacts with inaccuracy and bias in interesting ways. Inaccuracy reduces the corrective effect of defamation law—assuming that the public understands adjudication to be inaccurate—because a judgment in the victim's favor is a less reliable indicator of falsity. Bias, in contrast, can

31 See, e.g., *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1071 (5th Cir. 1987) (noting that "a readiness to retract tends to negate 'actual malice'"); *Hoffman v. Wash. Post Co.*, 433 F. Supp. 600, 605 (D.D.C. 1977), aff'd, 578 F.2d 442 (D.C. Cir. 1978) (similar).

32 See Cal Civ. Code § 48a (allowing daily or weekly news publications and radio stations to avoid special and exemplary damages by promptly publishing conspicuous retraction); Tex. Civ. Prac. & Rem. Code § 73.059 (similar rule for all publishers and broadcasters).

33 For this reason, it might under some circumstances be advantageous for a defamation plaintiff to waive the presumption of falsity so as to enhance the signaling value of a favorable verdict, assuming that the procedural rules of the relevant jurisdiction allow it.

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reduce or increase the corrective effect of defamation law. If the victim is the beneficiary of bias, then a defamation judgment in her favor may bring monetary relief but does not serve to signal that the allegedly defamatory statements were false; if audiences understand that the victim is the beneficiary of bias, then they should discount the informational value of any judgment in that victim's favor accordingly. Thus, the bias toward segregationist leaders in defamation cases in the U.S. South around the time of *New York Times v. Sullivan* and *Associated Press v. Walker* may have undermined the capacity of defamation law to correct when those leaders were the subjects of false and defamatory statements. If the victim is a target of bias, then the conclusion is reversed: a defamation judgment in that victim's favor is an especially strong indicator that—notwithstanding the adjudicator's bias—the victim's case was strong.

4.2 The Intensification Effect

For the victims of false statements, defamation liability is a double-edged sword. In addition to the corrective effect discussed above, defamation liability can lead to another effect—ignored so far by other legal scholars—which we call the *intensification effect*. The intensification effect arises when the presence of defamation liability deepens the wounds that a negative statement inflicts. This is an inevitable corollary to—and consequence of—the warming effect. Because a background of liability increases the credibility of all statements, false and true alike, defamation law may lead the victims of false statements to experience *more* harm than they would otherwise.

The intensification effect of defamation law can be short-term or long-term. In the short term, defamation law will likely lead listeners and readers to ascribe more credibility to any statement that they encounter, knowing that negative statements are no longer "cheap talk." In the long term, the effect of defamation law on victims depends on whether they sue and win. (A publicly disclosed settlement on favorable terms may have effects similar to a courtroom victory.) For those who sue and secure a favorable outcome, the corrective effect of a court judgment or settlement may outweigh the additional short-term harm from the intensification effect. But when victims do not sue—or sue and lose—audiences may interpret the absence of a defamation judgment as evidence that the statement in question was correct. For these victims, the intensification effect is long-term and potentially permanent.

The intensification effect of defamation liability in the long term may be especially worrisome with respect to victims of false statements who—for reasons that are unobservable to audiences—strongly prefer not to file suit. For example, a lower-income victim of a false and defamatory statement may be unable to afford an attorney, and audiences may mistakenly infer that the

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victim failed to file suit because she knew that she would lose on the question of falsity. (To be sure, if the victim is *observably* low-income, then audiences may take that into account when updating their beliefs based on the lack of a lawsuit.) Contingency fee arrangements ameliorate this problem somewhat, but lawyers may be unwilling to take a defamation case on contingency where the expected monetary recovery is low. In common law jurisdictions that follow the "English rule" (i.e., loser pays) with respect to attorneys' fees, risk-averse victims of false statements may shrink from filing suit because of the potential financial consequences of an unsuccessful claim. Other victims of false statements may have an unobservably strong preference for personal privacy that leads them not to want to sue, or may not want to relive traumatic experiences that depositions and cross-examination would bring back up. If audiences fail to account for these preferences when drawing inferences from the failure to sue, then the reputational harm to the victim from a false statement may be much greater than if there were no defamation liability at all.

While intensification may arise in certain cases due to cognitive errors on the part of audience members, the intensification effect is entirely compatible with a model of fully rational actors. Introducing liability for false statements will likely lead a Bayesian listener to adjust upwards her estimate of the probability that a given statement is true. She may be fully aware that *some* subjects of false statements do not sue, and that courts err in their evaluation of *some* defamation claims. Even so, she is making no inferential mistake when she responds to liability by assigning greater credibility to statements that she hears. If the introduction of liability for false statements increases the quality of speech, then—holding quantity constant—liability should lead a listener to encounter fewer false claims but to believe those false claims more so than she did before. (Listeners presumably will assign greater weight to true claims as well.)

The interactions between the intensification effect and the common law presumptions are complex. As a general rule, factors that make it easier for defamation plaintiffs to prevail also strengthen the negative inferences that audiences will draw before victims sue or after victims sue and lose. Thus, when malice is presumed, defamation victims are more likely to experience the short-term intensification effect of liability (because negative statements are now more credible) but also less likely to experience the intensification effect from an unsuccessful lawsuit (because such suits are more likely to prevail). At the same time, the long-term intensification effect on victims of negative statements who do not sue, or sue and lose, will be more pronounced. When falsity is presumed, the corrective effect of a judgment or favorable settlement is (as noted above) somewhat diminished, but the intensification effect on victims who do not obtain a judgment or favorable settlement will be magnified. The fact that a victim of a negative statement did not sue—or sued

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and lost—may lead audiences to infer that the victim anticipated that the speaker could make out an affirmative defense of truth.

The relationship between the intensification effect and the common law presumption of harm is particularly noteworthy. Where the presumption applies (i.e., in cases of libel and slander per se), the fact that a victim of a negative statement did not sue or sued and lost is an especially strong signal that the relevant statement is true: the absence or failure of a lawsuit cannot easily be chalked up to the fact that the victim's reputation suffered no compensable harm. Again, this suggests that the presumption of harm may have unintended consequences for the very individuals it is intended to protect. For example, the application of the harm presumption to imputations of homosexuality may magnify the harm of such statements in environments where homophobia remains.

Where courts relax the common law presumptions, as in the USA, the intensification effect of an unsuccessful defamation lawsuit is likely to depend upon procedural particulars. For example, if the jury is asked to deliver special verdicts on the questions of malice, falsity, and harm, then a defamation plaintiff who prevails on falsity but loses on malice or harm may experience a positive corrective effect: while the court has not awarded her damages, a jury has agreed with her that the allegedly defamatory statement was false, and audiences may take note. If the jury is asked only for a general verdict, then audiences may treat all unsuccessful defamation victims alike. The special-verdict format is therefore better for plaintiffs who can prevail on falsity but not on other elements; the general-verdict format is better for plaintiffs who lose on falsity (as audiences will mentally group them together with the first set of unsuccessful plaintiffs).

The intensification effect interacts with inaccuracy and bias in sometimes surprising ways. In the short term (i.e., before the victim files or would be expected to file a lawsuit), the victims of negative statements likely *benefit* from adjudicative inaccuracy, because such statements are less credible when the legal system commits random errors. In the long term, inaccuracy means that more victims of false statements will fail to recover, but the negative inferences that audiences draw from those failures will be moderated.

Bias, meanwhile, may magnify the intensification effect of defamation liability on subjects who are ostensible "beneficiaries" of bias. For example, the short-term harm to a segregationist leader in the mid-20th century U.S. South from a negative report in a national newspaper may have been greater because audiences knew that juries were biased in the plaintiff's favor: thus, the fact that the newspaper chose to publish the story suggests especially high confidence in its veracity. In the long term, the intensification effect of a bias beneficiary's failure to obtain a defamation judgment or favorable settlement may be especially

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strong, particularly when the common law presumptions apply. In such cases, the fact that the bias beneficiary could not prevail in a defamation lawsuit may lead audiences to infer that the subject expected to lose on the question of falsity even though the deck was stacked in her or his favor.

