



ABA Forum on Communications Law

CLE Materials

Index of Documents

I. What is Instagram?

A. Miss Universe L.P., LLLP and Donald J. Trump v. Univision Networks, & Studios, Inc., Amended Complaint

II. What is raising taxes?

A. Cease and Desist Letter from the Trump Organization to the Club for Growth

III. What is the Miss USA pageant?

A. *Miss Universe L.P. LLLP v. Sheena Monnin*, 12 Civ. 9174 (JPO) (S.D.N.Y. July 2, 2013)

IV. What is architecture?

A. Donald J. Trump v. Chicago Tribune Company and Paul Gapp, 616 F.Supp. 1434 (S.D.N.Y. 1985)

V. What are his feelings?

A. *Donald J. Trump v. Timothy L. O'Brien*, Case No. A-6141-08T3 (N.J. Super. Ct. App. Div. 2011)

VI. What is Masson v. New Yorker?

A. M. Masson v. New Yorker Magazine, Inc. et al., 501 U.S. 496 (1991)

VII. Who is Bert Lahr?

A. Bert Lahr v. Adell Chemical Co., Inc., et al., 300 F.2d 256 (1st Cir. 1962)

VIII. What is “Cromunchkin”?

A. Cromunchkin Trademark Status

B. DD IP Holder LLC v. Andrew Douglass

IX. What is copyright protection as characters?

A. Warner Bros. Entm’t v. X One Productions, No. 10-1743 (8th Cir. 2011)

X. Who is Judy Garland?

A. *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958)

XI. Who is Frank Sinatra ?

A. *Frank Sinatra v. National Enquirer Inc., et al.*, 854 F.2d 1191 (9th Cir. 1988)

XII. Who are the Cherry Sisters ?

A. *Cherry c. Des Moines Leader et al.*, 86 N.W. 323 (Iowa 1901)

XIII. Who is Bill Cosby ?

A. *Tamara Green et al. v. William H. Cosby, Jr.*, Memorandum and Order Regarding Defendant's Motion to Dismiss Plaintiff's Complaint

B. *Renita Hill v. William H. Cosby Jr.*, Complaint

C. *Renita Hill v. William H. Cosby Jr.*, 15 cv 1658 (W.D. Pa. Jan. 21, 2016)

XIV. Who is Sean Penn?

A. *Sean Penn v. Lee Daniels and John Does 1-100*, Complaint

XV. What is a chocolate soufflé?

A. *Carol Burnett v. National Enquirer, Inc.*, 144 Cal. App. 991 (1983)

XVI. Who is Richard Nixon?

A. *Time, Inc. v. Hill*, 385 U.S. 374 (1967)

XVII. Who is Alexander Hamilton

A. *People v. Croswell*, 3 Johns. Cas. No. 377 (N.Y. 1804)

XVIII. Who is Thurgood Marshall?

A. *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966)

XIX. Who is Kenneth Starr?

A. *Morse et al. v. Frederick*, 551 U.S. 393 (2007)

XX. Who is Johnnie Cochran?

A. *Tory et al. v. Cochran*, 554 U.S. 734 (2005)

XXI. Who are Justices Black and Goldberg?

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

XXII. Who is Justice Stevens?

A. *Texas v. Johnson*, 491 U.S. 397 (1989)

XXIII. Who is Justice Stevens?

A. *Citizens United v. Federal Election Commission*, 129 S.Ct. 2893 (2009)

XXIV. What is, that he was not the son of an orangutan?

A. *Donald J. Trump v. William Maher*, Complaint

I. WHAT IS INSTAGRAM?

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----	X
MISS UNIVERSE L.P., LLLP and DONALD J. TRUMP,	:
	:
Plaintiffs,	:
	:
- against -	:
	:
UNIVISION NETWORKS & STUDIOS, INC. and	:
ALBERTO CIURANA, individually,	:
	:
Defendants.	:
	:
-----	X

Case No. 15 CV 5377 (JGK)(JLC)

AMENDED COMPLAINT

JURY TRIAL DEMANDED

Plaintiffs Miss Universe L.P., LLLP (“MUO”) and Donald J. Trump (“Mr. Trump”) (collectively, “Plaintiffs”), by and through their undersigned attorneys, as and for their Amended Complaint against defendants Univision Networks & Studios, Inc. (“Univision”) and Alberto Ciurana, individually (“Mr. Ciurana”) (collectively, “Defendants”) allege, as follows:

NATURE OF THE CASE

1. At issue in this action are claims for breach of contract, intentional interference with contractual relationships, and defamation arising from the recent decision by Univision, the largest Spanish language television network in the United States, to suddenly terminate its contractual relationship with MUO on the eve of the 2015 Miss USA pageant for no legally justifiably reason and refuse to broadcast the Miss Universe and Miss USA pageants from 2015 through 2019. In addition to seeking recovery for compensatory and consequential damages, by this action Plaintiffs also seek punitive damages and legal fees from the Defendants.

2. Simply stated, Univision had no right to terminate its relationship with MUO and refuse to broadcast the pageants. As demonstrated below, the agreement between Univision and

MUO, which requires that Univision broadcast each of the Miss Universe and USA pageants “live via the Univision or UniMas Networks ... at least one (1) time” each year, is clear and unequivocal and does not give Univision the right to terminate simply because it does not agree with Mr. Trump’s longstanding personal views or statements, all of which are protected by the First Amendment and have been echoed by many in this country.

THE PARTIES

3. MUO was and is a Delaware limited liability limited partnership with a principal place of business at 725 Fifth Avenue, New York, New York. It is duly authorized to commence this action.

4. Mr. Trump is an individual with an address at 721 Fifth Avenue, New York, New York.

5. Upon information and belief, at all relevant times set forth herein, Univision was and is a privately held California corporation with a principal place of business at 9405 N.W. 41st Street, Miami, Florida.

6. Upon information and belief, at all relevant times set forth herein, Mr. Ciurana was and is an individual with an address at 9405 N.W. 41st Street, Miami, Florida and the President of Programing and Content for Univision.

FACTS COMMON TO ALL CAUSES OF ACTION

The Miss Universe Organization

7. Prior to a sale of its assets on September 10, 2015, MUO was in the business of organizing, staging and producing some of the world’s most successful, well known, and respected pageant competitions, including Miss USA, Miss Teen USA and Miss Universe.

Indeed, in 2014 alone, the Miss USA competition was seen by more than 100 million viewers in over 70 countries while, in 2015, the Miss Universe pageant was broadcast to a worldwide audience of approximately 1 billion viewers in more than 190 countries.

The Univision Agreement

8. On or about January 14, 2015, following a bidding war between rival Spanish language television networks Telemundo and Univision, MUO and Univision (together, the “Parties”) entered into a license agreement pursuant to which Univision acquired from MUO the sole and exclusive right to broadcast, in Spanish, live and on demand, via television and any digital media, the Miss USA, Miss Teen USA and Miss Universe competitions (together, the “Final Events”) for five (5) straight years – from 2015 through 2019 – in the United States (including Puerto Rico) and Canada (the “Agreement” or “Univision Agreement”).

9. Pursuant to Section 1(a) of the Univision Agreement, MUO agreed that it would “organize, stage and produce” the Final Events, all of which would “feature contestants from around the world or the United States (as applicable) consistent with the production values, performances and other elements of past Miss Universe, Miss USA and Miss Teen USA (as webcast) Pageants.”

10. Pursuant to Section 1(b), MUO and Univision agreed that both the Miss USA and Miss Universe competitions “will be staged during primetime (U.S. Eastern Time) on dates to be mutually agreed upon by the parties” and that MUO will “use reasonable efforts” to hold each such competition “on a Sunday night.”

11. Pursuant to Section 2(a)(vi) and (b), MUO agreed that each Final Event would be “organized, staged and promoted in [a] manner such that it will be a first-class network-quality production”, would “have a duration of two (2) or three (3) hours” and that MUO would produce

and deliver such Final Events “in accordance with the first class quality production standards for United States broadcast networks’ prime-time programs.”

12. Pursuant to Section 3(a), Univision, in turn, agreed that it would broadcast each of the Final Events, i.e., the Miss USA and Miss Universe competitions “live ... at least one time.”

Section 3(a) states, quite clearly, as follows:

“Univision will exhibit each Program live via the Univision or UniMas Networks or as otherwise mutually agreed by the parties at least one (1) time, provided that Univision will not be obligated to broadcast the Teen Final Event.”

13. In consideration of these rights, Univision agreed that it would pay MUO a license fee in the sum of \$2.5 million per year for 2015, 2016 and 2017 and in the sum of \$3 million per year for 2018 and 2019, for a total of \$13.5 million over the five (5) year term.

14. Section 5(b) identifies certain limited bases upon which the Parties may terminate the Univision Agreement. Specifically: (i) Section 5(b)(i) gives the Parties the right to terminate in the event either party files for bankruptcy, (ii) Section 5(b)(ii) gives MUO the right to terminate if Univision either fails to pay the License Fee or otherwise breaches and fails to timely cure any material obligation; and (iii) Section 5(b)(iii) gives Univision the right to terminate if MUO grants the same rights granted to Univision to another party or otherwise breaches and fails to timely cure any material obligation. In other words, under the facts at issue herein, Univision had no contractual right to terminate the Agreement.

15. Notwithstanding these termination rights, Section 5(b)(iv) states that the “[t]ermination of this Agreement for any reason provided herein will not relieve the breaching party of its obligation to perform up to the effective date of such termination ...”

16. Pursuant to Section 25(b), the Parties agreed that the “prevailing party” in “any action for the breach of this Agreement” will “be entitled to seek reasonable costs and expenses

incurred in connection with such action, including attorneys' fees and expert witness fees incurred in connection with such action."

17. Pursuant to Section 25(c) and (d), the Parties agreed that the Univision Agreement "will be governed by, and construed in accordance with, the laws of the State of New York" and that the Parties each "irrevocably submits to the jurisdiction of any New York State or United States Federal court sitting in New York County, New York in any action or proceeding arising out of or relating to this Agreement or the transactions contemplated hereby, and irrevocably agrees that any such action or proceeding may be heard and determined only in such New York State or Federal court."

Univision Announces Its Plan to Terminate the Agreement After Mr. Trump Repeats His Longstanding Position on Immigration Reform

18. On June 16, 2015, Mr. Trump, at a nationally televised event held in Trump Tower, formally announced his candidacy for President of the United States. During his 45 minute speech, Mr. Trump addressed a multitude of political issues, many of which, over the last decade, have consistently served as the focal point of his political views, including, among other things, the economy and his plans for improved job growth, that Mexico and other nations consistently outmaneuver the United States on trade, illegal immigration and the need for a more effective border between the United States and Mexico, currency manipulation by the Chinese government, the recent decline in U.S.-Israeli relations, and the ongoing threat from Al Qaeda, ISIS, and other international terrorist groups.

19. On June 25, 2015, just eight days after Mr. Trump's announcement and a mere five months after executing the Univision Agreement, Mr. Trump, suddenly and without warning, received a telephone call from a high ranking executive at Univision stating that, in response to Mr. Trump's June 16 comments on illegal immigration, Univision had been

inundated with calls demanding that Univision immediately terminate its relationship with MUO and Mr. Trump.

20. Clearly nervous and unable to get the words out, the Univision executive then proceeded to profusely apologize for what he was about to say: that despite recognizing its clear and unambiguous contractual obligation under the Agreement to broadcast both the upcoming Miss USA pageant and future Miss Universe pageants live, the decision had been made by the highest ranking executives at Univision to terminate its relationship with MUO effective immediately and simply pay MUO the \$13.5 million in License Fees it owes. Unfortunately, that amount pales in comparison to the total amount Univision will ultimately have to pay.

21. In reality, however, Mr. Trump's calls for immigration reform, particularly with respect to the U.S.-Mexican border, were nothing new. Indeed, for over a decade, Mr. Trump had, in numerous television and news interviews, consistently voiced his concerns regarding the influx of illegal immigrants pouring into the United States across the Mexican border and the crime that has resulted therefrom, views which were widely reported by every major media outlet, including, both Univision and NBC.

22. As Mr. Trump explained in an interview with Fox News' Bill O'Reilly on March 30, 2011, "[t]hey're coming over, and they're climbing over a fence, and there's nobody within 10 miles — and they're selling drugs all over the place, they're killing people all over the place — and we're not doing anything about it." However, Mr. Trump cautioned that it was difficult to generalize the experience of all immigrants who had entered the United States illegally. "You're going to have to look at the individual people, see how they've done, see how productive they've been, see what their references are -- and then make a decision," he said. "You have some great, productive people -- and then you have some total disasters that probably

should be in prison.”

23. Indeed, Mr. Trump was not the only one bringing the need for immigration reform to the forefront of the political landscape. In a September 10, 2014 article, Fusion, a joint venture between Disney/ABC and none other than Univision, following an investigation into illegal immigration, reported that “[a] staggering 80 percent of Central American girls and women crossing Mexico en route to the United States are raped along the way” – typically by “other migrants, bandits, or even government authorities.”

24. Univision was aware of Mr. Trump’s stance on illegal immigration and the possibility that he might declare himself a candidate for the presidency well before January 2015 when it entered into the Agreement with MUO.

25. Notwithstanding the foregoing, literally within minutes of Mr. Trump receiving the call, Univision, in a pre-orchestrated move that was designed to punish and embarrass the Plaintiffs, released a statement to all of its radio and television outlets and on its website (the “Univision Statement”) announcing that, in response to Mr. Trump’s June 16 comments, which were virtually identical to the comments he had made previously, not only would Univision “not be airing the Miss USA pageant” on July 12, but it was also terminating its relationship with MUO in its entirety. The Univision Statement reads, as follows:

“Today, the entertainment division of Univision Communications Inc. announced that it is ending the Company’s business relationship with the Miss Universe Organization, which is part-owned by Donald J. Trump, based on his recent, insulting remarks about Mexican immigrants. At Univision, we see first-hand the work ethic, love for family, strong religious values and the important role Mexican immigrants and Mexican-Americans have had and will continue to have in building the future of our country. **We will not be airing the Miss USA pageant on July 12th or working on any other projects tied to the Trump Organization.**

Univision News and the local news division will continue to provide comprehensive coverage of all candidates, including Mr. Trump, to ensure our audience continues to have access to all points of view (emphasis added).”

(See <http://corporate.univision.com/2015/06/statement-from-the-entertainment-division-of-univision-communications-inc-on-june-25-2015/>)

26. Simply stated, there is nothing in the Agreement which gives Univision the right to terminate its relationship with MUO based on Mr. Trump’s comments. Even if there were, Univision would have been required to serve formal notice on MUO. Univision has failed to do so. Instead, Univision, in an obvious attempt to politicize the situation and suppress Mr. Trump’s right to free speech, including his views on both trade and illegal immigration along the U.S.-Mexican border, has made a concerted effort, upon information and belief, in collusion with others, to wage war against Plaintiffs in the media.

27. To make matters worse, on June 25, 2015, Mr. Ciurana, Univision’s President of Programing and Content, posted a photo on his official Univision Instagram account showing Mr. Trump side by side with Dylann Roof, the 21 year old who had been recently arrested in the murder of nine (9) African-Americans attending bible study at a church in Charleston, South Carolina, one of the worst hate crimes to ever take place on U.S. soil. Across the top of both photos appeared the words “NO COMMENTS.”

28. By posting these pictures side by side, the outrageously false and reckless statements that Mr. Ciurana was conveying to his readers was that Mr. Trump had committed similar heinous acts and/or that he had incited others to commit similar heinous acts.

29. Almost immediately, Mr. Ciurana’s false statement was picked up by the media and became the subject of hundreds, if not thousands, of press articles, yet another example of Univision’s dubious efforts to create a false narrative in an attempt to upset Mr. Trump’s

longstanding personal and business relationship with the Hispanic community.

30. However, Univision's attempt to suppress Mr. Trump's First Amendment rights and defame his image did not end there. Upon information and belief, shortly after terminating its relationship with Plaintiffs, and only hours after Mr. Trump had begun what would become his meteoric rise among 2016 Republican candidates for President in the New Hampshire polls, executives at Univision, many of whom, including but not limited to Univision's President and CEO, Randy Falco (who had previously worked at NBC for more than 30 years and were, thus, well aware of Plaintiffs' contractual relationships with NBC), colluded with their former colleagues at NBC and/or otherwise used and/or threatened economic coercion and other improper and illegal tactics and means, to cause NBC to permanently sever its contractual and business relationship with Plaintiffs by, among other things, refusing to broadcast the Miss USA, Miss Teen USA and Miss Universe pageants in express violation of NBC's contractual obligations. Univision undertook these actions, among other reasons, for the malicious, improper, and intentional purpose of punishing MUO for Mr. Trump's comments, and also based upon the mistaken belief that the termination of the NBC agreement would reduce or extinguish Univision's contractual obligations to pay license fees and other damages to MUO under the Agreement.

31. Despite being contractually obligated to, at a minimum, "broadcast the first run of the MISS UNIVERSE Pageant during primetime hours on the NBC television network" through 2016, NBC capitulated to Univision's threatened economic coercion and/or other improper and illegal tactics and means to terminate its relationship with Plaintiffs and, on June 29, 2015, issued the following statement on its website:

"At NBC, respect and dignity for all people are cornerstones of our values. Due to the recent derogatory statements by Donald Trump

regarding immigrants, NBCUniversal is ending its business relationship with Mr. Trump. **To that end, the annual Miss USA and Miss Universe Pageants, which are part of a joint venture between NBC and Trump, will no longer air on NBC...** (emphasis added).

32. The announcement by NBC was shocking, not simply because it was contractually obligated to broadcast the Miss Universe pageant, but also because it represented a dramatic turnaround from the statement NBC had issued just days before on June 26, 2015 when it explained, quite simply, that “Donald Trump’s opinions do not represent those of NBC, and we do not agree with his positions on a number of issues, including his recent comments on immigration.”

The Substantial Damages

33. As a result of Univision’s egregious, brazen and unjustifiable acts and conduct, including, without limitation, their intentional breach of the Univision Agreement and interference with MUO’s contractual relations with NBC, Plaintiffs have already suffered and will continue to suffer tens, if not hundreds of millions of dollars in damages.

34. Univision’s own investor presentations tout the recent growth in the Hispanic population as well as their overall spending power, predicting an 85% increase in Hispanic consumer spending in the next 10 years. Beauty pageants enjoy wide popularity in Hispanic culture. For instance, Venezuela has produced more Miss Universe winners than any other country, and Colombia holds about 400 beauty pageants each year.

35. Univision has long been recognized as the leading Spanish language network in the United States and Canada with tens of millions of viewers, at times, even beating out prominent English language networks such as ABC, CBS, FOX and, of course, NBC. In 2014, more than 80 million people tuned in to Univision just to watch the broadcast of the FIFA World

Cup.

36. In an attempt to not only capture this viewership but also establish a lucrative market for related MUO advertising, in-telecast promotions, joint selling possibilities, licensing and merchandising, in or about January 2015, MUO made the decision to pass over lucrative offers from competing Spanish language networks, such as Telemundo (an NBC owned company that had the right to broadcast the pageants in the past), and enter into the Agreement granting Univision the exclusive right to broadcast the pageants, live, in Spanish for five (5) years, from 2015 through 2019.

37. Announcing the signing of the Agreement in a joint press release with Univision, the President of MUO, Paula Shugart, stated as follows:

Our new partnership will bring the MISS UNIVERSE and MISS USA pageants, among the most watched forms of television entertainment in the world to Univision, the number one media brand for U.S. Hispanics... Our collaboration will bring unmatched entertainment to the most passionate, loyal audience that Univision offers to one of the fastest growing and important demographic communities in the U.S.

38. As a result of Univision's last minute decision on June 25, 2015 to terminate the Agreement and not broadcast the upcoming Miss USA pageant two weeks later on July 12, 2015, MUO was unable to arrange for a Spanish language broadcaster replacement.

39. With no Spanish language broadcast, MUO lost much of its Spanish-speaking audience and, with it lost or incurred tens, if not hundreds, of millions of dollars in advertising sales, production costs, venue fees, telecast promotions, sponsorships, joint selling possibilities, licensing, merchandising revenue, franchise fees, brand value and the like, both in the immediate future and for many years to come. In short, the potential fallout from Univision's brazen decision to simply walk away from its contractual obligations is catastrophic.

40. However, the damage to Plaintiffs as a result of Univision's decision to simply

terminate its relationship with MUO without any conceivable legal justification, though substantial in its own right, does not end there. Instead, Univision, upon information and belief, decided to take its dispute with Mr. Trump even further, engaging in a wrongful, willful, concerted and purposeful effort to coerce, collude and/or conspire with NBC executives to breach their contractual obligations with MUO.

Mr. Trump Becomes the Sole Owner of MUO

41. On September 10, 2015, Mr. Trump and Trump Pageants LLC, an entity which Mr. Trump owns and controls, acquired all of the general and limited partnership interests in MUO that they did not already own from certain entities affiliated with NBCUniversal Media LLC.

42. As a result of this transaction, on September 10, 2015, Mr. Trump became the beneficial owner of 100% of MUO. Subsequently, MUO sold certain of its assets in a private transaction to an affiliate of William Morris Endeavor, but retained all rights to assert the claims and seek the damages set forth in this lawsuit.

AS AND FOR A FIRST CLAIM FOR RELIEF
(Breach of Contract)

43. MUO repeats and realleges each and every allegation as if fully set forth at length herein.

44. Pursuant to the terms of the Agreement, in exchange for MUO granting Univision the exclusive right to exhibit the Miss USA, Miss Teen USA and Miss Universe pageants from 2015 through 2019, Univision agreed to (i) pay MUO certain License Fees totaling \$13.5 million and (ii) broadcast the Miss USA and Miss Universe pageants “live via the Univision or UniMas Networks ... at least one (1) time.”

45. Univision further agreed to engage in joint selling efforts for in-telecast sponsorships, on-site sponsors and advertisers, merchandising and licensing opportunities and to share revenue with MUO from these efforts.

46. In breach of the Agreement, on June 25, 2015, Univision issued the Statement that it was unilaterally “ending the Company’s business relationship with the Miss Universe Organization” and would “not be airing the Miss USA pageant on July 12th.”

47. Implied by law into the terms of the Agreement is a covenant of good faith and fair dealing.

48. Here, Univision breached the implied covenant of good faith and fair dealing by intentionally and purposefully inducing or causing NBC to breach its contract with MUO, all in an effort to prevent MUO from being able to honor a “condition precedent” in the Agreement to wit: to secure and maintain an English language broadcaster for each Program under the Agreement.

49. By its conduct, Univision sought to destroy MUO’s right to receive from Univision the license payments and other benefits due under the agreement.

50. Under the Agreement, in the event that MUO is found to be the “prevailing party,” it is “entitled to seek reasonable costs and expenses incurred in connection with such action, including attorneys’ and expert witness fees incurred in connection with such action.”

51. MUO has incurred, and will continue to incur, costs and expenses, including attorneys’ fees and disbursements, in connection with this action.

52. By reason of Univision’s actions, MUO has suffered and will continue to suffer damages in an amount to be determined at trial, but believed to be in excess of \$500 million, together with attorneys’ fees, reasonable costs and expenses, and interest.

53. MUO has not breached its obligations under the contract.

AS AND FOR A SECOND CLAIM FOR RELIEF
(Intentional Interference with Contractual Relationship)

54. Plaintiffs repeat and reallege each and every allegation as if fully set forth at length herein.

55. Plaintiffs and their respective affiliates are parties to numerous valid and enforceable agreements with various third parties (the “Third Party Agreements”).

56. At all times relevant herein, Univision was aware of the existence of certain of the Third Party Agreements.

57. Upon information and belief, Univision without justification engaged in a wrongful, willful, malicious, concerted and purposeful effort to coerce, collude and/or conspire with various parties to terminate their contractual and other business relationships with Plaintiffs knowing full well of the existence of the Third Party Agreements.

58. Univision’s interference with Plaintiffs’ contractual relations has caused and will continue to cause Plaintiffs to suffer damages in an amount to be determined at trial, but believed to be in excess of \$500 million.

AS AND FOR A THIRD CLAIM FOR RELIEF
(Defamation)

59. Mr. Trump repeats and realleges each and every allegation as if fully set forth at length herein.

60. As detailed above, Defendants made false statements concerning Mr. Trump.

61. Among the false statements by Defendants was the June 25, 2015 photograph published by Mr. Ciurana on Instagram as described above and as set forth in Exhibit “A.”

62. Given the entire context of the publication, including the surrounding events and its target audience, a reasonable person could understand Mr. Ciurana to be stating that Mr. Trump had committed heinous acts similar to Roof, and/or that Mr. Trump had incited others to commit similar heinous acts.

63. This statement was patently false because as Defendants well knew (or should have known) at the time (and still) Mr. Trump has never committed heinous acts similar to Roof's, and never incited Roof or anyone else to commit such heinous acts.

64. The false statements that Defendants made concerning Mr. Trump were published to various third parties.

65. Defendants made the false statements with actual malice, that is, with knowledge that the statements were false, or with reckless disregard of whether they were false or not.

66. The false statements expose Mr. Trump, both personally and in his business dealings, to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace, and tend to disparage Mr. Trump in the way of his profession or trade.

67. In making these false statements, Defendants acted with wanton dishonesty such that punitive damages are warranted. Defendants have also acted recklessly and with actual malice, and without any privilege, actual or qualified.

68. The statements about Mr. Trump have injured, and were made with an intent to injure, Mr. Trump's reputation in his business as a media figure and well-known businessman. As a result, Defendants' conduct rises to the level of defamation *per se*, and no proof of special harm or damages is necessary.

WHEREFORE, Plaintiffs respectfully request judgment, as follows:

(i) with respect to the first cause of action, an order awarding damages in favor of MUO for breach of the Agreement against Univision in an amount to be determined at trial, but believed to be in excess of \$500 million, together with interest, attorneys' fees, and costs and expenses;

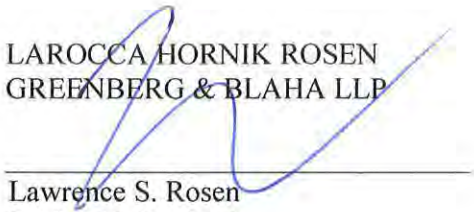
(ii) with respect to the second cause of action, an order awarding damages in favor of Plaintiffs for intentional interference with contractual relationship against Univision in an amount to be determined at trial, but believed to be in excess of \$500 million, together with punitive damages in an amount to be determined at trial, but believed to be in excess of \$500 million, interest, costs and expenses;

(iii) with respect to the third cause of action, an order awarding damages in favor of Mr. Trump for defamation against Defendants, jointly and severally, in an amount to be determined at trial, but believed to be in excess of \$500 million, together with punitive damages in an amount to be determined at trial, but believed to be in excess of \$500 million, interest, costs and expenses; and

(iv) granting Plaintiffs such other and further relief as the Court deems just and proper.

Dated: New York, New York
November 6, 2015

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EXHIBIT A



II. WHAT IS RAISING TAXES?



CEASE & DESIST DEMAND

September 21, 2015

By Federal Express

David McIntosh
The Club for Growth
2001 L Street, NW, Suite 600
Washington, D.C. 20036

Re: *Your Defamatory Attack Ad*

Dear Mr. McIntosh:

I am General Counsel to Donald J. Trump. We recently had the opportunity to view your television commercial entitled "*Politician*" together with your accompanying statements in the media concerning my client's views (collectively, your "Attack Ad") and, quite frankly, are dismayed by the depths special interest groups like yours will go to in an attempt to materially mislead the public for the personal benefit of you and your financial backers.

Simply stated, your Attack Ad is not only completely disingenuous, but replete with outright lies, false, defamatory and destructive statements and downright fabrications which you fully know to be untrue, thereby exposing you and your so-called "club" to liability for damages and other tortious harm. For example, while your Attack Ad blatantly misrepresents to the public that Mr. Trump "supports higher taxes", nothing could be further from the truth. To be clear, Mr. Trump's tax plan, which is scheduled to be released later this week, supports a lowering of taxes.

Not surprisingly, a closer look at your Attack Ad reveals that your supposed "*source*" for this statement is -- according to the small print on your website -- nothing more than a single article published in the *Advocate* on February 15, 2000 which quoted Mr. Trump as supposedly saying he would "impose a one-time net worth tax of 14.25% on the superwealthy ... to pay off the national debt." That's it. While a reputable organization would have at least had the decency to disclose its source -- and the fact that the source article is more than 15 years old -- your pitiful little group conveniently chose to leave that information out in a deliberate attempt to mislead the public into believing that it is reflective of Mr. Trump's current position -- when, unquestionably, it is not. Making matters worse, you then chose to appear on several talk shows, including, MSNBC's *Morning Joe*, in which you furthered the erroneous notion that Mr. Trump "supports higher taxes" even though you have absolutely no factual support for that statement. In other words, you lied. Mr. Trump does not support higher taxes. This is the very definition of libel.

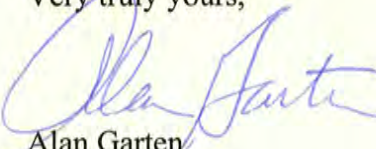
Mr. David McIntosh
September 21, 2015
Page 2

Sadly, the deplorable actions of your organization are not the least bit surprising. As I am sure you recall, it was only a few short months ago that you very openly and shamelessly attempted to extort Mr. Trump to the tune of \$1 million in exchange for your political support. Indeed, you were not even the least bit discreet about your motives in that, after meeting with Mr. Trump, you immediately followed up with a June 2, 2015 letter requesting a "contribution of \$1 million" in exchange for an endorsement by your organization's political action committee. "*This contribution,*" you proclaimed, "*would have a dramatically positive impact on the Club's ability to identify future free-enterprise champions.*" When Mr. Trump, however, presumably unlike many of the other candidates, refused to succumb to your extortionist demands, your only response was to oppose his inclusion in the August 6, 2015 Fox News Republican Presidential Debate, launch a series of misleading Attack Ads targeting Mr. Trump and, ultimately, endorse certain other candidates. Though your website states that donations to "Club for Growth ... are NOT publicly disclosed", one can only assume that the candidates you are endorsing paid handsomely for your support. American politics at its worst. If that is not a "shake-down", I do not know what is.

Rest assured, however, we will not sit idly by and allow special interest groups and political action committees like yours to defame Mr. Trump and cause damage to his reputation and business interests by intentionally disseminating libelous statements you fully know to be untrue and, even worse, continue to purposely mislead the American people for your own financial gain. Toward that end, Mr. Trump has authorized our legal team to take all necessary and appropriate actions to bring an immediate halt to your defamatory Attack Ads. In the interest of avoiding what will certainly be a costly litigation process, we are prepared to offer you the one-time opportunity to rectify this matter by providing us with your prompt written assurances that (i) you have stopped running the Attack Ads; and (ii) you will not generate or disseminate any misleading or inaccurate information or make any factually baseless accusations you know to be untrue with respect to my client at any point in the future. In the event, however, we do not promptly receive these assurances, please be advised that we will commence a multi-million dollar lawsuit against you personally and your organization for your false and defamatory statements and the damage you have intentionally caused to my client's interests as well as pursue all other remedies available to us at law or in equity.

Please be guided accordingly.

Very truly yours,



Alan Garten

cc: Donald J. Trump
Marc E. Kasowitz, Esq.

III. WHAT IS THE MISS USA PAGEANT?

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

MISS UNIVERSE L.P., LLLP.,
Petitioner,

-v-

SHEENA MONNIN,
Respondent.

12 Civ. 9174 (JPO)
OPINION AND ORDER

J. PAUL OETKEN, District Judge:

Respondent Sheena Monnin (“Monnin”) is the former Miss Pennsylvania USA, and this matter relates to a dispute between Monnin and the Miss Universe L.P., LLLP (“MUO”), which organizes and runs the Miss USA Pageant together with one of its equity owners, Donald Trump. Before the Court are Petitioner MUO’s petition to confirm the Arbitration Award entered in its favor, pursuant to the Federal Arbitration Act, 9 U.S.C. § 9, and Respondent Monnin’s cross-petition to vacate that award. For the reasons that follow, MUO’s petition is granted, Monnin’s cross-petition is denied, and the Arbitration Award is confirmed.

I. Background

A. Factual Background

1. The Pageants

On December 4, 2012, Monnin was crowned Miss Pennsylvania USA 2012. (Memorandum of Law in Opposition, Dkt. No. 17 (“Monnin Opp.”), at 4.) In the wake of her victory, Monnin met with Randy Sanders (“Sanders”), the owner of Sanders & Associates, Inc., which owns the franchise for the Miss Pennsylvania USA Pageant. Sanders provided Monnin with three contracts, including one between Monnin and MUO. (Id.) According to Monnin, the documents were “long, single spaced, extremely dense, and full of legal terms that [Monnin] did not understand.” (Id.) Although Monnin asserts that she “barely [had] read through the first few pages (which did not contain an arbitration clause),” when Sanders returned and asked her if she had questions (id. at 4-5), a copy of the relevant contract reveals that Monnin initialed every page, and signed the final one. (Declaration of Scott S. Balber, Dkt. No. 23 (“Balber Decl.”), Ex. A.) Sanders later provided Monnin with a signed copy of the two contracts with Sanders &

Associates, as well as with an unsigned copy of the agreement with MUO. With respect to this latter document, Monnin contends that “[h]aving only read the first few pages, [she] could not confirm that the third document was an actual copy of the Miss USA agreement that she had signed.” (Monnin Opp. at 5.)

Monnin, as Miss Pennsylvania USA, went on to compete in the Miss USA Pageant in Las Vegas, Nevada. The telecast for the Miss USA Pageant began on June 3, 2012, with fifty-one contestants onstage. The field, however, was quickly limited to the top 16 contestants, based upon scoring from a prior, preliminary round. During a commercial break, the women who did not advance, Monnin among them, were dismissed from the stage. (Id. at 5-6.) While waiting in the wings before returning to the dressing rooms, Monnin claims that Miss Florida USA, KarMa Brez (“Brez”), intimated that the results of the contest were predetermined, stating: “I know who is going to be in the top 5.” (Id. at 6.) After inquiring further, Monnin contends that Brez explained that she had seen a “paper in a notebook in the back of the stage entitled ‘final show telecast’ earlier in that day,” in which the top 5 contestants were already listed, despite the fact that the competition had not yet proceeded to the finals. (Id.) Immediately, Monnin texted Sanders, stating “this is f-ing rigged Randy,” adding various other statements such as “I’m done. This is ridiculous” and “It’s obviously rigged so the girl they want can shine; they kept several beautiful girls out for that reason.” (Declaration of Richard F. Klineburger, III, Dkt. No. 18 (“Klineburger Decl.”), Ex. P (“Final Award”), at 4; Declaration of Respondent Sheena Monnin, (“Monnin Decl.”), Ex. A.)¹ Monnin asserts that she remained silent for the remainder of the competition, “hoping that Brez would turn out to be wrong.” (Monnin Opp. at 6.) The final 5 women, however, matched those on the putative list, and the overall “winner was Miss Rhode Island USA, Olivia Culp, just as Brez stated.” (Id.)

The morning after the pageant, on June 4, 2012, Monnin emailed Sanders her resignation; she also sent Sanders a text message which stated as follows: “Please check your email. I have sent you my final and unchangeable thoughts and decision. I will not change my mind or be talked out of this decision. Time will not change my decision. I consider my choice to be effective immediately.” (Monnin Decl., Ex. A.) She also added: “I will not keep quiet on this. This was not fair play.” (Id.) Monnin’s resignation email to Sanders cited her disagreement with the MUO decision to permit transgendered contestants to compete in the Pageant, stating: “I refuse to be part of a pageant system that has so far and so completely removed itself from its foundational principles as to allow and support natural born males to compete in it. This goes against every moral fiber of my being.” (Final Award, at 5.)

¹ This text message exchange also included a barrage from Monnin stating, in rapid succession: “Seriously?” “Colorado?”; “South Carolina?”; “Florida saw the list of Top 5 this morning”; “It was on a script for the show tonight”; “I’m fine. But I thought his was an honest system”; “I truly hope it is.” Sanders expressed his belief that the system was well-regulated and honest, and implored Monnin to “Be strong!” and not to “let this change who you are!”

2. The Relevant Statements

That same day, Monnin posted on her Facebook page, informing her fans of her resignation. She wrote the following:

I have decided to resign my position as Miss Pennsylvania USA 2012. Effective immediately I have voluntarily, completely and utterly removed myself from the Miss Universe Organization. In good conscience I can no longer be affiliated in any way with an organization I consider to be fraudulent, lacking in morals, inconsistent, and in many ways trashy. I do not support this system in any way. In my heart I believe in honesty, fair play, a fair opportunity, and high moral integrity, none of which in my opinion are part of this pageant system any longer.

(Id. at ¶ 47.) Monnin received some initial support from fellow Pageant contestants, with one sending her a Facebook message stating: “I’m so proud of you. I was there with you backstage when it all went down. Didn’t Kelly O² also confirm the script? So crazy. Love u sista. Flo-Reeeeda!” Monnin responded, thanking the unnamed contestant for her support, to which the woman replied: “This is kind of cool. You started a big buzz and the blogs actually agree with you. Go girl!” (Monnin Decl., Ex. B.) Monnin also received a text message from another Pageant participant, who applauded Monnin for speaking out and added, “hopefully this brings more awareness to how shady this particular competition really was.” (Id., Ex. C.) Bolstered by this support, Monnin wrote another Facebook post on June 5, 2012:

I agree that it is my moral obligation to state what I witnessed and what I know to be true. I will relay to you the reasoning behind my resignation. I witnessed another contestant who said she saw the Top 5 BEFORE THE SHOW EVER STARTED proceed to call out in order who the Top 5 were before they were announced on stage. Apparently the morning on June 3rd she saw a folder lying open to a page that said ‘FINAL SHOW telecast, June 3, 2012’. After the Top 16 were called and we were standing backstage she hesitantly said to me and another contestant that she knew who the Top 5 were. I said ‘who do you think they will be? She said that she didn’t ‘think’ she ‘knew’ because she saw the list that morning. She relayed whose names were on the list. Then we agreed to wait and see if that was indeed the Top 5 called that night. After it was indeed the Top 5 I knew the show must be rigged; I decided at that moment to distance myself from an organization who did not allow fair play and whose morals did not match my own. That is all I know about this. If this contestant would like to step forward as an eye witness and as being the one who saw the sheet with the Top 5 already selected before the judges ever saw the Top 16, then perhaps action can be taken.

² Referring to celebrity Kelly Osborne.

As for me, I believe her words and I will not encourage anyone to compete in a system that in my opinion and from what I witnessed was dishonest.