In sum, defamation liability does not always redound to the benefit of false-statement victims. In the short term, it likely has the opposite effect, because it lends credibility to negative statements (true and false). In the long term, the effect of defamation liability on subjects depends on whether the subject sues and wins (or, similarly, settles on favorable terms). Once again, we see that defamation liability involves much more than a straight tradeoff between the interests of speakers and victims: it also involves complicated tradeoffs among speakers and victims.

4.3 Effects on Primary Behavior

So far we have focused on the ways in which defamation law affects the choices of potential speakers (the deterrence, chilling, warming, and substitution effects) and the ways in which it affects the subjects of false statements after such statements are made (the corrective and intensification effects). Yet, the impacts of defamation law may be felt at a far earlier stage: at the time that an individual is contemplating actions that will potentially expose her to the risk that she will become the subject of false statements. The effects of defamation law at this earlier stage are potentially significant, though difficult to discern.

We start with the effect of defamation law on "wrongdoing," by which we refer to socially undesirable behavior. The effects of defamation liability run in divergent directions. On the one hand, the chilling effect generated by defamation liability may reduce the risk that wrongdoing will be exposed and so lead to more of it occurring. Furthermore, given the possibility of inaccurate or biased adjudication, potential wrongdoers may anticipate some benefit from engaging in actions that become the subject of true statements but nonetheless result in liability (and compensation). These "false positives" potentially raise the rewards to—and thus the prevalence of—wrongdoing. On the other hand, defamation liability may reduce the prevalence of wrongdoing for three reasons. First, the warming effect may increase the risk that wrongdoing will be exposed. Second, the intensification effect may increase the harm to wrongdoers from defamatory statements: the background of defamation liability means that if wrongdoing is exposed, then it is more likely that audiences will take allegations of wrongdoing seriously and sanction them. Third, for the same reason, if wrongdoing is exposed and reports of wrongdoing are considered credible because of the defamation law background, audiences may be more likely to take steps to prevent wrongdoing from recurring. The net effect of defamation

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liability on wrongdoing thus depends on whether the chilling effect and the prospect of false positives outweigh the warming effect, the intensification effect, and the mobilizing effect on audiences.

These competing considerations have important implications for the evaluation of U.S. constitutional law. Recall that in *New York Times v. Sullivan*, the Court emphasized that "[t]he protection of the public requires . . . information" about—potentially criticism of—"the political conduct of officials" (376 U.S. at 272). The analysis here suggests that it is radically unclear whether the public is better protected against wrongdoing by public officials when the malice presumption applies or when it does not. On the one hand, a presumption of malice may result in more wrongdoing by public officials, who expect that the presumption will chill accurate reports of their misdeeds (and, potentially better yet, they may even win damages for speech that is misdiagnosed as defamation). On the other hand, a presumption of malice may result in less wrongdoing by public officials, who fear that the warming effect will encourage whistleblowing and that the intensification effect will magnify the harm to their reputation when misdeeds are alleged.

The effect of defamation law on "rightdoing" is similarly uncertain. By "rightdoing," we refer to socially desirable behavior that nonetheless exposes the actor to the risk that she will be the victim of negative statements. We consider "rightdoing" to include participation in civic life as an activist, candidate, or honest public official. Since *New York Times v. Sullivan* and subsequent cases imposed an actual malice requirement for "public figure" plaintiffs, one potential consequence of active participation in civic life has been a higher bar to recovery for defamation. Richard Epstein and others have criticized *New York Times Co. v. Sullivan* on these grounds: the "actual malice" standard, the critics say, discourages honest citizens from participating in civic life and thereby losing the protections of the malice presumption.[34] Yet as our analysis implies, the effect of the "actual malice" standard on the incentives of honest citizens to participate in public life depends critically on the relative size of the deterrence effect, the warming effect, the corrective effect, and the intensification effect. Indeed, if the intensification effect outweighs the deterrence and the corrective effects, then the "actual malice" standard can encourage participation in public life—the exact opposite of the effect that Epstein's criticism

34 See Epstein (1986, p. 799) ("[T]he rules of defamation . . . shape the primary decisions to enter into political discussion and debate. It does not seem far-fetched to assume that some honest people are vulnerable to serious loss if defamed. The greater their reputations, the greater their potential losses. If the remedies for actual defamation are removed, or even watered down, one response is for these people to stay out of the public arena, thus opening the field for other persons with lesser reputations and perhaps lesser character. The magnitude of this effect is very hard to measure, but there is no reason to assume that it is trivial.").

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contemplates. That is, an honest individual who considers entering civic life may realize that once she becomes a public figure for purposes of defamation law, the credibility of negative statements about her will decline. This may result in fewer such statements (if the warming effect outweighs the deterrence and chilling effects) and reduced reputational harm from such statements (if the intensification effect outweighs the corrective effect).

5. TAILORING DEFAMATION LIABILITY

Defamation law is already "tailored" in several respects. First and foremost, it is tailored geographically: different regimes apply in different countries, and even within the USA, there is some amount of interjurisdictional variation (though the constitutionalization of defamation law is a constraint upon interjurisdictional variety). Second, defamation law is tailored by topic: different rules regarding the presumption of harm apply to speech on matters of public and private concern, and the rules regarding the actionability of slander depend on the topic of the allegedly slanderous statement. Third, defamation law is tailored by the target, or "victim" (i.e., the individual or entity about whom the allegedly defamatory statement is made). At least in the USA, public-figure and private-figure plaintiffs face very different liability bars. Fourth, defamation law can be tailored by speaker. Speaker-side tailoring already applies limitedly in U.S. states that distinguish between media and non-media defendants (see *Gertz*, 418 U.S. at 342, 347; *Phila. Newspapers*, 475 U.S. at 768–769, 777–778; *Benson*, 561 N.W.2d at 537). Ultimately, we conclude that speaker-side tailoring ought to play a much larger role in defining defamation liability than it does so far.

5.1 Tailoring by Geography

Geographic tailoring—or "decentralization"—of defamation law occurs when different rules regarding liability apply in different places. The contrast between the USA and other common law countries is one example of such decentralization; the more subtle differences among U.S. states are another. A possible argument in favor of tailoring defamation law geographically is that the relative sizes of the relevant effects may vary from jurisdiction to jurisdiction. Another argument for decentralization is that lawmakers can learn through policy variation among jurisdictions. By observing different laws in practice, we can arrive at better estimates of the magnitudes of defamation law's various effects, and we can therefore set policy in a more empirically informed fashion. The theoretical ambiguities identified in Sections 3 and 4 arguably suggest that an experimentalist approach will be particularly fruitful in the defamation law context.

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The contrast between the USA's heavily constitutionalized law of defamation and the defamation liability regimes in other common law countries offers both a case in point and a cautionary tale. On the one hand, differences between the USA and other common law countries provide us with a wealth of data about the effects of higher and lower thresholds for liability. On the other hand, the continuing debate about defamation law reform in and beyond the English-speaking world suggests that this wealth of data has resolved very little. Media organizations in other common law countries continue to reveal scandals involving public figures, notwithstanding the fact that public figures in those countries can recover more easily for libel and slander. Whether such reports are more or less frequent in common law countries other than the USA is difficult to measure; even if we could come up with a reliable measure, it would be impossible to know whether the disparity reflects differences in the underlying rate of wrongdoing (which could be endogenous or exogenous to the defamation liability regime) or differences in institutions and cultures. The percentage of survey respondents who say that the media reports news accurately is higher in Canada, the UK, and Australia than in the USA (see Mitchell et al. 2018) (78 percent in Canada, 63 percent in the UK, 57 percent in Australia, and 56 percent in the USA), which might suggest that more plaintiff-friendly defamation laws in those countries are contributing to the credibility of media organizations, but there are so many other factors that distinguish Canada, the UK, and Australia from the USA that any such inference is tentative at best.