(Id. at ¶ 51.) In the aftermath of these two Facebook posts, Monnin claims that MUO “went on a veritable media frenzy,” with Trump stating on Good Morning America that Monnin suffered “loser’s remorse,” and MUO’s counsel threatening legal action. (Monnin Opp. at 8.) Trump also appeared on the Today Show, where he called Monnin’s allegations “disgraceful,” and noted that Brez denied that she had seriously contended the show was “fixed” or predetermined. Later, Brez appeared on E! and confirmed Trump’s account, explaining that she was only joking when she spoke about the rehearsal list and adding that the eventual winner, Olivia Culpo, was not on that list, and as such, the Pageant could not have been rigged. (Id. at 8-9.)

Monnin claims that, “overwhelmed” with the attacks against her, and supported by some of her fellow contestants,³ she “felt compelled to publically respond.” (Id. at 9.) It is this compulsion which gave rise to an appearance by Monnin on the Today Show, and eventually, resulted in the Arbitration Award against her. During Monnin’s discussion with Ann Curry, airing on June 8, 2012, Monnin repeated the substance of her Facebook posts and beliefs on national television, explaining in detail her conversation with Miss Florida USA. (Final Award, at 6.) In response to Curry’s statement that Brez, Miss Florida, had since clarified her statements, Monnin explained that “many years of psychological training” had enabled her to discern when an individual was being truthful. (Id. at 7.) Accordingly, Monnin reiterated that she was sure, without a doubt, that Miss Florida had been honest when she had stated that the results of the contest were predetermined (Id.) Monnin also added that she had no intention of utilizing the Today Show interview in order to “destroy” or “bad talk” anybody, but rather, simply wanted to provide her version of events. (Id. at 9.) The day following the interview, Monnin received another text of support from a fellow contestant, who wrote, inter alia: “Wow I can’t believe FL is denying what she said now.” (Monnin Decl., Ex. E.)

³ One contestant texted Monnin in the wake of MUO’s and Trump’s media statements: “I’m proud of you for standing up for what you believe in. You are [sic] a strong, beautiful, and intelligent woman, don’t let Trump make feel [sic] like anything less! I sincerely hope that the truth will come out and it will because of your courage to speak up.” (Monnin Decl., Ex. D.) Another sent her a similarly encouraging Facebook message:

I’ve been talking with the other girls and we’re all disgusted with how they are trying to turn things against you in the media. We know you didn’t make this up out of no where [sic] — a lot of girls know about that list backstage and are outraged. I personally heard about it straight from the girl who saw the list. I want to thank you for not just sticking up for yourself and your beliefs, but all of us. We want to get behind you on this if we can, if there’s anything we can do let us know!

(Id., Ex. E.)

3. The Arbitration

Monnin’s contract with MUO, titled “Official Entry Form/Contract 2012 Miss USA Pageant,” provided that in the event that “any controversy or claim arising out of or relating to this Agreement, the breach of any term hereof, or [] participation in or in connection with the Pageant” could not “be settled through direct discussions,” the parties agreed to “endeavor first to settle the controversy or claim by mediation . . . administered by JAMS,” and if unable to resolve the issues, agreed to submit to “binding arbitration . . . administered by JAMS.” (Final Award, Ex. B, ¶ 22.) Accordingly, on June 25, 2012, after Monnin failed to participate in mediation, MUO filed its Demand for Arbitration and Statement of Claim with JAMS, serving it on Monnin. (Monnin Opp. at 10.) MUO’s Statement of Claim sought compensatory damages of \$10 million, for alleged defamation, tortious interference with prospective economic advantage, and breach of contract. (See Balber Decl., Ex. D.) Over the course of the next several months, JAMS and MUO’s counsel engaged in significant correspondence with both Monnin and her attorney Richard Klineburger, III. (See Reply Memorandum of Law in Further Support, Dkt. No. 22 (“MUO Rep.”), at 3-5.) However, neither Monnin nor Klineburger participated in the arbitration process, and they both failed to appear at the Arbitration Hearing, which took place on November 5, 2012.⁴ It appears that Monnin was unaware that the Arbitration Hearing was going forward, as her attorney had not told her as much. (See Monnin Opp. at 13 (“[T]otally unbeknownst to Sheena, on November 5, 2012, an arbitration hearing had proceeded before Arbitrator Katz.”).) In addition to engaging in pre-hearing briefing, at the day-long Hearing, MUO provided various exhibits, including a videotape of Monnin’s Today Show interview, and live testimony from four witnesses: (1) Paula Shugart, MUO’s President; (2) Tal Goldhammer, an Ernst and Young partner responsible for monitoring the Pageant’s judging process; (3) Craig Heitkamp, a state director and franchisee of MUO; and (4) Jonathan Low, an expert witness who testified regarding damages. (See MUO Rep. at 6-7.)

On December 10, 2012, Arbitrator Theodore H. Katz issued his Arbitration Award. (See generally Final Award.) In his Award, Arbitrator Katz meticulously reviewed the background circumstances of the dispute between Monnin and MUO, describing the various statements made by Monnin—via text message; on Facebook; and finally, during her television interview on the Today Show. (Id. at 4-6.) The Award noted that “when questioned by MUO officials, Miss Florida expressed shock that Monnin was claiming that she had identified the five finalists before they were announced.” (Id. at 7.) Arbitrator Katz wrote that despite the fact that Miss Florida had clarified her statements, Monnin nonetheless repeated her allegations concerning the Pageant during her Today Show interview. (Id.) Additionally, the Award detailed the “many comments and

⁴ The various exchanges among JAMS, MUO, Monnin, Klineburger, and MUO’s counsel are documented and discussed in further detail below in section III.B.

questions” MUO received from “the press, the general public, as well as franchisees and other business-related entities” in the wake of Monnin’s public comments. (Id.)

Arbitrator Katz also discussed how, “[i]n the months preceding the 2012 Miss USA Pageant, MUO had been planning to stage its 2013 Pageant on the Gulf Coast.” (Id.) In an effort to do so, MUO met with “members of the local Congressional delegation and other local politicians, who endorsed the locale of the Pageant and viewed it as a means of increasing tourism on the storm-ravaged Gulf Coast.” (Id.) In keeping with this theme, MUO engaged in significant discussions with BP as a potential corporate sponsor, “who was prepared to pay a \$5 million site fee to MUO, as a means of burnishing its corporate image.” (Id.) However, Arbitrator Katz cited testimony showing that, in the wake of Monnin’s comments, when “MUO resumed discussions with [BP],” the sponsor inquired as to “the allegations of ‘rigging’, [and] expressed concern about the effect on its image,” eventually choosing to “abandon[] the proposed sponsorship.” Furthermore, the Award explained that, as a result of this sponsorship loss, MUO was forced to “hastily” make “arrangements to stage the Pageant in Las Vegas, where it did not receive a site fee.” (Id.)

In analyzing liability, Arbitrator Katz found that Monnin published defamatory statements about MUO on Facebook and on the Today show, and furthermore, that the statements were factual, capable of proof, false, and “obviously harmful to MUO’s business reputation.” (Id.) Moreover, he concluded that Monnin made the statements with “actual malice.” (Id. at 9-10.) However, Arbitrator Katz found no breach of contract, as Monnin had already resigned by the time she published the June 5 Facebook statement and engaged in the Ann Curry interview. Regarding damages, Arbitrator Katz found that MUO had proved that it lost \$5 million in the form of the BP site fee, as the sponsorship failed to go forward due to the “rigging allegations.” (Id. at 12-13.) He denied MUO’s claims for additional damages, citing a lack of “sound basis to fix a reasoned and reasonably precise amount of loss of [market] value,” and also declined to award MUO injunctive relief. (Id. at 14.) To summarize, Arbitrator Katz awarded \$5 million in monetary damages to MUO, finding that Monnin had defamed the organization with her public statements. (Id. at 16.)

B. Procedural Background

MUO filed its Petition to Confirm the Arbitration Award with this Court on December 17, 2012. (Dkt. No. 1.) MUO next requested that the Court enter a default judgment against Monnin, who had been served with the Petition on December 20, 2012. (Dkt. Nos. 4, 5.) In early January, Monnin, who at the time was pro se, requested a four-week extension to respond to the Petition. (Dkt. No. 11.) This Court granted Monnin’s request and set a briefing schedule in its Order of January 11, 2013. (Dkt. No. 9.) Monnin, who by this time had secured counsel, filed her Cross-Motion to Vacate the Arbitration Award on February 5, 2013. (Dkt. No. 16.) MUO submitted its Reply Memorandum of Law on February 20, 2013. (Dkt. No. 22.)

II. Legal Standard

“It is well-settled that judicial review of an arbitration award is narrowly limited,” *Barbier v. Shearson Lehman Hutton Inc.*, 948 F.2d 117, 120 (2d Cir. 1991), and the reviewing court “must grant” the petition to confirm an award “unless the award is vacated, modified, or corrected,” 9 U.S.C. § 9; accord *D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95, 110 (2d Cir. 2006). Moreover, a reviewing court may vacate an Arbitration Award only in certain, specific circumstances. *Id.* The Federal Arbitration Act (“the FAA”) limits grounds for vacatur to the following four circumstances:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a); accord *Rich v. Spartis*, 516 F.3d 75, 81-82 (2d Cir. 2008). In addition to the grounds for vacatur specified in § 10(a), there is a fifth, “judicially-created ground, namely that ‘an arbitral decision may be vacated when an arbitrator has exhibited a manifest disregard of law.’” *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 121-22 (2d Cir. 2011) (quoting *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 208 (2d Cir. 2002) (footnote omitted)).

“A party moving to vacate an arbitration award has the burden of proof, and the showing required to avoid confirmation is very high.” *Gottdiener*, 462 F.3d at 110. This limited review is designed to preserve the “twin goals” of arbitration: “settling disputes efficiently and avoiding long and expensive litigation.” *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9, 12 (2d Cir. 1997). The Second Circuit has consistently emphasized the “extremely limited” role of courts in reviewing arbitration awards, *Wall Street Assoc., L.P. v. Becker Paribas, Inc.*, 27 F.3d 845, 849 (2d Cir. 1994) (citations omitted), and accordingly, “[o]nly ‘a barely colorable justification for the outcome reached’ by the arbitrators is necessary to confirm the award,” *Gottdiener*, 462 F.3d at 110 (quoting *Landy Michaels Realty Corp. v. Local 32B-32J, Service Employees Int’l Union*, 954 F.2d 794, 797 (2d Cir. 1992)). Therefore, even when a reviewing court disagrees with the merits of an arbitrator’s decision, so long as “‘a ground for the arbitrator’s decision can be inferred from the facts of the case,’” the award

will be confirmed. *Barbier*, 948 F.2d at 121 (quoting *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1216 (2d Cir. 1972)).

III. Discussion

Monnin moves to vacate the Arbitrator's award on three alternative grounds: (1) that Arbitrator Katz exceeded the scope of his powers, as proscribed by 9 U.S.C. § 10(a)(4); (2) that Monnin lacked both actual and constructive notice of the Arbitration Hearing and the claims it was to resolve, making the process fundamentally unfair, as contemplated in 9 U.S.C. § 10(a)(3); and (3) that Arbitrator Katz's decision was based upon a manifest disregard for the law. The Court addresses each argument in turn.

A. Scope of Arbitrator's Powers

Monnin first contends that Arbitrator Katz exceeded his powers in awarding \$5 million in damages for defamation, asserting that the television interview upon which Arbitrator Katz based his findings was not raised in MUO's statement of claim, and thus, was not properly submitted to arbitration. See, e.g., 9 U.S.C. § 10(a)(4) ("where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made" (emphasis added)).

The Second Circuit has "'consistently accorded the narrowest of readings' to section 10(a)(4) permitting vacatur where the arbitrator has exceeded her powers." *Jock*, 646 F.3d at 122 (internal quotations omitted) (quoting *ReliaStar Life Ins. Co. of N.Y. v. EMC Nat. Life Co.*, 564 F.3d 81, 85 (2d Cir. 2009)). The central inquiry when examining vacatur under § 10(a)(4) is "whether the arbitrators had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrators correctly decided that issue." *Westerbeke Corp. v. Daihatsu Motor Corp.*, 304 F.3d 200, 220 (2d Cir. 2002) (quoting *DiRussa v. Dean Witter Reynolds Inc.*, 212 F.3d 818, 824 (2d Cir. 1997)) (quotations omitted). Thus, alleged legal errors, even those of a serious nature, will not give rise to the circumstances contemplated by § 10(a)(4). "Accordingly, an arbitrator may exceed her authority by, first, considering issues beyond those the parties have submitted for her consideration, or, second, reaching issues clearly prohibited by law or by the terms of the parties' agreement." *Jock*, 646 F.3d at 122. Neither circumstance is present here.

Courts especially emphasize the narrowness of § 10(a)(4) "when [it] is invoked to challenge an award deciding 'a question which all concede to have been properly submitted in the first instance.'" *Id.* (quoting *DiRussa*, 212 F.3d at 824). Likewise here, all parties concede that MUO's defamation claim was properly submitted to arbitration; however, Monnin seeks vacatur on the ground that Arbitrator Katz exceeded his powers in determining that Monnin defamed MUO during her television interview, contending that the statements Monnin made on the *Today Show* were outside the scope of the issues submitted for arbitration. In response, MUO asserts that Monnin's *Today Statements*

were thrice submitted to Arbitrator Katz: (1) in the Statement of Claim; (2) in MUO's pre-hearing briefing; and (3) at the Arbitration Hearing itself.

With respect to the Statement of Claim, Monnin substantially relies on the Fifth Circuit case *Totem Marine Tug & Barge, Inc. v. North American Towing, Inc.*, 607 F.2d 649 (5th Cir. 1979), claiming that the case's reasoning applies with full force here. (See Monnin Opp. at 18-20.) Totem, however, as emphasized by its progeny, is inopposite here. "In Totem, the parties, Totem and North American, entered into a charter agreement for a vessel owned by Totem, which Totem terminated before the agreement expired." *Capgemini U.S. LLC v. Sorensen*, No. 04 Civ. 7584 (JGK), 2005 WL 1560482, at *8 (S.D.N.Y. July 1, 2005). The Totem court held that "[t]he arbitration panel exceeded its powers by awarding damages for charter hire to North American," when North American had "fail[ed] to list charter hire in its itemized statement of damages submitted to Totem," and had "conceded" in its brief "that charter hire was not an issue in the arbitration." Totem, 607 F.2d at 651. Moreover, in an itemization of its damages, North American notably failed to include any damages associated with charter hire. *Id.* at 651-52. Accordingly, when the arbitrators nevertheless awarded damages for charter hire, they had "ignored the arbitral dispute submitted by the parties and dispensed their 'own brand of industrial justice.'" *Id.* at 652 (quoting *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960)). Here, however, the circumstances are markedly different.

First, Monnin's Today Show statements were within the scope of the original Statement of Claim. The first allegation in the Statement of Claim is that of defamation. (See Klineburger Decl., Ex. B, at In 32-37.) As is common practice, the defamation claim incorporates the factual allegations of the entire Statement—factual allegations that include the assertion that "[t]he libelous [Facebook] post concerning MUO has been republished and widely disseminated by the media in print, radio, television and via the internet." (*Id.* at ¶17 (emphasis added).) Accordingly, the Today Show statements can reasonably be considered as within the scope of the Statement of Claim. Moreover, the courts, in more recent years, have readily distinguished Totem, noting that "federal law does not impose any requirements as to how specific a notice of arbitration must be," *Executone Info. Sys., Inc. v. Davis*, 26 F.3d 1314, 1322 (5th Cir. 1994), meaning that even where a specific claim is not asserted in extreme detail in the original Statement of Claim, it remains within the arbitration's scope, so long as the issue is generally submitted to arbitration, see *Carte Blanche (Singapore) Pte. Ltd. v. Carte Blanche Int'l, Ltd.*, 683 F. Supp. 945, 957-58 (S.D.N.Y. 1988), *aff'd*, 888 F.2d 260 (2d Cir. 1989) (holding that an award of \$5.1 million in consequential damages did not exceed arbitrators' power, even though "the original pleading in the case sought total damages of approximately \$6.7 million, and [] the original pleading was not amended to allow so large a claim for consequential damages"); see also *Harper Ins. Ltd. v. Century Indem. Co.*, 819 F. Supp. 2d 270, 277 (S.D.N.Y. 2011) ("It is indisputable that arbitrators have no authority to rule on an issue not submitted to them. However, there is no parallel per

se rule that it is beyond the authority of the arbitrators to issue a remedy directed to an issue squarely before them unless it was requested by one of the parties. The case law presented by petitioners only supports the former, uncontested, rule of law.”); Capgemini, 2005 WL 1560482, at *8 (“Here, unlike in Totem, the Panel did not decide a separate theory of liability that was not at issue in the arbitration. Although Capgemini disputes the form that the damages for the 10,201 shares took, it does not dispute that liability for the shares was a central issue in the arbitration and was fully litigated. Therefore, Totem does not provide support for the argument that the Court should for vacate the Award based pursuant to § 10(a)(4).”).

Second, even if the Statement of Claim were to be considered too vague to reasonably include the Today Show statements, these comments were directly submitted to Arbitrator Katz as aspects of the defamation claim at two other “critical junctures” of the arbitration process: namely, (1) in MUO’s pre-hearing brief; and (2) at the Arbitration Hearing itself. (See MUO Rep. at 12.) MUO submitted its pre-hearing brief to Arbitrator Katz on October 26, 2012, in which MUO dedicated substantial attention to the statements made by Monnin on the Today Show. (See generally Balber Decl., Ex. M.) For example, in the briefs preliminary statement, MUO noted that mere days after the two defamatory Facebook posts, “Monnin repeated her unfounded accusations on national television, even in the face of evidence that her statements could not possibly be true.” (Id. at 1; see id. at 6 (“On June 8, 2012, Monnin appeared on the popular NBC morning show ‘Today.’ In an interview conducted by ‘Today’ co-host Ann Curry . . . , Monnin disparaged the integrity of MUO before a national television audience.”); id. at 8 (“During the ‘Today’ interview, Monnin referred to the possibility that her claims ‘would potentially drastically change the reputation of the Miss Universe Organization.’).) Accordingly, Monnin’s statements during the Today Show were highlighted in the pre-hearing brief as a basis for defamation liability, and it could thus have come as no surprise that the statements were later considered by Arbitrator Katz in making his eventual determination.

The centrality of the Today Show statements throughout MUO’s brief is sharply contrasted with the situation in Totem, where the party seeking damages not only “fail[ed] to list charter hire in its itemized statement of damages submitted to Totem,” but also “conceded” in its brief that “charter hire was not an issue in the arbitration.” Totem, 607 F.2d at 651. Thus, when Totem arbitrators awarded damages associated with charter hire, it clearly reflected a use of power outside the scope of the issues submitted to arbitration, whereas here, MUO’s briefing underscored the Today Show statements as bases for defamation liability. Similarly, evidence presented at the Arbitration Hearing itself highlighted the importance of the Today Show statements within MUO’s narrative. (See MUO Rep. at 13 (noting that MUO President Shugart referred to the Today Show statements nearly 20 times during the course of her testimony before Arbitrator Katz and adding that the Today Show interview was screened during the Arbitration Hearing, and both the DVD and the transcript were accepted as exhibits to the Arbitration).)

Thus, in light of the narrowness of the § 10(a)(4) exception, together with the marked presence of the Today Show statements throughout the Arbitration process, Arbitrator Katz cannot be said to have exceeded his powers in issuing the \$5 million award for defamation.

B. Notice

Monnin also alleges that she never received due notice of the Arbitration Hearing, and therefore that the process lacked the requisite fundamental fairness. (See Monnin Opp. at 20-23.) In response, MUO contends that Monnin and her attorney refused to participate in the Arbitration process, despite repeated and adequate attempts to keep them apprised of the proceedings.

Upon her receipt of the Miss Pennsylvania USA title, Monnin undisputedly signed a contract that provided for mediation and binding arbitration in the event of “any controversy or claim arising out of or relating to [the] Agreement, the breach of any term hereof, or [Monnin’s] participation in or connection with the Pageant [that could not] be settled through direct discussions.” (Balber Decl., Ex. A, at ¶ 22.) While Monnin raises various claims about the circumstances under which she signed this contract (see Monnin Opp. at 4-5), she undisputedly initialed each page, including the page containing the arbitration clause, and signed the agreement, certifying that she had read it. (Balber Decl., Ex. A, at 18.) Accordingly, Monnin does not seriously contend that she was not bound by the contract’s terms requiring that disputes be submitted to arbitration—though she does assert her attorney told her that she was not so bound—but rather, focuses more significantly on the purported lack of notice of the Arbitration process and Hearing.

It is axiomatic that while arbitration “is much less formal than a trial in court,” all parties to such a proceeding are nevertheless “entitled to notice and an opportunity to be heard.” Totem, 607 F.2d at 651. Accordingly, in examining alleged misconduct by an arbitrator, as contemplated in § 10(a)(3), “[t]he relevant inquiry under both the federal and New York arbitration statutes is whether misconduct by the Arbitrator resulted in a denial of ‘fundamental fairness.’” *Euromarket Designs, Inc. v. McGovern & Co., LLC*, No. 08 Civ. 7908 (LTS)(DCF), 2009 WL 2868725, at *4 (S.D.N.Y. Sept. 3, 2009) (citations omitted). Here, Monnin construes her purported lack of notice as misconduct on the part of Arbitrator Katz, which in turn denied her a fundamentally fair hearing, compelling vacatur. Monnin’s assertions, however, are belied by the record.

1. Extent of Notice to Monnin

Despite Monnin’s characterization of events, it appears that both Monnin and her counsel “received routine, consistent communications about the Arbitration from both the MUO and JAMS and were fully aware of each stage of the proceedings.” (MUO Rep. at 4.) First, on June 6, 2012, in the wake of Monnin’s Facebook posts, MUO notified Monnin by hand delivered letter and email that it “intend[ed] to assert” claims “arising

out of false and defamatory statements [Monnin had] made concerning the 2012 Miss USA Pageant.” (Balber Decl., Ex. C.) In that letter, MUO directed Monnin to “retain any and all documents and electronic information in any form . . . , relating in any way to the MUO or the Miss USA Pageant.” (Id.) The next day, on June 7, 2012, MUO began mediation proceedings, through JAMS, in accordance with Monnin’s contract with MUO. Monnin was also sent a copy of that commencement letter—via both email and federal express. (Id., Ex. D.) On June 12, 2012, MUO—through counsel—emailed Monnin in an attempt to schedule a mediation session for June 20, 2012, detailing the foregoing attempts to contact Monnin and stating “I am trying to connect with you so that we can move forward with the mediation which we hope will resolve the dispute between you and the MUO.” (Id. at E.) Monnin did not participate in the mediation, and accordingly, on June 25, 2012, MUO commenced a JAMS arbitration against Monnin. The following day, Monnin was served with copies of the Demand, Statement of Claim, and Official Entry Form and Contract for the 2012 Miss USA Pageant. (See Balber Decl., Ex. B.)

According to Monnin, she immediately turned these documents over to Klineburger, her attorney, who, in turn, told Monnin that “she was not bound by any agreement to arbitrate and that Sheena need not respond to any communications from JAMS.” (Monnin Opp. at 10.) On June 28, 2012, Klineburger corresponded with MUO, writing that he had been retained to represent Sheena Monnin “with regard to the [JAMS Mediation] along with a ancillary [sic] claim against [MUO] and/or relevant third parties.” (Balber Decl., Ex. G.) Klineburger not only copied Monnin on the letter, he also stated that he would “reach out to your [sic] early next week to discuss this matter further.” (Id.) JAMS officially commenced the Arbitration on July 2, 2012, sending notice to both MUO’s attorneys and Monnin. (Id. at Ex. G.) In the Official Commencement, JAMS enclosed a list of available arbitrators, and gave the parties instructions on the baseline procedure going forward. (Id.) The following day, on July 3, 2012, Klineburger wrote to MUO, explaining that Monnin was “not subject to the terms of the ‘Official Entry Form/Contract’ for the 2012 Miss USA Pageant,” and as such would “not be participating in any JAMS arbitration.” (Klineburger Decl., Ex. C.) Without discussing the reasoning behind this conclusion in detail, Klineburger stated that “as of June 4, 2012,” the date of Monnin’s resignation, she “had no duty to [MUO].” (Id.) Monnin was copied on this letter, as was the JAMS Resolution Center. (Id.)

Ten days later, on July 13, 2013, JAMS appointed retired Magistrate Judge Theodore H. Katz as the arbitrator for the case, sending notice of that appointment to MUO’s counsel and Monnin. (Balber Decl., Ex. H.) Klineburger next wrote to JAMS on July 18, 2012, confirming that he represented Monnin in the JAMS Arbitration, copying Monnin and MUO on the correspondence. (Klineburger Decl., Ex. D.) In that correspondence, Klineburger reiterated that Monnin was “not subject to any arbitration provisions, has not entered into an agreement with [JAMS] and [would] not be participating in any JAMS resolution services.” (Id.) In August, Meredith Stockman, the

Case Coordinator for the Monnin matter at JAMS, repeatedly emailed Monnin directly regarding the case, discussing outstanding invoices for the proceedings and scheduling. (Id., Exs. F, G.) On August 27, 2012, in response to these emails, Klineburger contacted JAMS via email and stated that Monnin “never contracted with [JAMS] for any services whatsoever,” and as such, had “no intention of going forward with anything involving such dispute resolution.” (Id., Ex. H.) Klineburger also mandated that as Monnin was represented by counsel, JAMS was never to “contact her directly ever again.” (Id.) Again, Monnin was copied on this correspondence.

On August 29, 2012, JAMS notified MUO and Monnin, via counsel, of a scheduled conference call with Arbitrator Katz on September 14, 2012. (Id., Ex. I.) Klineburger, copying Monnin, responded to this notice with another letter to JAMS, stating: “Neither myself [sic] nor Ms. Monnin will have a conference call in the above captioned matter since there is nothing to have a conference call about.” (Id., Ex. J.) Accordingly, the conference call proceeded without Monnin or Klineburger. On September 4, 2012 Case Manager Stockman emailed Klineburger regarding the balance owed to JAMS for the arbitration. (Id., Ex. K.) Klineburger responded and asked for a “signed agreement with [JAMS] wherein either myself [sic] and/or my client agreed to utilize your services.” (Id., Ex. L.) Klineburger concluded his September 5 email to JAMS by asking that JAMS “leave [him] and Ms. Monnin alone.” (Id.)

On September 19, 2012, Arbitrator Katz issued a Report of Preliminary Conference and Scheduling Order, noting Monnin’s failure to respond to the Statement of Claim and scheduling the Hearing for November 5, 2012. This Order was sent to Klineburger. (Balber Decl., Ex. J.) JAMS also sent Klineburger a separate notice of hearing. (Id., Ex. K.) As Arbitration proceeded, Monnin remained non-participatory, failing to respond to the document requests that MUO served on Klineburger on September 21, 2012 (id., Ex. L), and choosing not to conduct any discovery of her own. Additionally, neither Monnin nor Klineburger on her behalf submitted a pre-hearing memorandum, exhibits, or a witness list, as directed by Arbitrator Katz’s Order of September 20. On November 2, 2012, JAMS again contacted all parties, including Klineburger, confirming that the Arbitration Hearing would go forward on November 5, 2012. (Klineburger Decl., Ex. M.) Klineburger then sent a letter to MUO and counsel, attaching a draft complaint against MUO and Donald Trump, stating that he intended to file the complaint in the Western District of Pennsylvania; Monnin was copied on that correspondence. (Id., Ex. N.) According to MUO, on November 2, 2012, Klineburger participated in a telephone call with Scott S. Balber, MUO’s attorney in the Arbitration, and Michael Cohen, Executive Vice President of the Trump Organization. (MUO Rep. at 6.) Klineburger reportedly said during the call that he had been speaking to Monnin and that unless MUO withdrew the Arbitration, he would file the complaint against Trump and MUO. Additionally, when asked if he planned to appear at the Arbitration Hearing, Klineburger stated that Monnin was still considering her options. (Id.)

Neither Monnin nor Klineburger appeared for the Arbitration Hearing on November 5, 2012. (See Monnin Decl., Ex. K.) On December 10, 2012, Klineburger received an email from Monnin’s father, Phillip Monnin, thanking him for “successfully removing [the MUO] threat of arbitration[,]” and inquiring as to the status of the complaint against Mr. Trump. (Klineburger Decl., Ex. O.) Klineburger did not “immediately respond” to Mr. Monnin’s correspondence, and three days later, JAMS sent Klineburger a copy of the Final Arbitration Award entered by Arbitrator Katz. (Id. at ¶¶ 27-28.) Klineburger claims that this email from JAMS was the first time he learned, “contrary to Philip Monnin’s December 10, 2012 email and unbeknownst to Monnin, that the Arbitration had proceeded before Arbitrator Katz on November 5, 2012.” (Id. at ¶ 30.) At this juncture, Klineburger sent a letter to JAMS Case Manager Stockman, stating as follows:

Please be advised that I never requested to go forward with arbitration in the above captioned matter. For some strange reason, you people think by sending me bills and correspondence relating to a matter in which I had no involvement, somehow or another makes me responsibility [sic]. Let me make this clear: I do not represent Ms. Monnin with regard to this matter. I did not sign any documentation subjecting either myself or Ms. Monnin through this process. Please stop bothering me. This is annoying. I owe nothing. . . . I do not represent Ms. Monnin with regard to this matter. If you wish to contact her directly, please feel free to do so. I will not waste anymore [sic] time with this matter.

(Id., Ex. R.)

In a declaration, Klineburger states that since he never received a substantive response from JAMS regarding the signed agreement he requested, he “believed the matter to be resolved.” (Id. at ¶ 24.)⁵ He also states that “although [he] alone was copied on correspondence from JAMS after September 5, 2012, [he] felt it unnecessary to respond or to forward same to Monnin.” (Id.) Klineburger admits that he had “no communication with Monnin regarding JAMS or Miss Universe’s attempt to arbitrate at a hearing on any particular date” for the two-month period between September and November 2012. (Id.) According to Monnin, she was shocked to receive correspondence from Klineburger on December 13, 2012 stating as follows:

⁵ As discussed, after signing and initialing her contract with MUO, Monnin received an unsigned copy of the Agreement, which included the Arbitration Clause. She provided this document to Klineburger, who concluded, because he never received a copy of the signed version, that his client, Monnin, was not subject to the Arbitration Clause or the agreement. (Id. at ¶¶ 6, 12, 22, 24.) However, copies of the signed Agreement were part of the record of the Arbitration Hearing (see Final Award, Ex. 3 (citing the Agreement as an exhibit and discussing its terms)), and the Proof of Service reflects that MUO’s demand for arbitration, statement of claim, and a copy of the official entry form were all served on Monnin on June 25, 2012. (See Balber Decl., Ex. B.)

It seems that despite every [sic] effort on my part in indicating that we were not proceeding with the arbitration, the attorneys for Miss Universe and Donald Trump went ahead and had arbitration without anyone present on your behalf. I am not licensed to practice law in the State of New York. Therefore, I cannot give you advice on this arbitration matter.

(Monnin Decl., ¶ 81.) Monnin was “shocked” to receive this last of Klineburger’s correspondence, as she was under the impression that the situation had been handled by counsel, and had been told repeatedly by Klineburger that she was not required to participate in the Arbitration proceedings. (Monnin Opp. at 16.)

2. The Arbitration’s Fundamental Fairness in Light of Notice

First and foremost, as discussed above, Monnin herself received consistent communication from MUO, counsel to MUO, JAMS, and later, Arbitrator Katz, detailing the various stages of the Arbitration proceedings. Not only was she initially served with the Statement of Claim, but several of the aforementioned parties were in constant contact with Monnin via email and letter for several months. Monnin ceased receiving correspondence only when Klineburger confirmed and emphasized his representation of Monnin, and mandated that all future correspondence regarding the Arbitration be directed at Klineburger, rather than his client. MUO, counsel to MUO, and JAMS all complied with this directive, and were subsequently in constant contact with Klineburger. While it is unfortunate and perhaps unfair that Klineburger, likely in violation of the Model Rules of Professional Conduct, failed to communicate with his client for several months, despite receiving repeated entreaties and status updates regarding the Arbitration, it is well established that notice to an attorney constitutes notice to the represented client. See *Ogodor v. City of New York*, No. 98 Civ. 5353 (LAK)(RLE), 2001 WL 210192, at *3 (S.D.N.Y. Feb. 26, 2001), report and recommendation adopted, March 14, 2001 (“Notice to an attorney qualifies as notice to a client and thus Taubman’s receipt of the EEOC Right To Sue letter constituted Ogodor’s receipt of the letter.”); accord *McKinney v. Waterman S.S. Corp.*, 925 F.2d 1, 5 (1st Cir. 1991) (“Notice to an attorney is notice to the client.” (citing Fed. R. Civ. P. 5(b); *Irwin v. Veterans Administration*, 498 U.S. 89, 111 (1990))).

The situation here is akin to that in *Euromarket*, 2009 WL 2868725. In that case, Respondent McGovern & Co., LLC sought vacatur of an arbitration award entered against it, citing a lack of fundamental fairness due to the lack of notice, as McGovern itself never had any actual notice of the hearing, because its General Counsel, Michael P. Goldsmith “handled all aspects of the underlying arbitration between the parties,” and chose to keep “the arbitration proceeding a secret, and [] never informed McGovern that an arbitration hearing had been scheduled.” *Id.* at 2. As here, McGovern did not appear at the Arbitration Hearing, and was unaware of its existence until much later. *Id.* Despite these circumstances, and despite the fact that Goldsmith turned out to be a disbarred

attorney incapable of actual representation, the Euromarket court upheld the fundamental fairness of the award, noting:

[T]he undisputed facts, and Respondent's admissions of record, indicate clearly that Respondent, through its designated representative, received notice of the arbitration proceedings and was afforded the opportunity to be heard. There is no dispute that Goldsmith, an officer of McGovern LLC, was on notice of the arbitration proceedings and of the hearing. Goldsmith participated in the preliminary hearing, during which the June evidentiary hearing date was set. He communicated with the AAA via facsimile and email. Goldsmith's own adjournment request indicates that he was aware of the date of the hearing. Additionally a March 3, 2008, letter from the AAA reminded the parties that the arbitration could proceed, pursuant to the AAA Rules, in the absence of any party who, after due notice, failed to be present or to obtain an adjournment.

Id. at *5 (internal citations omitted) (emphasis added). At bottom, Arbitrator Katz, together with MUO and JAMS, like the arbitrator and petitioners in Euromark, "provided the requisite notice to Respondent's representative," "did not prevent Respondent from presenting evidence, or limit the type of evidence that Respondent could present, nor . . . prevent Respondent from cross-examining witnesses or otherwise defending its position." Id. In sum, Klineburger's "alleged failure to communicate properly with his client and the resultant [award] [] cannot be attributed to any flaw in the arbitral proceedings." Id. Moreover, as in Euromark, Arbitrator Katz "did not merely enter a default judgment against Respondent for failure to appear at the hearing." Id. Instead, he carefully considered the evidence presented and the relevant law.

Second, both Monnin and Klineburger contend that the lack of valid notice is underscored by the fact that neither JAMS nor MUO ever provided Klineburger with a copy of the signed contract in which Monnin agreed that all disputes with MUO would be submitted to mediation and, if unresolvable, to arbitration. (See Klineburger Decl., ¶ 24 ("Having received no substantive response from JAMS, I believed the matter to be resolved. No signed arbitration agreement had been produced between Miss Universe and Monnin; even if there was a signed agreement it terminated when she resigned; and there was no signed agreement with JAMS."); id., ¶ 33 ("The first time I saw any signed arbitration agreement was when Miss Universe attached one to its Petition to Confirm the Final Arbitration Award filed in this Court.")) These assertions, however, do not nullify the valid notice of the Arbitration proceedings, nor do they present a valid excuse for non-participation. It is well established that "[r]efusal to participate in an arbitration proceeding is not required in order to preserve an objection to arbitrability. On the contrary, the purpose of the Federal Arbitration Act is to encourage participation." Nat'l Ass'n of Broadcast Employees & Technicians AFL-CIO v. Nat'l Broadcasting Co., 707 F. Supp. 124, 130 (S.D.N.Y. 1988); cf. Bridgepointe Master Fund Ltd. v. Biometrx, Inc., No. 09 Civ. 6874, 2009 WL 4756440, at *3 (S.D.N.Y. Dec. 11, 2009) ("While BMRX

complains of short notice, in fact, it had ample notice of the arbitration. Instead, it deliberately chose not to participate. Indeed, it appears in light of its non-performance of the financial agreement and failure to pay the amount due and owing, which it does not contest, the BMRX made a tactical choice to absent itself from the arbitration.”); see also *Michaels v. Mutual Marine Office, Inc.*, 472 F. Supp. 26, 31 (S.D.N.Y. 1979) (noting that participation in an arbitration proceeding “clearly” can be “without prejudice to [a] [] denial of liability”). Accordingly, Monnin could have preserved her apparent objection to arbitrability while nevertheless participating in the process. Moreover, JAMS’ alleged failure to provide Klineburger with a copy of the Agreement between Monnin and MUO is a red herring for two reasons. First, Monnin herself had signed the Agreement and it was part of the record for the Arbitration proceedings, and second, Klineburger failed even to serve document requests on MUO’s counsel that encompassed the Agreement, as he refused to participate in any pre-Hearing briefing or exchange.

In sum, the record establishes that Monnin received ample notice—both actual and constructive through her counsel—of the Arbitration proceedings. The onus was on her to inquire as to the status of those proceedings when she had heard nothing from her counsel, MUO, or JAMS for several months. Moreover, Monnin’s apparent objections to arbitrability could have been preserved despite her participation. Thus, the Arbitration was not fundamentally unfair.

3. Conduct of Monnin’s Counsel

Although not grounds for vacatur, the Court notes the apparent deficiency of Klineburger’s representation of his client, Monnin, throughout these proceedings.

Klineburger undisputedly held himself out as Monnin’s counsel and representative for both the Arbitration and other “ancillary proceedings,” only to later disavow this relationship, informing Monnin that he is not licensed to practice in New York, and thus, was unable to give her advice on the Arbitration matter. Additionally, Klineburger directed JAMS and MUO to cease all direct contact with Monnin, but admittedly failed to communicate with her regarding the status of the Arbitration for months at a time, in clear contravention of the Rules of Professional Conduct. See, e.g., Model Rules of Prof’l Conduct R. 1.4(a)-(b) (“A lawyer shall: . . . reasonably consult with the client about the means by which the client’s objectives are to be accomplished; [] keep the client reasonably informed about the status of the matter; . . . and . . . [] [a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”).