Geographically decentralized defamation law is, moreover, arguably an impossibility in an age in which individuals and information freely and frequently transcend jurisdictional lines. No country has complete autonomy over the defamation liability regime that applies to speech by or about its own citizens when libel tourism remains a booming industry. At the same time, the opposite of libel tourism—what we might call "libel isolationism"—limits jurisdictional autonomy as well. By "libel isolationism," we refer to the refusal of one jurisdiction to respect and enforce a defamation judgment rendered by courts in another jurisdiction. (The USA after the SPEECH Act has emerged as the world's leading libel isolationist.) Consider the case of a U.S. newspaper that publishes allegations of sexual harassment against an Australian actor, by an Australian citizen, and involving conduct that allegedly occurred in Australia. If the newspaper's assets are exclusively in the USA and the accuser moves his or her assets there, it may be difficult or impossible for the actor to collect on a defamation judgment even if he prevails in Australian court. The allegations, meanwhile, may reach Australian audiences via the newspaper's globally available website, and the reputational harm to the actor may be just as severe as if the allegations were published locally. U.S. defamation law thus spills over to other countries just as other countries' defamation laws spill over to the USA.

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The choice-of-law and choice-of-forum problems that arise in the global context may be even more vexing if defamation law is decentralized domestically across subnational jurisdictions. Drawing inferences about defamation law based on state-to-state variation will be difficult when speech and conduct in, say, New York is responsive not only to New York's defamation laws but also to Alabama's. To be sure, some subnational variation is inevitable in the USA unless defamation law is completely constitutionalized, and some cross-country variation is unavoidable unless defamation law is governed entirely by international treaty. The informational value of such variation is limited, however, both by measurement challenges and by spillover effects.

5.2 Tailoring by Topic

A second type of tailoring in defamation law is topical. By topical tailoring, we refer to the application of different defamation liability rules for speech on different topics. Some amount of topical tailoring exists at common law—consider, for example, the presumption for slanderous statements that impute to the plaintiff a criminal offense, loathsome disease, matter incompatible with her business or profession, or serious sexual misconduct (Restatement (Second) of Torts 1977, §§ 570–574). U.S. constitutional law regarding defamation incorporates a degree of topical tailoring as well: consider the rule regarding the presumption of harm in *Dun & Bradstreet v. Greenmoss Builders*, which distinguishes between speech on matters of public concern and speech on purely private matters. The U.K. Parliament has enacted a number of topic-specific defamation rules over time, including the (since-repealed) Slander of Women Act 1891, which extended the presumption of harm to statements imputing unchastity to a female plaintiff, and more recently the Defamation Act 2013, which added a statutory defense for the publication of statements on a matter of public interest that the publisher reasonably believes to be in the public interest (Defamation Act 2013 (2013 c.26), §§ 4, 9).

Topical tailoring reflects the reasonable intuitions that the public's interest in the free flow of information and interest of victims in protecting their reputations will vary based on the topic of speech. For statements on matters of public concern, we potentially care more about maximizing the quantity and quality of information than about potential reputational harm to defamation victims. For other types of speech (e.g., imputations of homosexuality), most will agree that the free flow of information has limited or even negative social value and the reputational interests of victims should be paramount. But while these considerations suggest that the balance among defamation law's competing priorities should be struck differently in different contexts, they do not yield clear policy prescriptions. As emphasized above, raising the bar for defamation liability may

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lead to more speech or less speech, depending on the relative magnitudes of the chilling and warming effects. Likewise, applying a presumption of harm may enhance or detract from the protection of false-statement victims' reputations, depending on the relative magnitudes of the deterrence and corrective effects (on the one hand) and the intensification effect (on the other). Simply concluding that speech on a particular topic is especially valuable to society or especially harmful to the reputation of false-statement victims tells us little about what defamation liability rules are optimal.

To be sure, there may be some contexts in which we can say with reasonable confidence that the chilling effect of defamation liability will outweigh the warming effect, and so a higher bar to liability (i.e., a more defendant-friendly regime) is desirable if the interests of speakers are paramount. One possible example is section 6 of the United Kingdom's Defamation Act 2013, which creates a statutory privilege for peer-reviewed statements in scientific and academic journals (Defamation Act 2013 (2013 c.26), § 6).[35] We might expect that the peer review process would weed out false statements already, in which case the deterrence effect of defamation law would be muted. And it seems likely that academic authors—whose career advancement often depends upon journal publications—would have strong incentives to publish articles regardless of defamation law's warming effect. We might be worried, however, that journals will be influenced in their publication decisions by the chilling effect of defamation liability, or that scholars will substitute away from socially valuable but controversial research toward less socially valuable topics because of defamation liability fears. These fears may be magnified by the risk of adjudicative inaccuracy, especially in highly technical fields, as judges and jurors likely know less about these topics than scientists and other academics do. It thus seems reasonable to conclude that the benefits of defamation law in the peer review context are limited and the costs are potentially significant—a conclusion that the UK Parliament's decision reflects.[36]

35 The Defamation Act 2013 preserves an island of defamation liability for peer-reviewed statements if the plaintiff can show actual malice. See Defamation Act 2013 (2013 c.26), § 6(6). A different type of "peer-review privilege" exists under U.S. federal law and applies to statements by physicians who participate in peer review to determine whether a colleague's clinical privileges should be revoked. See Health Care Quality Improvement Act of 1986, Pub. L. No. 99-660, §§ 411, 100 Stat. 3784 (codified at 42 U.S.C. § 111111).

36 Libel lawsuits against peer-reviewed journals and their authors are not unheard of. For example, in 2016, a dietary supplements manufacturer Hi-Tech Pharmaceuticals sued Harvard Medical School Professor Pieter Cohen over an article published in the peer-reviewed *Drug Testing and Analysis* that cast doubt on Hi-Tech's claims about the contents of its supplements. See *Hi-Tech Pharm., Inc. v. Cohen*, 277 F. Supp. 3d 236 (D. Mass. 2016). The case went to trial, with a jury ultimately finding in favor of Cohen (Hall-Lipsy & Malanga 2017). In 2017, Stanford engineering professor Mark Jacobson, who had previously published an article in the *Proceedings of the National Academy of*

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5.3 Tailoring by Victim

A third type of tailoring of defamation law is by the target, or victim, of speech. We might, for example, apply different defamation liability regimes to different types of victims depending upon the weight we place on their reputational interests and their alternative avenues for redress. The *New York Times v. Sullivan* rule is an application of victim-based tailoring, apparently motivated by the view that public officials should "be treated as men [and women] of fortitude" who can use their prominent platforms to defend their reputations rather than resorting to the courts (376 U.S. at 273 (internal quotation marks omitted)). The extension of the *New York Times* rule to "pervasive" or all-purpose public figures is a further application (*Gertz*, 418 U.S. at 351). Other defamation law doctrines reflect a mix of victim-based and topical tailoring. For example, the rule requiring "limited-purpose" public-figure plaintiffs to prove actual malice for a limited range of issues entails a victim-based component (is the plaintiff an individual who has voluntarily injected herself or been drawn into a particular public controversy?) and a topic-based component (does the speech pertain to the public controversy in which the plaintiff is involved?). The Slander of Women Act 1891 was similarly a victim/topic hybrid (was the plaintiff female, and if so, did the statement impute unchastity?).

The superficial attraction of victim-based tailoring is similar to the intuitive appeal of topical tailoring: just as there are some topics about which information is especially valuable, there may be some potential victims whose reputations are especially vulnerable to false statements or who for other reasons merit special protection from defamation. At the same time, victim-based tailoring is plagued by the same problems as topical tailoring: even if it were clear which victims merit extra protection, it is far from clear whether raising or lowering the threshold for liability brings us closer to that protective objective. For example, the Slander of Women Act might have deterred false imputations of unchastity and made it easier for victims of such slander to recover, but it also might have lent additional credibility to such claims and intensified the attendant harms.

Sciences (*PNAS*), sued another researcher and the National Academy of Sciences for publishing a response in *PNAS* that challenged Jacobson's conclusion. See Complaint, *Jacobson v. Clack*, C.A. No. 17-0006685 (D.C. Sup. Ct. filed Sept. 29, 2017). Jacobson dropped the lawsuit several months later. See Michael Hiltzik, A Stanford Professor Drops His Ridiculous Defamation Lawsuit Against His Scientific Critics, *L.A. Times* (Feb. 23, 2018), https://www.latimes.com/business/hiltzik/la-fi-hiltzik-jacobson-lawsuit-20180223-story.html. Comprehensive data on the frequency of defamation claims against peer-reviewed journals is scant. The American Psychological Association's longtime publisher reports receiving about one lawsuit threat per year over the course of his career (Wogan 2010).

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One possible response to the above-described ambiguity is to allow victims to choose the defamation regime that best suits their needs and interests—what we might call "victim-side self-tailoring." That is, we could allow victims to elect into (or out of) the presumptions of malice, falsity, and harm, and thus to judge for themselves whether the deterrence and corrective benefits of the common law regime outweigh the intensification costs. To some extent, the USA's constitutionalized defamation liability regime already incorporates victim-side electivity: an individual has control over whether she becomes a public official, and she has at least some (though not total) control over whether she becomes an all-purpose or limited-purpose public figure other than a public official. Victim-side electivity could, at least in theory, be more explicit and expansive. For example, individuals who wanted the common law presumptions of malice, fault, and harm to apply could attach the symbol Ⓟ to the ends of their names in order to signal that they have opted into the presumptions. We might even imagine an a-la-carte menu approach, with individuals specifying which of the common law presumptions they choose for themselves (e.g., Ⓜ, Ⓕ, Ⓗ).[37] Victim elections also might be recorded in a centralized and publicly available registry.

Beyond the not-inconsiderable implementation challenges of victim-side electivity, however, there are more serious conceptual problems with this approach. Imagine that the default is not to apply the common law presumptions and that an individual must affirmatively opt into each one. If a person begins to sign her name with Ⓜ, Ⓕ, Ⓗ at the end, others might draw negative inferences based on that election. For example, opting for the protections of the common law presumptions might be interpreted as a signal that an individual has something to hide. That might not be an undesirable outcome if the objective is to facilitate the free flow of information—victim-side elections would themselves be informative. Yet, it does appear to be more problematic if the ostensible objective is victim protection.

In any event, it is far from clear why victims' interests should be paramount in the design of a defamation liability regime. What is best for the targets of negative speech is not necessarily best for society. For example, a corrupt public official may decide that the chilling effects of defamation liability outweigh the warming and intensification effects, and may therefore elect into a high-liability regime (e.g., applying all three common law presumptions). That choice may turn out to be privately optimal for the corrupt official but deleterious from a

37 An implementation strategy that would require fewer keyboard shortcuts might be to allow individuals to opt into the three presumptions by enclosing their names in parentheses or brackets, though this might be confused with the triple-parentheses that some American Jews have adopted in response to the rise of alt-right antisemitism. Matthew Yglesias, The (((Echo))), Explained, *Vox* (June 6, (2016), https://www.vox.com/2016/6/6/11860796/echo-explained-parentheses-twitter.).

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societal perspective. The decision to delegate defamation law decisionmaking to the targets of negative statements is certainly questionable and likely indefensible.

5.4 Tailoring by Speaker

A fourth and final type of defamation law tailoring is speaker-based. The relative magnitudes of the deterrence, chilling, warming, and substitution effects will likely vary from speaker to speaker, and so the optimal liability regime for different speaker types might vary too. For example, well-established media organizations might benefit little from defamation law's warming effect because their reputational capital already bestows credibility upon their reporting, though they still might be responsive to the chilling effect of potentially ruinous defamation judgments. To promote a vibrant press, we might therefore relax the common law presumptions of malice, falsity, and harm for media organizations while applying those presumptions to other speakers who potentially would benefit from defamation law's warming effect. We might even choose to exempt media organizations from defamation law entirely.

Speaker-based tailoring, like victim-based tailoring, is already reflected in U.S. defamation law to a limited extent. A few states draw distinctions in their defamation law between media and non-media defendants, though several justices have suggested that the Constitution makes no such distinction (*Dun & Bradstreet*, 472 U.S. at 783–784 (Brennan, J., dissenting)). In any event, the media/non-media distinction is coarser than the analysis here might suggest it should be: while well-established media organizations like the *New York Times* and the *Washington Post* might benefit little if at all from defamation law's warming effect, the warming effect on an upstart publication with no reputation might be more significant.[38]

An alternative and potentially more attractive approach would be to allow "speaker-side self-tailoring"—i.e., to let speakers choose whether and which of the common law presumptions apply to them, or to specify the damages that they will pay if their statements are found to be false and defamatory. A speaker might make this election "in gross" (i.e., applying to all statements that the speaker makes[39]) or on a statement-specific basis. An in-gross election might take a form similar to what we describe above for victim-side elections—a specific marker after a speaker's name and/or an entry in a central registry.

38 Drawing an intellectually defensible line between media and non-media speakers in an age of blogs and social media is also a difficult if not impossible task.

39 The analogy here is to easements "in gross," which attach to a particular individual rather than to a particular piece of property. See Black's Law Dictionary, 10th ed., s.v. "in gross."

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Statement-specific elections could take the form of adverbs attached to potentially defamatory statements in order to signal the applicable liability regime. For example, a statement that "X *allegedly* murdered Y" might mean that the speaker is opting out of the common law presumptions; a statement that "X *purportedly* murdered Y" might mean that the speaker is opting out of defamation liability altogether.

In-gross and statement-specific elections would be novel innovations in defamation law,[40] but they are not without analogues elsewhere. Some scholars of law and finance have suggested that a non-U.S. firm's decision to list its securities on a U.S. exchange can be understood as a way for the firm to "bond" itself to a liability regime that penalizes false and misleading statements—arguably a form of election in gross (see, e.g., Coffee 1999, 2002; Stulz 1999; Rock 2002). Meanwhile, tax law practitioners have developed a verbal system to signal their confidence in a particular position, with a "will" opinion indicating confidence of 90 percent or higher, a "should" opinion indicating confidence of 70–75 percent or higher, and a "more likely than not" opinion indicating confidence greater than 50 percent (Rothman 2011, p. 327). Lower confidence levels include "substantial authority" (35–40 percent), "reasonable possibility of success" (33 1/3%), and "reasonable basis" (20–30 percent). A "will" opinion for a position that the Internal Revenue Service rejects exposes the practitioner to a greater risk of malpractice liability than, for example, a "reasonable basis" opinion for the same position.

The attraction of speaker-side self-tailoring is that it could eliminate defamation law's chilling effect without sacrificing the warming effect. An individual whose speech might be chilled by the prospect of a defamation judgment could opt out of liability (e.g., by attaching the adverb "purportedly" to the potentially defamatory statement) and then engage in speech. Yet, that would not stop a speaker who desires the credibility that comes with defamation liability from gaining the benefits of the warming effect. In this regard, speaker-side self-tailoring appears to be much more speech-friendly than the USA's constitutionalized regime, which reduces the warming effect of the common law regime for some speakers who might benefit from it.

40 Cf. Restatement (Second) of Torts § 578 illus. c (noting that "one who repeats a slanderous statement originally published by a third person is subject to liability to the person defamed as though he had himself originated the statement," and "[t]his is true although the speaker accompanies the slander with a statement that it is a rumor only"). Contrary to popular myth, use of the word "allegedly" does not defeat a potential libel claim. See Jonathan Holmes, Ian Hislop's Top Tip for Not Getting Sued: "Allegedly" Doesn't Work, *Radio Times* (Oct. 16, 2016), https://www.radiotimes.com/news/2016-10-16/ian-hislops-top-tip-for-not-getting-sued-allegedly-doesnt-work (quoting Private Eye editor and prankster Ian Hislop as saying: "I should point out that allegedly is no defence at all in libel. I perpetrated this myth for years hoping some judge would believe me").

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The effects of speaker-side self-tailoring on victims are more complicated—and depend in part on the alternative against which speaker-side self-tailoring is compared. If the default is a low liability regime that applies across the board, then speaker-side self-tailoring generally benefits victims when the speakers who target them elect to stick with the low liability default regime: the intensification effect is weaker than if self-tailoring were not possible, while the corrective effect is unchanged. Speaker-side self-tailoring has more ambiguous effects on victims when speakers elect into the high liability option. Now, the victim has a better shot at correction and monetary compensation than if low liability were mandatory, but the intensification effect is also stronger.