Moreover, Klineburger, without citing any authority, and without any apparent consideration of the consequences of non-participation, repeatedly asserted that his client was simply not required to engage in mediation or arbitration, as provided for in the applicable Agreement. Seemingly oblivious to the facts that (1) the Arbitration could, and would, proceed in Monnin’s absence; and (2) the law permitted Monnin to participate

without conceding arbitrability, Klineburger ignored all entreaties and document requests, failed to draft a pre-hearing brief, and did not represent his client in the Arbitration, despite claiming to serve as her counsel and representative. See *id.* R. 1.1 (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”); *id.* R. 1.3 (“A lawyer shall act with reasonable diligence and promptness in representing a client.”). Klineburger’s contention that he, in good faith, believed that Monnin was not bound by the Agreement excuses neither his failure to communicate with her, nor his choice not to engage in document discovery or exhibit designations, which would have likely resulted in production of the very Agreement he repeatedly claimed to disavow.

Monnin, as the individual affected by, and initially served with, the Statement of Claim, cannot be absolved entirely for her indifference to the proceedings that occurred, over the course of several months, without her participation. Nevertheless, it does well to note that Monnin was repeatedly advised by counsel that she need not participate in the Arbitration. Blindly, but perhaps understandably, Monnin put her trust in her attorney, believing that he would represent her interests to the best of his ability throughout the Arbitration process. Unfortunately, Klineburger chose to ignore the responsibilities owed to his client, along with the ethical duties governing his profession. And while the notice given to Monnin and Klineburger was legally valid, and the arbitral process fundamentally fair, Monnin is now faced with dire consequences due, in no small part, to her counsel’s ineptitude, which constitutes a harsh result.

C. Manifest Disregard of the Law

Finally, Monnin seeks vacatur of the Arbitration Award on the ground that Arbitrator Katz exhibited a manifest disregard for the law, as defined by the Second Circuit in *Jock*. See 646 F.3d at 121-22 (“In addition to the section 10(a) grounds for vacatur, we have recognized a judicially-created ground, namely that ‘an arbitral decision may be vacated when an arbitrator has exhibited a manifest disregard of law.’ (quoting *Westerbeke Corp.*, 304 F.3d at 208 (footnote omitted)).

“A party seeking to vacate an arbitration award on the basis of manifest disregard of the law must satisfy a two-pronged test, proving that: ‘(1) the arbitrator knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrator was well defined, explicit, and clearly applicable to the case.’” *Gottdiener*, 462 F.3d at 110-11. Manifest disregard is a rigorous standard, and it reflects far “more than error or misunderstanding with respect to the law.” *Id.* at 111 (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986) (quotations omitted)). The Second Circuit clarified in *DiRussa* that manifest disregard does not refer to merely a “controlling legal principle” and “obvious error” in ignoring it; by contrast, “the term ‘disregard’ implies that the arbitrator appreciates the existence of a

clearly governing legal principle but decides to ignore or pay no attention to it.” DiRussa, 121 F.3d at 821 (quoting Bobker, 808 F.2d at 933)).

Here, Monnin contends that Arbitrator Katz correctly stated, and was accordingly well aware of, the controlling precedent on defamation, but nevertheless refused to apply the law. (See Monnin Opp. at 24-25.) The crux of Monnin’s argument is that “there was absolutely no evidence offered at the arbitration hearing to suggest Sheena’s comments caused BP to cancel its sponsorship.” (Id. at 25.) The Court disagrees.

First, Arbitrator Katz carefully considered the evidence before him, describing various ways in which Monnin’s statements resulted in “immediate economic consequences” for MUO, including the loss of BP’s sponsorship. (See Final Award, at 14.) The Award painstakingly examines the evidence provided with respect to the traditional relationship between the Miss Universe Pageant and the host site, discussing the importance of the “site fee” as a source of revenue for MUO. (Id. at 12.) Accordingly, there is far more than a “barely colorable” justification for the result reached in Arbitrator Katz’s decision. And second, Monnin’s argument with respect to manifest disregard is ultimately a disagreement with Arbitrator Katz’s factual findings: namely, that the evidence revealed that the BP sponsorship was lost as a result of Monnin’s statements. Manifest disregard would have been reflected if Arbitrator Katz knew of the requirement that MUO prove causation, for example, but chose not to demand it of them, regardless of this knowledge. The vacatur that Monnin seeks on this ground is nothing more than a disagreement with Arbitrator Katz’s application of the admittedly correct legal standard. See, e.g., *Wallace v. Buttar*, 378 F.3d 182, 190 (2d Cir. 2004) (“A federal court cannot vacate an arbitral award merely because it is convinced that the arbitration panel made the wrong call on the law. On the contrary, the award ‘should be enforced, despite a court’s disagreement with it on the merits, if there is a barely colorable justification for the outcome reached.’” (quoting *Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255, 260 (2d Cir. 2003) (emphasis in original))). Accordingly, vacatur is inappropriate, as Arbitrator Katz did not manifestly disregard the law in reaching his decision.

IV. Conclusion

The Court does not take lightly that Monnin is compelled to pay what is a devastating monetary award. Moreover, Monnin undeniably is suffering from her poor choice of counsel, who unconscionably chose to absent himself from the Arbitration proceedings, advised Monnin to do the same, and presented no evidence on her behalf over the course of several months. Although Monnin should have initially engaged in mediation and later, remained diligent over the course of the Arbitration process, it is clear from the record that she was woefully unaware of both the consequences of her disengagement and the severity of the allegations in the Statement of Claim.

That being said, a court's role in reviewing an arbitration award is necessarily limited, and such decisions may be set aside only in certain, enumerated circumstances. Accordingly, the Court is bound by the law, and its review may not exceed the scope defined for it by this Circuit's precedent. Sympathy, or apparent inequity, may play no role in a court's legal analysis, and here, the law is clear.

For the foregoing reasons, the Arbitration Award entered by Arbitrator Theodore H. Katz, is CONFIRMED and Respondent's petition to vacate the Award is DENIED.

The Clerk of Court is directed to enter judgment accordingly, to close the motion at docket entry number 16, and to close the case.

SO ORDERED.

Dated: New York, New York July 2, 2013

/s/J. Paul Oetken

J. PAUL OETKEN

United States District Judge

IV. WHAT IS ARCHITECTURE?

TRUMP v. CHICAGO TRIBUNE CO.
No. 84 Civ. 6873 (EW).
616 F.Supp. 1434 (1985)

Donald J. TRUMP,
Plaintiff,

v.

CHICAGO TRIBUNE COMPANY and Paul Gapp,
Defendants.

United States District Court, S.D. New York. September 3, 1985.

David Berger, New York City, for plaintiff.

Lawrence Gunnels, Chicago, Ill., Berner & Berner, P.C., New York City (Thomas R. Berner, New York City, of counsel), for defendants.

OPINION

EDWARD WEINFELD, District Judge.

Plaintiff Donald Trump, a New York real estate developer, brings this libel action against the Chicago Tribune Company (“Tribune”) and Paul Gapp, an employee of the Tribune whose byline describes him as the Tribune’s “architecture critic.” Plaintiff’s complaint seeks damages based upon statements contained in an article appearing under the heading of “Design” in the Sunday Tribune Magazine of August 12, 1984, in which Gapp discussed Trump’s plan to construct the tallest building in the world, a 150-story tower, on a landfill site at the southeast end of Manhattan island.

[616 F.Supp. 1435]

Plaintiffs complaint alleges that Gapp’s criticism of the proposed venture, which was accompanied by a Tribune artist’s illustration depicting a building which plaintiff calls “an atrocious, ugly monstrosity” damaged plaintiff’s reputation as a developer conscious of aesthetic values and “torpedoed” plaintiffs plans. Defendant moves for dismissal of the complaint under Fed.R. Civ.P. 12(b)(6).

The article published by the Tribune and written by Gapp began with the sentence: “The only remotely appealing aspect of Donald Trump’s proposed 150-story Manhattan skyscraper, announced several days ago, is that it would not be done in the

Fence Post Style of the 1970s.”¹ The following paragraph declared that “the world’s tallest tower would be one of the silliest things anyone could inflict on New York or any other city.” The piece went on to describe Trump Tower, another development by plaintiff, as a “skyscraper offering condos, office space and a kitschy shopping atrium of blinding flamboyance.” Gapp described Trump’s proposal for the 1,940-foot building as “Guinness Book of World Records architecture,” and characterized as “eyewash” Trump’s statement that the new building would architecturally “balance” the two World Trade Center towers on the west side of lower Manhattan.

Plaintiff maintains that these comments were false and defamatory, and alleges in particular that he has chosen no architect and has no plan for his proposed building. He claims that the Tribune article falsely implies that plaintiff has plans for the building and that Gapp had reviewed them and found them aesthetically displeasing. Plaintiff also asserts a claim based upon remarks by Gapp published in the Wall Street Journal in its Real Estate column of August 29, 1984. Gapp told the Journal’s reporter that Trump’s proposal was “aesthetically lousy,” and that the central part of his own city, Chicago, “has already been loused up by giant-ism.”

Defendants, on the other hand, argue that the contents of the Gapp article are entitled to complete immunity under the First Amendment protection of expressions of opinion.

Expressions of “one’s opinion of another, however unreasonable or vituperative, since they cannot be subjected to the test of truth or falsity, cannot be held libelous and thus are entitled to absolute immunity from liability under the First Amendment.”² Opinion may be expressed through “rhetorical hyperbole” and “vigorous epithets,”³ even in the most pejorative terms, but when the criticism takes the form of accusations of criminal or unethical conduct, or derogation of professional integrity in terms subject to factual verification, the borderline between fact and opinion has been crossed.⁴ Whether a

¹ Chicago Tribune, Aug. 12, 1984, § 13, page 8, col. 1.

² *McManus v. Doubleday & Co.*, 513 F.Supp. 1383, 1385 (S.D.N.Y.1981). See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339, 94 S.Ct. 2997; 3006, 41 L.Ed.2d 789 (1974); *Davis v. Ross*, 754 F.2d 80 (2d Cir.1985); *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir.), cert. denied, 434 U.S. 834, 98 S.Ct. 120, 54 L.Ed.2d 95 (1977).

³ *Letter Carriers v. Austin*, 418 U.S. 264, 284, 94 S.Ct. 2770, 2781, 41 L.Ed.2d 745 (1974); *Greenbelt Pub. Assn. v. Bresler*, 398 U.S. 6,14, 90 S.Ct. 1537, 1541, 26 L.Ed.2d 6 (1970).

⁴ See *Cianci v. New Times Pub. Co.*, 639 F.2d 54, 63-64 (2d Cir.1980); *Silsdorf v. Levine*, 59 N.Y.2d 8, 462 N.Y.S.2d 822, 449 N.E.2d 716, cert. denied, 464 U.S. 831, 104 S.Ct. 109, 78 L.Ed.2d 111 (1983); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 382, 397 N.Y.S.2d 943, 951, 366 N.E.2d 1299, cert. denied, 434 U.S. 969, 98 S.Ct. 514, 54 L.Ed.2d 456 (1977); *Edwards v. National Audubon Soc., Inc.*, 556 F.2d 113, 121-22 (2d Cir.), cert. denied, 434 U.S. 1002, 98 S.Ct. 647 (1977).

statement constitutes fact or opinion is a question of law, and is thus appropriate for resolution on a motion to dismiss.⁵

[616 F.Supp. 1436]

After a careful review of the record, this court has no doubt that the statements contained in the Tribune article are expressions of opinion. The very presentation of the article in the Sunday Tribune Magazine section, under the heading of the “Design” column, with a byline identifying the author as the Tribune’s “Architecture Critic,” informs the reader that the article embodies commentary by a Tribune columnist, and is not a news story reporting factual material. From the first sentence, which describes the “only remotely appealing aspect” of the Trump project, the prose is cast in subjective terms; the very words Trump objects to, which refer to the proposal as “one of the silliest things anyone could inflict on New York” and describe the asserted aesthetic balance between the proposed tower and the World Trade Center as “eyewash,” convey to the reader the highly personal and subjective nature of the judgments expressed. It must be clear to any reader that in the realm of architecture, as in all aesthetic matters, what is “appealing” to one viewer may be appalling to another.⁶ There are many who would disagree with Mr. Gapp’s view, also expressed in the Tribune piece, that the World Trade Centers “still stand as two of the most desolately ugly buildings in New York,”⁷ but there is no way that the Court could instruct a jury on the process of evaluating whether the statement is true or false as a matter of fact.

The conclusion that the Tribune article embodies opinion rather than fact is also compelled upon examination of those statements classified as opinion in previous court decisions. The Supreme Court has held that describing a real estate developer’s negotiating position as “blackmail” was a statement of opinion,⁸ as was the charge that

⁵ See *Letter Carriers v. Austin*, 418 U.S. 264, 282, 94 S.Ct. 2770, 2780, 41 L.Ed.2d 745 (1974); *Greenbelt Pub. Assn. v. Bresler*, 398 U.S. 6, 11, 90 S.Ct. 1537, 1540, 26 L.Ed.2d 6 (1970); *Hotchner*, 551 F.2d at 913; *Buckley v. Littell*, 539 F.2d 882, 888 (2d Cir.1976), cert. denied, 429 U.S. 1062, 97 S.Ct. 786, 50 L.Ed.2d 777 (1977); *Held v. Pokorny*, 581 F.Supp. 1038 (S.D.N.Y.1984); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 381, 397 N.Y.S.2d 943, 950, 366 N.E.2d 1299, cert. denied, 434 U.S. 969, 98 S.Ct. 514; 54 L.Ed.2d 456 (1977).

⁶ Thus, for example, the Eiffel Tower, one of the most widely recognized and admired structures in the world, was criticized by Guy De Maupassant as

an unavoidable and tormenting nightmare . . . this tall skinny pyramid of iron ladders, this giant and disgraceful skeleton with a base that seems made to support a formidable monument of cyclops and which aborts into the thick, ridiculous profile of a factory chimney.

See J. Harris, *The Tallest Tower: Eiffel and the Belle Epoque* 21 (1975). De Maupassant joined a letter signed by 46 other French artists calling the Tower a “useless and monstrous” “horror.” *Id.*

⁷ *Chicago Tribune*, Aug. 12, 1984, § 13, page 8 col. 2.

⁸ *Greenbelt Pub. Assn. v. Bresler*, 398 U.S. 6, 14, 90 S.Ct. 1537, 1541, 26 L.Ed.2d 6 (1970).

workers refusing to join a union had “rotten principles,” and “lacked character.”⁹ Statements by a public official that a board game satirizing the system of public assistance for the poor was “ugly and damaging” and “by its insensitivity and shoddiness [did] a discredit to those associated with its manufacturing and marketing” were protected as opinion by our Court of Appeals,¹⁰ as was a statement calling an author and lecturer a “fellow traveler” of “fascists” and the “radical right.”¹¹ Similarly, this Court has held that it was a protected expression of opinion to call “immoral” a lawyer’s decision to exercise his right of election against the will of his deceased wife.¹² The New York courts¹³ have held that calling a Judge incompetent, accusing a former director of

[616 F. Supp. 1437]

the State Lottery of “gypping” and “systematically cheating” the public, and describing a teacher who had received pay to which he was not entitled while on sick leave as a “no-show” are all expressions of opinion which cannot be the predicate for a defamation action.¹⁴ These cases present claims far more compelling than that advanced by plaintiff here, and each has been found to involve expressions of opinion entitled to full First Amendment protection.

Plaintiff asserts that even if the Tribune article expresses opinion, it is still not entitled to constitutional protection unless the facts supporting the opinion are set forth.¹⁵ Placing principal reliance upon the decision by our Court of Appeals in *Hotchner v. Castillo-Puche*,¹⁶ plaintiff alleges that the article incorrectly implies that defendants had knowledge of facts, unknown to the general public, which substantiate the opinions

⁹ Letter Carriers v. Austin, 418 U.S. 264, 284; 94 S.Ct. 2770, 2781, 41 L.Ed.2d 745 (1974).

¹⁰ Hammerhead Enters., Inc. v. Brezenoff, 707 F.2d 33 (2d Cir.), cert. denied, 464 U.S. 892, 104 S.Ct. 237, 78 L.Ed.2d 228 (1983).

¹¹ Buckley v. Littell, 539 F.2d 882, 893-95 (2d Cir.1976), cert. denied, 429 U.S. 1062, 97 S.Ct. 786, 50 L.Ed.2d 777 (1977).

¹² Held v. Pokorny, 583 F.Supp. 1038 (S.D.N.Y. 1984).

¹³ The parties in this case have assumed that New York law would apply. Plaintiff is a citizen of New York, the subject of the article was transactions taking place in New York, and New York is the place in which plaintiff claims the damage arising from the publication occurred. Thus, despite the fact that the article was conceived, edited and published in Illinois, the parties’ assumption as to choice of law is correct. See *Machleder v. Diaz*, 538 F.Supp. 1364 (S.D.N.Y.1982).

¹⁴ *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 380-81 397 N.Y.S.2d 943, 950-51, 366 N.E.2d 1299, cert. denied, 434 U.S. 969, 98 S.Ct. 514, 54 L.Ed.2d 456 (1977); *Bruno v. New York News*, 89 A.D.2d 260, 456 N.Y.S.2d 837 (2d Dept.1982); *DeLuca v. New York News*, 109 Misc.2d 341, 438 N.Y.S.2d 199 (Sup.Ct.1981).

¹⁵ *Silsdorf v. Levine*, 59 N.Y.2d 8, 13, 462 N.Y.S.2d 822, 825, 449 N.E.2d 716, cert denied, 464 U.S. 831, 104 S.Ct. 109, 78 L.Ed.2d 111 (1983).

¹⁶ 551 F.2d 910, 913 (2d Cir.), cert. denied, 434 U.S. 834, 98 S.Ct. 120, 54 L.Ed.2d 95 (1977).

expressed, that these facts are false, and that the opinions therefore lose their protected character.

Plaintiff correctly characterizes the holdings in Silsdorf and Hotchner, but their application to the record before the court does not yield plaintiff's conclusion. The facts supporting Mr. Gapp's "speculation" are fully set forth in the article; indeed, the closing section of the article begins with the sentence: "Yet, while this sort of speculation is amusing, it is necessary to add a few hard facts."¹⁷ The matter which follows, concerning the economic constraints on developers seeking to build particularly tall buildings and relying in part on "statistics provided by Trump," is not disputed by the plaintiff. Other facts set forth in the article concerning the Trump proposal include the information that no architect had been selected and no specific design for the building agreed upon, along with the paragraph:

In a recent interview, the real estate tycoon said he proposes to build his 1,940-foot building on landfill along the edge of the East River near the southern tip of Manhattan. It would cost \$1 billion and house offices on its lower levels, a hotel in the middle and luxury apartments on top.¹⁸

Plaintiff testified at his deposition that in July 1984, before the publication of the article in question, he was interviewed by a reporter at the New York Times, and at that interview conveyed to the reporter all the information set out in the paragraph quoted above.¹⁹ Thus, it was plaintiff's own statements, conveyed to the press through an interview plaintiff himself arranged, which formed the factual basis of the opinions expressed in the defendants' article. Upon the totality of the record presented, the Court finds that the article set out in full the facts on which the opinions expressed were predicated, and further finds that the truth of those facts is not in dispute, the bulk of the factual material having been provided by the plaintiff.

Plaintiff nonetheless contends that the illustration and caption accompanying the article, which depict a 150-story building drawn to scale against the skyline of lower Manhattan, falsely imply that defendants had access to plaintiff's plan for the building, and he further contends that the building depicted does not accurately portray his plans.

Even if the Court were to accept plaintiff's invitation to take the illustration and

[616 F. Supp. 1438]

¹⁷ Chicago Tribune, Aug. 12, 1984, § 13, page 8 col. 4.

¹⁸ Chicago Tribune, Aug. 12, 1984, § 13, page 8 col. 1.

¹⁹ Transcript of Deposition of Donald J. Trump, Jan. 29, 1985, at 9-15.

caption out of the context of the article as a whole, plaintiff's claim with respect to the illustration must fail. The caption identifies the illustration as the "artist's conception of Donald Trump's proposed 150-story skyscraper,"²⁰ and thus makes clear that the illustration, like the article it accompanies, is opinion, not a factual report. In addition, plaintiff's claim with respect to the illustration depends upon his contention that the illustration is not in keeping with his proposal, which he says calls for a "tapered" building on a developed site which would include several smaller buildings and extensive landscaping.²¹ At the same time, plaintiff is equally vehement in declaring that he has no plans, and has not even engaged an architect. Thus, plaintiff contends on the one hand that certain details of the project, as for example that he intends a "tapered" building, were misrepresented by the Tribune; on the other hand, he objects to the artist's rendering in the Tribune illustration on the ground that he has no architect and has not yet made any plans. Plaintiff cannot have it both ways.

Moreover, the root of plaintiff's objection to the illustration, and the essence of his allegation that it has a defamatory meaning, is that he finds the building depicted to be "an atrocious, ugly monstrosity."²² This is, of course, precisely the same sort of individual, subjective aesthetic opinion which defendant Gapp expressed in the article. Plaintiff's negative opinion of the building depicted in the illustration is no more subject to factual proof than are the negative opinions of plaintiff's proposal expressed by defendant Gapp in the article itself. Plaintiff chose to give publicity to his proposal, particularly in granting an interview to a representative of the New York Times. He finds aesthetically displeasing the terms in which that publicity was interpreted by the defendants here. As this Court has previously said,

Men in public life, whether they be judges, legislators, [or] executives . . . must accept as an incident of their service harsh criticism, oftentimes unfair and unjustified — at times false and defamatory — and this is particularly so when their activities or performance may be the subject of differing attitudes and stir deep controversy.²³

²⁰ Chicago Tribune, Aug. 12, 1984, § 13, page 8, caption (emphasis added).

²¹ The building portrayed by the Tribune artist is in three distinct horizontal segments, set back in a step arrangement, placed on a site which lacks smaller surrounding buildings or visible landscaping. The Tribune explains that the step arrangement is in keeping with the statements made by Trump in the New York Times interview, in which he told the Times reporter that the building would contain offices in its lower part, a hotel in its middle section, and luxury apartments at the top. Transcript of Deposition of Donald J. Trump, Jan. 29, 1985, at 11-12.

²² Complaint, para. 12.

²³ *Adey v. United Action for Animals, Inc.*, 361 F.Supp. 457 (S.D.N.Y.1973), *aff'd*, 493 F.2d 1397 (2d Cir.), *cert. denied*, 419 U.S. 842, 95 S.Ct. 74, 42 L.Ed.2d 70 (1974).

Plaintiff, having sought publicity for his proposal, finds that defendants do not like his proposed structure. He, on the other hand, does not like their conception any better. The words of the Latin proverb are particularly appropriate here: *De gustibus non est disputandum*, there is no disputing about tastes.²⁴ The complaint is dismissed.

So ordered.

²⁴ See B. Evans, *Dictionary of Quotations* 679 (1968).

V. WHAT ARE HIS FEELINGS?

DONALD TRUMP v. TIMOTHY L. O'BRIEN

(NOTE: The status of this decision is Published.)

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APPROVED FOR PUBLICATION

September 7, 2011

APPELLATE DIVISION

DONALD J. TRUMP,
Plaintiff-Appellant,

v.

TIMOTHY L. O'BRIEN, TIME WARNER BOOK GROUP, INC., and WARNER
BOOKS, INC.,
Defendants-Respondents.

September 7, 2011

Argued April 12, 2011 – Decided
Before Judges Payne, Koblitz and Hayden.

On appeal from Superior Court of New Jersey,
Law Division, Camden County, Docket No. L-545-06.

Karen A. Contoy argued the cause for appellant (Sterns & Weinroth attorneys; Joel H.
Sterns, of counsel; Ms. Confoy and Erica S. Helms on the brief).

Andrew J. Ceresney (Debevoise & Plimpton L.L.P.) of the New York bar, admitted pro
hac vice, argued the cause for respondents (Reed Smith L.L.P. and Mr. Ceresney,
attorneys; Mr. Ceresney, Mary Jo White (Debevoise & Plimpton L.L.P.) of the New York

bar, admitted pro hac vice, and Andrew M. Levine (Debevoise & Plimpton L.L.P.) of the New York bar, admitted pro hac vice, of counsel; Kellie A. Lavery and Mark S. Melodia, on the brief).

The opinion of the court was delivered by

PAYNE, J.A.D.

Donald Trump, the plaintiff in a suit for defamation, appeals from a Law Division order granting summary judgment to defendants, Timothy O'Brien, the author of *TrumpNation*, *The Art of Being The Donald*, and his publishers, Time Warner Book Group, Inc. and Warner Books, Inc.¹ On appeal, Trump contends that he produced clear and convincing evidence of actual malice on the part of O'Brien and that issues of fact precluded summary judgment. He argues as well that O'Brien was an agent of his publisher, and thus the publisher defendants should be held liable on a theory of respondeat superior. We affirm.

I.

O'Brien is a financial reporter with graduate degrees from Columbia University in journalism, business and United States history. He has reported on business and other subjects for newspapers including *The New York Times* and *The Wall Street Journal*, and he presently serves as the editor of the Sunday Business section of *The Times*. Over the years, O'Brien has written extensively on Trump. In 1992, he served as a research assistant to Wayne Barrett, the author of a Trump biography entitled *Trump: The Deals and The Downfall*. In 1998, O'Brien wrote *Bad Bet: The Inside Story of the Glamour, Glitz, and Danger of America's Gambling Industry*, a book that included reporting on Trump's Atlantic City casino operations. In 2004, O'Brien participated in writing a series of articles about Trump that appeared in *The Times* that focused on financial troubles faced by Trump's enterprises and the difficulty of determining an accurate value for Trump's holdings and his net worth. In one article, co-authored by O'Brien, that appeared on September 8, 2004, he reported Trump's estimates of his own net worth as between \$2 billion and \$5 billion. However, O'Brien also wrote:

The largest portion of Mr. Trump's fortune, according to three people who had had direct knowledge of his holdings, apparently comes from his lucrative inheritance. These people estimated that Mr. Trump's wealth, presuming that it is not encumbered by heavy debt, may amount to about \$200 million to \$300 million. That is an enviably large sum of money by most people's standards but far short of the billionaire's club.

¹ Warner Books Inc. is now known as Grand Central Publishing, a subsidiary of Hachette Book Group U.S., Inc., the successor to Time Warner Book Group, Inc.

In December 2004, O'Brien signed a contract with Warner Books, Inc. to write TrumpNation. Despite negative reporting in the past, Trump cooperated with O'Brien in connection with that book, submitting to interviews on numerous occasions, making available members of his staff including Chief Financial Officer Allen Weisselberg and in-house attorney Michelle Lokey, and disclosing certain financial information and supporting documents. In writing his book, O'Brien reported on information conveyed by Trump, but he also utilized the research he had gathered in connection with his prior writings about Trump, new research, and re-interviews of the three anonymous sources used earlier who, now, "lowered their estimates of Trump's net worth to between \$150 million and \$250 million (because of the decreased value of Trump's casino holdings at the time [he] was writing the Book)."

On October 23, 2005, The Times published in the newspaper an excerpt from Chapter Six of TrumpNation that contained the lowered estimates provided by the three anonymous sources as to Trump's net worth, but also included a statement that "Donald's casino holdings have recently rebounded in value, perhaps adding as much as \$135 million to these estimates." Three days later, on October 26, 2005, the book was published without the added statement.

In Chapter Six, O'Brien discussed at length Trump's vacillating fortunes and the difficulty he experienced in attempting to determine with any accuracy what Trump's net worth actually was. O'Brien commenced the chapter with a description of the first phase of Trump's career one that ended with admitted debts of \$900 million and the deals he made with banks to restructure those debts. He then turned to a description of Trump's appearance on, disappearance from, and reappearance on Forbes magazine's annual list of America's 400 wealthiest individuals, noting Trump's jockeying for inclusion on that list, and stating that in 2004 Trump ranked 189th with an estimated wealth of \$2.6 billion. O'Brien then turned to a conversation that he had with Trump in early 2005, during which Trump had stated that he was worth \$5 to \$6 billion. However, O'Brien noted that, during the prior August, Trump had stated to him that his net worth was \$4 to \$5 billion, but later that day stated that his casino holdings represented two percent of his wealth, which "gave him a net worth of about \$1.7 billion." Additionally, O'Brien noted that a brochure on the nightstand at Trump's Palm Beach club stated that he was worth \$9.5 billion.

Referring to an April 21, 2005 meeting with Weisselberg, O'Brien stated that he had been informed at that time that Trump was worth \$6 billion, "[b]ut the list of assets Weisselberg quoted, all of which were valued in very inflated and optimistic terms and some of which Donald didn't own, totaled only about \$5 billion." Weisselberg, it was stated, was unable to come up with evidence of the additional billion. A chart detailing "Weisselberg's assessment of Donald's riches" that in large measure corresponds to O'Brien's handwritten notes of the April 21 meeting was reproduced on the facing page.

O'Brien wrote that the chart containing Weisselberg's valuations "left me confused." That statement was followed by the passage that gives rise to this lawsuit. There, O'Brien, relying on his three anonymous sources, stated:

So I asked around for guidance. Three people with direct knowledge of Donald's finances, people who had worked closely with him for years, told me that they thought his net worth was somewhere between \$150 million and \$250 million. By anyone's standards this still qualified Donald as comfortably wealthy, but none of these people thought he was remotely close to being a billionaire.²

That passage was followed by:

Donald dismissed this as naysaying.

"You can go ahead and speak to guys who have four-hundred-pound wives at home who are jealous of me, but the guys who really know me know I'm a great builder," he told me.

Additionally, in Chapter Six, O'Brien discussed Trump's interest in Manhattan property known as the West Side Yards. He noted that Trump had initially purchased the property for \$115 million, but had been forced to sell it to a Hong Kong development group in 1994 for \$85 million. He wrote: "According to former members of the Trump Organization, Donald didn't retain any ownership of the site the Hong Kong group merely promised to give him a 20 to 30 percent cut of the profits once the site was completely developed." He stated further:

In June 2005, the Asian investors who controlled the West Side Yards sold the entire site for \$1.8 billion about half the amount that Donald had told me it was worth. Although Donald told me that the site was debt free when the Asians sold it, others involved in the transaction said the Yards carried a substantial amount of debt and expenses that had to be deducted from the sale price. Although Donald declined to detail how much money he realized personally on the sale, it was

² In answers to interrogatories, Trump identified nine allegedly defamatory comments, each of which related to his net worth: (1) the statement that we have quoted, on which this litigation principally focuses; (2) repeated references in the book to Trump's "verbal billions"; (3) a passage stating "[Trump's ability to float above the wreckage of his financial miscues and magically add zeroes to his bank account ensured that he remained an object of fascination"; (4) the October 2005 Times article quoting from TrumpNation; (5) an October 31, 2005 "Squawk Box" interview on CNBC where O'Brien stated that "[Trump has] occupied center stage by adding zeroes here and there and papering over losses"; (6) a second statement in that interview that Trump was "nowhere close" to being worth \$2.7 billion; (7) a statement by O'Brien on David Latko's "Money and More" that essentially repeated the anonymously sourced information; (8) a statement at a Coliseum Books event that "[Trump] doesn't have any [money] to invest"; and (9) another statement at that event that "[Trump's] net worth is definitely inflated. Forbes Magazine puts his worth at \$2.7 billion, but I am almost certain that is a complete work of fiction."

certainly a fraction of the \$1.3 billion he had told me that the Yards would add to his bank account after a sale.

Following publication of TrumpNation, suit was filed on Trump's behalf.

During the course of discovery, Trump sought disclosure of the identity of the three confidential sources utilized by O'Brien, his notes regarding his interviews with those sources, and various other non-confidential materials relating to O'Brien's research, writing and editorial processes. O'Brien resisted disclosure of this information, but following Trump's motion to compel production, the motion judge (a judge different from the one granting summary judgment) ordered that the information and documents be produced. Defendants then sought leave to appeal. We granted the motion and reversed the motion judge's order, finding that the confidential materials were absolutely protected by New York's Shield Law, N.Y. Civ. Rights 79-h, and the New Jersey newperson's privilege, N.J.R.E. 508 and N.J.S.A. 2A:84A-21. *Trump v. O'Brien*, 403 N.J. Super. 281, 298, 302-04 (App. Div. 2008). We found, additionally, that a qualified privilege, which Trump had failed to overcome, applied under 79-h(c) of New York's Shield Law to non-confidential materials relating to the research, writing and editorial processes that O'Brien sought to protect, *id.* at 302,³ and that those materials were absolutely protected by New Jersey law. *Id.* at 302-04.

Prior to moving for summary judgment, O'Brien produced redacted copies of the notes taken of interviews with the three confidential sources in 2004 and 2005. He has declined to identify those sources, claiming that they would be subject to retaliation were he to do so. On March 20, 2009, defendants filed two motions for summary judgment, arguing in one that Trump had failed to demonstrate by clear and convincing evidence actual malice on the part of O'Brien or respondeat superior liability on the part of the publisher defendants, and in the other arguing that Trump had failed to demonstrate that he had been damaged by O'Brien's allegedly defamatory statements. In a lengthy, thoughtful and legally well-supported oral opinion, Judge Michele M. Fox, relying on New Jersey and New York law, which she properly found to be in accord on the issues raised, granted summary judgment on the ground that Trump had failed to establish actual malice. She did not reach defendants' second motion.

II.

"In order to establish a *prima facie* case of defamation

. . . a plaintiff must show that a defendant communicated to a third person a false statement about the plaintiff that tended to harm the plaintiff's reputation in the eyes of the community or to cause others to avoid plaintiff." *McLaughlin v. Rosanio, Bailets & Talamo, Inc.*, 331 N.J. Super. 303, 312 (App. Div.) (citing

³ Trump has not further sought to overcome that privilege.

Lynch v. N.J. Educ. Ass'n, 161 N.J. 152, 164-65 (1999)), certif. denied, 166 N.J. 606 (2000). Because there is no doubt that Trump is a public figure, to be actionable, the alleged defamatory statements by O'Brien must have been uttered or published with "actual malice." N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80, 84 S. Ct. 710, 726, 11 L. Ed. 2d 686, 706 (1964). To establish actual malice, Trump was required to demonstrate by clear and convincing evidence, id. at 285-86, 84 S. Ct. at 729, 11 L. Ed. 2d at 710, that O'Brien published his statements "with knowledge that [they were] false or with reckless disregard of whether [they were] false or not." Id. at 279-80, 84 S. Ct. at 726, 11 L. Ed. 2d at 706.

We have recently addressed the actual malice standard, stating:

In order to meet the actual-malice standard, "a public figure must prove with convincing clarity that the defamatory statements were published by the defendant with knowledge of their falsity or reckless disregard of whether they were true or false." Lawrence v. Bauer Publ'g & Printing Ltd., 89 N.J. 451, 466 (citing New York Times Co. v. Sullivan, supra, 376 U.S. at 279-80, 84 S. Ct. at 725-26, 11 L. Ed. 2d at 706), cert. denied, 459 U.S. 999, 103 S. Ct. 358, 74 L. Ed. 2d 395 (1982). In this context, "reckless disregard" refers to "the publishing of defamatory statements with a 'high degree of awareness of their probable falsity.'" Ibid. (quoting Garrison v. Louisiana, 379 U.S. 64, 74, 85 S. Ct. 209, 215, 13 L. Ed. 2d 125, 133 (1964)). In fact, "the recklessness in publishing material of obviously doubtful veracity must approach the level of publishing a 'knowing, calculated falsehood.'" Ibid. (quoting Ryan v. Brooks, 634 F.2d 726, 733 (4th Cir. 1980)). "Negligent publishing does not satisfy the actual-malice test." Lynch, supra, 161 N.J. at 165.

[Berkery v. Estate of Stuart, 412 N.J. Super. 76, 90 (App. Div. 2010).]

A determination of the existence of actual malice requires a subjective inquiry focusing on the defendant's state of mind. DeAngelis v. Hill, 180 N.J. 1, 13 (2004). "To find actual malice, the factfinder must determine that the defendant in fact entertained serious doubts about the truth of the statement or that defendant had a subjective awareness of the story's probable falsity." Costello v. Ocean Cnty. Observer, 136 N.J. 594, 615 (1994) (citing Schiavone Constr. Co v. Time, Inc., 847 F.2d 1069, 1089 (3d Cir. 1988)). As a consequence, although the use of summary judgment procedures to conclude defamation actions is favored, Maressa v. New Jersey Monthly, 89 N.J. 176, 196, cert. denied, 459 U.S. 907, 103 S. Ct. 211, 74 L. Ed. 2d 169 (1982), courts have recognized that an analysis of a defendant's state of mind in a defamation action "does not readily lend itself to summary disposition." Id. at 197 n.10 (quoting Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9, 99 S. Ct. 2675, 2680 n.9, 61 L. Ed. 2d 411, 422 n.9 (1979)). As a consequence, we are instructed to "carefully examine the circumstances surrounding publication of defamatory allegations of fact to determine whether the issue of actual malice should go to the jury." Ibid.

In this regard, we are also bound by the standard applicable to summary judgment set forth in *Brill v. Guardian Life Insurance Company of America*, 142 N.J. 520, 540 (1995) and Rule 4:46-2(c). See *Prudential Prop. & Cas. Ins. Co. v. Boylan*, 307 N.J. Super. 162, 167 (App. Div.), cert. denied, 154 N.J. 608 (1998). Thus, we can affirm summary judgment only when “the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.” *Ibid.*

“To determine whether a genuine issue of material fact exists regarding actual malice, a court must consider whether the plaintiff has produced the ‘quantum and quality of proof’ necessary under the *New York Times v. Sullivan* standard.” *Costello v. Ocean County Observer*, 136 N.J. 594, 614 (1994) (quoting *Schiavone Constr. Co. v. Time, Inc.*, 847 F.2d 1069, 1089 (3d Cir. 1988)). “When a case concerns a public official or public figure, the court should grant summary judgment dismissing the complaint if a reasonable jury could not find that the plaintiff had established actual malice by clear and convincing evidence.” *Lynch*, supra, 161 N.J. at 169. “Although courts construe the evidence in the light most favorable to the non-moving party in a summary judgment motion, the ‘clear and convincing’ standard in defamation action[s] adds an additional weight to the plaintiffs’ usual ‘preponderance of the evidence’ burden.” *Costello*, supra, 136 N.J. at 615. “Plaintiffs . . . must produce substantial evidence to survive a motion for summary judgment.” *Ibid.*

[*Berkery*, supra, 412 N.J. Super. at 91-92.]

III.

A major focus of the parties’ argument centers on O’Brien’s anonymous sources. In that regard, Trump argues that the information supplied was false, that O’Brien deliberately disregarded contrary information, and that O’Brien’s reliance on his sources demonstrates actual malice. We disagree.