If the default is a high liability regime, then again the effects of speaker-side self-tailoring on victims depend upon which option the speaker who targets them chooses. If the speaker sticks with the high liability default regime, then the victim is unambiguously worse off: her prospects for compensation and correction are the same as under the alternative, but the speaker's choice to stick with the high liability regime will signal credibility to audiences. If the speaker elects into low liability, then the consequences for the victim are mixed. On the one hand, the victim potentially loses a chance at correction and compensation. On the other hand, the intensification effect of the high liability regime will be muted.

There are at least three circumstances in which speaker-side self-tailoring may be especially harmful to victims. The first is when the speaker discounts the future hyperbolically or quasi-hyperbolically (i.e., she is focused on present-period effects to the near exclusion of subsequent ramifications). Under these circumstances, a speaker may elect into high liability and utter a false statement without much of a care as to whether the false statement results in future legal consequences. For example, a politician in the run-up to an election might make a false statement about a rival and choose high liability for additional credibility, because the politician's primary concern is winning the upcoming election and not the payment of damages afterward. Note, though, that this risk is mitigated if audiences anticipate that the speaker will discount the future heavily, in which case the speaker's choice of the high liability regime will emit a weaker signal. Thus, if voters recognize that candidates care much more about consequences pre-election than post-election, they may discount the signal sent by a candidate's choice of the high liability option.

Second, speaker-side self-tailoring is prone to mischief if the speaker has private knowledge about the victim's low propensity to sue. Under these circumstances, the speaker can make negative statements about the victim that will be viewed credibly by audiences but that are unlikely to result in liability. For example, some Christians interpret language in Paul's First Epistle to the Corinthians to mean that they should generally refrain from filing lawsuits—

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especially against a fellow Christian defendant (1 Cor. 6: 1–8).[41] If a speaker knows that his intended victim adheres to this belief but audience members do not know that fact, then the speaker can make negative statements about the victim with near-impunity and audiences will draw unfavorable inferences about the victim from her failure to file suit.

Third, speaker-side self-tailoring is particularly problematic for victims when speakers are unobservably judgment-proof. Imagine, not so hypothetically, a celebrity boxer who has made hundreds of millions of dollars from prizefights and endorsement deals over his career but—unbeknownst to the public—has squandered that fortune through extravagant expenditures and ill-fated investments.[42] If the boxer opts into high liability and makes a negative statement about another person, audiences might view the statement as credible because they believe that the boxer is putting part of his fortune on the line. But if in fact the boxer is on the brink of bankruptcy, he might have little to lose from liability, and his talk might indeed be cheap. Victims of the bankrupt boxer's defamatory statements would be doubly harmed: they would suffer the intensification effect of defamation liability because audiences would assign credibility to the boxer's statements, but without the monetary compensation that is typically available to defamation victims.

The potential harm to victims from speaker-side self-tailoring is less clear when the speaker is not unobservably judgment-proof but the opposite: unobservably wealthy. The concern in these circumstances is that a speaker will opt into high liability, make false and defamatory statements about a person she dislikes, and then willingly pay damages that represent a very small portion of her net worth and that have a trivial effect on her overall utility. Audiences aware of the speaker's vast wealth may account for that factor in deciding how much credibility to accord to her statements. However, audiences unaware of the speaker's resources may view the statements as initially credible because they appear not to be cheap talk. The victim still may benefit from the corrective effect of a favorable judgment, but only after suffering a short-term intensification effect. Concerns regarding unobservably wealthy speakers may be allayed; however, if the speaker's wealth is ultimately observable to the court and the relevant jurisdiction considers the speaker's resources in setting punitive damages. If both speakers and audiences know that courts will scale-up

41 See Alice Curtis, Should Christians Sue? *Christianity Today* (Aug. 6, 2001), https://www.christianitytoday.com/ct/2001/august6/27.66.html.

42 Cf. Richard Sandomir, Tyson's Bankruptcy is a Lesson in Ways to Squander a Fortune, *N.Y. Times* (Aug. 5, 2003), https://www.nytimes.com/2003/08/05/sports/tyson-s-bankruptcy-is-a-lesson-in-ways-to-squander-a-fortune.html (explaining how boxer Mike Tyson became insolvent notwithstanding $400 million of earnings over two decades).

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punitive damages to deter wealthy individuals from making false and defamatory statements, then it may not be necessary for audiences to observe speaker wealth directly. Courts can ensure that awards are of sufficient size that the speaker experiences a real loss of utility when she purposefully defames a personal foe, and thus talk will not be cheap even for the deep-pocketed (Polinsky & Shavell 1998).

While currently defamation law does not provide for speaker-side self-tailoring, speakers can potentially obtain some of the benefits of self-tailoring today through other means. One way is for a speaker to purposefully subject herself to adjudication of defamation claims under a more stringent liability regime. For example, when an Israel-based academic sought to bring criminal libel charges in French court against New York University law professor Joseph Weiler over a review he wrote of her book, Weiler urged the court to adjudicate the claim against him on the merits rather than seeking preliminary dismissal on jurisdictional grounds. Weiler explained that he thought "it was important to challenge this hugely dangerous attack on academic freedom and liberty of expression" rather than resting solely on a technical defense.[43] Weiler's actions can be characterized as a type of speaker-side self-tailoring: the American academic exposed himself to trial in a French court because he understood that adjudication on the merits would bolster his credibility.[44]

Another form of speaker-side self-tailoring occurs through "prove me wrong" offers. In a "prove me wrong" offer, a speaker makes a statement and simultaneously or subsequently offers a sum of money if the statement is shown to be false. Prove-me-wrong offers can be "open" (i.e., anyone who falsifies the speaker's statement can claim the award), or they can be "closed" (i.e., only the target of the speaker's statement is eligible to collect). The speaker can specify that the award will go to the person who proves her wrong, or she can specify that the payment will go to a specific charity. The general rule in contract law is that "[a]n offeror is the master of his offer" (*Newman v. Schiff*, 778 F.2d 460, 466 (8th Cir. 1985)), and so it is up to the speaker to decide whether the prove-me-wrong offer is open or closed and whether it is noncharitable or charitable.

Prove-me-wrong offers have a rich history in the law, dating back to the canonical late-nineteenth-century English case *Carlill v. Carbolic Smoke Ball*

43 See Joseph Weiler, In the Dock, in Paris, *EJIL: Talk!* (Jan. 25, 2011), https://www.ejiltalk.org/in-the-dock-in-paris; see also, Verdict Handed Down in French Criminal Libel Trial of Joseph Weiler, *NYU Law News* (Mar. 11, 2011), http://www.law.nyu.edu/news/weiler_trial_france (noting that "Weiler could simply have challenged the court's jurisdiction, but chose to argue the merits of the libel charge as well").

44 Shay Levie and Avraham Tabbach cite the Weiler example to illustrate a related point: that parties to litigation may waive defenses as a way to credibly communicate private information about the strength of their merits case (Levie & Tabbach 2018, pp. 14–15, n. 66).

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Co.[45] There, the defendant manufactured a "smoke ball" that it said could prevent viral infections, and it offered £100 to anyone who used the product three times a day for at least two weeks and thereafter contracted influenza or the cold ([1893] 1 Q.B. 256). The plaintiff saw the advertisement, bought a smoke ball, used it as directed, caught the flu, and sued. The lower court ruled in her favor, and the Court of Appeal affirmed. The Lord Justices agreed that the manufacturer had made a valid offer which the plaintiff accepted by acting on the advertisement. They agreed, moreover, that there was sufficient consideration for the manufacturer's promise, both because of the "inconvenience" to the plaintiff of using the smoke ball thrice daily for two weeks and because of the publicity that the manufacturer received from the advertisement.