The Supreme Court has held:

A finding of actual malice may not be based solely on the character of the published statement. *Washington Post Co. v. Keogh*, 365 F.2d [965,] 970 [(D.D.C. 1966)]. Nor may it be based solely on the publisher’s failure to seek independent verification of the information. *St. Amant v. Thompson*, 390 U.S. [727], 731, 88 S. Ct. [1323], 1325, 20 L. Ed 2d [262], 267 [(1968)]. The two in combination, however, may support a conclusion of recklessness. Public figure libel plaintiffs can recover for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers. [*Curtis Publishing Co.*

v. Butts, 388 U.S. 130, 155, 87 S. Ct. 1975, 1991, 18 L. Ed. 2d 1094, [1111], reh. den., 389 U.S. 889, 88 S. Ct. 11, 19 L. Ed. 2d 197 (1967) (holding it reckless to allege that respondent football coach “fixed” a game when defendant publication failed to investigate reports that allegation was false).

Thus, an inference of actual malice may arise when a false report is published solely in reliance on confidential sources if (1) the content of the report is such as to be defamatory as a matter of law, (2) the defendant knew or should have known of some reasonable means of verifying its accuracy, and (3) the failure to verify rises to the level of a gross violation of the standards of responsible journalism. If the recklessness approaches the level of publishing a knowing, calculated falsehood, the decision whether the defendant acted with reckless disregard for the truth should be submitted to the jury. See *Lawrence v. Bauer Publishing & Printing*, 89 N.J. 451, 466-467 (1982).

[Maressa, *supra*, 89 N.J. at 199-200 (footnote omitted).]

We do not find that standard to have been met in this case. O’Brien has certified that he re-interviewed his three confidential sources prior to publishing their net worth estimates, and he has produced notes of his meetings with them both in 2004 and in 2005. The notes are significant, in that they provide remarkably similar estimates of Trump’s net worth, thereby suggesting the accuracy of the information conveyed. See *Clyburn v. News World Commc’ns, Inc.*, 705 F. Supp. 635, 642 (D.D.C. 1989) (basing finding of no actual malice on fact that confidential sources gave consistent information).

Further, the accounts of the sources contain significant amounts of additional information that O’Brien was able to verify independently. In answers to interrogatories, he listed that information as:

(1) plaintiff’s interest in the limited partnerships that owned the West Side Yards project, (2) plaintiff’s negotiations with Hilton in the mid-1990s regarding the potential sale of plaintiff’s casino company, (3) plaintiff’s business dealings with Kenneth Shapiro and Daniel Sullivan; (4) negotiations regarding the restructuring of Trump Hotels and Casino Resorts, Inc. in 2004; (5) the sale of Fred Trump’s real estate portfolio in Brooklyn in 2004; (6) plaintiff’s interest in 40 Wall Street and the level of borrowings relating to that property; (7) plaintiff’s interest in the CM Building and litigation surrounding that interest; (8) plaintiff’s interest in Trump International Hotel and Tower on Columbus Circle in New York; (9) plaintiff’s financial condition and the restructuring of plaintiff’s outstanding debt during certain periods.

That the source has provided other reliable information is recognized as an indicator of reliability in criminal cases involving informants. See, e.g., *State v. Keyes*, 184 N.J. 541, 555 (2005). It has also been recognized as significant in a defamation

context to demonstrate the absence of actual malice. *Southwell v. S. Poverty Law Ctr.*, 949 F. Supp. 1303, 1307-08 (W.D. Mich. 1996).

In support of their argument that O'Brien's reliance on his confidential sources was proper, defendants cite *Sprewell v. NYP Holdings, Inc.*, 841 N.Y.S.2d 7 (App. Div. 1st Dept. 2007). In that case, then New York Knicks player, Latrell Sprewell, claimed he was libeled by defendant, Marc Berman, a reporter for The New York Post, when he wrote an article, based in part on information provided by confidential sources, stating that Sprewell had broken his shooting hand in September 2002 by hitting a wall on his boat during an altercation but did not promptly report the injury to the team. Berman noted that Sprewell denied that he broke his hand in the manner Berman claimed. *Id.* at 8-10.

In determining that summary judgment should have been granted by the trial court, even assuming that Berman's statements as to how Sprewell injured his hand were false, the appeals court noted that the information in Berman's articles was not reported as uncontrovertible fact, but rather, the author disclosed that the articles were based on the reports of two confidential informants and that the information was denied by Sprewell. *Id.* at 10. The court also noted that the record had demonstrated that Berman subjectively believed the information, and that a partial description of the interior of Sprewell's boat provided additional evidence of reliability. *Ibid.*

Further, Berman had sought to verify the informants' accounts by speaking with plaintiff through his agent and publicist, and seeking confirmation through multiple other sources. *Id.* at 10-11. The court held: "Those investigative efforts demonstrate that Berman did not deliberately fail to seek confirmatory information or otherwise act with reckless disregard for the truth." *Id.* at 11. In these circumstances, the court held that plaintiff had not presented any evidence that would raise a triable issue of fact concerning actual malice, let alone the clear and convincing evidence of malice applicable on summary judgment. *Ibid.* "Indeed, while plaintiff, through his representatives, denied the accusations of the confidential witnesses, his explanation for the injury continuously changed, from he had 'no clue,' to he banged it while 'frantically pulling on a rope' sailing in rough waters, to he 'slipped and fell.'" *Ibid.* Accordingly, summary judgment should have been granted. See also *Bement v. N.Y.P. Holdings, Inc.*, 760 N.Y.S.2d 133, 137 (App. Div. 1st Dept. 2003); *Suson v. NYP Holdings, Inc.*, 862 N.Y.S.2d 818 (N.Y. Civ. Ct. 2008).

Defendants argue that the facts of the present matter are akin to Sprewell and likewise support summary judgment in their favor. We conclude that defendants' position has merit. In this regard, we note that, contrary to Trump's position, O'Brien does not adopt the low estimates of net worth set forth by his anonymous sources. In his deposition, O'Brien testified: "I had good reason to believe [the sources] felt the numbers were accurate, and I had very, very good reason to believe that they were." However, in the book, O'Brien did not cite the sources' views as fact, but instead utilized their lower

figures as an illustration of the spread in estimates of Trump's wealth, while suggesting that, in his own view, Trump's net worth was far less than he claimed it to be. O'Brien's opinions in this regard were not actionable, because they were absolutely privileged. *Maressa*, supra, 89 N.J. at 197 (citing, inter alia, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40, 94 S. Ct. 2997, 3006-07, 41 L. Ed. 2d 789, 805 (1974)); see also *Kotlikoff v. The Community News*, 89 N.J. 62, 73-74 (1982).

Further, as in *Sprewell*, O'Brien reported Trump's denial of the accuracy of the low net worth figures, although his statement, touting his abilities as a builder, can be construed as less of a denial than an avoidance of the issue presented. Even if that denial had been absolute, which it certainly was not, publication of a statement in the face of denial, however vehement, does not constitute actual malice. *Edwards v. Nat'l Audubon Soc.*, 556 F.2d 113, 121 (2d Cir.) ("such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error."), cert. denied, sub nom. *Edwards v. N.Y. Times Co.*, 434 U.S. 1002, 98 S. Ct. 647, 54 L. Ed. 2d 498 (1977).

Additionally, as we have previously stated, O'Brien confirmed much of the information provided by the confidential sources, and, like the reporter in *Sprewell*, he sought to confirm the net worth numbers. In this regard, we note that in claiming that overwhelming evidence established the scale of Trump's wealth, Trump relied in large measure on a 2004 Statement of Financial Condition prepared by Weiser L.L.P., Certified Public Accountants, to which O'Brien was allegedly given access on three occasions including during the course of the April 21, 2005 meeting.

However, a preface to that Statement demonstrates its limited value as an accurate representation of Trump's net worth. There, the accountants cautioned that they had "not audited or reviewed the accompanying statement of financial condition and, accordingly, do not express an opinion or any other form of assurance on it." Further, the accountants noted significant departures from generally accepted accounting principles, and stated "[t]he effects of the departures from generally accepted accounting principles as described above have not been determined." Among the issues they found to exist was the fact that estimates of amounts to be received in the future did not reflect rights that were non-forfeitable, fixed and determinable and not dependent on future services. The values of Trump's closely held businesses were not expressed in terms of assets net of liabilities, and the ownership percentages of each closely held business held by Trump was not disclosed. Additionally, the tax consequences on Trump's holdings were not set forth. As a result, the accountants concluded:

Because the significance and pervasiveness of the matters discussed above make it difficult to assess their impact on the statement of financial condition, users of this financial statement should recognize that they might reach different conclusions about the financial condition of Donald J. Trump if they had access to a revised statement of financial condition prepared in conformity with generally accepted accounting principles.

Gerald Rosenblum, an accountant who participated in compiling the 2004 Statement of Financial Condition, was asked in his deposition whether he was aware of all liabilities of Trump and his related entities. He responded: “I asked the client to provide me with a list of liabilities as they existed at June 30th, 2005. The client presented me with a list, in essence. I’m not certain to this day that I was aware of all of Mr. Trump’s liabilities at that point in time, and I sought no corroboration.”

While O’Brien may have had “unprecedented” access to evidence of Trump’s financial position, nothing in the record suggests that such access was sufficient to permit an accurate estimate of his net worth. Further, it is indisputable that Trump’s estimates of his own worth changed substantially over time and thus failed to provide a reliable measure against which the accuracy of the information offered by the three confidential sources could be gauged. The following exchange from Trump’s deposition is illustrative of this point:

Q Now, Mr. Trump, have you always been completely truthful in your public statements about your net worth of properties?

A I try.

Q Have you ever not been truthful?

A My net worth fluctuates, and it goes up and down with markets and with attitudes and with feelings, even my own feelings, but I try.

Q Let me just understand that a little bit. Let’s talk about net worth for a second. You said that the net worth goes up and down based upon your own feelings?

A Yes, even my own feelings, as to where the world is, where the world is going, and that can change rapidly from day to day. Then you have a September 11th, and you don’t feel so good about yourself and you don’t feel so good about the world and you don’t feel so good about New York City. Then you have a year later, and the city is as hot as a pistol. Even months after that it was a different feeling.

So yeah, even my own feelings affect my value to myself.

...

Q When you publicly state what you’re worth, what do you base that number on?

...

A I would say it’s my general attitude at the time that the question may be asked. And as I say, it varies.

Further, as defendants note in their brief, other sources recognized the difficulty of estimating Trump's net worth and the wide spread of plausible values. Defendants quote a September 9, 2004 article in The Washington Post, which stated:

Actually, it's hard to know exactly what percent of Trump's net worth is tied to the casino business, because most of Trump's portfolio is in privately held companies that don't report earnings. He's described himself as "a billionaire many times over," but who knows? There are skeptics out there who believe Trump has \$300 million, tops. And the guy has a reputation for, let's say, shading the news in a light that reflects his enthusiasms.

An April 12, 2004 article, published in Time magazine stated:

How rich is the Donald? To interviewers, he hints that his wealth is somewhere between \$2 billion and \$6 billion. Rival developers estimate it's nowhere near even the lower figure.

The article continued by reporting on his successful redevelopment of a building at 40 Wall Street, but then balanced it with a report of his casinos "[s]wamped with debt" and the statement that "Trump has become more front man than hands-on developer."

An older Fortune article, published on April 3, 2000, noted that

Trump delights in the sort of elaborate shell games and impenetrably complex deals that frustrate the most conscientious efforts to assess a person's true worth. "It's always good to do things nice and complicated," he once told an interviewer, "so that nobody can figure it out."

That difficulty is compounded by Trump's astonishing ability to prevaricate. . . .

[W]hen Trump says he owns 10% of the Plaza Hotel, understand that what he actually means is that he has the right to 10% of the profit if it's ever sold. When he says he's building a "90-story building" next to the U.N., he means a 72-story building that has extra-high ceilings.

And, finally, defendants point to a January 19, 2000 article in The Wall Street Journal that noted Trump's boasts of his success but then stated:

But a look at the major sources of his wealth, including the Trump Place apartment development on New York City's west side, the 70-story Trump World Tower project and the midtown General Motors Building, shows that several of his billions are based on profits that are far in the future and far from guaranteed.

In summary, we find no evidence to support Trump's conclusion that the confidential sources utilized by O'Brien were fictitious. Maressa, *supra*, 89 N.J. at 198

(holding that “refusal to name [a] source cannot support an inference that no source existed”). Further we find no evidence to suggest that O’Brien’s reliance on the confidential sources suggested actual malice on O’Brien’s part under the standards established by *Maressa*, supra, 89 N.J. at 199-200, and *Sprewell*, supra, 841 N.Y.S.2d at 11. We find no basis for Trump’s argument that O’Brien had “obvious reasons to doubt the veracity of [his] informants or the accuracy of [their] reports.” *St. Amant v. Thompson*, 390 U.S. 727, 732, 88 S. Ct. 1323, 1326, 20 L. Ed. 2d 262, 268 (1968). There were no significant internal inconsistencies in the information provided by the confidential sources, nor was there “reliable” information that contradicted their reports, so as to provide evidence of actual malice. *Schiavone Constr. Co.*, supra, 847 F.2d at 1090. Nothing suggests that O’Brien was subjectively aware of the falsity of his source’s figures or that he had actual doubts as to the information’s accuracy. *Lawrence*, supra, 89 N.J. at 467-68 (citations omitted).

IV.

Trump contends additionally that factual issues precluded summary judgment. We concur with Judge Fox’s ruling to the contrary. In this regard, Trump claims that defendants’ position that Trump refused to provide O’Brien with evidence of the full extent of his liabilities was contradicted by evidence that Trump gave O’Brien “unprecedented access to his finances.” However, as we have illustrated previously, the materials that Trump claims to have provided to O’Brien were incomplete and unaudited, and did not contain accurate indications of Trump’s ownership interests in properties, his liabilities, and his revenues, present or future. Although O’Brien’s access may have been “unprecedented,” that term must be interpreted in relation to the access provided to others and not in relation to Trump’s entire financial picture.

Trump claims a dispute of fact as to whether O’Brien took notes at meetings with Trump’s staff, particularly the meeting of April 21, 2005. However, neither Weisselberg nor Lokey denied that note-taking occurred; they stated only that they did not “recall” note-taking. Moreover, even if a factual dispute existed on this matter, it is not material to the issue of whether Trump can produce clear and convincing evidence of O’Brien’s actual malice.

Trump argues that O’Brien told Lokey at the time of the April meeting that he was uninterested in looking at the materials she had compiled because the book had already been written. Further, he contends on the basis of statements of O’Brien’s research assistant, Joseph Plambeck, that he investigated only Trump’s “Mojo,” that O’Brien’s statement to the contrary that Plambeck did substantive research into the value of buildings was false and that O’Brien’s research was thus inadequate.

However, that argument ignores the fact that O’Brien had been researching and writing about Trump for years. Moreover, his failure to conduct research could, at most, be considered evidence of negligence, not actual malice. *Schiavone Constr. Co.*, supra,

847 F.2d at 1090 (citing *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 153-54, 87 S. Ct. 1975, 1991, 18 L. Ed. 2d 1094, 1110 (1967); *Sullivan*, supra, 376 U.S. at 287, 84 S. Ct. at 730, 11 L. Ed. 2d at 710-11; *E. H. McDowell v. Paiewonsky*, 769 F.2d 942, 951 (3d Cir. 1985)).

Additionally, Trump contends that, despite O'Brien's knowledge that Trump "owned" West Side Yards, O'Brien falsely published in TrumpNation that he did not own the property. However, the evidence is clear that Trump's thirty-percent interest was only in limited partnerships with the Hong Kong owners, and indeed he admitted as much at his deposition. Thus any factual dispute about "ownership" appears a matter of semantics.

Further, Trump admitted in his deposition that, under the partnership agreement, the general partners would have to recover their entire investment before Trump would see any return. As a consequence, his future profits remained speculative. Additionally, the record discloses that the Hong Kong general partners were solely responsible for the sale of the property, and after it was sold by them for \$1.76 billion, they were sued by Trump in Federal Court for undervaluing the real estate and thereby reducing his return. What that return would be remains speculative, because encumbrances on the property were not disclosed by Trump.

Trump contends also that O'Brien was motivated by ill will in publishing the information that he did about Trump. However, even if we assume such to be the case, ill will does not constitute actual malice. *Maressa*, supra, 89 N.J. at 199. Rather, malice concerns the publisher's "state of knowledge of the falsity of what he published, not at all upon his motivation in publishing it" *Lawrence*, supra, 89 N.J. at 468 (quoting *Herbert v. Lando*, 441 U.S. 153, 199-200, 99 S. Ct. 1635, 1660-61, 60 L. Ed. 2d 115, 148-49 (Stewart, J., dissenting) (1979)).

V.

In his third argument, Trump contends that he opposed O'Brien's motion for summary judgment with sufficient direct and circumstantial evidence that O'Brien either knew his source's estimates of Trump's net worth were false, or that O'Brien recklessly disregarded the fact that those estimates were false to support a jury verdict in his favor or, at a minimum, to survive summary judgment. In large measure, we have addressed Trump's arguments elsewhere in this opinion, in particular, his argument that O'Brien had reason to doubt the credibility of his sources and that he published their estimates in reckless disregard of their falsity, his argument that O'Brien purposefully avoided evidence establishing Trump's net worth, and his argument that O'Brien was motivated by ill will.

We reject Trump's additional argument that O'Brien improperly ignored Trump's interest in the "Trump" brand. As Trump's accountants acknowledge in the 2004

Statement of Financial Condition, under generally accepted accounting principles, reputation is not considered a part of a person's net worth.⁴

Trump notes additionally that in the article written three days before the publication of TrumpNation, O'Brien acknowledged that the value of Trump's casinos had rebounded. However, that statement in itself provides no evidence of actual malice. Moreover, it is difficult to conceive how this evidence of enhanced financial condition could reasonably have been incorporated in a book that had already been printed and was awaiting release.

A further argument is made that, after being provided with an advance copy of the book, Trump and his attorneys alerted the Business Editor of The Times that the book contained glaring falsehoods, and that the editor discussed the matter with O'Brien. Nonetheless, publication occurred. However, the issue is not whether the book contained false statements, but rather, whether it contained defamatory statements made with actual malice. The letters sent to the Business Editor contained no particularized information that would have placed O'Brien on notice as to the inaccuracy of his statements.

As a consequence of the foregoing, we find no triable issue as to the existence of actual malice in this matter, and for that reason, affirm summary judgment for O'Brien. Absent actual malice on his part, respondeat superior liability cannot arise.⁵ Thus we find that summary judgment was also properly granted to the publishing defendants.

Affirmed.

⁴ Trump contends that O'Brien acknowledged that his name was a valuable asset, calling it "bigger than Coke and Pepsi." That statement is incorrect. The claim was reported in a BusinessWeek article as emanating from Trump himself.

⁵ We do not address the issue of agency, but note that evidence of such would also be required.

VI. WHAT IS MASSON V NEW YORKER?

MASSON v. NEW YORKER MAGAZINE, INC.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

No. 89-1799

M. MASSON, PETITIONER v. NEW YORKER MAGAZINE, INC., ALFRED A. KNOPE, INC. and JANET MALCOLM

[June 20, 1991]

Justice Kennedy delivered the opinion of the Court.

In this libel case, a public figure claims he was defamed by an author who, with full knowledge of the inaccuracy, used quotation marks to attribute to him comments he had not made. The First Amendment protects authors and journalists who write about public figures by requiring a plaintiff to prove that the defamatory statements were made with what we have called “actual malice,” a term of art denoting deliberate or reckless falsification. We consider in this opinion whether the attributed quotations had the degree of falsity required to prove this state of mind, so that the public figure can defeat a motion for summary judgment and proceed to a trial on the merits of the defamation claim.

I

Petitioner Jeffrey Masson trained at Harvard University as a Sanskrit scholar, and in 1970 became a professor of Sanskrit & Indian Studies at the University of Toronto. He spent eight years in psychoanalytic training, and qualified as an analyst in 1978. Through his professional activities, he came to know Dr. Kurt Eissler, head of the Sigmund Freud Archives, and Dr. Anna Freud, daughter of Sigmund Freud and a major psychoanalyst in her own right. The Sigmund Freud Archives, located at Maresfield Gardens outside of London, serves as a repository for materials about Freud, including his own writings, letters, and personal library. The materials, and the right of access to them, are of immense value to those who study Freud, his theories, life and work.

In 1980, Eissler and Anna Freud hired petitioner as Projects Director of the Archives. After assuming his post, petitioner became disillusioned with Freudian psychology. In a 1981 lecture before the Western New England Psychoanalytical Society

in New Haven, Connecticut, he advanced his theories of Freud. Soon after, the Board of the Archives terminated petitioner as Projects Director.

Respondent Janet Malcolm is an author and a contributor to respondent *The New Yorker*, a weekly magazine. She contacted petitioner in 1982 regarding the possibility of an article on his relationship with the Archives. He agreed, and the two met in person and spoke by telephone in a series of interviews. Based on the interviews and other sources, Malcolm wrote a lengthy article. One of Malcolm's narrative devices consists of enclosing lengthy passages in quotation marks, reporting statements of Masson, Eissler, and her other subjects.

During the editorial process, Nancy Franklin, a member of the fact-checking department at *The New Yorker*, called petitioner to confirm some of the facts underlying the article. According to petitioner, he expressed alarm at the number of errors in the few passages Franklin discussed with him. Petitioner contends that he asked permission to review those portions of the article which attributed quotations or information to him, but was brushed off with a never-fulfilled promise to "get back to [him]." App. 67. Franklin disputes petitioner's version of their conversation. App. 246-247.

The New Yorker published Malcolm's piece in December 1983, as a two-part series. In 1984, with knowledge of at least petitioner's general allegation that the article contained defamatory material, respondent Alfred A. Knopf, Inc., published the entire work as a book, entitled *In the Freud Archives*.

Malcolm's work received complimentary reviews. But this gave little joy to Masson, for the book portrays him in a most unflattering light. According to one reviewer,

"Masson the promising psychoanalytic scholar emerges gradually, as a grandiose egotist — mean-spirited, self-serving, full of braggadocio, impossibly arrogant and, in the end, a self-destructive fool. But it is not Janet Malcolm who calls him such: his own words reveal this psychological profile — a self-portrait offered to us through the efforts of an observer and listener who is, surely, as wise as any in the psychoanalytic profession." Coles, *Freudianism Confronts Its Malcontents*, *Boston Globe*, May 27, 1984, pp. 58, 60.

Petitioner wrote a letter to the *New York Times Book Review* calling the book "distorted." In response, Malcolm stated:

"Many of [the] things Mr. Masson told me (on tape) were discreditable to him, and I felt it best not to include them. Everything I do quote Mr. Masson as saying was said by him, almost word for word. (The 'almost' refers to changes made for the sake of correct syntax.) I would be glad to play the tapes of my conversation with Mr. Masson to

the editors of The Book Review whenever they have 40 or 50 short hours to spare.” App. 222-223.

Petitioner brought an action for libel under California law in the United States District Court for the Northern District of California. During extensive discovery and repeated amendments to the complaint, petitioner concentrated on various passages alleged to be defamatory, dropping some and adding others. The tape recordings of the interviews demonstrated that petitioner had, in fact, made statements substantially identical to a number of the passages, and those passages are no longer in the case. We discuss only the passages relied on by petitioner in his briefs to this Court.

Each passage before us purports to quote a statement made by petitioner during the interviews. Yet in each instance no identical statement appears in the more than 40 hours of taped interviews. Petitioner complains that Malcolm fabricated all but one passage; with respect to that passage, he claims Malcolm omitted a crucial portion, rendering the remainder misleading.

(a) “Intellectual Gigolo.” Malcolm quoted a description by petitioner of his relationship with Eissler and Anna Freud as follows:

“‘Then I met a rather attractive older graduate student and I had an affair with her. One day, she took me to some art event, and she was sorry afterward. She said, ‘Well, it is very nice sleeping with you in your room, but you’re the kind of person who should never leave the room — you’re just a social embarrassment anywhere else, though you do fine in your own room.’ And you know, in their way, if not in so many words, Eissler and Anna Freud told me the same thing. They like me well enough ‘in my own room.’ They loved to hear from me what creeps and dolts analysts are. I was like an intellectual gigolo — you get your pleasure from him, but you don’t take him out in public. . . .’” In the Freud Archives 38.

The tape recordings contain the substance of petitioner’s reference to his graduate student friend, App. 95, but no suggestion that Eissler or Anna Freud considered him, or that he considered himself, an “intellectual gigolo.” Instead, petitioner said:

“They felt, in a sense, I was a private asset but a public liability. . . . They liked me when I was alone in their living room, and I could talk and chat and tell them the truth about things and they would tell me. But that I was, in a sense, much too junior within the hierarchy of analysis, for these important training analysts to be caught dead with me.” *Id.*, at 104.

(b) “Sex, Women, Fun.” Malcolm quoted petitioner as describing his plans for Maresfield Gardens, which he had hoped to occupy after Anna Freud’s death:

“‘It was a beautiful house, but it was dark and sombre and dead. Nothing ever went on there. I was the only person who ever came. I would have renovated it, opened it up, brought it to life. Maresfield Gardens would have been a center of scholarship, but it would also have been a place of sex, women, fun. It would have been like the change in *The Wizard of Oz*, from black-and-white into color.’” In the Freud Archives 33.

The tape recordings contain a similar statement, but in place of the reference to “sex, women, fun,” and *The Wizard of Oz*, petitioner commented:

“[I]t is an incredible storehouse. I mean, the library, Freud’s library alone is priceless in terms of what it contains: all his books with his annotations in them; the Schreber case annotated, that kind of thing. It’s fascinating.” App. 127.

Petitioner did talk, earlier in the interview, of his meeting with a London analyst:

“I like him. So, and we got on very well. That was the first time we ever met and you know, it was buddybuddy, and we were to stay with each other and [laughs] we were going to pass women on to each other, and we were going to have a great time together when I lived in the Freud house. We’d have great parties there and we were [laughs] —

. . . .

“. . . going to really, we were going to live it up.” *Id.*, at 129.

(c) “It Sounded Better.” Petitioner spoke with Malcolm about the history of his family, including the reasons his grandfather changed the family name from Moussaieff to Masson, and why petitioner adopted the abandoned family name as his middle name. The article contains the passage:

“‘My father is a gem merchant who doesn’t like to stay in any one place too long. His father was a gem merchant, too — a Bessarabian gem merchant, named Moussaieff, who went to Paris in the twenties and adopted the name Masson. My parents named me Jeffrey Lloyd Masson, but in 1975 I decided to change my middle name to Moussaieff — it sounded better.’” In the Freud Archives 36.

In the most similar tape recorded statement, Masson explained at considerable length that his grandfather had changed the family name from Moussaieff to Masson when living in France, “[j]ust to hide his Jewishness.” Petitioner had changed his last name back to Moussaieff, but his then wife Terry objected that “nobody could pronounce it and nobody knew how to spell it, and it wasn’t the name that she knew me by.” Petitioner had changed his name to Mous saieff because he “just liked it.” “[I]t was sort of part of analysis: a return to the roots, and your family tradition and so on.” In the end,

he had agreed with Terry that “it wasn’t her name after all,” and used Moussaieff as a middle instead of a last name. App. 87-89.

(d) “I Don’t Know Why I Put It In.” The article recounts part of a conversation between Malcolm and petitioner about the paper petitioner presented at his 1981 New Haven lecture:

“[I] asked him what had happened between the time of the lecture and the present to change him from a Freudian psychoanalyst with somewhat outre views into the bitter and belligerent anti-Freudian he had become.

“Masson sidestepped my question. ‘You’re right, there was nothing disrespectful of analysis in that paper,’ he said. ‘That remark about the sterility of psychoanalysis was something I tacked on at the last minute, and it was totally gratuitous. I don’t know why I put it in.’” In the Freud Archives 53.

The tape recordings instead contain the following discussion of the New Haven lecture:

Masson: “So they really couldn’t judge the material. And, in fact, until the last sentence I think they were quite fascinated. I think the last sentence was an in, [sic] possibly, gratuitously offensive way to end a paper to a group of analysts. Uh, — ”

Malcolm: “What were the circumstances under which you put it [in]? . . .”

Masson: “That it was, was true.

. . . .

“ . . . I really believe it. I didn’t believe anybody would agree with me.

. . . .

“ . . . But I felt I should say something because the paper’s still well within the analytic tradition in a sense. . . .

. . . .

“ . . . It’s really not a deep criticism of Freud. It contains all the material that would allow one to criticize Freud but I didn’t really do it. And then I thought, I really must say one thing that I really believe, that’s not going to appeal to anybody and that was the very last sentence. Because I really do believe psychoanalysis is entirely sterile” App. 176.

(e) “Greatest Analyst Who Ever Lived.” The article contains the following self-explanatory passage:

“A few days after my return to New York, Masson, in a state of elation, telephoned me to say that Farrar, Straus & Giroux has taken *The Assault on Truth* [Masson’s book]. ‘Wait till it reaches the best-seller list, and watch how the analysts will crawl,’ he crowed. ‘They move whichever way the wind blows. They will want me back, they will say that Masson is a great scholar, a major analyst — after Freud, he’s the greatest analyst who ever lived. Suddenly they’ll be calling, begging, cajoling: “Please take back what you’ve said about our profession; our patients are quitting.” They’ll try a short smear campaign, then they’ll try to buy me, and ultimately they’ll have to shut up. Judgment will be passed by history. There is no possible refutation of this book. It’s going to cause a revolution in psychoanalysis. Analysis stands or falls with me now.’” In the Freud Archives 162.

This material does not appear in the tape recordings. Petitioner did make the following statements on related topics in one of the taped interviews with Malcolm:

“... I assure you when that book comes out, which I honestly believe is an honest book, there is nothing, you know, mean-minded about it. It’s the honest fruit of research and intellectual toil. And there is not an analyst in the country who will say a single word in favor of it.” App. 136.

“Talk to enough analysts and get them right down to these concrete issues and you watch how different it is from my position. It’s utterly the opposite and that’s finally what I realized, that I hold a position that no other analyst holds, including, alas, Freud. At first I thought: Okay, it’s me and Freud against the rest of the analytic world, or me and Freud and Anna Freud and Kur[t] Eissler and Vic Calef and Brian Bird and Sam Lipton against the rest of the world. Not so, it’s me. it’s me alone.” Id., at 139.

The tape of this interview also contains the following exchange between petitioner and Malcolm:

Masson: “. . . analysis stands or falls with me now.”

Malcolm: “Well that’s a very grandiose thing to say.”

Masson: “Yeah, but it’s got nothing to do with me. It’s got to do with the things I discovered.” Id., at 137.

(f) “He Had The Wrong Man.” In discussing the Archives’ board meeting at which petitioner’s employment was terminated, Malcolm quotes petitioner as giving the following explanation of Eissler’s attempt to extract a promise of confidentiality:

“‘[Eissler] was always putting moral pressure on me. ‘Do you want to poison Anna Freud’s last days? Have you no heart? You’re going to kill the poor old woman.’ I said to him, ‘What have I done? You’re doing it. You’re firing me. What am I supposed to do — be grateful to you?’ ‘You could be silent about it. You could swallow it. I know it is painful for you. But you could just live with it in silence.’ ‘Why should I do that?’ ‘Because it is the honorable thing to do.’ Well, he had the wrong man.’” In the Freud Archives 67.

From the tape recordings, on the other hand, it appears that Malcolm deleted part of petitioner’s explanation (italicized below), and petitioner argues that the “wrong man” sentence relates to something quite different from Eissler’s entreaty that silence was “the honorable thing.” In the tape recording, petitioner states:

“But it was wrong of Eissler to do that, you know. He was constantly putting various kinds of moral pressure on me and, ‘Do you want to poison Anna Freud’s last days? Have you no heart?’ He called me: ‘Have you no heart? You’re going to kill the poor old woman. Have you no heart? Think of what she’s done for you and you are now willing to do this to her.’ I said, ‘What have I, what have I done? You did it. You fired me. What am I supposed to do: thank you? be grateful to you?’ He said, ‘Well you could never talk about it. You could be silent about it. You could swallow it. I know it’s painful for you but just live with it in silence.’ ‘Fuck you,’ I said, ‘Why should I do that? Why? You know, why should one do that?’ ‘Because it’s the honorable thing to do and you will save face. And who knows? If you never speak about it and you quietly and humbly accept our judgment, who knows that in a few years if we don’t bring you back?’ Well, he had the wrong man.” App. 215-216.

Malcolm submitted to the District Court that not all of her discussions with petitioner were recorded on tape, in particular conversations that occurred while the two of them walked together or traveled by car, while petitioner stayed at Malcolm’s home in New York, or while her tape recorder was inoperable. She claimed to have taken notes of these unrecorded sessions, which she later typed, then discarding the handwritten originals. Petitioner denied that any discussion relating to the substance of the article occurred during his stay at Malcolm’s home in New York, that Malcolm took notes during any of their conversations, or that Malcolm gave any indication that her tape recorder was broken.

Respondents moved for summary judgment. The parties agreed that petitioner was a public figure and so could escape summary judgment only if the evidence in the record would permit a reasonable finder of fact, by clear and convincing evidence, to

conclude that respondents published a defamatory statement with actual malice as defined by our cases. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (/supct-cgi/get-us-cite?477+242), 255-256 (1986). The District Court analyzed each of the passages and held that the alleged inaccuracies did not raise a jury question. The court found that the allegedly fabricated quotations were either substantially true, or were “‘one of a number of possible rational interpretations’ of a conversation or event that ‘bristled with ambiguities,’” and thus were entitled to constitutional protection. 686 F. Supp. 1396, 1399 (1987) (quoting *Bose Corp. v. Consumer’s Union of the United States, Inc.*, 466 U.S. 485 (/supct-cgi/get-us-cite?466+485), 512 (1984)). The court also ruled that the “he had the wrong man” passage involved an exercise of editorial judgment upon which the courts could not intrude. 686 F. Supp., at 1403-1404.

The Court of Appeals affirmed, with one judge dissenting. 895 F. 2d 1535 (CA9 1989). The court assumed for much of its opinion that Malcolm had deliberately altered each quotation not found on the tape recordings, but nevertheless held that petitioner failed to raise a jury question of actual malice, in large part for the reasons stated by the District Court. In its examination of the “intellectual gigolo” passage, the court agreed with the District Court that petitioner could not demonstrate actual malice because Malcolm had not altered the substantive content of petitioner’s self-description, but went on to note that it did not consider the “intellectual gigolo” passage defamatory, as the quotation merely reported Kurt Eissler’s and Anna Freud’s opinions about petitioner. In any event, concluded the court, the statement would not be actionable under the “‘incremental harm branch’ of the ‘libelproof’ doctrine,” *id.*, at 1541 (quoting *Herbert v. Lando*, 781 F. 2d 298, 310-311 (CA2 1986)).

The dissent argued that any intentional or reckless alteration would prove actual malice, so long as a passage within quotation marks purports to be a verbatim rendition of what was said, contains material inaccuracies, and is defamatory. 895 F. 2d, at 1562-1570. We granted certiorari, 498 U.S. — (1990), and now reverse.

II

A

Under California law, “[l]ibel is a false and unprivileged publication by writing . . . which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.” Cal. Civ. Code Ann. 45 (West 1982). False attribution of statements to a person may constitute libel, if the falsity exposes that person to an injury comprehended by the statute. See *Selleck v. Globe International, Inc.*, 166 Cal. App. 3d 1123, 1132, 212 Cal. Rptr. 838, 844 (1985); *Cameron v. Wernick*, 251 Cal. App. 2d 890, 60 Cal. Rptr. 102 (1967); *Kerby v. Hal Roach Studios, Inc.*, 53 Cal. App. 2d 207, 213, 127 P. 2d 577, 581 (1942); cf. *Baker v. Los Angeles Herald Examiner*, 42 Cal. 3d 254, 260-261, 721 P. 2d 87, 90-91 (1986). It matters not under California law that petitioner alleges only part of

the work at issue to be false. “[T]he test of libel is not quantitative; a single sentence may be the basis for an action in libel even though buried in a much longer text,” though the California courts recognize that “[w]hile a drop of poison may be lethal, weaker poisons are sometimes diluted to the point of impotency.” *Washburn v. Wright*, 261 Cal. App. 2d 789, 795, 68 Cal. Rptr. 224, 228 (1968).

The First Amendment (/supct-cgi/get-const?billofrights.html#amendmenti) limits California’s libel law in various respects. When, as here, the plaintiff is a public figure, he cannot recover unless he proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice, i. e., with “knowledge that it was false or with reckless disregard of whether it was false or not.” *New York Times Co. v. Sullivan*, 376 U.S. 254 (/sucpt-cgi/get-us-cite?376+254), 279-280 (1964). Mere negligence does not suffice. Rather, the plaintiff must demonstrate that the author “in fact entertained serious doubts as to the truth of his publication,” *St. Amant v. Thompson*, 390 U.S. 727 (supct-dgi/get-us-cite?390+727), 731 (1968), or acted with a “high degree of awareness of . . . probable falsity,” *Garrison v. Louisiana*, 379 U.S. 64 (/supct-cgi-get-us-cite?379+64), 74 (1964).

Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will. See *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, 398 U.S. 6 (/supct-cgi-get-us-cite?398+6) (1970). We have used the term actual malice as a shorthand to describe the First Amendment (/supct-cgi/get-const?billofrights.html#amendmenti) protections for speech injurious to reputation and we continue to do so here. But the term can confuse as well as enlighten. In this respect, the phrase may be an unfortunate one. See *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (/supct-cgi-get-us-cite?491+657), 666, n. 7 (1989). In place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity. This definitional principle must be remembered in the case before us.

B

In general, quotation marks around a passage indicate to the reader that the passage reproduces the speaker’s words verbatim. They inform the reader that he or she is reading the statement of the speaker, not a paraphrase or other indirect interpretation by an author. By providing this information, quotations add authority to the statement and credibility to the author’s work. Quotations allow the reader to form his or her own conclusions, and to assess the conclusions of the author, instead of relying entirely upon the author’s characterization of her subject.

A fabricated quotation may injure reputation in at least two senses, either giving rise to a conceivable claim of defamation. First, the quotation might injure because it attributes an untrue factual assertion to the speaker. An example would be a fabricated

quotation of a public official admitting he had been convicted of a serious crime when in fact he had not.

Second, regardless of the truth or falsity of the factual matters asserted within the quoted statement, the attribution may result in injury to reputation because the manner of expression or even the fact that the statement was made indicates a negative personal trait or an attitude the speaker does not hold. John Lennon once was quoted as saying of the Beatles, “We’re more popular than Jesus Christ now.” *Time*, Aug. 12, 1966, p. 38. Supposing the quotation had been a fabrication, it appears California law could permit recovery for defamation because, even without regard to the truth of the underlying assertion, false attribution of the statement could have injured his reputation. Here, in like manner, one need not determine whether petitioner is or is not the greatest analyst who ever lived in order to determine that it might have injured his reputation to be reported as having so proclaimed.

A self-condemnatory quotation may carry more force than criticism by another. It is against self-interest to admit one’s own criminal liability, arrogance, or lack of integrity, and so all the more easy to credit when it happens. This principle underlies the elemental rule of evidence which permits the introduction of admissions, despite their hearsay character, because we assume “that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true.” Advisory Committee’s Notes on Fed. Rule Evid. 804(b)(3), 28 U.S.C. App., p. 789 (citing *Hileman v. Northwest Engineering Co.*, 346 F. 2d 668 (CA6 1965)).

Of course, quotations do not always convey that the speaker actually said or wrote the quoted material. “Punctuation marks, like words, have many uses. Writers often use quotation marks, yet no reasonable reader would assume that such punctuation automatically implies the truth of the quoted material.” *Baker v. Los Angeles Examiner*, 42 Cal. 3d, at 263, 721 P. 2d, at 92. In *Baker*, a television reviewer printed a hypothetical conversation between a station vice president and writer/producer, and the court found that no reasonable reader would conclude the plaintiff in fact had made the statement attributed to him. *Id.*, at 267, 721 P. 2d, at 95. Writers often use quotations as in *Baker*, and a reader will not reasonably understand the quotations to indicate reproduction of a conversation that took place. In other instances, an acknowledgement that the work is so-called docudrama or historical fiction, or that it recreates conversations from memory, not from recordings, might indicate that the quotations should not be interpreted as the actual statements of the speaker to whom they are attributed.

The work at issue here, however, as with much journalistic writing, provides the reader no clue that the quotations are being used as a rhetorical device or to paraphrase the speaker’s actual statements. To the contrary, the work purports to be nonfiction, the result of numerous interviews. At least a trier of fact could so conclude. The work contains lengthy quotations attributed to petitioner, and neither Malcolm nor her publishers indicate to the reader that the quotations are anything but the reproduction of

actual conversations. Further, the work was published in *The New Yorker*, a magazine which at the relevant time seemed to enjoy a reputation for scrupulous factual accuracy. These factors would, or at least could, lead a reader to take the quotations at face value. A defendant may be able to argue to the jury that quotations should be viewed by the reader as nonliteral or reconstructions, but we conclude that a trier of fact in this case could find that the reasonable reader would understand the quotations to be nearly verbatim reports of statements made by the subject.

C

The constitutional question we must consider here is whether, in the framework of a summary judgment motion, the evidence suffices to show that respondents acted with the requisite knowledge of falsity or reckless disregard as to truth or falsity. This inquiry in turn requires us to consider the concept of falsity; for we cannot discuss the standards for knowledge or reckless disregard without some understanding of the acts required for liability. We must consider whether the requisite falsity inheres in the attribution of words to the petitioner which he did not speak.

In some sense, any alteration of a verbatim quotation is false. But writers and reporters by necessity alter what people say, at the very least to eliminate grammatical and syntactical infelicities. If every alteration constituted the falsity required to prove actual malice, the practice of journalism, which the First Amendment ([/sucpt-cgi/get-const?billofrights.html#amendmenti](#)) standard is designed to protect, would require a radical change, one inconsistent with our precedents and First Amendment ([/sucpt-cgi/get-const?billofrights.html#amendmenti](#)) principles. Petitioner concedes this absolute definition of falsity in the quotation context is too stringent, and acknowledges that “minor changes to correct for grammar or syntax” do not amount to falsity for purposes of proving actual malice. Brief for Petitioner 18, 36-37. We agree, and must determine what, in addition to this technical falsity, proves falsity for purposes of the actual malice inquiry.

Petitioner argues that, excepting correction of grammar or syntax, publication of a quotation with knowledge that it does not contain the words the public figure used demonstrates actual malice. The author will have published the quotation with knowledge of falsity, and no more need be shown. Petitioner suggests that by invoking more forgiving standards the Court of Appeals would permit and encourage the publication of falsehoods. Petitioner believes that the intentional manufacture of quotations does not “represent[t] the sort of inaccuracy that is commonplace in the forum of robust debate to which the New York Times rule applies,” *Bose Corp.*, 466 U.S., at 513, and that protection of deliberate falsehoods would hinder the First Amendment ([/sucpt-cgi/get-const?billofrights.html#amendmenti](#)) values of robust and well-informed public debate by reducing the reliability of information available to the public.

We reject the idea that any alteration beyond correction of grammar or syntax by itself proves falsity in the sense relevant to determining actual malice under the First Amendment. An interviewer who writes from notes often will engage in the task of attempting a reconstruction of the speaker's statement. That author would, we may assume, act with knowledge that at times she has attributed to her subject words other than those actually used. Under petitioner's proposed standard, an author in this situation would lack First Amendment (supct-cgi/get-const?billofrights.html#amendmenti) protection if she reported as quotations the substance of a subject's derogatory statements about himself.

Even if a journalist has tape recorded the spoken statement of a public figure, the full and exact statement will be reported in only rare circumstances. The existence of both a speaker and a reporter; the translation between two media, speech and the printed word; the addition of punctuation; and the practical necessity to edit and make intelligible a speaker's perhaps rambling comments, all make it misleading to suggest that a quotation will be reconstructed with complete accuracy. The use or absence of punctuation may distort a speaker's meaning, for example, where that meaning turns upon a speaker's emphasis of a particular word. In other cases, if a speaker makes an obvious misstatement, for example by unconscious substitution of one name for another, a journalist might alter the speaker's words but preserve his intended meaning. And conversely, an exact quotation out of context can distort meaning, although the speaker did use each reported word.

In all events, technical distinctions between correcting grammar and syntax and some greater level of alteration do not appear workable, for we can think of no method by which courts or juries would draw the line between cleaning up and other changes, except by reference to the meaning a statement conveys to a reasonable reader. To attempt narrow distinctions of this type would be an unnecessary departure from First Amendment ([/supct-cgi/get-const?billofrights.html#amendmenti](https://supct-cgi/get-const?billofrights.html#amendmenti)) principles of general applicability, and, just as important, a departure from the underlying purposes of the tort of libel as understood since the latter half of the 16th century. From then until now, the tort action for defamation has existed to redress injury to the plaintiff's reputation by a statement that is defamatory and false. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (supct-cgi/get-us-cite?497+1), — (1990). As we have recognized, “[t]he legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 341 ([/supct-cgi/get-us-cite?418+341](https://supct-cgi/get-us-cite?418+341)) (1974). If an author alters a speaker's words but effects no material change in meaning, including any meaning conveyed by the manner or fact of expression, the speaker suffers no injury to reputation that is compensable as a defamation.

These essential principles of defamation law accommodate the special case of inaccurate quotations without the necessity for a discrete body of jurisprudence directed

to this subject alone. Last Term, in *Milkovich v. Lorain Journal Co.*, we refused “to create a wholesale defamation exemption for anything that might be labeled ‘opinion.’” 497 U.S., at — (slip op., at 16) (citation omitted). We recognized that “expressions of ‘opinion’ may often imply an assertion of objective fact.” *Ibid.* We allowed the defamation action to go forward in that case, holding that a reasonable trier of fact could find that the so-called expressions of opinion could be interpreted as including false assertions as to factual matters. So too in the case before us, we reject any special test of falsity for quotations, including one which would draw the line at correction of grammar or syntax. We conclude, rather, that the exceptions suggested by petitioner for grammatical or syntactical corrections serve to illuminate a broader principle.

The common law of libel takes but one approach to the question of falsity, regardless of the form of the communication. See Restatement (Second) of Torts 563, Comment c (1977); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* 776 (5th ed. 1984). It overlooks minor inaccuracies and concentrates upon substantial truth. As in other jurisdictions, California law permits the defense of substantial truth, and would absolve a defendant even if she cannot “justify every word of the alleged defamatory matter; it is sufficient if the substance of the charge be proved true, irrespective of slight inaccuracy in the details.” B. Witkin, *Summary of California Law*, 495 (9th ed. 1988) (citing cases). In this case, of course, the burden is upon petitioner to prove falsity. See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (/supct/cgi/get-us-cite?475-767), 775 (1986). The essence of that inquiry, however, remains the same whether the burden rests upon plaintiff or defendant. Minor inaccuracies do not amount to falsity so long as “the substance, the gist, the sting, of the libelous charge be justified.” *Heuer v. Kee*, 15 Cal. App. 2d 710, 714, 59 P. 2d 1063, 1064 (1936); see also *Alioto v. Cowles Communications, Inc.*, 623 F. 2d 616, 619 (CA9 1980); *Maheu v. Hughes Tool Co.*, 569 F. 2d 459, 465-466 (CA9 1978). Put another way, the statement is not considered false unless it “would have a different effect on the mind of the reader from that which the pleaded truth would have produced.” R. Sack, *Libel, Slander, and Related Problems* 138 (1980); see, e. g., *Wheling v. Columbia Broadcasting System, Inc.*, 721 F. 2d 506, 509 (CA5 1983); see generally R. Smolla, *Law of Defamation* 5.08 (1991). Our definition of actual malice relies upon this historical understanding.

We conclude that a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for purposes of *New York Times Co. v. Sullivan*, 376 U.S., at 279-280, and *Gertz v. Robert Welch, Inc.*, *supra*, at 342, unless the alteration results in a material change in the meaning conveyed by the statement. The use of quotations to attribute words not in fact spoken bears in a most important way on that inquiry, but it is not dispositive in every case.

Deliberate or reckless falsification that comprises actual malice turns upon words and punctuation only because words and punctuation express meaning. Meaning is the

life of language. And, for the reasons we have given, quotations may be a devastating instrument for conveying false meaning. In the case under consideration, readers of *In the Freud Archives* may have found Malcolm's portrait of petitioner especially damning because so much of it appeared to be a self-portrait, told by petitioner in his own words. And if the alterations of petitioner's words gave a different meaning to the statements, bearing upon their defamatory character, then the device of quotations might well be critical in finding the words actionable.

D

The Court of Appeals applied a test of substantial truth which, in exposition if not in application, comports with much of the above discussion. The Court of Appeals, however, went one step beyond protection of quotations that convey the meaning of a speaker's statement with substantial accuracy and concluded that an altered quotation is protected so long as it is a "rational interpretation" of an actual statement, drawing this standard from our decisions in *Time, Inc. v. Pape*, 401 U.S. 279 ([/supct-cgi/get-us-cite?401+279](#)) (1971), and *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 ([/supct-cgi/get-us-cite?466+485](#)) (1984). Application of our protection for rational interpretation in this context finds no support in general principles of defamation law or in our First Amendment ([/supct-cgi/get-const?billofrights.html#amendmenti](#)) jurisprudence. Neither *Time, Inc. v. Pape*, nor *Bose Corp.*, involved the fabrication of quotations, or any analogous claim, and because many of the quotations at issue might reasonably be construed to state or imply factual assertions that are both false and defamatory, we cannot accept the reasoning of the Court of Appeals on this point.

In *Time, Inc. v. Pape*, we reversed a libel judgment which arose out of a magazine article summarizing a report by the United States Commission on Civil Rights discussing police civil rights abuses. The article quoted the Commission's summary of the facts surrounding an incident of police brutality, but failed to include the Commission's qualification that these were allegations taken from a civil complaint. The Court noted that "the attitude of the Commission toward the factual verity of the episodes recounted was anything but straightforward," and distinguished between a "direct account of events that speak for themselves," 401 U.S., at 285, 286, and an article descriptive of what the Commission had reported. *Time, Inc. v. Pape* took into account the difficult choices that confront an author who departs from direct quotation and offers his own interpretation of an ambiguous source. A fair reading of our opinion is that the defendant did not publish a falsification sufficient to sustain a finding of actual malice.

In *Bose Corp.*, a Consumer Reports reviewer had attempted to describe in words the experience of listening to music through a pair of loudspeakers, and we concluded that the result was not an assessment of events that speak for themselves, but "'one of a number of possible rational interpretations' of an event 'that bristled with ambiguities' and descriptive challenges for the writer." 466 U.S., at 512 (quoting *Time, Inc. v. Pape*, *supra*, at 290). We refused to permit recovery for choice of language which, though

perhaps reflecting a misconception, represented “the sort of inaccuracy that is commonplace in the forum of robust debate to which the New York Times rule applies.” 466 U.S., at 513.

The protection for rational interpretation serves First Amendment principles by allowing an author the interpretive license that is necessary when relying upon ambiguous sources. Where, however, a writer uses a quotation, and where a reasonable reader would conclude that the quotation purports to be a verbatim repetition of a statement by the speaker, the quotation marks indicate that the author is not involved in an interpretation of the speaker’s ambiguous statement, but attempting to convey what the speaker said. This orthodox use of a quotation is the quintessential “direct account of events that speak for themselves.” *Time, Inc. v. Pape*, supra, at 285. More accurately, the quotation allows the subject to speak for himself.

The significance of the quotations at issue, absent any qualification, is to inform us that we are reading the statement of petitioner, not Malcolm’s rational interpretation of what petitioner has said or thought. Were we to assess quotations under a rational interpretation standard, we would give journalists the freedom to place statements in their subjects’ mouths without fear of liability. By eliminating any method of distinguishing between the statements of the subject and the interpretation of the author, we would diminish to a great degree the trustworthiness of the printed word, and eliminate the real meaning of quotations. Not only public figures but the press doubtless would suffer under such a rule. Newsworthy figures might become more wary of journalists, knowing that any comment could be transmuted and attributed to the subject, so long as some bounds of rational interpretation were not exceeded. We would ill serve the values of the First Amendment (</supct-cgi/get-const?billofrights.html#amendmenti>) if we were to grant near absolute, constitutional protection for such a practice. We doubt the suggestion that as a general rule readers will assume that direct quotations are but a rational interpretation of the speaker’s words, and we decline to adopt any such presumption in determining the permissible interpretations of the quotations in question here.

III

A

We apply these principles to the case before us. On summary judgment, we must draw all justifiable inferences in favor of the the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S., at 255. So we must assume, except where otherwise evidenced by the transcripts of the tape recordings, that petitioner is correct in denying that he made the statements attributed to him by Malcolm, and that Malcolm reported with knowledge or reckless disregard of the differences between what petitioner said and what was quoted.

Respondents argue that, in determining whether petitioner has shown sufficient falsification to survive summary judgment, we should consider not only the tape recorded statements but also Malcolm's typewritten notes. We must decline that suggestion. To begin with, petitioner affirms in an affidavit that he did not make the complained of statements. The record contains substantial additional evidence, moreover, evidence which, in a light most favorable to petitioner, would support a jury determination under a clear and convincing standard that Malcolm deliberately or recklessly altered the quotations.

First, many of the challenged passages resemble quotations that appear on the tapes, except for the addition or alteration of certain phrases, giving rise to a reasonable inference that the statements have been altered. Second, Malcolm had the tapes in her possession and was not working under a tight deadline. Unlike a case involving hot news, Malcolm cannot complain that she lacked the practical ability to compare the tapes with her work in progress. Third, Malcolm represented to the editor-in-chief of *The New Yorker* that all the quotations were from the tape recordings. Fourth, Malcolm's explanations of the time and place of unrecorded conversations during which petitioner allegedly made some of the quoted statements have not been consistent in all respects. Fifth, petitioner suggests that the progression from typewritten notes, to manuscript, then to galleys provides further evidence of intentional alteration. Malcolm contests petitioner's allegations, and only a trial on the merits will resolve the factual dispute. But at this stage, the evidence creates a jury question whether Malcolm published the statements with knowledge or reckless disregard of the alterations.

B

We must determine whether the published passages differ materially in meaning from the tape recorded statements so as to create an issue of fact for a jury as to falsity.

(a) "Intellectual Gigolo." We agree with the dissenting opinion in the Court of Appeals that "[f]airly read, intellectual gigolo suggests someone who forsakes intellectual integrity in exchange for pecuniary or other gain." 895 F. 2d, at 1551. A reasonable jury could find a material difference between the meaning of this passage and petitioner's tape-recorded statement that he was considered "much too junior within the hierarchy of analysis, for these important training analysts to be caught dead with [him]."

The Court of Appeals majority found it difficult to perceive how the "intellectual gigolo" quotation was defamatory, a determination supported not by any citation to California law, but only by the argument that the passage appears to be a report of Eissler's and Anna Freud's opinions of petitioner. *Id.*, at 1541. We agree with the Court of Appeals that the most natural interpretation of this quotation is not an admission that petitioner considers himself an intellectual gigolo but a statement that Eissler and Anna Freud considered him so. It does not follow, though, that the statement is harmless. Petitioner is entitled to argue that the passage should be analyzed as if Malcolm had

reported falsely that Eissler had given this assessment (with the added level of complexity that the quotation purports to represent petitioner's understanding of Eissler's view). An admission that two well-respected senior colleagues considered one an "intellectual gigolo" could be as or more damaging than a similar self-appraisal. In all events, whether the "intellectual gigolo" quotation is defamatory is a question of California law. To the extent that the Court of Appeals based its conclusion in the First Amendment (</supct-cgi/get-const?billofrights.html#amendmenti>), it was mistaken.

The Court of Appeals relied upon the "incremental harm" doctrine as an alternative basis for its decision. As the court explained it, "[t]his doctrine measures the incremental reputational harm inflicted by the challenged statements beyond the harm imposed by the nonactionable remainder of the publication." *Ibid.*; see generally Note, 98 Harv. L. Rev. 1909 (1985); R. Smolla, *Law of Defamation* 9.10[4][d] (1991). The court ruled, as a matter of law, that "[g]iven the . . . many provocative, bombastic statements indisputably made by Masson and quoted by Malcolm, the additional harm caused by the 'intellectual gigolo' quote was nominal or nonexistent, rendering the defamation claim as to this quote nonactionable." 895 F. 2d, at 1541.

This reasoning requires a court to conclude that, in fact, a plaintiff made the other quoted statements, cf. *Liberty Lobby, Inc. v. Anderson*, 241 U.S. App. D.C. 246, 251, 746 F. 2d 1563, 1568 (1984), vacated and remanded on other grounds, 477 U.S. 242 (</supct-cgi/get-us-cite?477+242>) (1986), and then to undertake a factual inquiry into the reputational damage caused by the remainder of the publication. As noted by the dissent in the Court of Appeals, the most "provocative, bombastic statements" quoted by Malcolm are those complained of by petitioner, and so this would not seem an appropriate application of the incremental harm doctrine. 895 F. 2d, at 1566.

Furthermore, the Court of Appeals provided no indication whether it considered the incremental harm doctrine to be grounded in California law or the First Amendment (</supct-cgi/get-const?billofrights.html#amendmenti>). Here, we reject any suggestion that the incremental harm doctrine is compelled as a matter of First Amendment (</supct-cgi/get-const?billofrights.html#amendmenti>) protection for speech. The question of incremental harm does not bear upon whether a defendant has published a statement with knowledge of falsity or reckless disregard of whether it was false or not. As a question of state law, on the other hand, we are given no indication that California accepts this doctrine, though it remains free to do so. Of course, state tort law doctrines of injury, causation, and damages calculation might allow a defendant to press the argument that the statements did not result in any incremental harm to a plaintiff's reputation.

(b) "Sex, Women, Fun." This passage presents a closer question. The "sex, women, fun" quotation offers a very different picture of petitioner's plans for Maresfield Gardens than his remark that "Freud's library alone is priceless." See *supra*, at 5. Petitioner's other tape-recorded remarks did indicate that he and another analyst planned to have great parties at the Freud house and, in a context that may not even refer to Freud

house activities, to “pass women on to each other.” We cannot conclude as a matter of law that these remarks bear the same substantial meaning as the quoted passage’s suggestion that petitioner would make the Freud house a place of “sex, women, fun.”

(c) “It Sounded Better.” We agree with the District Court and the Court of Appeals that any difference between petitioner’s tape-recorded statement that he “just liked” the name Moussaieff, and the quotation that “it sounded better” is, in context, immaterial. Although Malcolm did not include all of petitioner’s lengthy explanation of his name change, she did convey the gist of that explanation: Petitioner took his abandoned family name as his middle name. We agree with the Court of Appeals that the words attributed to petitioner did not materially alter the meaning of his statement.

(d) “I Don’t Know Why I Put It In.” Malcolm quotes petitioner as saying that he “tacked on at the last minute” a “totally gratuitous” remark about the “sterility of psychoanalysis” in an academic paper, and that he did so for no particular reason. In the tape recordings, petitioner does admit that the remark was “possibly [a] gratuitously offensive way to end a paper to a group of analysts,” but when asked why he included the remark, he answered “[because] it was true . . . I really believe it.” Malcolm’s version contains material differences from petitioner’s statement, and it is conceivable that the alteration results in a statement that could injure a scholar’s reputation.

(e) “Greatest Analyst Who Ever Lived.” While petitioner did, on numerous occasions, predict that his theories would do irreparable damage to the practice of psychoanalysis, and did suggest that no other analyst shared his views, no taperecorded statement appears to contain the substance or the arrogant and unprofessional tone apparent in this quotation. A material difference exists between the quotation and the tape-recorded statements, and a jury could find that the difference exposed petitioner to contempt, ridicule or obloquy.

(f) “He Had The Wrong Man.” The quoted version makes it appear as if petitioner rejected a plea to remain in stoic silence and do “the honorable thing.” The tape-recorded version indicates that petitioner rejected a plea supported by far more varied motives: Eissler told petitioner that not only would silence be “the honorable thing,” but petitioner would “save face,” and might be rewarded for that silence with eventual reinstatement. Petitioner described himself as willing to undergo a scandal in order to shine the light of publicity upon the actions of the Freud Archives, while Malcolm would have petitioner describe himself as a person who was “the wrong man” to do “the honorable thing.” This difference is material, a jury might find it defamatory, and, for the reasons we have given, there is evidence to support a finding of deliberate or reckless falsification.

C

Because of the Court of Appeals' disposition with respect to Malcolm, it did not have occasion to address petitioner's argument that the District Court erred in granting summary judgment to The New Yorker Magazine, Inc., and Alfred A. Knopf, Inc. on the basis of their respective relations with Malcolm or the lack of any independent actual malice. These questions are best addressed in the first instance on remand.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

VII. WHO IS BERT LAHR?

Bert Lahr, Plaintiff, Appellant, v. Adell Chemical Co., Inc., et al., Defendants, Appellees, 300 F.2d 256 (1st Cir. 1962)

U.S. Court of Appeals for the First Circuit - 300 F.2d 256 (1st Cir. 1962)

Heard November 9, 1961

Decided March 12, 1962

George Waldstein, Boston, Mass., with whom Harold Katz, Boston, Mass., was on brief, for appellant.

Jerome P. Facher, Boston, Mass., with whom Hale & Dorr, Boston, Mass., was on brief, for appellees.

Before WOODBURY, Chief Judge, and HARTIGAN and ALDRICH, Circuit Judges.

ALDRICH, Circuit Judge.

This is an appeal from the dismissal of a complaint for failure to state a cause of action. The plaintiff contends that he has alleged three causes — for unfair competition, for invasion of privacy and for defamation. According to the complaint the plaintiff is a professional entertainer who has achieved stardom — with commensurate financial success — on the legitimate stage, in motion pictures, on radio, television and other entertainment media throughout the United States, Canada and elsewhere. This he has done in substantial measure because his “style of vocal comic delivery which, by reason of its distinctive and original combination of pitch, inflection, accent and comic sounds,” has caused him to become “widely known and readily recognized * * * as a unique and extraordinary comic character.” The complaint alleges that the defendant Adell Chemical Company, in advertising its product “Lestoil” on television, used as a commercial a cartoon film of a duck and, without the plaintiff’s consent, “as the voice of the aforesaid duck, an actor who specialized in imitating the vocal sounds of the plaintiff.” It is further alleged that the “vast public television audience and the entertainment industry” throughout the United States, Canada and elsewhere believed that the words spoken and the comic sounds made by the cartoon duck were supplied and made by the plaintiff. It is alleged that this was a misappropriation of the plaintiff’s “creative talent, voice, vocal sounds and vocal comic delivery” and a “trading upon his fame and renown.” In addition, it injured plaintiff’s reputation in the entertainment field, both because it cheapened plaintiff to indicate that he was reduced to giving anonymous television commercials and because the imitation, although recognizable, was inferior in quality and suggested that his abilities had deteriorated.

Although plaintiff asserts the “voice of the aforesaid duck,” alias perhaps mockingbird, was heard throughout the land, with possibly varying legal consequences, the law he cites is on no such scale. Upon our pressing, he agreed that we need consider no law except that of Massachusetts and New York. We will interpret this concession as meaning not that plaintiff does not claim injury in other states, but that for present purposes we may assume the law of those states to be in accord with one or both of the two jurisdictions specified.¹

We deal first with the right of privacy. The Massachusetts court has avoided recognizing such a right. *Kelley v. Post Publishing Co.*, 1951, 327 Mass. 275, 98 N.E.2d 286; *Themo v. New England Newspaper Pub. Co.*, 1940, 306 Mass. 54, 27 N.E.2d 753. Plaintiff alleges nothing on this score which tempts us to depart from that practice. To the extent that the complaint states anything of substantial moment, it should fall within the claims for unfair competition and defamation. We see no profit in exploring this alternative and, if anything, thornier path. Cf. *Prosser, Privacy*, 48 Cal. L. Rev. 383, 401 (1960).

Any rights resulting from the special New York statute, sometimes called the right of privacy statute, flow from the use, for commercial purposes, of a party’s “name, portrait or picture.” New York Civil Rights Law, McKinney’s Consol. Laws, c. 6 §§ 50 and 51. Plaintiff’s claim here, at best, is that though the picture was that of a duck, the voice was the “name,” which he enlarges to “identity,” of the plaintiff. The statute is very specific. If the legislature intended that whenever an anonymous speaker extolled a commercial product a cause of action arose (and criminal penalties could be imposed) if anyone could claim the voice was mistaken as his, it should have used a phrase of more general import. In the absence of any New York authority, “name” can be given no such catholic connotation.²

With respect to the claim for defamation, we are not faced with the problem of whether defendant’s conduct in broadcasting a tape-recording is to be considered libel or slander. Since the injury alleged was to plaintiff’s professional reputation, it makes no difference. *Lynch v. Lyons*, 1939, 303 Mass. 116, 20 N.E.2d 953; *Lovejoy v. Whitcomb*, 1899, 174 Mass. 586, 55 N.E. 322; *Nichols v. Item Publishers, Inc.*, 1956, 309 N.Y. 596, 132 N.E.2d 860; *Rager v. McCloskey*, 1953, 305 N.Y. 75, 111 N.E.2d 214. A charge that an entertainer has stooped to perform below his class may be found to damage his reputation. *Louka v. Park Entertainments, Inc.*, 1936, 294 Mass. 268, 1 N.E.2d 41; *Sim v.*

¹ We will not, on the other hand, adopt defendant’s singular theory that Massachusetts, as the court of the forum, would not look beyond its own law with respect to unfair competition (which defendant construes with great strictness in its favor) and, on the other hand, would look only to the law of New York, as the state of plaintiff’s domicile, for defamation

² Plaintiff quotes the phrase “word painting” from *Levey v. Warner Bros. Pictures, Inc.*, D.C.S.D.N.Y., 1944, 57 F. Supp. 40, 42. We think the quotation fails to take into account the next sentence. In any event, it is dictum not followed in any state decision

H. J. Heinz Co., Ltd., (C.A.) [1959] 1 W.L.R. 313, *semble*.³ Plaintiff's allegations in this respect are not insufficient. Whether audible identification was enough in a field where imitation is easy, and perhaps properly suspect, is a matter we do not wish to decide upon the bare allegations of a complaint. But it has never been held in defamation that a plaintiff must be identified by name. *Louka v. Park Entertainments, Inc.*, *supra*; *Robinson v. Coulter*, 1913, 215 Mass. 566, 102 N.E. 938; *Kern v. News Syndicate Co.*, 1958, 6 A.D.2d 404, 178 N.Y.S.2d 274.

Plaintiff's additional assertion that an inferior imitation damaged his reputation raises a more doubtful question. Even entertainers who make no claim to uniqueness have distinctive vocal characteristics and may be thought to be recognized. If every time one can allege, "Your (anonymous) commercial sounded like me, but not so good," and contend the public believed, in spite of the variance, that it was he, and at the same time believed, because of the variance, that his abilities had declined, the consequences would be too great to contemplate. Occasional disparagement of public entertainers is the commonly accepted lot. Furthermore, there is no absolute test of excellence in dramatic performance. If what was attributed to the plaintiff was so manifestly inferior as to constitute actionable defamation, see, e. g., *Ben-Oliel v. Press Pub. Co.*, 1929, 251 N.Y. 250, 167 N.E. 432, we hold he must be able to point to some identification with himself more specific than the remaining similarities. We know of no case which gives a plaintiff such liberty to put a cap on and at the same time say it does not fit.⁴

In the light of the foregoing it is not strictly necessary to consider on what further grounds the complaint can be supported, but since the question of unfair competition must inevitably arise we will discuss it briefly. The defendant obscures the issue by arguing at length that imitation is not unfair competition. This may indeed be true, if there is no confusion of source. Cf. *Chappell & Co. v. Fields*, 2 Cir., 1914, 210 F. 864; *Cheney Bros. v. Doris Silk Corp.*, 2 Cir., 1929, 35 F.2d 279, cert. den. 281 U.S. 728, 50 S. Ct. 245, 74 L. Ed. 1145. But plaintiff here is not complaining of imitation in the sense of simply copying his material or his ideas, but of causing a mistake in identity. Such passing off is the basic offense. True, it was not defendant's product that was offered in competition, but that of the anonymous imposter whom defendant, for its benefit, subsidized. This is a distinction without a difference. Plaintiff's complaint is that defendant is "stealing his thunder" in the direct sense; that defendant's commercial had greater value because its audience believed it was listening to him. In the light of plaintiff's allegations we could not say there was no such enhancement.

³ Sim was an application for a preliminary injunction. The facts were remarkably like those at bar. In refusing the interlocutory order the court did not suggest that plaintiff had not stated a valid cause of action. For an able discussion of that case, see Mathieson, Comment, 1961, 39 Can.B.Rev. 409

⁴ We do not accept the dictum favorable to the plaintiff on this point in *Gardella v. Log Cabin Products Co.*, 2 Cir., 1937, 89 F.2d 891, 896. While there may theoretically be a twilight zone where identification and defamation overlap, we think our present decision goes far enough

Furthermore, we can hardly agree with defendant that “there is no competitive interest or purpose served * * * and no real confusion of product which would lead to the appellant’s loss of opportunity in the entertainment field.” It could well be found that defendant’s conduct saturated plaintiff’s audience to the point of curtailing his market. No performer has an unlimited demand. We may agree with defendant that plaintiff has not shown any “property” interest entitled to copyright protection. And we might hesitate to say that an ordinary singer whose voice, deliberately or otherwise, sounded sufficiently like another to cause confusion was not free to do so. Plaintiff here alleges a peculiar style and type of performance, unique in a far broader sense. Before going further into this matter, and the possible relevancy and scope of secondary meanings, we think plaintiff’s adjectival allegations should be tested in the crucible. Cf. *Chaplin v. Amador*, 1928, 93 Cal. App. 358, 269 P. 544.

So far we have been talking about the defendant Adell Chemical Co. (and, in effect, another corporation similarly charged). Plaintiff also claims that defendant Barowsky, a principal stockholder and an officer of Adell, was personally liable. The complaint alleges that the tortious acts were committed by the corporate defendant, its “officers, servants, agents, affiliates and employees.” We agree with Barowsky that simply identifying him as “an officer” does not adequately allege his personal involvement. But a corporate officer is liable for torts in which he personally participated, whether or not he was acting within the scope of his authority. *Marks v. Polaroid Corp.*, 1 Cir., 1956, 237 F.2d 428; *National Cash-Register Co. v. Leland*, 1 Cir., 1899, 94 F. 502. After remand the district court may, in its discretion, consider a motion to amend the complaint to make the allegations more specific as to Barowsky in this respect if the plaintiff so wishes. However, we cannot agree with the plaintiff that since Adell is dissolved, and Barowsky is an alleged recipient of its assets in distribution, his secondary liability, if any, as a distributee, *Burke v. Marlboro Awning Co.*, 1953, 330 Mass. 294, 113 N.E.2d 222, can be enforced in a primary action. Mass.G.L. c. 156, § 38; see *Priest v. Essex Hat Mfg. Co.*, 1874, 115 Mass. 380; *Cambridge Water Works v. Somerville Dyeing & Bleaching Co.*, 1862, 4 Allen 239, 86 Mass. 239. See also 13A *Fletcher Cyclopedica Corporations* ch. 58, §§ 6320, 6322 (1961 revision).

A word about the statute of limitations. The complaint alleges that the offending activities occurred “since the beginning of December 1958.” In Massachusetts the ordinary tort period of limitations is two years; for libel it is one year. Mass.G.L. c. 260, §§ 2A, 4. The action was not commenced until January 1961. It does not appear for how long a period the duck trespassed on plaintiff’s reputation. Defendant, relying on the single publication rule, asserts that plaintiff’s rights became barred by December 1960. This rule is normally applicable to continued sales and new editions of a single literary work. See, e. g., *Dale System, Inc. v. Time, Inc.*, D.C. Conn., 1953, 116 F. Supp. 527; *Uniform Single Publication Act* (1952). Cf. *Riley v. Dun & Bradstreet*, 6 Cir., 1959, 172 F.2d 303. The statute of limitations is an affirmative defense. Whether the single publication rule should be applied to the circumstances of this case had best be decided

when we know what they were. A fortiori, we will decide nothing about laches in respect to unfair competition. Cf. *Seaboard Finance Co. v. Martin*, 5 Cir., 1957, 244 F.2d 329.

Judgment will be entered vacating the judgment of the District Court and remanding the case to that court for further proceedings not inconsistent herewith.

VIII. WHAT IS A “CROMUNCHKIN”?

Generated on:

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Mark: CROMUNCHKIN

cromunchkin

US Serial Number: 86451786

Application Filing Date:

Nov. 12, 2014

Filed as TEAS Plus: Yes

Currently TEAS Plus:

Yes

Register:

Principal

Mark Type:

Trademark, Service Mark

Status:

Abandoned after an inter partes decision by the Trademark Trial and Appeal Board. For further information, see TTABVue on the Trademark Trial and Appeal Board web page.

Status Date:

Jan. 14, 2016

Publication Date: Apr. 14, 2015

Date Abandoned: Jan. 14, 2016

Mark Information

Mark Literal Elements:

CROMUNCHKIN

Standard Character Claim:

Yes. The mark consists of standard characters without claim to any particular font style, size, or color.

Mark Drawing Type:

4 - STANDARD CHARACTER MARK

Goods and Services

Note: The following symbols indicate that the registrant/owner has amended the goods/services:

- Brackets [...] indicate deleted goods/services;
- Double parenthesis (()) identify any goods/services not claimed in a Section 15 affidavit of incontestability; and
- Asterisks *,* identify additional (new) wording in the goods/services.

For:

Bakery desserts; Bakery goods; Bakery goods and dessert items, namely, cakes, cookies, pastries, candies, and frozen confections for retail and wholesale distribution and consumption on or off the premises; Bakery goods and dessert items, namely, cheesecakes for retail and wholesale distribution and consumption on or off the premises; Bakery goods, namely, nuggets of croissant and doughnut; Bakery products; Bakery products, namely, sweet bakery goods; Bases for bakery goods; Bread; Bread and buns; Bread and pastry; Bread bases; Bread crumb; Bread crumbs; Bread doughs; Bread flavoured with spices; Bread mixes; Bread rolls; Bread sticks; Brioche; Buns; Cake batter; Cake doughs; Cake frosting; Cake icing; Cake mixes; Cake mixes, namely, cake bases; Cakes; Croissants; Donuts; Doughnut holes; Doughnuts; Instant doughnut mixes; Macaroons; Macaroons; Mixes for bakery goods; Mixes for bakery goods containing cornmeal; Muffin mixes; Muffins; Pastries; Scones

International Class(es): 030 - Primary Class

U.S Class(es):

046

Class Status:

ABANDONED

Basis:

1(b)

For:

Online retail bakery shops; Retail bakery shops; Self-serve retail bakery shops

International Class(es): 035 - Primary Class

U.S Class(es):

100, 101, 102

Class Status:

ABANDONED

Basis:

1(b)

For:

Bakery services, namely, the manufacture of bakery products to order and/or specification of others

International Class(es): 040 - Primary Class

U.S Class(es):

100, 103, 106

Class Status:

ABANDONED

Basis:

1(b)

Basis Information (Case Level)

Filed Use: No

Currently Use: No

Amended Use: No

Filed ITU: Yes

Currently ITU: Yes

Amended ITU: No

Filed 44D: No

Currently 44D: No

Amended 44D: No

Filed 44E: No

Currently 44E: No

Amended 44E: No

Filed 66A: No

Currently 66A: No

Filed No Basis: No

Currently No Basis: No

Current Owner(s) Information

Owner Name:

Andrew Douglass

Owner Address:

P.O. Box 251
5 Miln St.
Cranford, NEW JERSEY 07016
UNITED STATES

Legal Entity Type: INDIVIDUAL

Citizenship:

UNITED STATES

Attorney/Correspondence Information

Attorney of Record - None
Correspondent

Correspondent
Name/Address:

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LEWIS BRISBOIS BISGAARD & SMITH LLP
633 W 5TH STREET
STE 4000
LOS ANGELES, CALIFORNIA 90071
UNITED STATES

Phone: 9082721491

Correspondent e-mail: sdouglass2010@gmail.com

Correspondent e-mail
Authorized:

Yes

Domestic Representative - Not Found

Prosecution History

Date	Description	Proceeding Number
Jan. 15, 2016	ABANDONMENT NOTICE MAILED - INTER PARTES DECISION	
Jan. 14, 2016	ABANDONMENT - AFTER INTER PARTES DECISION	
Jan. 14, 2016	OPPOSITION TERMINATED NO. 999999	223199
Jan. 14, 2016	OPPOSITION DISMISSED NO. 999999	223199
Aug. 10, 2015	OPPOSITION INSTITUTED NO. 999999	223199
Apr. 29, 2015	EXTENSION OF TIME TO OPPOSE RECEIVED	
Apr. 14, 2015	OFFICIAL GAZETTE PUBLICATION CONFIRMATION E-MAILED	
Apr. 14, 2015	PUBLISHED FOR OPPOSITION	

Mar. 25, 2015 NOTIFICATION OF NOTICE OF PUBLICATION E-MAILED
 Mar. 02, 2015 APPROVED FOR PUB - PRINCIPAL REGISTER
 Feb. 27, 2015 ASSIGNED TO EXAMINER
 Nov. 19, 2014 NEW APPLICATION OFFICE SUPPLIED DATA ENTERED IN TRAM
 Nov. 15, 2014 NEW APPLICATION ENTERED IN TRAM

81848

TM Staff and Location Information

TM Staff Information

TM Attorney: PARK, JENNY K

Law Office Assigned:

LAW OFFICE 104

File Location

Current Location: TTAB

Date in Location:

Jan. 14, 2016

Proceedings

Summary

Number of Proceedings:

2

Type of Proceeding: Opposition

Proceeding Number: [91223199](#)

Filing Date:

Aug 10, 2015

Status: Terminated

Status Date:

Jan 14, 2016

Interlocutory Attorney: GEORGE POLOGEORGIS

Defendant

Name:

Andrew Douglass

Correspondent Address:

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 LEWIS BRISBOIS BISGAARD & SMITH LLP
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leo.bautista@lewisbrisbois.com , toni.esponzoa@lewisbrisbois.com , mona.jackson@lewisbrisbois.com

Associated marks

Mark	Application Status	Serial Number	Registration Number
CROMUNCHKIN	Abandoned - After Inter-Partes Decision	86451786	

Plaintiff(s)

Name:

DD IP Holder LLC

Correspondent Address:

GABRIELLE S ROTH
 SUGHRUE MION PLLC
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 WASHINGTON DC , 20037
 UNITED STATES

Correspondent e-mail:

tm@sughrue.com , groth@sughrue.com , kdunmire@sughrue.com

Associated marks

Mark	Application Status	Serial Number	Registration Number
MUNCHKINS	Renewed	76385440	2672062

Prosecution History

Entry Number	History Text	Date	Due Date
1	FILED AND FEE	Aug 10, 2015	
2	NOTICE AND TRIAL DATES SENT; ANSWER DUE:	Aug 10, 2015	Sep 19, 2015
3	PENDING, INSTITUTED	Aug 10, 2015	

4	STIP FOR EXT	Sep 18, 2015
5	EXTENSION OF TIME GRANTED	Sep 18, 2015
6	D MOT TO CORRECT REQ FOR AN EXT OF TIME	Sep 23, 2015
7	TRIAL DATES RESET	Oct 13, 2015
8	ANSWER	Oct 14, 2015
9	CONSOLIDATED W/91223178	Oct 15, 2015
10	ANSWER AND COUNTERCLAIM (FEE)	Oct 15, 2015
11	BD DECISION: DISMISSED W/O PREJ	Jan 14, 2016
12	TERMINATED	Jan 14, 2016

Type of Proceeding: Extension of Time

Proceeding Number: [86451786](#)

Filing Date:

Apr 29, 2015

Status: Terminated

Status Date:

Aug 12, 2015

Interlocutory Attorney:

Defendant

Name:

Andrew Douglass

Correspondent Address:

ANDREW DOUGLASS
PO BOX 251
CRANFORD NJ , 07016-0251

Associated marks

Mark	Application Status	Serial Number	Registration Number
CROMUNCHKIN	Abandoned - After Inter-Partes Decision	86451786	

Potential Opposer(s)

Name:

DD IP Holder LLC

Correspondent Address:

Gabrielle S. Roth
Sughrue Mion PLLC
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Correspondent e-mail:

tm@sughrue.com , groth@sughrue.com , kdunmire@sughrue.com

Associated marks

Mark	Application Status	Serial Number	Registration Number

Prosecution History

Entry Number	History Text	Date	Due Date
1	INCOMING - EXT TIME TO OPPOSE FILED	Apr 29, 2015	
2	EXTENSION OF TIME GRANTED	Apr 29, 2015	

Side - 1



NOTICE OF ABANDONMENT
MAILING DATE: Jan 15, 2016

The trademark application identified below was abandoned on Jan 14, 2016 as a result of Trademark Trial and Appeal Board proceedings.