Some U.S. courts have followed similar reasoning to hold that "prove me wrong" offers are enforceable. In one famous case, the operator of a Missouri museum devoted to the nineteenth century bank and train robber Jesse James claimed that James had not died in 1882, as is widely believed, but instead had lived into the 1950s and resided at the museum. The museum operator offered a $10,000 reward to anyone who could "prove me wrong," and members of James's family took up the offer. A Missouri court awarded $10,000 to the family members after concluding that they had successfully proven the operator's claim to be incorrect (*James v. Turilli*, 473 S.W.2d 757, 762 (Mo. App. 1971)). In another case, the vice president of a company in Washington state that distributed punchboards (game boards used for lotteries) offered $10,000 to anyone who could prove that one of the company's boards was "crooked." A state court ordered the vice president to pay $10,000 to a man who proved that two such boards were crooked (*Barnes v. Treece*, 549 P.2d 1152 (Wash. App. 1976)). In several other cases, courts have said that "prove me wrong" offers are in theory enforceable, though they have declined to order payment under the particular facts.[46]

None of the above-mentioned cases involved a speaker making a potentially defamatory statement about another person and offering to pay that person if proven wrong. Several real-world examples following the latter fact pattern do exist—and curiously, the current U.S. president seems to have been involved in a disproportionate number of these episodes. Perhaps most prominently, Trump said in 2012 that he would donate $5 million to the charity of Barack Obama's choice if the forty-fourth president provided records showing that he

45 On prove-me-wrong cases, see generally O'Gorman (2015).

46 See, e.g., *Republican Nat'l Comm. v. Taylor*, 299 F.3d 887 (D.C. Cir. 2002) (offer enforceable but claim not proven wrong); *Rosenthal v. Al Packer Ford, Inc.*, 374 A.2d 377 (Md. App. 1977) (same); *Newman v. Schiff*, 778 F.2d 460 (8th Cir. 1985) (offer enforceable, though no payment ordered); *Kolodziej v. Mason*, 996 F. Supp. 2d 1237 (M.D. Fla. 2014) (same).

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was born in the USA. (Trump later upped the ante to $50 million, though he then acknowledged in September 2016 that Obama was in fact U.S.-born. Obama does not appear to have made any attempt to collect.)[47] The next year, comedian Bill Maher appeared on NBC's *Tonight Show* with Jay Leno and offered to donate $5 million to a charity of Trump's choice if the real estate developer and future president could prove that he is not "the spawn of his mother having sex with an orangutan" (see Payne 2013). This time, Trump did act on the offer, filing a lawsuit against Maher in California state court.[48] Trump soon dropped the suit; his then-lawyer Michael Cohen said that Trump would file an amended complaint,[49] but nearly six years have passed without further legal action. Most recently, Trump offered to pay $1 million to a charity of Elizabeth Warren's choice in July 2018 if the Democratic Senator from Massachusetts could produce evidence from a genetic test that she is of Native American heritage.[50] Three months later, Warren released results from a DNA analysis indicating that she had a Native American ancestor six to ten generations ago; she has asked him to send a $1 million check to the National Indigenous Women's Resource Center.[51]

The enforceability of these Trumpian prove-me-wrong offers is far from clear. Following the logic of *Carbolic Smoke Ball*, the efforts by the subjects of these offers to falsify the speaker's claims (e.g., producing a birth certificate or taking a genetic test) might well be sufficient consideration under state contract law. But several more obstacles stand in the way. One is whether a court would consider the offer to be "in jest."[52] Lawyers and law professors quoted in the media coverage of the Trump-Maher suit said that Trump's claim against the

47 David A. Fahrenthold, Trump Said He'd Give Away $5 Million—or Maybe $50 Million—for Proof Obama Was Born in the U.S. Will He Pay? *Wash. Post* (Sept. 16, 2016), https://www.washington-post.com/news/post-politics/wp/2016/09/16/trump-said-hed-give-away-5-million-or-maybe-50-million-for-proof-obama-was-born-in-the-u-s-will-he-pay-it.

48 Complaint, *Trump v. Maher*, No. BC499537 (Cal. Sup. Ct. filed Feb. 4, 2013), https://bit.ly/2WgB0XK.

49 See Joseph Ax, Trump Withdraws "Orangutan" Lawsuit Against Comic Bill Maher, *Reuters* (Apr. 2, 2013), https://www.reuters.com/article/entertainment-us-usa-trump-lawsuit-idUSBRE9310PL20130402.

50 See Tim Hains, Trump Offers $1 Million for "Pocahontas" Elizabeth Warren To Take DNA Test To Prove Indian Ancestry, *RealClearPolitics* (July 5, 2018), https://www.realclearpolitics.com/video/2018/07/05/trump_offers_1_million_for_pocahontas_elizabeth_warren_to_take_dna_test.html.

51 See Tucker Higgins, Trump Said He Would Give $1 Million to Charity if Elizabeth Warren Took a DNA Test. Now She Wants Him To Pay Up, *CNBC* (Oct. 15, 2018), https://www.cnbc.com/2018/10/15/elizabeth-warren-dna-test-she-urges-trump-to-fulfill-1-million-charity-pledge.html.

52 See *Leonard v. Pepsico*, Inc., 88 F. Supp. 2d 116, 127 (S.D.N.Y. 1999) (stating that "[i]f it is clear that an offer was not serious, then no offer has been made," and holding that Pepsi's alleged offer of a Harrier jet to anyone who collected 7 million "Pepsi Points" was "clearly in jest").

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comedian would likely fail on those grounds.[53] Another is whether a court would consider the arrangement to be an illegal "wager." The *Restatement (First) of Contracts* gives the illustration of "A," who "promises B one hundred dollars if B can give ocular demonstration of the rotundity of the earth, to the satisfaction of C." The *Restatement* concludes—albeit without an extended explanation—that the bargain between A and B is an illegal wager (Restatement (First) of Contracts 1932, § 520 illus. 10). Similar reasoning could potentially apply to prove-me-wrong offers such as the ones Trump made to then-president Obama and Senator Warren. A third potential obstacle is the general rule that "[a] promise ... is unenforceable on grounds of public policy if ... the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms" (Restatement (Second) of Contracts 1981, § 178). This public policy doctrine has been invoked to deny enforcement of prove-me-wrong offers.

One such case involved a referendum in Cudahy, Wisconsin, in which voters decided whether the community's water supply would be fluoridated. A fluoridation opponent, James Quirk, offered $1000 to the pro-fluoridation Junior Chamber of Commerce (Jaycees) if members of the organization could prove that "a daily dose of four glasses" of fluoridated water "cannot cause dermatologic, gastrointestinal, and neurological disorders" (*Cudahy Junior Chamber of Commerce v. Quirk*, 165 N.W.2d 116, 117 (Wis. 1969) (internal quotation marks omitted)). The Jaycees sought to prove Quirk wrong; a jury found that they had successfully done so; and the trial court awarded them $1000. On appeal, though, the Wisconsin Supreme Court held that the offer was unenforceable on public policy grounds. Citing *New York Times v. Sullivan*, the court said that "there is a wide latitude constitutionally assured to participants in the political process," and "[i]t includes the right to be wrong, as one side almost always is in a debate of a public issue" (*id.*, p. 119). Ordering Quirk to pay the Jaycees would, on the court's view, infringe upon this right.

The analysis here suggests that the Wisconsin Supreme Court not only got it wrong in *Quirk*, but got it backwards. The ability to make enforceable prove-me-wrong statements allows participants in public debate to communicate information more credibly than they could if talk were cheap. Leaving it to the speaker to select the applicable liability regime substantially allays concerns

53 See Lucy Tiven, Donald Trump's 2013 Lawsuit Against Bill Maher Reveals a Lot About His Campaign, *ATTN:* (Nov. 6, 2016), https://archive.attn.com/stories/12009/donald-trumps-2013-lawsuit-against-bill-maher-reveals-lot-about-his-campaign (citing University of Southern California law professor Robert Rasmussen and Columbia Law School professor Jody Kraus); Eriq Gardner, Why Donald Trump is Likely to Lose a Lawsuit Against Bill Maher (Analysis), *Hollywood Reporter* (Feb. 4, 2013), https://www.hollywoodreporter.com/thr-esq/why-donald-trump-is-lose-417806 (citing media and entertainment lawyer Dori Hanswirth).

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about a chilling effect. It is, if anything, the nonenforcement of prove-me-wrong offers that threatens discourse, because it makes it more difficult for speakers who lack reputational capital to compete in the marketplace of ideas with speakers who have that asset. As for victims (i.e., individuals who are the targets of negative statements backed by prove-me-wrong offers), the welfare effects of prove-me-wrong offers are ambiguous: while they are harmed (at least in the short term) by the offer's intensification effect, they may benefit in the long run from the corrective effect of enhanced damages and an adjudicatory forum. The balance of speaker-side benefits, a richer marketplace of ideas, and ambiguous effects on victims seems to weigh in favor of enforcement. It almost certainly cannot be said that the substantial interest in enforcement is "clearly outweighed" by the ambiguous victim-side effects.

Yet even if prove-me-wrong offers were consistently enforced, they would not serve as perfect substitutes for the speaker-side self-tailoring suggested here. One way to characterize a prove-me-wrong offer is that the offeree is opting into an irrebuttable presumption of malice and is taking the issue of harm off the table: the amount of the offer substitutes for a court's award of damages. What the offeree cannot do, though, is opt into the presumption of falsity: after all, the premise of a prove-me-wrong offer is that the offeree, not the offeror, must bear the burden of proof. An offer of the type "I will pay you $X if I fail to prove that you were born outside the United States" or "I will pay you $X if I fail to prove that you are the spawn of an orangutan" would likely fail for lack of consideration before a court even reached the question of jest.[54]

There remains a question as to why prove-me-wrong offers are not more often utilized. One possible answer is that for such an offer to communicate the intended signal of credibility, the speaker would have to publicize information not only about the terms of the offer but also about the legal principles that make the offer a potentially valid one. The latter is a significant cost for a lone speaker to bear and, once she has borne it, other speakers could free-ride off her efforts by making their own "prove me wrong" offers and trusting that audiences would understand their consequences.

Another possible answer involves social norms and mores. Prove-me-wrong offers have arguably become the province of plutocrats angling for publicity and comedians looking for laughs. Consider the reaction to former Massachusetts Governor Mitt Romney's prove-me-wrong offer to rival Republican presidential candidate Rick Perry in a December 2011 debate, when Romney offered

54 What a prove-me-wrong offeror potentially could do instead is to set a low burden of proof for the offeree. Instead of "I will pay you $X if you *prove* that you were born outside the United States," Trump could have said "I will pay you $X if you provide *substantial evidence*"—or "*any evidence*"—"that you were born outside the United States."

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Perry $10,000 if Perry could prove that Romney had ever advocated a nationwide health insurance mandate.[55] Political strategist Mark McKinnon, a former adviser to President George W. Bush, called Romney's offer "a huge unforced error" that "reminded everyone of a candidate who seems rich, elite, and out of touch."[56] Other journalists and pundits described it as a "gaffe"[57] and a "baffling" mistake.[58] Virtually, no one other than Romney's own advisers argued that the offer bolstered the credibility of Romney's claim that Perry had misrepresented the former Massachusetts Governor's record.

Insofar as Romney's offer to Perry violated a social norm or more, the norm or more does not seem to apply to all instances of speaker-side self-tailoring. For example, Weiler, the NYU law professor, drew praise for fighting the French defamation charge on the merits.[59] While monetary prove-me-wrong offers may have come to be viewed by many as garish, the same social meaning does not seem to apply to all instances in which a speaker opts into a more stringent defamation regime. Social meanings, moreover, are potentially endogenous to legal rules (Lessig 1995). An explicit legal framework for speaker-side self-tailoring may dissipate some of the stigma that monetary prove-me-wrong offers have arguably taken on.

In sum, prove-me-wrong offers are at best an imperfect substitute for the sort of speaker-side self-tailoring that we envision here. The enforceability of such offers is the subject of some doubt, thereby diminishing their signaling value. Prove-me-wrong offers cannot easily be used to opt into a presumption of falsity. And for reasons that are sociological rather than legal, specifying a dollar figure for liability may be considered uncouth in ways that opting into the common law presumptions might not be. That quite a few speakers have

55 See Matt DeLong, Mitt Romney Challenges Rick Perry to $10,000 Bet in GOP Debate, *Wash. Post* (Dec. 11, 2011), https://www.washingtonpost.com/blogs/election-2012/post/mitt-romney-challenges-rick-perry-to-10000-bet-in-gop-debate/2011/12/11/gIQAudrBnO_blog.html. The terms of Romney's offer were not crystal-clear, and it may have been a two-sided bet rather than a unilateral prove-me-wrong offer.

56 Mark McKinnon, Republican Debate: Newt Won and Romney Bombed with a Bet, *Daily Beast* (Dec. 10, 2011), https://www.thedailybeast.com/republican-debate-newt-won-and-romney-bombed-with-a-bet.

57 Ros Krasny, Romney Looks to Bounce Back After $10,000 Bet Gaffe, *Wash. Post* (Dec. 11, 2011), https://www.reuters.com/article/us-usa-campaign-romney/romney-looks-to-bounce-back-after-10000-bet-gaffe-idUSTRE7B825X20111212.

58 Chris Clizza & Aaron Blake, Mitt Romney's $10,000 Mistake, *Wash. Post* (Dec. 12, 2011), https://www.washingtonpost.com/blogs/the-fix/post/mitt-romneys-10000-mistake/2011/12/11/gIQA9aEQpO_blog.html.

59 See, e.g., Kevin Jon Heller, Joseph Weiler in the Dock, *Opinio Juris* (Jan. 25, 2011), http://opiniojuris.org/2011/01/25/joseph-weiler-in-the-dock ("I feel nothing but admiration for Weiler's courage—particularly his unwillingness to contest the French court's jurisdiction").

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nonetheless issued such offers over the years suggests that they recognize a point that we have sought to illustrate: greater liability for falsehoods enhances the credibility of a speaker's statements and can sometimes serve a speaker's overall interests.

6. CONCLUSION

This article has sought to expand upon—and upend—the traditional view of defamation law as entailing a tradeoff between deterrence and chilling. Defamation liability is indeed likely to deter false statements and—at least when humans and courts are fallible—to chill some true ones. But it also has the potential to do much more. It can "warm" rather than chill speech by adding credibility and thereby inducing individuals who otherwise would have remained silent to instead speak out. It can—and almost certainly does—cause speakers to substitute negative statements for positive ones and sometimes vice versa, and to shift among subjects when liability is topically tailored. It can both correct and intensify the harms that defamation victims experience. And it can shape primary behavior—"wrongdoing" and "rightdoing"—sometimes for better and sometimes for worse.

Our analysis of defamation law's consequences has, so far, elided one significant variable that we would be remiss not to discuss: the extent to which potential speakers, subjects, and listeners have knowledge of defamation law's details.[60] The deterrence and chilling effects most clearly depend on whether potential speakers—but not necessarily audiences—are aware of the relevant liability regime. In other cases, however, the relationship between the hypothesized effect and legal knowledge is more attenuated.

To use one ripped-from-the-headlines example: in May 2019, an altered video of the Speaker of the U.S. House of Representatives, Nancy Pelosi, circulated on Facebook and generated several million views. Facebook acknowledged that the video was fake but refused to remove it. "We don't have a policy that stipulates that the information you post on Facebook must be true," the company said.[61] The incident likely reduced the credibility that some individuals assign to information they encounter on that site (to the extent that any of Facebook's billions of users previously took Facebook posts as fact).

60 We thank Aziz Huq and Catherine Sharkey for prompting this discussion.

61 Drew Harwell, Facebook Acknowledges Pelosi Video is Faked but Declines to Delete it, *Wash. Post* (May 24, 2019), https://www.washingtonpost.com/technology/2019/05/24/facebook-acknowledges-pelosi-video-is-faked-declines-delete-it.

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One can imagine a counterfactual in which Facebook adopted the opposite policy and began to punish users for false posts (e.g., by suspending or deleting their accounts). That policy, insofar as potential speakers were aware of it, might deter false posts. It also might chill true posts if potential speakers lacked confidence in Facebook's adjudicative accuracy. It might further make Facebook a more attractive platform for speakers who seek to credibly communicate information, thereby "warming" speech.