SERIAL NUMBER: 86451786
MARK: CROMUNCHKIN
OWNER: Andrew Douglass

Side - 2

UNITED STATES PATENT AND TRADEMARK OFFICE
COMMISSIONER FOR TRADEMARKS
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UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

nmt

Mailed: January 14, 2016

Opposition No. 91223178
(Parent case)
Opposition No. 91223199

DD IP Holder LLC

v.

Andrew Douglass

By the Trademark Trial and Appeal Board:

On January 14, 2016, Applicant filed an abandonment of its application Serial Nos. 86447618 and 86451786, with Opposer's written consent.

Furthermore the parties stipulate to the joint dismissal of the counterclaim and consolidated opposition proceeding without prejudice.

In view thereof, application Serial Nos. 86447618 and 86451786 stand abandoned, and the counterclaim and consolidated opposition are dismissed without prejudice. *See* Trademark Rules 2.106(c) and 2.135.

IX. WHAT IS COPYRIGHT PROTECTION AS CHARACTERS?

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 10-1743

Warner Bros. Entertainment, Inc.; Warner Bros. Consumer Products, Inc.; Turner Entertainment Co.,
Appellees,

v.

X One X Productions, doing business as X One X Movie Archives, Inc.; A.V.E.L.A., Inc., doing business as Art & Vintage Entertainment Licensing Agency; Art-Nostalgia.com, Inc.; Leo Valencia,
Appellants.

Appeal from the United States
District Court for the
Eastern District of Missouri.

Submitted: February 24, 2011
Filed: July 5, 2011

Before GRUENDER, BENTON, and SHEPHERD, Circuit Judges.

GRUENDER, Circuit Judge.

A.V.E.L.A., Inc., X One X Productions, and Art-Nostalgia.com, Inc. (collectively, “AVELA”) appeal a permanent injunction prohibiting them from licensing certain images extracted from publicity materials for the films *Gone with the Wind* and *The Wizard of Oz*, as well as several animated short films featuring the cat-and-mouse duo “Tom & Jerry.” The district court issued the permanent injunction after granting summary judgment in favor of Warner Bros. Entertainment, Inc., Warner Bros. Consumer Products, Inc., and Turner Entertainment Co. (collectively, “Warner Bros.”) on their claim that the extracted images infringe copyrights for the films. For the reasons discussed below, we affirm in part, reverse in part, and remand for appropriate modification of the permanent injunction.

I. BACKGROUND

Warner Bros. asserts ownership of registered copyrights to the 1939 Metro-Goldwyn-Mayer (“MGM”) films *The Wizard of Oz* and *Gone with the Wind*. Before the

films were completed and copyrighted, publicity materials featuring images of the actors in costume posed on the film sets were distributed to theaters and published in newspapers and magazines. The images in these publicity materials were not drawn from the film footage that was used in the films; rather, they were created independently by still photographers and artists before or during production of the films. The publicity materials, such as movie posters, lobby cards, still photographs, and press books, were distributed by the original rights-holder, MGM's parent company Loew's, Inc.,¹ and did not comply with the copyright notice requirements of the 1909 Copyright Act, 17 U.S.C. §§ 1 et seq. (1976) (superseded effective 1978). Warner Bros. also asserts ownership of registered copyrights to various animated Tom & Jerry short films that debuted between 1940 and 1957. Movie posters and lobby cards for these short films also were distributed without the requisite copyright notice. As a result, Warner Bros. concedes that it has no registered federal copyrights in the publicity materials themselves.²

AVELA has acquired restored versions of the movie posters and lobby cards for *The Wizard of Oz*, *Gone with the Wind*, and several Tom & Jerry short films. From these publicity materials, AVELA has extracted the images of famous characters from the films, including Dorothy, Tin Man, Cowardly Lion, and Scarecrow from *The Wizard of Oz*; Scarlett O'Hara and Rhett Butler from *Gone with the Wind*; and the eponymous Tom and Jerry. AVELA licenses the extracted images for use on items such as shirts, lunch boxes, music box lids, and playing cards, and as models for three-dimensional figurines such as statuettes, busts, figurines inside water globes, and action figures. In many cases, AVELA has modified the images, such as by adding a character's signature phrase from the movie to an image modeled on that character's publicity photograph. In other cases, AVELA has combined images extracted from different items of publicity material into a single product. In one example, a publicity photograph of Dorothy posed with Scarecrow serves as the model for a statuette and another publicity photograph of the "yellow brick road" serves as the model for the base of that same statuette.

Warner Bros. sued AVELA, claiming that such use of the extracted images infringes the copyrights for the films. Warner Bros. also asserted claims of, inter alia, trademark infringement and unfair competition. AVELA contended that the distribution of the publicity materials without copyright notice had injected them into the public domain, thus precluding any restrictions on their use. On cross-motions for summary judgment, the district court granted summary judgment to Warner Bros. on the copyright infringement claim and denied summary judgment to both parties on the trademark infringement and unfair competition claims.

¹ Loew's obtained an interest in the copyright to *Gone with the Wind*, as well as the right to distribute the film, from producer David O. Selznick.

² Some of the still photographs for *The Wizard of Oz* and a few of the movie posters for the Tom & Jerry films complied with copyright notice provisions, but those copyrights were not timely renewed.

The district court's analysis did not require it to determine expressly whether the publicity materials had reached the public domain. Instead, the district court held that, even if the images were extracted from public domain materials, AVELA's practice of modifying the extracted images for placement on retail products constituted infringement of the film copyrights. Warner Bros. averred that it would not assert the copyrights against unaltered reproductions of individual items of publicity material, eliminating any need to resolve whether the publicity materials were in the public domain.

Based on the finding of copyright infringement, the district court separately entered a permanent injunction against all use of the publicity material images, except for exact duplication of individual items of publicity material. AVELA appeals the entry of the permanent injunction.

II. DISCUSSION

Although certain claims remain pending in the district court, we have jurisdiction over this appeal of the entry of a permanent injunction under 28 U.S.C. § 1292(a)(1). Because the propriety of the permanent injunction depends upon the propriety of the underlying grant of summary judgment on the copyright infringement claim, we have jurisdiction to review the decision granting summary judgment as well. *Mulcahy v. Cheetah Learning LLC*, 386 F.3d 849, 852 (8th Cir. 2004). We review a grant of summary judgment *de novo*, affirming only if “the evidence, viewed in the light most favorable to the nonmoving party, demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” *Schoolhouse, Inc. v. Anderson*, 275 F.3d 726, 728 (8th Cir. 2002). We may affirm the judgment of the district court “on any basis disclosed in the record, whether or not the district court agreed with or even addressed that ground.” *PFS Distribution Co. v. Raduechel*, 574 F.3d 580, 591 (8th Cir. 2009) (quoting *Palavra v. I.N.S.*, 287 F.3d 690, 693 (8th Cir. 2002)).

A. Copyright Ownership

The plaintiff in a copyright infringement claim has the burden to prove ownership of a valid copyright. *Taylor Corp. v. Four Seasons Greetings, LLC*, 403 F.3d 958, 962 (8th Cir. 2005). In support of its motion for summary judgment, Warner Bros. submitted an affidavit from Kate Chilton, its in-house counsel, tracing the interaction of the various assignment and corporate merger documents that establish Warner Bros.'s chain of title to the asserted copyrights back to 1939. The affidavit stated that Chilton had personal knowledge of the facts recited, based on her review of corporate documents. However, while the affidavit stated that the referenced documents had been produced to AVELA in discovery, the actual documents establishing chain of title were not attached to the affidavit.

AVELA argues that the district court erred in considering the affidavit and that, absent the challenged affidavit, Warner Bros. did not submit evidence sufficient to prove

ownership of the copyrights. In particular, AVELA contends that the documents establishing title were not in the record and that Chilton was not competent to testify about chain of title because her review of the documents did not give her “personal knowledge,” as required by Fed. R. Civ. P. 56. The version of Rule 56 in effect at the time of the summary judgment motion stated:

A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit.

Fed. R. Civ. P. 56(e)(1) (2010) (superseded Dec. 1, 2010). We review the admission of evidence for consideration at the summary judgment stage for an abuse of discretion. *Conseco Life Ins. Co. v. Williams*, 620 F.3d 902, 907 (8th Cir. 2010).

While Warner Bros.’s failure to attach the referenced documents to the affidavit was error under the version of Rule 56 in effect at the time, the error was harmless. See *Sugarbaker v. SSM Health Care*, 190 F.3d 905, 911 (8th Cir. 1999). There is no dispute that the referenced documents were produced to AVELA in discovery. In addition, they were in the record because they were attached to Warner Bros.’s original complaint.³ Despite having had a full opportunity to review the documents establishing chain of title to the copyrights, AVELA points to no inadequacies in the chain-of-title documents themselves. Because the documents would be admissible at trial, the error in form at the summary judgment stage was harmless in this case.⁴ Cf. *Walker v. Wayne Cnty., Iowa*, 850 F.2d 433, 435 (8th Cir. 1988) (finding no reversible error in the district court’s consideration of inadmissible hearsay at the summary judgment stage where the same evidence could be submitted in admissible form at a trial).

In addition, we reject the argument that Chilton was not competent to testify on the matters stated in the affidavit. Chilton’s affidavit simply explained how to navigate the array of documents showing that the asserted copyrights were valid and that Warner

³ Although a Second Amended Complaint without the documents attached was operative at the time of the summary judgment motion, we have recognized that documents attached to a superseded original complaint are part of the record before the district court. See, e.g., *Muhammed v. DEA, Asset Forfeiture Unit*, 92 F.3d 648, 654 (8th Cir. 1996) (holding that an exhibit attached to the plaintiffs’ original complaint must be considered on a motion to dismiss, despite the fact that the plaintiffs’ amended complaint did not include or cite the contents of that exhibit); *Less v. Lurie*, 789 F.2d 624, 625 (8th Cir. 1986) (considering a partnership agreement attached only to plaintiffs’ initial complaint in considering a motion to dismiss plaintiffs’ Second Amended Complaint).

⁴ The current version of Rule 56 no longer requires attachment of a sworn or certified copy of each paper referenced in an affidavit. See Fed. R. Civ. P. 56(c)(4). Instead, a party that wishes to challenge an affiant’s reliance on an unattached document may object that the material “cannot be presented in a form that would be admissible in evidence.” Fed. R. Civ. P. 56(c)(2).

Bros. had obtained ownership of them. “A lay witness may give an opinion only if it is rationally based on the perception of the witness and would help the factfinder determine a matter in issue.” *Hurst v. United States*, 882 F.2d 306, 312 (8th Cir. 1989). Here, Chilton’s opinion about how the multiple documents combined to establish chain of title could be viewed as helpful to the factfinder. Furthermore, “[p]ersonal knowledge or perception acquired through review of records prepared in the ordinary course of business . . . is a sufficient foundation for lay opinion testimony.” *Burlington N. R.R. Co. v. Nebraska*, 802 F.2d 994, 1004-05 (8th Cir. 1986). Therefore, Chilton’s review of the documents was sufficient to render her competent to testify to the matters in the affidavit.

As a result, the district court did not abuse its discretion in admitting the affidavit. AVELA makes no argument that the documents and affidavit, if admissible, are insufficient to establish chain of title. Therefore, we proceed to determine whether AVELA’s use of images from the publicity materials infringes the film copyrights.

B. The Public Domain Nature of the Publicity Materials

Because our analysis differs from that of the district court, we find it necessary to determine whether the publicity materials reached the public domain.

Whether a work entered the public domain prior to January 1, 1978, the effective date of the 1976 Copyright Act, 17 U.S.C. §§ 101 et seq., must be determined according to copyright law as it existed before that date, under the 1909 Copyright Act. See *Brown v. Tabb*, 714 F.2d 1088, 1090-91 (11th Cir. 1983). Under the 1909 Copyright Act, one who created an artistic work held a common law copyright in that work until “publication” occurred. See *Burke v. Nat’l Broad. Co., Inc.*, 598 F.2d 688, 691 & n.2 (1st Cir. 1979). If the publication complied with the notice requirements of the 1909 Copyright Act, the common law copyright was replaced with a federal statutory copyright, but a publication without the prescribed notice resulted in the forfeiture of any copyright. *Data Cash Sys., Inc. v. IS&A Grp., Inc.*, 628 F.2d 1038, 1042 (7th Cir. 1980). In other words, the general rule under the 1909 Copyright Act is that a work published in the United States without the statutorily required copyright notice fell into the public domain, “precluding forever any subsequent copyright protection of the published work.” *Twin Books Corp. v. Walt Disney Co.*, 83 F.3d 1162, 1165-66 (9th Cir. 1996).

Warner Bros. concedes that the publicity materials now copied by AVELA were distributed to theaters without the statutorily required notice, but it nevertheless contends that these materials were not injected into the public domain because their distribution was a “limited publication.” As distinguished from a “general publication” that results in injection into the public domain, a limited publication is one that occurs “under conditions which exclude the presumption that [the work] was intended to be dedicated to the public.” *Am. Tobacco Co. v. Werckmeister*, 207 U.S. 284, 299 (1907), superseded by statute, Copyright Act of 1976, as recognized in *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985). Courts developed the doctrine of limited publication “[t]o

lessen the sometimes harsh effect of the rule that publication destroyed common law rights.” Brown, 714 F.2d at 1091. Warner Bros. contends that the conditions for a limited publication were satisfied for the movie posters and lobby cards for *The Wizard of Oz* and *Gone with the Wind* because those materials were not distributed directly to the general public, but rather were leased solely to theaters under an agreement (the “National Screen Agreement”) that required the materials to be returned or destroyed after the theater stopped running the subject film.⁵

We have held that a publication is general, rather than limited, if the rights-holder demonstrated an express or implied intent to abandon his right to control distribution and reproduction of his work, as determined objectively from “the implications of his outward actions to the reasonable outsider.” *Nucor Corp. v. Tenn. Forging Steel Serv., Inc.*, 476 F.2d 386, 390 n.7 (8th Cir. 1973) (quoting *Edgar H. Wood Assocs., Inc. v. Skene*, 197 N.E.2d 886, 892 (Mass. 1964)). There is a dearth of Eighth Circuit case law applying this test, and the parties argue this issue under a framework developed by the Ninth Circuit and adopted by several other circuits defining a limited publication as a distribution (1) to a definitely selected class of persons, (2) for a limited purpose, (3) without the right of reproduction, distribution, or sale. See *White v. Kimmell*, 193 F.2d 744, 746-47 (9th Cir.1952); see also Brown, 714 F.2d at 1091; *Data Cash Sys.*, 628 F.2d at 1042; *Burke*, 598 F.2d at 692; *Am. Visuals Corp. v. Holland*, 239 F.2d 740, 744 (2d Cir. 1956); 1-4 Melville B. & David Nimmer, *Nimmer on Copyright* § 4.13 (hereinafter “Nimmer on Copyright”). We agree that this test may help to focus the analysis.

Based on the record, any reasonable jury would have to conclude that the “return or destroy” provisions of the National Screen Agreement did not effectively preclude redistribution or sale of the images in the publicity materials made available to theaters for *The Wizard of Oz* and *Gone with the Wind*. For example, Leith Adams, Warner Bros.’s expert, conceded that theaters could “buy by the thousands” handouts and promotional flyers to pass out to the general public. At least some of these handouts and flyers included images of the characters. “Exploitation books” associated with *The Wizard of Oz* and *Gone with the Wind* allowed theaters to select promotional giveaway or sale items for the public, ranging from color-tinted publicity photographs to matchbooks to spare-tire covers. No evidence suggests that theaters were expected to recover these items from the public and return or destroy them. Adams also conceded that in addition to movie posters and lobby cards for the theaters’ own premises, theaters could obtain movie posters expressly constructed for posting on telephone poles throughout the theater’s local area. When asked if these movie posters generally were returned or destroyed, Adams responded, “I don’t think so but I don’t know.” We also

⁵ Notably, the National Screen Agreement submitted into the record by Warner Bros. covered publicity materials for films produced between July 8, 1937 and December 31, 1939. Because the *Tom & Jerry* short films at issue here debuted between 1940 and 1957, and Warner Bros. asserts no later agreements or additional grounds for finding a “limited publication,” Warner Bros. essentially concedes that the *Tom & Jerry* publicity materials are in the public domain.

note that Loew's initially took steps to obtain a federally registered copyright in some of the still photographs used in publicity materials for *The Wizard of Oz*, suggesting that Loew's did not expect the National Screen Agreement to preserve its copyrights in such materials.

As an additional matter, publicity material images for the films were distributed directly to the general public through newspapers and magazines. As a leading treatise states:

An issue of recurring application is publicity photos for motion pictures from the 1920's through 1970's. The films themselves from that era were routinely protected as validly noticed and registered works; but much less care was typically exercised during production and in the publicity office. Often, photos were taken on the set depicting the same stars, wearing the same costumes, appearing in the same scenery, that would later appear in the photoplay, but the photographs were sent off to newspapers before the film's release, in order to generate a buzz about its opening.

1-4 Nimmer on Copyright § 4.13[A][3].

Here, the record includes publicity photographs for *The Wizard of Oz* that appeared in *McCall's* magazine, *The Saturday Evening Post*, the *St. Louis Post-Dispatch*, and the *Chicago Herald and Examiner* before the film was released. It also includes publicity photographs for *Gone with the Wind* that appeared in the *Atlanta Constitution* and the *Atlanta Journal*, and other published material indicating that *Gone with the Wind* publicity photographs appeared in several magazines in the United States before the film was released. Obviously, in each case, the rights-holder granted the right of "reproduction, distribution [and] sale" of the subject publicity photographs to each respective newspaper and magazine. *White*, 193 F.2d at 747. At least one court has held that distribution of promotional photographs to theaters, even under an effective condition that the photographs be returned, is not sufficient to demonstrate a limited publication where the photographs are also distributed for use by newspapers and magazines. See *Milton H. Greene Archives, Inc. v. BPI Commc'ns, Inc.*, 378 F. Supp. 2d 1189, 1198-99 (C.D. Cal. 2005), *aff'd*, 320 F. App'x 572 (9th Cir. 2009) (unpublished per curiam).⁶

⁶ Warner Bros. argues that the distribution to newspapers and magazines is irrelevant in this case because AVELA extracts images only from restored movie posters and lobby cards, not from newspapers and magazines. Experts for both parties agreed, however, that the materials provided to theaters, on the one hand, and the materials provided to newspapers and magazines, on the other, were drawn from a single, comprehensive set of publicity images created for the sole purpose of promoting each film. Both avenues of distribution would be relevant to a reasonable outsider trying to discern Loew's intent to place limits on reproduction, distribution, and sale when it put these publicity materials in others' hands without copyright notice. See *Nucor Corp.*, 476 F.2d at 390 n.7; *Milton H.*

Given the undisputed evidence regarding handouts, flyers, giveaway and sale items, and movie posters for telephone poles distributed under the National Screen Agreement (in apparent contravention of its “return or destroy” provisions), as well as the widespread distribution of many publicity images to newspapers and magazines, the only possible “implications of [Loew’s] outward actions to the reasonable outsider” is that Loew’s intended to abandon the right to control reproduction, distribution, and sale of the images in the publicity materials. See *Nucor Corp.*, 476 F.2d at 390 n.7. In terms of the Ninth Circuit test, the publicity materials simply were not distributed to a definitely selected class of persons without the right of reproduction, distribution, or sale. See *White*, 193 F.2d at 746-47. To the contrary, the purpose of the distribution of all of these publicity materials was to reach as much of the public as possible. The studio itself happily estimated at the time that over 90 million people would see the advertising campaign for *The Wizard of Oz*. In practical terms, “courts have hesitated to find general publication if to do so would divest the common law right to profit from one’s own work,” *Burke*, 598 F.2d at 691, but here it appears Loew’s viewed the publicity materials as a tool to maximize profit from the copyrighted films, not as an independent source of revenue. Therefore, we conclude that the publicity materials for *The Wizard of Oz* and *Gone with the Wind*, as well as for the *Tom & Jerry* short films, are in the public domain.⁷

C. Copyright Infringement and the Right to Make Use of Public Domain Materials

The elements of copyright infringement are (1) ownership of a valid copyright and (2) copying of original elements of the copyrighted work. *Taylor*, 403 F.3d at 962-63. As discussed above, Warner Bros. has established ownership of valid copyrights in the movies and animated shorts. Copying can be shown either by (1) direct evidence of copying, or (2) access to the copyrighted material and substantial similarity between the AVELA work and the copyrighted work. *Id.* at 964. There is no dispute that AVELA had access to the films in question, each of which has a long history of popularity. See, e.g., *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1297 (C.D. Cal. 1995) (“[T]he sheer worldwide popularity and distribution of the Bond films allows

Greene Archives, 320 F. App’x at 573 (affirming, where publicity materials were distributed variously “to magazines, newspapers, and local theaters,” that a general publication still occurred with respect to the pictures that “were not used [by the recipients] as broadly as the others or at all” because the materials were made available with no limits on diffusion, reproduction, or distribution).

⁷ Warner Bros. also argued in district court that the publicity materials are protected by the film copyrights as derivative works of the films. Under the 1909 Copyright Act, what came to be known as “derivative works” were defined as “[c]ompilations or abridgements, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain or of copyrighted works. . . .” 17 U.S.C. § 7 (repealed effective 1978); see *Shoptalk, Ltd. v. Concorde-New Horizons Corp.*, 168 F.3d 586, 591 (2d Cir. 1999). Here, it is undisputed that the publicity materials were not based on film footage used in the copyrighted films, but rather on still photographs and artists’ renderings created independently from the film footage. Because they were not adapted or otherwise created from the films, the publicity materials cannot be “derivative works” of the films.

the Court to indulge a presumption of access.”). In addition, there is no dispute that the images in the AVELA works are substantially similar to the images in the copyrighted films, as they are in fact images of the same people in the same costumes (or, in the case of Tom and Jerry, of the same cartoon characters). The only remaining question is whether AVELA has appropriated “original elements” of the films, see Taylor, 403 F.3d at 962-63, or solely elements that are in the public domain.

Warner Bros. does not challenge the products that are exact reproductions of an entire item of publicity material. Instead, Warner Bros. contends that AVELA has extracted images from the public domain materials and used them in new ways that infringe the copyrights in the associated films. AVELA admits that it has used the images in new ways (and indeed has applied for its own copyrights for such derivative works), but it counters that there is no limitation on the public’s right to modify or make new works from public domain materials.

AVELA is correct that, as a general proposition, the public is not limited solely to making exact replicas of public domain materials, but rather is free to use public domain materials in new ways (i.e., to make derivative works by adding to and recombining elements of the public domain materials). “[W]here a work has gone into the public domain, it does in fact follow that any individual is entitled to develop this work in new ways.” *Pannonia Farms, Inc. v. USA Cable*, 2004 WL 1276842, at *9 & n.20 (S.D.N.Y. June 8, 2004) (rejecting the theory that the plaintiff’s copyrights in nine original Sherlock Holmes stories gave the plaintiff the exclusive right to make derivative works featuring the Holmes and Dr. Watson characters because fifty-plus earlier stories already had reached the public domain). Nevertheless, this freedom to make new works based on public domain materials ends where the resulting derivative work comes into conflict with a valid copyright.

For example, in *Silverman v. CBS Inc.*, 870 F.2d 40 (2d Cir. 1989), a number of pre-1948 Amos ‘n’ Andy radio scripts had entered the public domain. However, CBS held valid copyrights in a number of post-1948 radio scripts and, arguably, in a later television series. In 1981, Silverman began developing a Broadway musical version of Amos ‘n’ Andy, and CBS alleged that his script infringed its copyrights. Like AVELA here, Silverman argued that because the pre-1948 Amos ‘n’ Andy scripts were in the public domain, he was free to make any derivative work he wished featuring the Amos ‘n’ Andy characters. The court disagreed, holding that derivative works based on the public domain scripts still would infringe to the extent they used “any further delineation of the characters contained in the post-1948 radio scripts and the television scripts and programs, if it is ultimately determined that these last items remain protected by valid copyrights.” *Id.* at 50; see also *Pannonia Farms*, 2004 WL 1276842, at *9 (noting that although the characters of Sherlock Holmes and Dr. Watson were in the public domain based on fifty-plus public domain original stories, a new work that incorporated

“character traits newly introduced” by the nine later original stories still under copyright would infringe those copyrights).

In other words, if material related to certain characters is in the public domain, but later works covered by copyright add new aspects to those characters, a work developed from the public domain material infringes the copyrights in the later works to the extent that it incorporates aspects of the characters developed solely in those later works. Therefore, we must determine (1) the apparent scope of the copyrights in the later works (here, the films), (2) the scope of the material dedicated to the public in the publicity materials, which correspondingly limits the scope of the film copyrights, and (3) the scope into which each of AVELA’s images falls. If an AVELA work falls solely within the scope of the material dedicated to the public, there can be no infringement liability under the film copyrights. On the other hand, if some portion of an AVELA work falls outside the scope of the material dedicated to the public, but within the scope of the film copyrights, AVELA is liable for infringement.

1. The Scope of the Film Copyrights

It is clear that when cartoons or movies are copyrighted, a component of that copyright protection extends to the characters themselves, to the extent that such characters are sufficiently distinctive. See, e.g., *Gaiman v. McFarlane*, 360 F.3d 644, 661 (7th Cir. 2004) (“[A] stock character, once he was drawn and named and given speech [in a comic book series] . . . became sufficiently distinctive to be copyrightable.”); *Olson v. Nat’l Broad. Co., Inc.*, 855 F.2d 1446, 1452 (9th Cir. 1988) (holding that “copyright protection may be afforded to characters visually depicted in a television series or in a movie” for “characters who are especially distinctive”); *Metro-Goldwyn-Mayer*, 900 F. Supp. at 1296 (holding that plaintiffs’ copyrighted James Bond films established a copyright in the character of James Bond). The district court thoroughly and accurately applied this principle to the instant case, and the parties do not contest the district court’s analysis. We agree with the district court’s conclusion that Dorothy, Tin Man, Cowardly Lion, and Scarecrow from *The Wizard of Oz*, Scarlett O’Hara and Rhett Butler from *Gone with the Wind*, and Tom and Jerry each exhibit “consistent, widely identifiable traits” in the films that are sufficiently distinctive to merit character protection under the respective film copyrights. See *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003).

AVELA correctly points out that the scope of copyright protection for the characters in the films *The Wizard of Oz* and *Gone with the Wind* is limited to the increments of character expression in the films that go beyond the character expression in the books on which they were based. See *Silverman*, 870 F.2d at 49 (“[C]opyrights in derivative works secure protection only for the incremental additions of originality contributed by the authors of the derivative works.”). While true, this has little practical effect in the instant case, as a book’s description of a character generally anticipates very little of the expression of the character in film:

The reason is the difference between literary and graphic expression. The description of a character in prose leaves much to the imagination, even when the description is detailed—as in Dashiell Hammett’s description of Sam Spade’s physical appearance in the first paragraph of *The Maltese Falcon*. “Samuel Spade’s jaw was long and bony, his chin a jutting v under the more flexible v of his mouth. His nostrils curved back to make another, smaller, v. His yellow-grey eyes were horizontal. The v motif was picked up again by thickish brows rising outward from twin creases above a hooked nose, and his pale brown hair grew down—from high flat temples—in a point on his forehead. He looked rather pleasantly like a blond satan.” Even after all this, one hardly knows what Sam Spade looked like. But everyone knows what Humphrey Bogart looked like.

Gaiman, 360 F.3d at 660-61.

The film actors’ portrayals of the characters at issue here appear to rely upon elements of expression far beyond the dialogue and descriptions in the books. AVELA has identified no instance in which the distinctive mannerisms, facial expressions, voice, or speech patterns of a film character are anticipated in the corresponding book by a literary description that evokes, to any significant extent, what the actor portrayed. Put more simply, there is no evidence that one would be able to visualize the distinctive details of, for example, Clark Gable’s performance before watching the movie *Gone with the Wind*, even if one had read the book beforehand. At the very least, the scope of the film copyrights covers all visual depictions of the film characters at issue, except for any aspects of the characters that were injected into the public domain by the publicity materials.

2. The Scope of the Material Dedicated to the Public

AVELA contends that the injection of the publicity materials into the public domain simultaneously injected the film characters themselves into the public domain. To the extent that copyright-eligible aspects of a character are injected into the public domain, the character protection under the corresponding film copyrights must be limited accordingly.

As an initial matter, we reject AVELA’s contention that the publicity materials placed the entirety of the film characters at issue into the public domain. The isolated still images included in the publicity materials cannot anticipate the full range of distinctive speech, movement, demeanor, and other personality traits that combine to establish a copyrightable character. See, e.g., Gaiman, 360 F.3d at 660 (holding that the character’s “age, obviously phony title (‘Count’), what he knows and says, [and] his name” combine with his visual appearance “to create a distinctive character”); *Metro-Goldwyn-Mayer*, 900 F. Supp. at 1296 (citing “various character traits that are specific to Bond—i.e. his cold-bloodedness; his overt sexuality; his love of martinis ‘shaken, not stirred’; his marksmanship; his ‘license to kill’ and use of guns; his physical strength; [and] his

sophistication,” rather than his visual appearance alone, as establishing the copyrightability of the character); cf. *Walker v. Viacom Int’l, Inc.*, 2008 WL 2050964, at *5-6 (N.D. Cal. May 13, 2008) (holding that a copyrighted cartoon consisting of “four small and largely uninformative black and white panels” that conveyed “little to no information about [the character’s] personality or character traits” was insufficient to establish copyright protection of the character). Nevertheless, the publicity materials could have placed some aspects of each character’s visual appearance into the public domain.

A situation somewhat similar to the one we face was presented in *Siegel v. Warner Bros. Entm’t Inc.*, 542 F. Supp. 2d 1098 (C.D. Cal. 2008). The defendants owned the copyright in two promotional announcements for Superman comics, published before the first Superman comic book was issued. The black-and-white promotional announcements each included an image of the protagonist “wearing some type of costume” and “holding aloft a car.” *Id.* at 1126. The defendants argued that their copyright in the promotional announcements gave them rights over the entirety of the Superman character as later developed (and copyrighted separately) in the comic book. The court disagreed, stating:

[N]othing concerning the Superman storyline (that is, the literary elements contained in *Action Comics*, Vol. 1) is on display in the ads; thus, Superman’s name, his alter ego, his compatriots, his origins, his mission to serve as a champion of the oppressed, or his heroic abilities in general, do not remain within defendants sole possession to exploit. Instead the only copyrightable elements left [to defendants] arise from the pictorial illustration in the announcements, which is fairly limited.

Id. (emphasis added). As a result, the scope of the promotional announcements encompassed only the limited character of “a person with extraordinary strength who wears a black and white leotard and cape.” *Id.* Despite the earlier publication of the promotional announcements, the copyright in the later comic book nevertheless encompassed the fully developed character with “Superman’s distinctive blue leotard (complete with its inverted triangular crest across the chest with a red “S” on a yellow background), a red cape and boots, and his superhuman ability to leap tall buildings, repel bullets, and run faster than a locomotive, none of which is apparent from the announcement.” *Id.* Importantly, the scope of the character copyrighted through the promotional announcements was viewed on the strict basis of what was clearly visible in the announcements, not through the additional perspective of the later, more developed work.

In the instant case, the only “copyrightable elements” in the publicity materials (albeit injected into the public domain, rather than registered for copyright) are even more limited than in *Siegel*. While the promotional announcements in *Siegel* at least showed proto-Superman holding a car over his head, establishing a distinguishing characteristic

of “extraordinary strength,” the publicity materials here reveal nothing of each film character’s signature traits or mannerisms. At most, the publicity materials could have injected some of the purely visual characteristics of each film character into the public domain, akin to the character in “a black and white leotard and cape.” *Id.*

Because we must rely solely on visual characteristics, the individuals shown in the publicity materials establish “characters” for copyright purposes only if they display “consistent, widely identifiable” visual characteristics. See *Rice*, 330 F.3d at 1175. The *Walker* case is instructive in this regard. There, the plaintiff asserted his copyright in a comic strip entitled “Mr. Bob Spongee, The Unemployed Sponge” against the producers of the animated television series “SpongeBob SquarePants.” 2008 WL 2050964 at *1. The plaintiff had created sponge dolls based on his comic strip and placed advertisements in a newspaper. *Id.* Because these materials revealed “little to no information about Mr. Bob Spongee’s personality or character traits,” *id.* at * 5, the court could look only to his visual appearance for distinctiveness. The court held that in such a situation, a consistent visual appearance throughout the materials was a prerequisite for character protection. See *id.* at *5-6. Because of variations in the sponge’s clothing, color, eye and nose shape, and hair among the comic strip, dolls, and advertisements, the plaintiff’s copyright did not create any character protection. *Id.* at *6.⁸

Therefore, we must determine if any individual is depicted with consistent, distinctive visual characteristics throughout the various publicity materials. If so, those consistent visual characteristics define the “copyrightable elements” of that film character, *Siegel*, 542 F. Supp. 2d at 1126, which were injected into the public domain by the publicity materials. If not, then there are no visual aspects of the film character in the public domain, apart from the publicity material images themselves.

With respect to the cartoon characters Tom and Jerry, we note that on the spectrum of character copyrightability, the category of cartoon characters often is cited as the paradigm of distinctiveness. See, e.g., *Warner Bros., Inc. v. Am. Broad. Cos.*, 720 F.2d 231, 240 (2d Cir. 1983); 1-2 *Nimmer on Copyright* § 2.12. The record indicates that the Tom & Jerry publicity materials consist of just one public domain movie poster for each copyrighted short film, and the visual characteristics of Tom and Jerry in the first poster, for *Puss Gets the Boot* (released in 1940), are quite different from the characters popularly recognized as Tom and Jerry today. In addition, the first poster by itself reveals no distinctive character or visual traits, but only visual characteristics typical to cats and mice. As a result, the first poster is essentially a generic cat-and-mouse cartoon drawing

⁸ Of course, the presence of distinctive qualities apart from visual appearance can diminish or even negate the need for consistent visual appearance. See, e.g., *Metro-Goldwyn-Mayer*, 900 F. Supp. at 1296 (holding that variations in the visual appearance of James Bond did not negate character protection in light of his many distinctive and consistently displayed character traits; the fact that “many actors can play Bond is a testament to the fact that Bond is a unique character whose specific qualities remain constant despite the change in actors”).

that cannot establish independently copyrightable characters. Cf. Walker, 2008 WL 2050964 at *5-6 (finding a four-panel cartoon drawing featuring a personified sponge lacked the distinctiveness necessary to establish a copyrightable sponge character).

Meanwhile, the copyrighted short film that immediately followed the first poster revealed Tom and Jerry's character traits and signature antagonistic relationship. With the benefit of these strong character traits, the first short film was sufficient to establish the copyrightable elements of the Tom and Jerry characters as depicted therein. See ante at 15-16. In such a situation, each subsequent movie poster could inject into the public domain only the increments of expression, if any, that the movie poster itself added to the already-copyrighted characters from previously released Tom & Jerry films. See *Russell v. Price*, 612 F.2d 1123, 1128 (9th Cir. 1979) (“[A]lthough the derivative work may enter the public domain, the matter contained therein which derives from a work still covered by statutory copyright is not dedicated to the public.”); 1-3 Nimmer on Copyright § 3.07. Because they “derive[] from a work still covered by statutory copyright,” the underlying characters of Tom and Jerry are not in the public domain until the copyrights in the Tom & Jerry short films begin to expire.