The extent to which the policy would "warm" speech on Facebook—and potentially intensify the harms of speech on the site as well—would depend on how it affected the credibility that audiences assigned to Facebook posts. Importantly, the policy could boost the credibility of Facebook even in the eyes of audience members who were unaware of the policy. If users encountered fewer outlandish claims on the site, or fewer claims that were subsequently debunked, they might assign greater credibility to Facebook posts even if they did not know the reason for the quality change. That, in turn, might both warm and intensify. Potential speakers would have a greater incentive to broadcast their statements on Facebook, and the potential sting from those statements would be sharper.

The necessary conditions for the warming and intensification effects, then, are not that all or even most individuals understand the law. For the warming effect to obtain, the law must cause potential speakers to anticipate a greater benefit from speech—regardless of whether speakers themselves understand the connection between the law and the benefit. For the intensification effect to arise, the law must cause audiences to ascribe greater credibility to the statements they encounter—regardless, again, of whether they are aware of the legal link. Of course, if *no one* knows that defamation law has changed, then the change will be like the proverbial tree in a forest that makes no sound—warming, intensifying, or otherwise. Our point is, more modestly, that defamation law can have meaningful warming or intensification effects that extend beyond the law's renown.

The same is true for wrongdoing and rightdoing. In a media environment in which reporting on public corruption is perceived as thorough and credible, public officials may be deterred from wrongdoing, whether or not they know that defamation law is the reason that such an environment exists. Likewise, if individuals considering civic involvement know that entering the public sphere will expose them to harmful attacks on their reputations, they might be deterred from what we term "rightdoing" whether or not they understand defamation law's intricacies. The assumption that most or all actors have detailed knowledge of the law may be more plausible in the public-official context, but it is not strictly necessary in order for the hypothesized effects to manifest.

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The relationship between knowledge of the law and tailoring requires particular attention. If defamation laws are geographically tailored but speech crosses borders, lay audiences may struggle to determine which regime applies to which statement. To take a very real example: The *New York Times* maintains a bureau in Australia, and the paper's lawyers have advised its editors that the *Times* is subject to Australian law.[62] The *Washington Post* does not have an Australia bureau[63]—a fact that has caused it and the *Times* to make different decisions about Australia coverage.[64] A Web surfer sitting in Sydney might, for example, know that some international publications are bound by Australian law, but she might not know precisely which ones. She therefore may ascribe somewhat more credibility to statements that she encounters in the international press (as compared to a scenario in which no newspapers beyond Australia were subject to local law), but less than if all newspapers beyond Australia were bound by its law. Under these circumstances, Australian defamation law may have a net warming effect on the *Post* (which gets the credibility benefit without the liability cost) and a net chilling effect on the *Times* (which bears the full liability cost but receives only a partial credibility benefit).

The example suggests a more general observation about tailoring, whether by jurisdiction, topic, victim, or speaker. Imperfect knowledge of the law among audiences may allow speakers protected by a higher recovery bar to free-ride on the liability borne by other speakers. This predictably will have a number of consequences. If, for example, audiences know that statements on some but not all subjects are subject to a higher liability bar—but they do not know about the distinction between statements on matters of private concern (low bar) and statements on matters of public concern (high bar)—then defamation law may lead to more speech about matters of public concern and less speech about matters of private concern. That is because both statements receive a modest credibility boost, but only statements on matters of private concern trigger a

62 Damien Cave, Australian Gag Order Stokes Global Debate on Secrecy, *N.Y. Times* (Dec. 14, 2018), https://www.nytimes.com/2018/12/14/world/australia/australia-gag-order-court.html.

63 See The Washington Post's Foreign Correspondents, *Wash. Post*, https://www.washingtonpost.com/graphics/world/washington-post-foreign-correspondents/?utm_term=.902e0f6dad46 (last visited May 31, 2019). The *Post* therefore published on its website a story about an Australian cardinal's sex abuse conviction that the *Times*, citing liability concerns, declined to run for two more months.

64 Compare Chico Harlan, Australian Court Convicts Once-Powerful Vatican Official on Sex-Abuse-Related Charges, *Wash. Post* (Dec. 12, 2018), https://www.washingtonpost.com/world/australian-court-convicts-once-powerful-vatican-official-on-sex-abuse-related-charges/2018/12/12/da0d909c-fe20-11e8-a17e-162b712e8fc2_story.html, with Livia Albeck-Ripka & Damien Cave, Cardinal George Pell of Australia Convicted of Sexually Abusing Boys in 1996, *N.Y. Times* (Feb. 25, 2019), https://www.nytimes.com/2019/02/25/world/australia/george-pell-convicted-abuse.html (reporting same story two-and-a-half months later and noting that the *Times* did not publish in December—except in its U.S. print edition—because of an Australian court's gag order).

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potential liability cost. Likewise for statements about nonpublic figures (low bar) and public figures (high bar): audiences may, in effect, “under-credit” the former and “over-credit” the latter. Speakers thus may have stronger incentives to make statements about public figures (intermediate warming benefit; no deterrence or chilling) rather than nonpublic figures (intermediate warming benefit; higher deterrence and chilling).

Knowledge of the law is, importantly, not a fixed quantity. If, as we imagine above, symbols such as Ⓜ, Ⓕ, and Ⓗ began to appear at the end of signatures, we expect many people would notice and inquire. Likewise, if the opt-in or opt-out language used in a speaker-side self-tailoring regime were noticeably different from ordinary speech, then readers and listeners would likely take note. We should think of knowledge of the law, then, as being at least partially endogenous to the legal regime. Put more succinctly, we can use defamation law to shape knowledge of defamation law.

Defamation law is, to be sure, only one among an array of tools that policymakers can use to improve the quality and quantity of speech while also protecting victims' interests.[65] Subsidies for speech—for example, tax benefits for speech-oriented organizations, regardless of their ideology—may serve to offset defamation law's chill or to enhance its warming effects. Intellectual property law—chiefly but not exclusively copyright[66]—may raise the benefits of speech as much as or more than defamation law's warming effect (or may inhibit the free flow of information as much as or more than defamation law's chilling effect). On the other side of the speaker/victim divide, direct or indirect government compensation to false-statement victims may offset some of the reputational costs of defamation without generating an additional chilling effect on speakers, though also without producing an additional deterrence or warming effect.[67] A worthy objective for future work is to investigate the interactions between defamation law and other speech-promoting and reputation-protecting mechanisms, with a view toward identifying instances in which these various instruments can be used effectively in combination.

65 We thank Adam Samaha for emphasizing this point.

66 See, e.g., *Int'l News Serv. v. Assoc. Press*, 248 U.S. 215, 236 (1918) (invoking common law of unfair competition law to protect news service's "*quasi* property" right over a breaking news report).

67 For example, excluding defamation judgments and settlements from income tax would increase compensation to victims without increasing costs to speakers. Cf. *Murphy v. IRS*, 493 F.3d 170, 171 (D.C. Cir. 2007) (damages for loss of reputation are taxable income). Of course, this is desirable only if one wants to compensate victims without increasing costs to speakers. The discussion of the deterrence and warming effects above identifies reasons why policymakers might in fact want to raise the cost of false statements.

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Our focus on defamation law is one piece of this puzzle. The richer understanding of defamation law offered here serves to clarify—but also complicate—the compromises among competing values that policymakers must make. Of all the potential liability regimes, "speaker-side self-tailoring"—which allows speakers to specify the level of liability that they will face for false and defamatory statements—is likely to be the one most favorable to speakers and most conducive to a robust marketplace of ideas. Yet, the interests of speakers and audiences are not the only relevant inputs to the social welfare analysis, and policymakers must consider how heavily to weigh the reputational interests of the defamation victims whom speaker-side self-tailoring potentially harms. While we are skeptical that any liability regime will be recognized as optimal by all with a view, our hope is that economically informed analysis of defamation law will, at the very least, open eyes to new liability regimes that have the potential to improve upon the status quo. This is surely not the "open[ing] up" of defamation law that our epigraph envisions. It is, though, an "opening up" that we think should be cheered.

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