In contrast to Tom & Jerry, the record is clear that a veritable blitz of publicity materials for *Gone with the Wind* and *The Wizard of Oz* was distributed prior to the publication of each film. However, with respect to *Gone with the Wind*, the publicity material images are far from the cartoon-character end of the spectrum of character copyrightability. There is nothing consistent and distinctive about the publicity material images of Vivian Leigh as Scarlett O'Hara and Clark Gable as Rhett Butler. They certainly lack any cartoonishly unique physical attributes, and neither one is shown in a consistent, unique outfit and hairstyle. See Walker, 2008 WL 2050964 at *6; cf. Siegel, 542 F. Supp. 2d at 1126 (finding “a black and white leotard and cape” sufficiently distinctive to establish an element of character copyrightability). As a result, the district court correctly held that the publicity material images for *Gone with the Wind* are no more than “pictures of the actors in costume.” Indeed, if the publicity material images from *Gone with the Wind* were sufficient to inject all visual depictions of the characters Scarlett O'Hara and Rhett Butler into the public domain, then almost any image of Vivian Leigh or Clark Gable would be sufficient to do so as well. Therefore, the only images in the public domain are the precise images in the publicity materials for *Gone with the Wind*.

The characters in *The Wizard of Oz* lie closer to the cartoon-character end of the spectrum. There are many stylized aspects to the visual appearances of Scarecrow, Tin Man, and Cowardly Lion, and they perhaps might be considered as live-action representations of cartoon characters. Dorothy, while not so thoroughly stylized, wears a somewhat distinctive costume and hairstyle. However, a close examination of the record reveals that these potentially distinctive visual features do not appear in a consistent fashion throughout the publicity materials. For example, in the publicity materials, Judy

Garland as Dorothy sometimes wears a red dress and bow and black slippers, rather than the distinctive blue dress and bow and ruby slippers of the film, and her hairstyle also varies. From image to image, Scarecrow's costume color ranges from yellow to blue to black, Cowardly Lion's from light yellow to very dark brown, and Tin Man's from shiny silver to a dull blue-gray.⁹ Moreover, there are publicity material images in which other stylized elements of the characters' costumes and faces are significantly different from the look used in the film. For example, in some images Tin Man's face appears metallic, and in others it appears flesh-colored. If the publicity material images for *The Wizard of Oz* were held to establish the visual elements of copyrightable characters, their scope would encompass almost any character who wears a scarecrow or lion costume, and a wide range of little girl and silver robotic costumes as well, creating an unacceptable result:

If a drunken old bum were a copyrightable character, so would be a drunken suburban housewife, a gesticulating Frenchman, a fire-breathing dragon, a talking cat, a Prussian officer who wears a monocle and clicks his heels, a masked magician, *Rice v. Fox Broadcasting Co.*, 330 F.3d 1170, 1175-76 (9th Cir. 2003), and, in Learned Hand's memorable paraphrase of *Twelfth Night*, "a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress." *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930). It would be difficult to write successful works of fiction without negotiating for dozens or hundreds of copyright licenses, even though such stereotyped characters are the products not of the creative imagination but of simple observation of the human comedy.

Gaiman, 360 F.3d at 660. While the overly broad characters would be in the public domain rather than copyrighted in the instant case, the analysis of the copyrightability of a character must be the same in either case. See *Silverman*, 870 F.2d at 50.

We conclude that the characters' visual appearances in the publicity materials for *The Wizard of Oz* do not present the requisite consistency to establish any "copyrightable elements" of the film characters' visual appearances. Therefore, once again, the only images in the public domain are the precise images in the publicity materials for *The Wizard of Oz*.

3. AVELA's Use of the Public Domain Images

We held above that no visual aspects of the film characters in *Gone with the Wind* and *The Wizard of Oz* are in the public domain, apart from the images in the publicity materials themselves. Therefore, any visual representation that is recognizable as a

⁹ The record shows that these extreme color variations resulted from the practice of using artists to hand-color still photographs originally taken in black-and-white (because color photography was relatively new and expensive). The coloration artists often were left to their own discretion in choosing colors for each photograph.

copyrightable character from one of these films, other than a faithful copy of a public domain image, has copied “original elements” from the corresponding film. See Taylor, 403 F.3d at 962-63. We must examine the AVELA products based on *The Wizard of Oz* and *Gone with the Wind* to determine which ones display “increments of expression,” Silverman, 870 F.2d at 50, of the film characters beyond the “pictures of the actors in costume” in the publicity materials. The AVELA products in the record can be analyzed in three categories.

The first category comprises AVELA products that each reproduce one image from an item of publicity material as an identical two-dimensional image. While Warner Bros. does not challenge the reproduction of movie “posters as posters (or lobby cards as lobby cards),” it does challenge the reproduction of a single image drawn from a movie poster or lobby card on T-shirts, lunch boxes, music box lids, or playing cards, for example. We read the district court’s permanent injunction to follow Warner Bros.’s distinction, forbidding all uses except the reproduction of items of publicity material “in their entirety.” However, no reasonable jury could find that merely printing a public domain image on a new type of surface (such as a T-shirt or playing card), instead of the original surface (movie poster paper or lobby card paper), adds an increment of expression of the film character to the image.¹⁰ Similarly, Warner Bros. presents no reasoned argument as to why the reproduction of one smaller contiguous portion of an image from an item of publicity material, rather than the entirety of the image from that item, would add an increment of expression of the film character. As a result, products that reproduce in two dimensions any one portion of an image from any one item of publicity material, without more, do not infringe Warner Bros.’s copyright. For products in this category, we reverse the grant of summary judgment to Warner Bros. with respect to *The Wizard of Oz* and *Gone with the Wind* and direct the entry of summary judgment for AVELA. We also vacate the permanent injunction to the extent it applies to products in this category.

The second category comprises AVELA products that each juxtapose an image extracted from an item of publicity material with another image extracted from elsewhere in the publicity materials, or with a printed phrase from the book underlying the subject film, to create a new composite work. Even if we assume that each composite work is composed entirely of faithful extracts from public domain materials, the new arrangement of the extracts in the composite work is a new increment of expression that evokes the film character in a way the individual items of public domain material did not. For example, the printed phrase “There is no place like home” from the book *The Wizard of Oz* and a publicity material image of Judy Garland as Dorothy, viewed side by side in uncombined form, are still two separate works, one literary and one a picture of an actor

¹⁰ This principle would not apply if the new surface itself is independently evocative of the film character. For example, reproducing a publicity image of Judy Garland as Dorothy on a ruby slipper might well infringe the film copyright for *The Wizard of Oz*.

in costume. In contrast, a T-shirt printed with the phrase “There’s no place like home” along with the same image of Judy Garland as Dorothy is a new single work that evokes the film character of Dorothy much more strongly than the two separate works.¹¹ Because “the increments of expression added [to the public domain materials] by the films are protectable,” one making a new work from public domain materials infringes “if he copies these protectable increments.” Silverman, 870 F.2d at 50. Like the juxtaposition of an image and a phrase, a composite work combining two or more separate public-domain images (such as Judy Garland as Dorothy combined with an image of the Emerald City) also adds a new increment of expression of the film character that was not present in the separate images. Accordingly, products combining extracts from the public domain materials in a new arrangement infringe the copyright in the corresponding film. We affirm the district court’s grant of summary judgment to Warner Bros. with respect to The Wizard of Oz and Gone with the Wind and the permanent injunction for this category of products.¹²

The third category comprises AVELA products that each extend an image extracted from an item of publicity material into three dimensions (such as statuettes inside water globes, figurines, action figures, and busts). Many of these products also include a juxtaposition of multiple extracts from the public domain materials, and such composite works infringe for the reasons explained in the preceding paragraph. Even where the product extends a single two-dimensional public domain image into three dimensions, a three-dimensional rendering must add new visual details regarding depth to the underlying two-dimensional image. (As a simple illustration, it is impossible to determine the length of someone’s nose from a picture if they are looking directly at the camera.) Of course, even more visual details must be added if the two-dimensional image is transformed into a fully realized figure, as most three-dimensional AVELA products are. (Otherwise, for example, the back of each figurine character would be blank.) Much of this visual information is available in the feature-length films, where the characters are observable from a multitude of viewing angles.

In depositions, the AVELA licensees who developed the action figures, figurines, water globes, and busts made no pretense that they were not guided by their knowledge of the films. Instead, they indicated that, while each three-dimensional design began with an image from the public domain photo stills and movie posters, the goal was to create a

¹¹ Many of the phrases drawn from the underlying books are modified to some degree in the corresponding films, such as contracting “There is” to “There’s” in the cited example. The parties dispute whether such modified phrases are original to the films, and thus within the scope of the film copyrights, or still recognizable as phrases drawn from the books, and thus outside the scope of the film copyrights. We need not resolve that question because we hold that, even if the phrases taken alone are outside the scope of the film copyrights, the juxtaposition of the phrases with images from the publicity materials is an infringement of the film copyrights.

¹² AVELA does not dispute that a permanent injunction is appropriate to the extent that the AVELA products are found to infringe Warner Bros.’s copyrights.

product recognizable as the film character. The only reasonable inference is that the details added to establish perspective and full realization were chosen to be consistent with the film characters. As a result, the addition of visual details to each two-dimensional public domain image to create the three-dimensional product makes impermissible use of the “further delineation of the characters contained in” the feature-length films. See Silverman, 870 F.2d at 50. Accordingly, we also affirm the district court’s grant of summary judgment to Warner Bros. with respect to *The Wizard of Oz* and *Gone with the Wind* and the permanent injunction for this category of products.

We also held above that the characters of Tom and Jerry are not in the public domain. In addition, because the characters achieved copyright protection through the short films before all but the first movie poster entered the public domain, and the later movie posters necessarily exhibit those characters, even the use of any movie poster but the first requires Warner Bros.’s authorization. See Russell, 612 F.2d at 1128 (“Therefore, since exhibition of the film ‘Pygmalion’ necessarily involves exhibition of parts of Shaw’s play, which is still copyrighted, plaintiffs here may prevent defendants from renting the film for exhibition without their authorization.”). Warner Bros. has granted such authorization to the extent it has averred that it will not challenge the reproduction of movie “posters as posters (or lobby cards as lobby cards).”

Therefore, AVELA may use the first Tom & Jerry poster, for the short film *Puss Gets the Boot*, in the fashion described above for the publicity materials for *Gone with the Wind* and *The Wizard of Oz*. Accordingly, with respect to Tom & Jerry products based on the first publicity poster, we modify the district court’s grant of summary judgment and the permanent injunction to be consistent with the three categories of products described above for *Gone with the Wind* and *The Wizard of Oz*. With respect to all later Tom & Jerry posters, AVELA is authorized to make faithful reproductions, but not to reproduce those movie poster images on other products or to make derivative works based on Tom and Jerry. Accordingly, we affirm the grant of summary judgment to Warner Bros. and the permanent injunction crafted by the district court with respect to all other Tom & Jerry products.

III. CONCLUSION

For the foregoing reasons, we affirm in large part the district court’s grant of summary judgment to Warner Bros. on the issue of copyright infringement and the resulting permanent injunction. We reverse with respect to one category of AVELA products, and we vacate in corresponding part the permanent injunction entered by the district court. We remand for modification of the permanent injunction and further proceedings consistent with this opinion.

X. WHO IS JUDY GARLAND?

GARLAND v. TORRE

No. 325, Docket 24951.

259 F.2d 545 (1958)

Judy GARLAND, Petitioner-Appellee,

v.

Marie TORRE, Respondent-Appellant.

United States Court of Appeals Second Circuit.

Argued May 2, 1958.

Decided September 30, 1958.

Certiorari Denied December 8, 1958.

Lionel S. Popkin (of Hess, Mela, Segall, Popkin & Guterman), New York City (Lee N. Steiner, New York City, of counsel), for petitioner-appellee.

Mathias F. Correa (of Cahill, Gordon, Reindel & Ohl), New York City (Sheldon Oliensis, New York City, of counsel), for respondent-appellant.

Before CLARK, Chief Judge, and HINCKS and STEWART, Circuit Judges.

Certiorari Denied December 8, 1958. See 79 S.Ct. 237.

STEWART, Circuit Judge.

Judy Garland brought an action against Columbia Broadcasting System, Inc. (CBS), in the district court. Her complaint set out two claims, one for breach of contract, the other alleging that the defendant had made false and defamatory statements about her and had “authorized, requested and induced” their publication in newspapers and elsewhere. An alleged example of such a publication, annexed as an exhibit to the complaint, consisted of a few paragraphs in a column entitled “TV-Radio Today,” written by Marie Torre, and published in the New York Herald Tribune on January 10, 1957. In this column Miss Torre attributed to a CBS “network executive” several statements about the plaintiff which, the complaint alleged, were false, defamatory, and highly damaging to the plaintiff’s professional reputation. CBS filed an answer and counter-claim, denying

among other things that it had made the alleged false and defamatory statements or caused them to be published.

With the issue thus joined, counsel for both parties embarked upon pre-trial discovery proceedings. In a deposition taken by the defendant's counsel, the plaintiff testified that she did not know who at CBS had made the statements appearing in the Torre column, but that she had "been told it was either Lester Gottlieb or Hubbell Robinson." Gottlieb and Robinson were both executives of CBS. In their depositions, taken by the plaintiff's counsel, each denied making the statements in question. Each also denied knowing the identity of the "network executive" referred to in the column.¹

The plaintiff's counsel then took Marie Torre's deposition. She testified that the statements appearing in the column were in "exact words" statements which had been made to her over the telephone by a CBS informant. She refused, under repeated questioning, to give the name of this "network executive," asserting that to do so would violate a confidence. Proceedings were then initiated in the district court to compel her to disclose the name. Her counsel countered by filing a motion for an order directing that the identity of the CBS informant "not be inquired into" upon the ground that examination upon this subject would "unreasonably annoy, embarrass and oppress" the deponent. F.R. Civ.P. Rule 30, 28 U.S.C.A. After a hearing the district court denied the latter motion and ordered the witness to state the name of her informant. Upon her refusal in the presence of the court to do so, she was held in criminal contempt, and this appeal followed.²

Three alternative arguments are advanced in support of the appellant's position that it was error to require her to disclose in these pre-trial proceedings the identity of a confidential news source.³ The first contention is a Constitutional one — to compel newspaper reporters to disclose confidential sources of news would, it is asserted, encroach upon the freedom of the press guaranteed by the First Amendment, because "it would impose an important practical restraint

[259 F.2d 548]

on the flow of news from news sources to news media and would thus diminish pro tanto the flow of news to the public." Secondly, it is urged that quite apart from any Constitutional question, the societal interest in assuring a free and unrestricted flow of

¹ A third CBS executive, whose deposition was taken later, testified similarly.

² Sentenced to ten days imprisonment, the appellant was promptly released upon her own recognizance pending determination of the appeal. The district judge expressly noted on the record that the appellant was entirely respectful to the court and intended no personal affront to its dignity.

³ This confidentiality was apparently not explicit: "Q. Did this network executive ask you to withhold giving his name? A. No, he did not. It is just that having worked in the business so long, in cases like this you don't mention the man's name."

news to the public should impel this court to hold that the identity of a confidential news source is protected by at least a qualified privilege. Finally, the appellant contends that in the particular circumstances of this case the district court in any event should have ordered, under F.R.Civ.P. Rule 30, that no inquiry be made as to the identity of the CBS spokesman.

As to the Constitutional issue, we accept at the outset the hypothesis that compulsory disclosure of a journalist's confidential sources of information may entail an abridgment of press freedom by imposing some limitation upon the availability of news.⁴ Freedom of the press within the historic meaning of the First Amendment meant primarily freedom from previous restraints upon publication and freedom from censorship. *Near v. State of Minnesota*, 1931, 283 U.S. 697, 716, 51 S.Ct. 625, 75 L.Ed. 1357. Yet in the domain of indispensable First Amendment liberties, it is essential "not to limit the protection of the right to any particular way of abridging it." *Grosjean v. American Press Co.*, 1936, 297 U.S. 233, 249, 56 S.Ct. 444, 449, 80 L.Ed. 660. The fact that no direct restraint is imposed does not determine the question. *American Communications Ass'n, C. I. O. v. Douds*, 1950, 339 U.S. 382, 402, 70 S.Ct. 674, 94 L.Ed. 925. "[A]bridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action." *National Ass'n for Advancement of Colored People v. State of Alabama ex rel. Patterson*, 1958, 357 U.S. 449, 461, 78 S.Ct. 1163, 1171, 2 L.Ed. 2d 1488.

But freedom of the press, precious and vital though it is to a free society, is not an absolute. What must be determined is whether the interest to be served by compelling the testimony of the witness in the present case justifies some impairment of this First Amendment freedom. That kind of determination often presents a "delicate and difficult" task. *Schneider v. State of New Jersey*, 1939, 308 U.S. 147, 161, 60 S.Ct. 146, 161, 84 L.Ed. 155; *American Communications Ass'n, C. I. O. v. Douds*, *supra*, 339 U.S. at page 400, 70 S.Ct. at page 684 (and see cases cited in that opinion at pages 398 and 399, at pages 683 and 684 respectively). The task in the present case, though perhaps delicate, does not seem difficult.

"Liberty, in each of its phases, has its history and connotation." *Near v. State of Minnesota*, *supra*, 283 U.S. at page 708, 51 S.Ct. at page 628. Freedom of the press, hard-won over the centuries by men of courage, is basic to a free society. But basic too are courts of justice, armed with the power to discover truth. The concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of a free press.

⁴ Insofar as this proposition is factually supported in the record by the affidavits of Ogden R. Reid and Marie Torre, it is of course more than just a hypothesis. To be noted, however, are decisions to the effect that a journalist's professional status does not entitle him to sources of news inaccessible to others. *United Press Associations v. Valente*, 1954, 308 N.Y. 71, 123 N.E.2d 777; *Tribune Review Pub. Co. v. Thomas*, 3 Cir., 1958, 254 F.2d 883.

It would be a needless exercise in pedantry to review here the historic development of that duty.⁵ Suffice it to

[259 F.2d 549]

state that at the foundation of the Republic the obligation of a witness to testify and the correlative right of a litigant to enlist judicial compulsion of testimony were recognized as incidents of the judicial power of the United States. *Blair v. United States*, 1919, 250 U.S. 273, 279-281, 39 S.Ct. 468, 63 L.Ed. 979; *Wilson v. United States*, 1911, 221 U.S. 361, 372-373, 31 S.Ct. 538, 55 L.Ed. 771; *Blackmer v. United States*, 1932, 284 U.S. 421, 438, 52 S.Ct. 252, 76 L.Ed. 375; *United States v. Bryan*, 1950, 339 U.S. 323, 331, 70 S.Ct. 724, 94 L.Ed. 884. Whether or not the freedom to invoke this judicial power be considered an element of Fifth Amendment due process, its essentiality to the fabric of our society is beyond controversy.⁶ As Chief Justice Hughes put it: “[O]ne of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned.” *Blackmer v. United States*, *supra*, 284 U.S. at page 438, 52 S.Ct. at page 255.

Without question, the exaction of this duty impinges sometimes, if not always, upon the First Amendment freedoms of the witness. Material sacrifice and the invasion of personal privacy are implicit in its performance. The freedom to choose whether to speak or be silent disappears. But “[t]he personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public.” *Blair v. United States*, *supra*, 250 U.S. at page 281, 39 S.Ct. at page 471.

If an additional First Amendment liberty — the freedom of the press — is here involved, we do not hesitate to conclude that it too must give place under the Constitution to a paramount public interest in the fair administration of justice. “The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government.”

⁵ The history of the development of testimonial compulsion in English law is summarized in 8 Wigmore, *Evidence*, §§ 2190-2191 (3d ed. 1940). It was only after years of creative evolution that Sir Francis Bacon was able in 1612 to say in the *Countess of Shrewsbury’s Trial*, 2 Howell’s *State Trials* 769, 778: “* * * you must know that all subjects, without distinction of degrees, owe to the king tribute and service, not only of their deed and hand, but of their knowledge and discovery. If there be anything that imports the king’s service, they ought themselves undemanded to impart it; much more if they be called and examined, whether it be of their own fact or of another’s they ought to make direct answer.” 8 Wigmore, *Evidence*, § 2190. By the early Eighteenth Century it had become a “maxim” that “the public has a right to every man’s evidence.” 8 *id.*, § 2192.

⁶ It has been pointed out that the Sixth Amendment, expressly securing to criminal defendants the right to compulsory process for their witnesses, “provided nothing new or exceptional; but gave solid sanction, in the special case of accused persons, to the procedure ordinarily practised and recognized for witnesses in general.” 8 *id.*, § 2191.

Chambers v. Baltimore & Ohio R. Co., 1907, 207 U.S. 142, 148, 28 S.Ct. 34, 38, 52 L.Ed. 143. This, as Mr. Justice Frankfurter has pointed out in a somewhat different context, “has nothing to do with curtailing expression of opinion, be it political, economic, or religious, that may be offensive to orthodox views. It has to do with the power of the state to discharge an indispensable function of civilized society, that of adjudicating controversies between its citizens and between citizens and the state through legal tribunals in accordance with their historic procedures.” *Bridges v. State of California*, 1941, 314 U.S. 252, 291, 62 S.Ct. 190, 207, 86 L.Ed. 192 (dissenting opinion). See *Patterson v. Colorado ex rel. Attorney General*, 1907, 205 U.S. 454, 462-463, 27 S.Ct. 556, 51 L.Ed. 879.⁷

It is to be noted that we are not dealing here with the use of the judicial process to force a wholesale disclosure of a newspaper’s confidential sources of news, nor with a case where the identity of the news source is of doubtful relevance

[259 F.2d 550]

or materiality. Cf. *National Ass’n for Advancement of Colored People v. State of Alabama ex rel. Patterson*, 1958, 357 U.S. 449, 464-465, 78 S.Ct. 1163, 2 L.Ed. 2d 1488. The question asked of the appellant went to the heart of the plaintiff’s claim. We hold that the Constitution conferred no right to refuse an answer.

But even though lacking Constitutional sanction, the appellant’s refusal to disclose the name of her informant should, it is asserted, be protected by an evidentiary privilege. A threshold question — whether the existence of such a privilege is to be determined in this diversity case solely by New York law — is one unnecessary to decide.⁸ If New York law controls, there is no privilege. *People ex rel. Mooney v. Sheriff of New York County*, 1936, 269 N.Y. 291, 199 N.E. 415, 102 A.L.R. 769. If we are free to look beyond the law of New York, we find no reason to depart from the precedents, federal and state, refusing to recognize such a privilege in the absence of a statute creating one. *Brewster v. Boston-Herald-Traveler Corp.*, D.C.D. Mass.1957, 20 F.R.D.

⁷ Compare *Bridges v. State of California*, 1941, 314 U.S. 252, 62 S.Ct. 190, 86 L. Ed. 192, 159 A.L.R. 1346; *Pennekamp v. State of Florida*, 1946, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295; *Craig v. Harney*, 1947, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546. These decisions all recognized that when the exercise of freedom of the press directly impedes the proper functioning of the judicial process, it must yield.

⁸ Compare *Engl v. Aetna Life Ins. Co.*, 2 Cir., 1943, 139 F.2d 469, 470; *Palmer v. Fisher*, 7 Cir., 1955, 228 F.2d 603, 607-608; *Munzer v. Swedish American Line*, D.C.S.D.N.Y.1940, 35 F.Supp. 493, 496; *Reeves v. Pennsylvania R. Co.*, D.C.D.Del. 1949, 8 F.R.D. 616 with *Scourtes v. Fred W. Albrecht Grocery Co.*, D.C.N.D.Ohio 1953, 15 F.R.D. 55, 57; *Ex parte Sparrow*, D.C.N.D.Ala.1953, 14 F.R.D. 351. Cf. *Hickman v. Taylor*, 1957, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451. See 4 Moore, *Federal Practice*, § 26.23 [9]; Greene, *The Admissibility of Evidence under the Federal Rules*, 55 Harv.L.R. 197 (1941).

416; *Rosenberg v. Carroll*, D.C.S.D.N.Y.1951, 99 F.Supp. 629; *Clein v. State*, Fla.1950, 52 So.2d 117; *Plunkett v. Hamilton*, 1911, 136 Ga. 72, 70 S.E. 781, 35 L.R.A.,N.S., 583.

The privilege not to disclose relevant evidence obviously constitutes an extraordinary exception to the general duty to testify. Even those few situations to which the law has long accorded this privilege have been seriously questioned.⁹ It has been emphasized that the tendency should be “not to extend the classes to whom the privilege from disclosure is granted, but to restrict that privilege.” *People v. Sheriff of New York County*, supra, 269 N.Y. at page 295, 199 N.E. at page 416.¹⁰ To recognize the privilege asserted here, assuming our power to do so, would poorly serve the cause of justice.

There remains the appellant’s argument that in the circumstances of this case the district judge should have ordered, under Rule 30, F.R.Civ.P., that no inquiry be made of her as to the identity of her CBS informant.¹¹ The appellant points to the injury to her position as a journalist that could result from her compulsion to testify and to the possibility that the plaintiff might be able to acquire the information somewhere else. She also argues that the plaintiff’s claim for defamation is “of problematical merit, with grave doubt of ever being brought to trial,” and that the information sought to be exacted will therefore probably prove of no actual use to the plaintiff.

The language of Rule 30 clearly places the making of protective orders within the discretion of the trial court. There

[259 F.2d 551]

was no abuse of that discretion in this case. In denying the motion, Judge Ryan found that the deposition was “being taken by plaintiff in good faith and not in such manner as to unreasonably annoy, embarrass or oppress the witness,” and further that it was “a necessary step in the due and proper preparation for trial.”

These findings were entirely justified. While it is possible that the plaintiff could have learned the identity of the informant by further discovery proceedings directed to CBS, her reasonable efforts in that direction had met with singular lack of success.

⁹ See, e. g., Morgan, “Foreword,” Model Code of Evidence (1942), pp. 22-30.

¹⁰ See, e. g., 8 Wigmore, Evidence, §§ 2192, 2286 (3d ed., 1942); Ladd, “A Modern Code of Evidence,” Model Code of Evidence (1942), p. 346. An extension of the privilege of nondisclosure to newspapermen has been the subject of considerable specific study and criticism. See New York Law Revision Commission, Report (1949), pp. 23-168, for a comprehensive treatment of the subject in all its aspects; see excerpts from 1930 bulletins of the Committee on State Legislation, Assn. of the Bar of the City of N. Y., and from 1938 report of the A. B. A. Committee on the Improvement of the Law of Evidence quoted in 8 Wigmore, Evidence, § 2286 (3d ed., 1942).

¹¹ The appeal from the contempt order opens the preliminary proceedings to review. *Hickman v. Taylor*, 3 Cir., 1945, 153 F.2d 212, affirmed 1947, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451.

Without intimating the slightest view as to the merits of Judy Garland's claim against CBS for defamation, we cannot say that the claim is patently frivolous. The information sought was of obvious materiality and relevance. That being so, the eventual outcome of the litigation is not for the appellant nor for this court now to prophesy. Cf. *Blair v. United States*, 1919, 250 U.S. 273, 39 S.Ct. 468, 63 L.Ed. 979.

Affirmed.

XI. WHO IS FRANK SINATRA?

Frank Sinatra, Plaintiff-appellee,

v.

National Enquirer, Inc., et al., Defendant,

And clinic La Prairie, S.a., Defendant-appellant,

854 F.2d 1191 (9th Cir. 1988)

U.S. Court of Appeals for the Ninth Circuit - 854 F.2d 1191 (9th Cir. 1988)

Argued and Submitted Nov. 2, 1987. Decided Aug. 23, 1988

Patricia A. Beaman, Mayer, Brown & Platt, Los Angeles, Cal., for defendant-appellant.

John A. Lawrence, Rudin, Richman & Appel, Beverly Hills, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the Central District of California.

Before ALARCON and NELSON, Circuit Judges, and MUECKE,* District Judge.

NELSON, Circuit Judge:

Appellee Frank Sinatra brought an action under Cal.Civ.Code Sec. 3344 (1987 Supp.)¹ against Clinic La Prairie, S.A. (“Clinic”) over statements made by the Clinic’s employees that were published in a national tabloid. Clinic employees, when interviewed in Switzerland by reporters for the magazine, The National Enquirer, falsely stated that Sinatra visited and was given youth regeneration treatments at the Clinic. The Clinic unsuccessfully entered a special appearance to challenge the district court’s assertion of in personam jurisdiction over it. The Clinic renews its jurisdictional challenge on appeal from a judgment for Sinatra.

* The Honorable C.A. Muecke, United States Senior District Judge for the District of Arizona, sitting by designation

¹ Section 3344 states in part: “Any person who knowingly uses another’s name, voice, signature, photograph or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising, selling, or soliciting purchases of products, merchandise, goods or services, without such person’s prior consent, shall be liable for any damages sustained by the person or persons injured as a result thereof.”

The question on appeal involves whether statements made by employees of a Swiss clinic to a Florida corporation's reporter about a California resident, which are the foundation for an article published in a nationally circulated magazine, are sufficient minimum contacts to establish personal jurisdiction in California. This appeal involves the interaction between the "effects" reasoning of *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984), and the reasonableness focus in *Asahi Metal Industries v. Superior Court of Solano County*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987). What we are required to determine is whether (1) the solicitation of business in California combined with (2) the unauthorized use of another's name in order to promote that business and (3) knowledge that such use will injure a California plaintiff in California constitute sufficient minimum contacts to establish purposeful direction.

The facts establish that the Clinic concocted this false story as part of its continuing effort to solicit clients through the use of American media and advertising. We view the misappropriation of Sinatra's name as one component of a series of ongoing efforts by the defendant to avail itself of the benefits of the California market. The defendant, although lacking complete control over dissemination, intentionally used another's name for the defendant's commercial benefit. We hold that the Clinic's cumulative contacts with California make the exercise of jurisdiction by the California courts reasonable under the Due Process Clause of the Fourteenth Amendment. *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 839-41 (9th Cir. 1986). We therefore affirm the district court's exercise of jurisdiction over the Clinic.

BACKGROUND

Frank Sinatra is a well-known entertainer in the recording, television, and motion picture industries, who resides in California. The Clinic is a Swiss corporation, operating a medical clinic in Montreux, Switzerland. The Clinic has operated an information and reservation center in Kansas City, Missouri since 1976. Richard Van Vrooman set up the information center, represented the Clinic in the United States, and handled all reservations in the United States. Van Vrooman also coordinated the Clinic's extensive North American advertising efforts in which advertising was placed in various periodicals of national circulation.² Van Vrooman was the Clinic's sole representative in North America. The Clinic contests these facts and contends that it merely entered into a contract with New Life, a Missouri corporation, located solely in Missouri, to provide

² The Clinic primarily advertised its cosmetics and health products lines in North American publications. The Clinic sold these product lines in January, 1983 to a subsidiary of American-Cynamid, and licensed the Clinic's name for use in conjunction with the products. See Van Vrooman deposition, at 192. No evidence was presented at trial that established that any cosmetic ads were placed by the Clinic after 1983. However, Sinatra submitted evidence that after 1983 advertising for these health and beauty products also contained numerous references to the Clinic's treatments and to the Clinic's toll-free number in the United States. The advertisements indicated that reservations for the Clinic could be made by calling the number listed.

information to persons in the United States through a toll-free or “800” telephone number. According to the Clinic, Van Vrooman is the owner of New Life; the Clinic does not own or control any part of New Life; and no owner, employee, or officer of New Life is an owner, employee or officer of the Clinic.

On September 27, 1984, representatives of the Enquirer contacted the Clinic inquiring about an alleged visit by Sinatra. The Clinic referred the representatives to Van Vrooman. After speaking to an Enquirer editor, Van Vrooman informed the Clinic that if the Clinic would allow the Enquirer to print a statement that when the Clinic was asked if Sinatra had been a patient, the Clinic refused to confirm or deny the statement, then the Enquirer would send an editor to Switzerland to do a full feature on the Clinic. Van Vrooman also informed the Clinic of the Enquirer’s circulation, its general readership, and of the fact that the Clinic could successfully solicit clients through an article published in the magazine. At the request of the Clinic’s director, Van Vrooman attempted to contact Sinatra in California in order to solicit him to come to the Clinic.

In early October of 1984, an Enquirer reporter traveled to Switzerland. The president, chief of medicine, director, and other members of the Clinic met with the reporter and made several false statements concerning Sinatra’s alleged stay at the Clinic, including details of their personal contact with him. Sinatra never visited the Clinic, nor did he receive any treatment from the Clinic.

The National Enquirer, on the cover of its October 23, 1984 issue, published a photograph of Sinatra with the headline, “Sinatra Injected with Youth Serum--He’s Secretly Treated with Sheep Cells at Swiss Clinic” on the front page. The article falsely stated that Sinatra had been admitted to the Clinic where he had received a youth regeneration treatment that included an injection with “live cells from black sheep fetuses.” After publication, Van Vrooman telexed the Clinic stating that the article was positive, and that the wording of the article “protects the Clinic.”

Sinatra originally brought suit against the Clinic and the National Enquirer in California Superior Court for misappropriation of name, likeness, and photograph. The action was removed to federal district court based on diversity between the parties. Sinatra then settled with the Enquirer and voluntarily dismissed the Enquirer as a defendant. During the litigation, the Clinic moved to sever the jurisdictional issue in order to avoid forfeiting its jurisdictional defense under Swiss law. The district court denied the Clinic’s motion to dismiss for lack of jurisdiction. The Clinic petitioned this Court for review of the district court’s denial of the motion to dismiss on April 23, 1986. This Court required Sinatra to file an answer, but refused to stay the district court proceedings during the pendency of the interlocutory appeal. The district court also denied the Clinic’s motion to stay proceedings pending the outcome of this Court’s review of the district court’s exercise of jurisdiction over the Clinic.

The Clinic moved to sever the jurisdictional issue from the remaining issues at the beginning of trial on September 16, 1986. The district court denied the motion. The Clinic then withdrew from the courtroom and refused to participate because, by participating in a trial on the merits, it could be held to have waived its defense of lack of personal jurisdiction under Swiss law.³ At trial, Sinatra presented expert testimony concerning the value of the unlicensed use of his name. Sinatra also submitted deposition testimony and documentary exhibits as to the contacts between the Clinic, Van Vrooman and the Enquirer, and concerning the Clinic's and Van Vrooman's business activities in the United States. These materials were deemed admitted by the Clinic's refusal to respond to requests for admissions. At the conclusion of Sinatra's case and argument, the district court entered judgment in Sinatra's favor, awarding \$350,000 in compensatory damages and \$100,000 in punitive damages. This court eventually held that the Clinic's initial interlocutory appeal was mooted by the trial.

DISCUSSION

The district court's determination that personal jurisdiction can be properly exercised is a question of law, reviewed by this court de novo. *Decker*, 805 F.2d at 838. When a defendant challenges the sufficiency of personal jurisdiction, the plaintiff bears the burden of establishing personal jurisdiction over the defendant. *Cabbage v. Merchant*, 744 F.2d 665, 667 (9th Cir. 1984), cert. denied, 470 U.S. 1005, 105 S. Ct. 1359, 84 L. Ed. 2d 380 (1985). Because this case proceeded to trial, the plaintiff is put to the full burden of proof and must establish the jurisdictional facts by a preponderance of the evidence. *Forsythe v. Overmyer*, 576 F.2d 779, 781 (9th Cir.), cert. denied, 439 U.S. 864, 99 S. Ct. 188, 58 L. Ed. 2d 174 (1978); see also *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1286, n. 2 (9th Cir. 1977).

In a diversity case, the court must first inquire whether the assertion of jurisdiction satisfies California state law as well as due process requirements. *Corporate Investment Business Brokers v. Melcher*, 824 F.2d 786, 787 (9th Cir. 1987); *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986). Since California law confers jurisdiction coextensive with due process, this court need only analyze whether the exercise of jurisdiction comports with due process. *FDIC v. British-American Ins. Co. Ltd.*, 828 F.2d 1439, 1441 (9th Cir. 1987); *Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1396 (9th Cir. 1986); see Cal.Code Civ.Proc. Sec. 410.10 (West 1973).

The due process clause of the Fourteenth Amendment requires that the defendant must have minimum contacts with the forum state "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Data Disc*, 557 F.2d at 1287. See *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct.

³ This was the asserted basis for the Clinic's nonparticipation in the trial. We do not express an opinion whether the operation of Swiss law actually results in the waiver of jurisdictional defenses.

154, 158, 90 L. Ed. 95 (1945). Sinatra does not contend, and it is clear, that the Clinic did not have “substantial” or “continuous and systematic” contacts with California to support the exercise of general jurisdiction. See *Hirsch v. Blue Cross, Blue Shield of Kansas City*, 800 F.2d 1474, 1477 (9th Cir. 1986). See also, *Heliocopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 & n. 9, 104 S. Ct. 1868, 1872 & n. 9, 80 L. Ed. 2d 404 (1984). Therefore, the issue before this court is whether the district court properly asserted “limited” or “specific” jurisdiction for a cause of action arising out of the Clinic’s forum-related activities. *FDIC*, 828 F.2d at 1442; *Hirsch*, 800 F.2d at 1477.

This circuit applies a three-part test to evaluate whether a court may exercise specific jurisdiction:

1. The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws.
2. The claim must be one which arises out of or results from the defendant’s forum-related activities.
3. Exercise of jurisdiction must be reasonable.

Decker, 805 F.2d at 839.

Under the three-part test, the plaintiff must show that the Clinic’s contacts with California have a basis in “some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” *Asahi*, 107 S. Ct. at 1031 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174, 2183, 85 L. Ed. 2d 528 (1985)). To satisfy the minimum contacts requirement, the court examines whether the Clinic acted affirmatively to promote or transact business in California. See *Decker*, 805 F.2d at 840. A lesser showing of minimum contacts may still warrant the exercise of jurisdiction upon a showing of reasonableness. *Burger King*, 471 U.S. at 477, 105 S. Ct. at 2184. Once minimum contacts is shown, a rebuttable presumption arises that the exercise of jurisdiction is reasonable. *Haisten*, 784 F.2d at 1397. The defendant bears the burden of ultimately proving that the exercise of jurisdiction is unreasonable. *Burger King*, 471 U.S. at 477-78, 105 S. Ct. at 2184-85. We now turn to an examination of each prong of the test.

I. Purposeful Availment through Forum-Related Activities.

Purposeful availment analysis examines whether the defendant’s contacts with the forum are attributable to his own actions or are solely the actions of the plaintiff. *Asahi*, 107 S. Ct. at 1030; *Decker*, 805 F.2d at 840. In order to have purposefully availed oneself

of conducting activities in the forum, the defendant must have performed some type of affirmative conduct which allows or promotes the transaction of business within the forum state. *Id.* For example, the solicitation of business in the forum state that results in business being transacted or contract negotiations will probably be considered purposeful availment. *Decker*, 805 F.2d at 840. Moreover, the decisions of this court have interpreted the holdings of *Calder* and *Burger King* as modifying the purposeful availment rubric to allow “the exercise of jurisdiction over a defendant whose only ‘contact’ with the forum is the ‘purposeful direction’ of a foreign act having effect in the forum state.” *Haisten*, 784 F.2d at 1397 (emphasis in original).

In this case, the Clinic has directed its activities at California by using Sinatra’s name in an effort to promote its business. The Swiss acts or directions that had a California effect consist of: (1) the misappropriation of the value of Sinatra’s name through interviews conducted in Switzerland between Clinic employees and *Enquirer* reporters, in which the Clinic supplied false information about Sinatra’s treatment at the Clinic; (2) the Clinic’s California advertising efforts to attract patients; and (3) the Clinic’s knowledge of Sinatra’s residence in California.⁴ In addition, California is the situs of Sinatra’s injury.

After the *Enquirer* initially contacted the Clinic, an editor of the tabloid talked with Van Vrooman, the United States agent for the Clinic. Van Vrooman then told the Clinic that the *Enquirer* would do a feature article on the Clinic who, when asked, would neither confirm nor deny the statement that Sinatra had been a patient. Van Vrooman also told the Clinic about the *Enquirer*’s circulation, its general readership, and of the fact that the Clinic could successfully solicit clients through an article published in the magazine. The Clinic treated many California residents and Van Vrooman’s deposition establishes that a significant percentage of the Clinic’s United States clientele are California residents. Van Vrooman then arranged for a reporter to travel to the Clinic for an investigation and interviews.

In *Calder*, the Supreme Court held that California could exercise jurisdiction over the defendants because of the California effects of their conduct in Florida. To reach this holding, the Court determined that “California is the focal point both of the story and of the harm suffered.” 465 U.S. at 789, 104 S. Ct. at 1486. The article “concerned the California activities of a California resident.” *Id.* at 788, 104 S. Ct. at 1486. The Court also determined that the defendants’ sources for the article were from California, and that the plaintiff’s career centered around California.

Here differences exist because the focus of the article involves Sinatra’s alleged activities in Switzerland and the interview for the article took place in Switzerland.

⁴ The Clinic disputes the district court’s finding that it had knowledge of Sinatra’s residence. The following analysis presumes that the Clinic possessed this knowledge, because, as discussed below, the district court’s finding is supported by evidence presented at trial and was not clear error.

Although the defendants in *Calder* wrote and edited the article at issue, the Clinic's employees fabricated an elaborate story calculated to link Sinatra's name with their services. The Clinic's employees were encouraged to discuss their "personal" recollections and the allegedly embarrassing private details of Sinatra's treatments in order to obtain media coverage for the Clinic's treatments. Clearly, the Clinic discussed with Van Vrooman the expected commercial benefits of conducting an interview with the *Enquirer*. The Swiss Clinic knew of the extent of the *Enquirer*'s circulation and the nature of the readership, and it recognized the economic value of the implied endorsement. The Clinic viewed the article as essentially a free advertisement that could reach between five million and twenty million people in its target market.

Thus, we must consider the economic reality of the defendant's activities that form the basis for the assertion of jurisdiction. *Haisten*, 784 F.2d at 1398. The Supreme Court's decision in *Asahi* affirms the purposeful direction standard, but also scrutinizes the quality and quantity of the defendant's acts directed toward the forum. There the Court focused on the extent of control exercised by *Asahi Metals*, a Japanese tire valve manufacturer based in Japan with no direct contacts to California. "The 'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State." *Asahi*, 107 S. Ct. at 1033 (citations omitted)⁵.

The Clinic participates in conduct "which allows or promotes the transaction of business within the forum state." *Decker*, 805 F.2d at 840. The Clinic mounted significant advertising efforts in California by placing ads in *San Diego Magazine*, *Town & Country*, the *Wall Street Journal*, and elsewhere. The Supreme Court, in defining the nature of the "substantial connection," *Burger King*, 471 U.S. at 475, 105 S. Ct. at 2184, which must exist "between the defendant, the forum, and the litigation," *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S. Ct. 1473, 1478, 79 L. Ed. 2d 790 (1984), listed several factors which indicate purposeful direction. "Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, advertising in the forum State, establishing channels of communication for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to act as the sales agent in the forum State." *Asahi*, 107 S. Ct. at 1033 (O'Connor, J., plurality opinion). The Court relied on the absence of any business

⁵ The Supreme Court issued two plurality opinions, both holding that jurisdiction over a foreign component parts manufacturer in a California indemnity action was unreasonable. However, the opinions diverged as to the use of stream of commerce analysis. In Part II-A, Justice O'Connor argues that minimum contacts must be based on an affirmative act of the defendant rather than on the placement of goods into the stream of commerce. 107 S. Ct. at 1031-32. Justice Brennan states that the stream of commerce theory incorporates the purposeful acts of a defendant in directing goods into the stream of commerce, from which the defendant derives economic benefit. 107 S. Ct. at 1035-36 (concurring in part and in the judgment). Under either standard for evaluating purposeful direction, the Clinic's actions establish affirmative direction of its statements and advertising into California.

solicitation or promotional conduct to determine that, on the facts of Asahi, the exertion of personal jurisdiction was unreasonable. *Id.* Asahi Metals was aware that the valves it sold to the tire manufacturer were incorporated into tires sold in California. Four members of the Court agreed that clear awareness of the product entry into and use in California coupled with the economic benefit derived by Asahi Metals from the California sales were insufficient actions to establish the requisite purposeful direction into California. *Asahi*, 107 S. Ct. at 1034.

Here, the misappropriation is properly viewed as an event within a sequence of activities designed to use California markets for the defendant's benefit. The Clinic instructed Van Vrooman to advertise and approved the ads placed. By use of a toll-free telephone number, California customers were given access to information, advice, and reservations concerning the Swiss Clinic. Clearly the Clinic was more than merely aware that its services were known to or used by California clients. In effect, the Clinic created, controlled, and actively used the reservation and advertising system that brought customers from the United States to Switzerland. *Cf. Asahi*, 107 S. Ct. at 1033.

Given the Clinic's commercial activity in the forum state, it should have reasonably anticipated being brought into court in California. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 567, 62 L. Ed. 2d 490 (1980). In addition, the Clinic's acts in Switzerland clearly had a tortious effect in California. See *Cole v. Doe*, 77 Mich.App. 138, 258 N.W.2d 165 (Ill.1977) (California conversation about Michigan resident between California publicist and national columnist provided basis for Michigan jurisdiction after publication in Michigan paper).

Moreover, an essential element of the tort of misappropriation is the celebrity's right to control the use of the publicity value of his or her name as she or he sees fit. *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 348-49, 149 Cal. App. 3d 409, 417-18 (Cal.App. 1983). Thus, the nature of the injury--using Sinatra's name without compensation and potentially diluting the commercial value of the name--produces a situs of the injury in California. Sinatra conducts his business from California, he licenses his name in California, and the center of his business is in California. The Clinic intentionally tried to benefit from the use of Sinatra's name in order to attract clients. The Clinic, through its affirmative and knowing actions, tried to promote its services, which are used by a significant number of California residents, by misappropriating Sinatra's name in a publication that received a majority of its sales from California. See *Calder*, 465 U.S. at 785, 104 S. Ct. at 1484.

An analogy can be drawn between the intentional nature of the tort here and other torts in which a defendant's activity causes harm without physical contacts. In *Blue Ridge Bank v. Veribanc, Inc.*, 755 F.2d 371 (4th Cir. 1985), the Fourth Circuit held that a non-resident corporation was subject to jurisdiction in Virginia in a suit brought by a Virginia resident for defamation. The corporate defendant allegedly supplied libelous material to a syndicated columnist. The court held that personal jurisdiction over the

corporation was justified because the corporation supplied the information on the condition that it receive credit in the article, the information was supplied with the expectation that the defendant would receive new business, and the defendant should have foreseen being brought into court in any forum in which the article appeared. *Id.* at 374.

A district court in this circuit relied on *Blue Ridge* to exercise jurisdiction over a non-resident corporation for false statements made to third persons outside of California concerning a resident California corporation. *California Software Inc. v. Reliability Research*, 631 F. Supp. 1356, 1362 (C.D. Cal. 1986). The court found that the statements were expressly calculated to cause injury in California, the defendants knew the plaintiff would feel the injury in California, and the defendants expected to benefit directly from the statements. The Clinic is in a similar position and acted with a similar intent in this case. Therefore, we adopt the reasoning of the district court in *California Software* to allow the exercise of jurisdiction.⁶

Therefore, we conclude that the Clinic, through its pursuit of California clients by advertising, part of which involved the misappropriation of Sinatra's name in order to benefit the Clinic through the implied endorsement, possessed sufficient minimum contacts with California to justify the district court's exercise of jurisdiction over it. *Cf. Lake v. Lake*, 817 F.2d 1416 at 1423 (9th Cir. 1987) (jurisdiction in Idaho proper when a California attorney obtained a California custody order for a California mother, knowing that the court order would be used in Idaho courts to obtain custody from an Idaho father).⁷

⁶ In *Benally v. Hundred Arrows Press, Inc.*, 614 F. Supp. 969 (D.N.M. 1985), the district court refused to extend jurisdiction, based on the misappropriation of likeness, over a non-resident museum. In *Benally*, the museum had released a photograph for publication. The museum's actions in releasing the photograph were "mere untargeted tortious conduct." *Id.* at 975. The distribution was not aimed at the forum state, New Mexico, because the museum knew that the magazines containing the photograph would have multi-state circulation. The court relied on the fact that the Museum was not a "primary participant in the publication of the photograph, but simply a supplier of information." *Id.* at 976.

Benally is distinguishable on its facts. In *Benally*, the photographer had first allowed the photographs to be distributed in 1932; the Museum obtained the photographer's collection in 1979, including the photograph at issue; the Museum continued to grant requests for reprints of the photograph. The plaintiffs first sued in 1984. Between the time of the distribution and the time of suit, dozens of entities had used and reprinted the photograph, and the Museum had effectively lost primary control over its use and publication. Here, the Clinic retained control over the information provided to the *Enquirer* reporter. Indeed, the information would never have been published were it not for the Clinic's active campaign to use Sinatra's name for its commercial purposes. Thus, the nature of control over dissemination of information is different here from the control over dissemination of the photograph in *Benally*.

⁷ In *Lake*, the court held that the attorney took affirmative actions "for the very purpose of having their consequences felt in forum state." *Id.* (quoting *Wright v. Yackley*, 459 F.2d 287, 290 (9th Cir.

II. Reasonableness.

Reasonableness is considered as a separate factor in determining the existence of limited personal jurisdiction. *Melcher*, 824 F.2d at 790. However, the Clinic must overcome the presumption that the exercise of jurisdiction is reasonable because “it has been shown that the defendant purposefully availed himself of the forum’s benefits.” *Melcher*, 824 F.2d at 790. The burden thus shifts to the defendant to present a compelling case that jurisdiction would be unreasonable. *Burger King*, 471 U.S. at 477, 105 S. Ct. at 2184.

The court examines seven factors to determine reasonableness: the extent of purposeful interjection; the burden on the defendant; the extent of conflict with sovereignty of the defendant’s state; the forum state’s interest in adjudicating the suit; the most efficient judicial resolution of the dispute; the convenience and effectiveness of relief for the plaintiff; and the existence of an alternative forum. *Id.*; *Lake*, 817 F.2d at 1422. The application of these factors is not mechanical. *Hirsch*, 800 F.2d at 1481. In determining whether the exercise of personal jurisdiction is reasonable, the court must balance the seven factors. *FDIC*, 828 F.2d at 1442; *Olsen by Sheldon v. Government of Mexico*, 729 F.2d 641, 649 (9th Cir.), cert. denied, 469 U.S. 917, 105 S. Ct. 295, 83 L. Ed. 2d 230 (1984).

Extent of Purposeful Interjection

The factor of purposeful interjection is analogous to the purposeful direction analysis discussed above. See *Haisten*, 784 F.2d at 1401; *Melcher*, 824 F.2d at 790 (“Ninth Circuit cases give the ‘purposeful interjection’ factor no weight once it is shown that the defendant purposefully directed its activities to the forum state”). Because we have determined that the Clinic purposefully directed its activities toward California residents, we cannot conclude that it did not deliberately avail itself of the benefits of California laws or markets for its services. See *Hirsch*, 800 F.2d at 1481.

Burden on the Defendant

“We examine the burden on the defendant in light of the corresponding burden on the plaintiff.” *Brand v. Menlove Dodge*, 796 F.2d 1070 at 1075 (9th Cir. 1986). It presents as much of a burden for Sinatra to litigate in Switzerland as it does for the Clinic

1972)). Judge Wright emphasized, however, that jurisdiction could only be asserted once the plaintiff proved that the attorney knew that the order would be used in Idaho and then that the attorney continued to take such action. 817 F.2d at 1423. Here, the district court found that the Clinic knew that the *Enquirer* was a magazine of national circulation with a large circulation in California, the residence of many of the Clinic’s clients. Accord *Wallace v. Herron*, 778 F.2d 391 (7th Cir.) (Indiana had no personal jurisdiction over California attorneys sued by Indiana resident for malicious prosecution of a lawsuit in California), cert. denied, 475 U.S. 1122, 106 S. Ct. 1642, 90 L. Ed. 2d 187 (1985).

to litigate in California. The Supreme Court recently reiterated its concern with the burdens of defending a suit in a foreign country. “The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.” *Asahi*, 107 S. Ct. at 1034; see also *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325 (9th Cir. 1984), cert. denied, 471 U.S. 1066, 105 S. Ct. 2143, 85 L. Ed. 2d 500 (1985); *Rocke v. Canadian Automobile Sport Club*, 660 F.2d 395, 399 (9th Cir. 1981) (burden on Quebec company to defend suit in California, though not insurmountable, was substantial and should be given weight to militate against the assertion of jurisdiction in California).

However, modern advances in communications and transportation have significantly reduced the burden of litigating in another country. *Melcher*, 824 F.2d at 791; *Insurance Co. of North America v. Marina Salina Cruz*, 649 F.2d 1266, 1271 (9th Cir. 1981). The continuing contacts between the Clinic’s United States-based agent and California translate into less of a litigation burden than if the Clinic maintained no physical presence or agent within the United States. Moreover, because the Supreme Court has preferred nonjurisdictional methods of lessening the inconvenience faced by defendants, we decline to hold that the burden on the Clinic is so great as to constitute a deprivation of due process. *Burger King*, 471 U.S. at 477-78, 105 S. Ct. at 2184-85; *McGee v. International Life Ins. Co.*, 355 U.S. 220, 224, 78 S. Ct. 199, 201, 2 L. Ed. 2d 223 (1957).

Conflict with Sovereignty of the Defendant’s State

The factor of conflict with the sovereignty of the defendant’s state “is not dispositive because, if given controlling weight, it would always prevent suit against a foreign national in a United States court.” *Gates Learjet*, 743 F.2d at 1333. The Supreme Court, though, has cautioned against extending state long arm statutes in an international context. “Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.” *Asahi*, 107 S. Ct. at 1035 (quoting *United States v. First National City Bank*, 379 U.S. 378, 404, 85 S. Ct. 528, 542, 13 L. Ed. 2d 365 (1965) (Harlan, J., dissenting)). This circuit has also stated that litigation against an alien defendant creates a higher jurisdictional barrier than litigation against a citizen from a sister state because important sovereignty concerns exist. *FDIC*, 828 F.2d at 1444 (California jurisdiction over foreign defendant unreasonable although an employee of a foreign defendant’s subsidiary signed the contract and deposited money in California); *Pacific Atlantic Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1330 (9th Cir. 1985).

In *FDIC*, the defendant foreign corporation maintained no officer, affiliate, or subsidiary in the United States. While the vice-president of the subsidiary happened to be in California on unrelated business when asked by the parent corporation to accept a check consummating the transaction at issue, the isolated participation by the subsidiary

was an insufficient ground on which to base jurisdiction. In *Asahi*, the Court found the exercise of jurisdiction unreasonable in part because the tire manufacturer did not operate as *Asahi*'s agent or subsidiary--*Asahi* exercised little control over the marketing decisions or day-to-day activities of the manufacturer doing business in California. By contrast, *Van Vrooman* operated as the Clinic's agent in the United States. *Van Vrooman* actively solicited business in California and considered California one of the Clinic's best sources of American clients. In both *FDIC* and *Asahi* the control over California transactions was more attenuated than the control exerted by the Clinic over *Van Vrooman* or *Van Vrooman*'s activities with California on the Clinic's behalf.

Therefore, the possibility of an interruption of or interference with international commerce does not exist in this action because the Clinic maintains a continuing business relationship with its United States agent. By the Clinic's extensive advertising efforts and the maintenance of the toll-free information number, the Clinic has manifested an intent to serve and to benefit from the United States market. Thus, sovereignty considerations weigh less heavily than if no United States-based relationships were established.

Forum State's Interest in Adjudicating the Suit

California maintains a strong interest in providing an effective means of redress for its residents tortiously injured by commercial misappropriation. *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 160 Cal. Rptr. 323, 603 P.2d 425 (1979). See also *Brand*, 796 F.2d at 1075-76 (interest of forum state much stronger when plaintiff is a resident). California possesses a clear interest in protecting *Sinatra* as a California resident; thus, this case is different from the weak state interests present when nonresidents sue in California courts. See, e.g., *Asahi*, 107 S. Ct. at 1035; *Pacific Atlantic*, 758 F.2d at 1332. California's interest in providing effective redress for its residents supports the reasonableness of an exercise of jurisdiction in this case. See *Brand*, 796 F.2d at 1076 (discussing Ninth Circuit cases finding significant state interest because of injury to a forum citizen).

Efficient Judicial Resolution

California is the most efficient forum to hear this case. The employees of the Clinic who supplied the information to the *Enquirer* are located in Switzerland, but they are the only foreign witnesses or parties involved in this suit. *Van Vrooman*, the agent of the Clinic, resides in Missouri. The *National Enquirer* is a Florida corporation whose reporters are located across the nation. Additionally, establishing that the statements were made is only one aspect of the evidence required to resolve the claims. Expert testimony as to the value of the *Enquirer*'s article to the Clinic and as to the value of *Sinatra*'s name in general is also required. *Sinatra*'s career is centered in California and industry valuation experts are most likely located in the United States. Because the witnesses and evidence are primarily located in the United States, the United States is the most efficient

forum for resolution of this dispute. *Pacific Atlantic*, 758 F.2d at 1331. Thus, efficiency concerns weigh in favor of the exercise of jurisdiction in the United States.

Convenience and Effectiveness of Relief for Plaintiff

The maintenance of a suit outside of California would be inconvenient and costly for Sinatra, a California resident. Sinatra has not shown that the misappropriation cannot be effectively remedied in Missouri or Switzerland. See *Brand*, 796 F.2d at 1075 (plaintiffs made no showing that Arizona constituted a more convenient forum). Although location of the evidence and witnesses argues for the maintenance of this suit in the United States, this factor does not necessarily weigh in favor of California as a forum without further proof by Sinatra.

Existence of an Alternative Forum

Sinatra has not met his burden to show that another forum is unavailable. *Pacific Atlantic*, 758 F.2d at 1331. However, no regulatory or policy interests are served by the exercise of jurisdiction in Missouri, making it unlikely that Missouri possesses a strong interest in providing a forum to resolve this suit. Moreover, “[w]hether another reasonable forum exists becomes an issue only when the forum state is shown to be unreasonable.” *Melcher*, 824 F.2d at 791.

After balancing the relative significance of each factor, see *Olsen*, 729 F.2d at 649, we have determined that the district court’s exercise of jurisdiction over the Clinic was reasonable. The burden lay with the Clinic to rebut the presumption of reasonableness established by its actions taken to solicit and obtain business in California. This the Clinic did not do. Therefore, the Clinic, through its agent and promotional activities, should reasonably expect that its conduct would subject it to suit in the United States. *World-Wide Volkswagen*, 444 U.S. at 297, 100 S. Ct. at 567.

III. Sufficiency of the Evidence to Support the District Court’s Factual Findings.

The Clinic disputes some of the district court’s findings. Findings of fact should not be set aside unless clearly erroneous. Fed. R. Civ. P. 52(a); *Anderson v. Bessemer City*, 470 U.S. 564, 573-74, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518 (1985). The Clinic challenges the district court’s finding that the Clinic specifically knew that Sinatra resided in Palm Springs, California. The Clinic states that this finding is not supported by any evidence in the record. However, the deposition testimony of Van Vrooman, concerning his activities with the Clinic and the Enquirer, was presented at trial. Evidence indicated that Van Vrooman acted as an agent of the Clinic in his conversations with the Enquirer, in his placement of advertising for the Clinic, in his handling of reservations and information about the Clinic to all United States clients, and in his attempts to contact Sinatra. Whatever the form of the transactions between the Clinic and Van Vrooman, when the substance of the relationship is reviewed, it is clear that Van

Vrooman acted as an agent for the Clinic. Under California law, the knowledge of the agent is considered the knowledge of the principal. Cal.Civ.Code Secs. 2332 (West 1985); *Trane Co. v. Gilbert*, 73 Cal. Rptr. 279, 267 Cal. App. 2d 720 (1968).

In order to phone Sinatra, Van Vrooman had to know of Sinatra's residence. Van Vrooman's deposition admitted that he attempted to solicit Sinatra as a client during the call to Sinatra's agent. Compare *Cook Assocs., Inc. v. Colonial Broach & Mach. Co.*, 14 Ill.App.3d 965, 304 N.E.2d 27, 31 (1973) ("[It] was defendant who initiated the business transaction in question by telephoning plaintiff.") with *Brown v. Flowers Industries, Inc.*, 688 F.2d 328, 332-33 (5th Cir. 1982) (holding that a single defamatory telephone call to a person in Mississippi was sufficient to invoke personal jurisdiction because injury occurred in Mississippi and the defendant knew that the call was to Mississippi); *Murphy v. Erwin-Wasey, Inc.*, 460 F.2d 661, 664 (1st Cir. 1972) ("Where a defendant knowingly sends into a state a false statement intending that it should there be relied upon to the injury of a resident of that state, he has, for jurisdictional purposes, acted within that state.")

Information concerning Sinatra was communicated to the Clinic by Van Vrooman. Moreover, the Clinic knew the nature of the *Enquirer* publication, its target readership, and the value of linking Sinatra's name to the Clinic's treatment in an *Enquirer* article. The district court considered evidence as to the nature of Van Vrooman's work on behalf of the Clinic, the method of payment for Van Vrooman's services, his actions taken to promote the Clinic's business in California and the extent of the Clinic's control over Van Vrooman's daily activities. Therefore, the district court's finding of an agency relationship between Van Vrooman and the Clinic does not constitute clear error.

CONCLUSION

The Clinic's statements made and actions taken through its agent establish the requisite minimum contacts with California, because the misappropriation was part of the Clinic's ongoing efforts to advertise and solicit business in California. Therefore, because minimum contacts have been found, the defendant must meet its burden of establishing a compelling case that the exercise of jurisdiction on the basis of these facts would be unreasonable. This the defendant has not done.

Considerations of sovereignty, while important, are not implicated here to the same extent as when dealing with a completely foreign operation. Therefore, the fact that the Clinic is an alien defendant does not operate to bar jurisdiction in this case. The Clinic actively solicits business in the United States and in California through its advertising. California has an overriding interest in safeguarding its citizens from the diminution in value of their names and likenesses, enhanced by California's status as the center of the entertainment industry. The harm suffered by Sinatra was economic, and thus was felt by him at his domicile and the headquarters of his business. On these facts

we hold that the exercise of jurisdiction over the Clinic was reasonable. The decision of the district court is therefore **AFFIRMED**.

XII. WHO ARE THE CHERRY SISTERS?

CHERRY v. DES MOINES LEADER et al.,
114 Iowa, 298, 86 N. W. 323

(Supreme Court of Iowa. May 28, 1901.)

W. B. Crosby and Spurrier & Maxwell, for appellant. James C. Hume, for appellees.

(transcribed by B. Ekse, October, 2002)

DEEMER, J. The action is predicated on the publication of the following article: “Billy Hamilton, of the Odebolt Chronicle, gives the Cherry Sisters the following graphic write-up on their late appearance in his town: ‘Effie is an old jade of 50 summers, Jessie a frisky filly of 40, and Addie, the flower of the family, a capering monstrosity of 35. Their long, skinny arms, equipped with talons at the extremities, swung mechanically, and soon were waved frantically at the suffering audience. The mouths of their rancid features opened like caverns and sounds like the wailings of damned souls issued therefrom. They pranced around the stage with a motion that suggested a cross between the danse du ventre and a fox trot,—strange creatures with painted faces and hideous mien. Effie is spavined, Addie is stringhalt, and Jessie, the only one who showed her stockings, has legs without calves, as classic in their outlines as the curves of a broom handle.’” The defendants pleaded that plaintiff, with her sisters, were engaged in giving public performances, holding themselves out to the public as singers, dancers, reciters, and comedians; that their performances were coarse and farcical, wholly without merit, and ridiculous; that the Des Moines Leader is a newspaper published in the city of Des Moines, which the other defendants were conducting, and that the article appeared as a criticism of the performance given by plaintiff, and to expose the character of the entertainment; that it was written in a facetious and satirical style, and without malice or ill will towards plaintiff or her sisters. This is clearly a plea of privilege, and the direction to the jury to return a verdict for defendants was, no doubt, on the theory that the plea of privilege was established. That it was published of and concerning plaintiff in her role as a public performer scarcely admits of a doubt, and it is well settled that the editor of a newspaper has the right to freely criticise any and every kind of public performance, provided that in so doing he is not actuated by malice. In other words, the article was qualifiedly privileged. . . . The occasion was such that the presumption of malice arising from the publication is rebutted, and plaintiff, in order to recover, must prove actual malice. . . . By the term “actual malice” is meant personal spite or ill will, or culpable recklessness or negligence. Such malice may be shown by extrinsic evidence, or it may be gathered from the publication itself. There is absolutely no evidence, outside the publication itself, tending in any manner to show malice; hence, if malice be found, it must be from the article published. Ordinarily publication of such an article as the one in question would of itself be an indicium of malice, but, as applied to the facts of the case, we do not think it should be so held. Plaintiff described the entertainment she and her

sisters gave, in part, as follows: “These entertainments are concerts,--literary entertainments. I don’t sing much. The others do. I have recitations and readings; recite and read in costume. In feminine costumes. Dresses as long as I have on, or shorter. I don’t wear short dresses. Sometimes I have worn men’s clothes. I never dance. I recite essays and events that have happened, I have written up of my own. I have none of them with me. One is, ‘The Modern Young Man;’ the other, ‘An Event that Happened in the City of Chicago.’ I sing an Irish song,--an Irish ballad; also a eulogy on ourselves. It is a kind of a ballad composed by ourselves. I help the others sing it. I have forgotten it. It is about an editor. In the chorus I walked a little around the stage,--kind of a fast walk. A cavalier is a Spaniard, I believe. I represent a Spaniard. That is given in the act that we call ‘The Gipsy’s Warning.’ I wear my bicycle bloomer rig. They reach to my knees, and are divided like leggings,--black leggings with buttons on them. I wear a blue blouse,--a blue velvet blouse. Sometimes red and sometimes green. I have many suits; wear them in turn. The leggings are always black. In the chorus I walked a little around the stage,--kind of fast walk or a little run. Had on different kind of clothes,--mostly silk. We had a reproduction of the performance called ‘Trilby.’ The singing of Ben Bolt by my little sister. I would come in and hypnotize her in a farce way. I would tell the audience that I would hypnotize her while she would sing. I didn’t appear at any show without stockings. My little sister was barefooted in one act,--in very long dresses to her ankles. She also appears in a long robe in a tableau clinging to the cross. ‘Cherries ripe and cherries red’ is a eulogy song. I was not asked to repeat only one verse. Q. What is the verse? A. ‘Cherries red and cherries ripe, the cherries they are out of sight, cherries ripe and cherries red, Cherry Sisters still ahead.’” The defendant’s evidence regarding the character of the performance is in part as follows: “It was the most ridiculous performance I ever saw. There was no orchestra there. The pianist left after the thing was half over. She could not stand the racket and left. There was no other music, except vocal music from the Cherrys. They had a drum, and I think they had cymbals. As near as I can recollect, the curtain raised at the beginning, and the Cherrys appeared and gave a walk around and a song. I think it was ‘Ta, ra, ra, Boom de ay.’ They read essays and sung choruses and gave recitations, interspersed with the remarks that, if the boys didn’t stop, the curtain would go down. One young man brought a pair of beer bottles which he used as a pair of glasses. They threatened to stop the performance unless he was put out, but he was not put out, and they didn’t stop. When the curtain went up the audience shrieked and indulged in catcalls, and from that time one could hardly hear very much, to know what was going on, to give a recital of it. There was no bad language used, however. When Jessie was on the stage she appeared in the Trilby act in bare feet and short dresses. She was asked to trim her toe nails, and such irreverent remarks as that. She appeared more pleased than anything else. They had a washtub scene. I think Effie and Addie appeared with bare arms showing to the elbow, which was quite prominent. They went through the motions of washing, singing at the time. There was another piece called ‘The Gipsy’s Warning.’ One of the sisters appeared in a male costume. Then there was a song, ‘I want to be an editor,’ and an explanation, accompanying the song, that an editor down at Cedar Rapids insulted them, and they made him pay dearly for it. The song was so

jumbled up one could hardly make anything out of it, except, 'I want to be an editor, I want to be an editor,' whereupon the audience rose as one man and called on me to stand up. I did not stand up. My wife was there. While Jessie sang this she was rolling her eyes and swaying her body. I am not qualified to pass an opinion upon the merits of the singing. The discord was something that grated on one's nerves. There was short stepping around and swaying of the body. They went around the stage in one of their pieces,--I cannot say which,--sort of a mincing gait, shaking their bodies and making little steps. That is what made me describe it as a cross between the danse du ventre and a fox trot. They had their hands in front of them and at their sides. There was a tableau at the close, as I recollect. Jessie was the central figure in that piece, with her eyes uplifted, red lights, and so on. There was a 'Rock of Ages.' The audience was talking to the women, and they (the Cherry Sisters) would talk back. They would say: 'You don't know anything. You have not been raised well, or you would not interrupt a nice respectable show.' Nobody left during the performance except the pianist."

In the light of this evidence, and some other that cannot be reproduced, the trial court directed a verdict for the defendants. We are now asked to set aside its order on the theory that the question of malice was for the jury. This is, no doubt, the correct rule, when there is any substantial evidence of actual malice, either in the publication itself, or in the facts and circumstances surrounding the transaction. A mere scintilla is not sufficient, however, to take the case to the jury. The evidence should raise a probability of malice, and be more consistent with its existence than its absence. When the occasion is privileged the presumption arises that the publication was bona fide and without malice, and it is incumbent on plaintiff to overcome this presumption. If, from defendant's point of view, strong words seemed to be justified, he is not to be held liable, unless the court can say that what he published was to some extent, at least, inconsistent with the theory of good faith. These rules are well settled, and need no citation of authorities in their support. One who goes upon the stage to exhibit himself to the public, or who gives any kind of a performance to which the public is invited, may be freely criticised. He may be held up to ridicule, and entire freedom of expression is guaranteed dramatic critics, provided they are not actuated by malice or evil purpose in what they write. Fitting strictures, sarcasm or ridicule, even, may be used, if based on facts, without liability, in the absence of malice or wicked purpose. The comments, however, must be based on truth, or on what in good faith and upon probable cause is believed to be true, and the matter must be pertinent to the conduct that is made the subject of criticism. Freedom of discussion is guaranteed by our fundamental law and a long line of judicial decisions. . . .[T]he editor of a newspaper has the right, if not the duty, of publishing, for the information of the public, fair and reasonable comments, however severe in terms, upon anything which is made by its owner a subject of public exhibition, as upon any other matter of public interest; of privileged communications, for which no action will lie without proof of actual malice. . . .Surely, if one makes himself ridiculous in his public performances, he may be ridiculed by those whose duty or right it is to inform the public regarding the character of the performance. . . .Mere exaggeration, or even gross

exaggeration, does not of itself make the comment unfair. It has been held no libel for one newspaper to say of another, "The most vulgar, ignorant, and scurrilous journal ever published in Great Britain." . . . A public performance may be discussed with the fullest freedom, and may be subject to hostile criticism and hostile animadversions, provided the writer does not do it as a means of promulgating slanderous and malicious accusations. . . . Ridicule is often the strongest weapon in the hands of a public writer; and, if it be fairly used, the presumption of malice which would otherwise arise is rebutted, and it becomes necessary to introduce evidence of actual malice, or of some indirect motive or wish to gratify private spite. There is a manifest distinction between matters of fact and comment on or criticism of undisputed facts or conduct[.] Unless this be true, liberty of speech and of the press guaranteed by the constitution is nothing more than a name. If there ever was a case justifying ridicule and sarcasm,--aye, even gross exaggeration,--it is the one now before us. According to the record, the performance given by the plaintiff and the company of which she was a member was not only childish, but ridiculous in the extreme. A dramatic critic should be allowed considerable license in such a case. The public should be informed as to the character of the entertainment, and, in the absence of proof of actual malice, the publication should be held privileged. There is another rule of general application, now well known to the profession, that is involved, and that is that a motion to direct a verdict should be sustained when it clearly appears to the trial judge that it would be his duty to set aside a verdict in favor of the party on whom the burden of proof rests. . . .

Viewing the evidence in the light of the rules heretofore announced, and remembering that the trial court had the plaintiff before it and saw her repeat some of the performances given by her on the stage, we are of opinion that there was no error in directing a verdict for the defendants. Affirmed.

XIII. WHO IS BILL COSBY?

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TAMARA GREEN, THERESE SERIGNESE,
and LINDA TRAITZ

Plaintiffs,

v.

WILLIAM H. COSBY, JR.

Defendant.

Civil Action No. 14-30211-MGM

MEMORANDUM AND ORDER REGARDING DEFENDANT'S MOTIONS
TO DISMISS PLAINTIFFS' COMPLAINT

(Dkt. Nos. 21, 22, and 23)

October 9, 2015

MASTROIANNI, U.S.D.J.

I. INTRODUCTION

On December 10, 2014, Tamara Green filed a complaint alleging that William H. Cosby, Jr. ("Defendant") publicly defamed her in statements made by individuals operating at his direction and/or within the scope of their employment. (Dkt. No. 1, Compl.) The complaint was subsequently amended to include similar claims by two additional plaintiffs, Therese Serignese and Linda Tritz (collectively, the three are referred to as "Plaintiffs"). (Dkt. No. 13, Am. Compl.) Defendant filed motions to dismiss Plaintiffs' amended complaint in its entirety (Dkt. Nos. 21, 22, 23), which Plaintiffs opposed. (Dkt. No. 31.) Plaintiffs then sought leave to file a second amended complaint and, on April 16, 2015, the court granted Plaintiffs' request. *Green v. Cosby*, Civil Action No. 14-30211-MGM, 2015 WL 1736487, at *2-3 (D. Mass. Apr. 16, 2015). Plaintiffs' second amended complaint ("SAC") supplemented factual allegations with

respect to an allegedly defamatory statement directed at Green.¹ (Dkt. No. 48, SAC.) The court held a hearing on the matter and considered the written filings.

II. JURISDICTION

The SAC contains three defamation counts brought pursuant to state law. Defamation is not actionable under federal law. Federal courts have jurisdiction over suits brought pursuant to state law where there is complete diversity of citizenship between the adversaries and the amount in controversy exceeds a threshold amount of \$75,000. 28 U.S.C. § 1332; *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 513 (2006). Based on the content of the complaint, which Defendant has not disputed, the court finds Defendant is a citizen of Massachusetts and Plaintiffs are citizens of either California or Florida. (SAC ¶¶ 2, 4-6.) Plaintiffs each assert they are entitled to damages in excess of the statutory threshold amount. In the absence of any challenge from Defendant, the court finds it has jurisdiction in this case pursuant to 28 U.S.C. § 1332.

III. MOTION TO DISMISS STANDARD

When considering a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the court must accept all well-pleaded facts as true and draw all reasonable inferences in favor of the plaintiff. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); see also *San Gerónimo Caribe Project, Inc. v. Acevedo-Vilá*, 687 F.3d 465, 471 (1st Cir. 2012). The burden is on the moving party to demonstrate that even when viewed in the light most favorable to the plaintiff, the complaint lacks “sufficient factual matter” to state an actionable claim for relief that is “‘plausible on its face.’” *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* When evaluating the sufficiency of the factual allegations contained in the complaint, the court must be careful both to credit the factual assertions made by the plaintiff and to disregard “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.” *Id.* “Determining whether a complaint states a plausible claim for relief” is a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* at 679. A complaint must survive a motion to dismiss if the facts alleged are sufficient as to each element to “raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555; see also *Lister v. Bank of Am., N.A.*, 790 F.3d 20, 23 (1st Cir. 2015) (“Dismissal for failure to state a claim is appropriate if the complaint does

¹ When the court granted leave for Plaintiffs to file the SAC, the court simultaneously afforded Defendant the opportunity to “file a motion to dismiss which responds to the newly amended complaint, or which supplements the [motions to dismiss] previously filed.” (Dkt. No. 46.) Defendant notified the court of his continued reliance on previously-filed submissions. (Dkt No. 62, Def. Letter/request (non-motion).) Accordingly, the court evaluates Defendant’s previously-filed motions to dismiss, and arguments in support thereof, in relation to Plaintiffs’ SAC.

not set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory.” (internal quotation marks omitted)).

IV. FACTS AS ALLEGED BY PLAINTIFFS²

During the 1970s, Defendant, “an internationally known actor and comedian,” met each Plaintiff and subsequently sexually assaulted her. (SAC ¶¶ 3, 7, 18-21, 39, 47-48, 57, 63.) With respect to Plaintiff Green, “[o]n a certain date in the early 1970s,” Defendant offered her two pills, telling her they were over-the-counter cold medicine. (Id. ¶¶ 10, 12.) She took the pills and became weak and dizzy. (Id. ¶¶ 13-14.) Defendant then drove Plaintiff Green to her apartment, where he subjected her to sexual contact against her will and despite her repeated demands to stop. (Id. ¶¶ 17-21.) Plaintiff Green was unable to defend herself during the sexual assault because she remained weak and vulnerable. (Id. ¶ 22.)

In 1970, Plaintiff Traitz met Defendant while working as a waitress. (Id. ¶ 57.) On one occasion she accepted a ride home from Defendant, but he instead drove her to a beach. (Id. ¶¶ 58-59.) He parked his car and then opened a briefcase containing pills and urged Plaintiff Traitz to take some pills “to relax.” (Id. ¶ 60.) When Plaintiff Traitz declined the pills, Defendant groped her, pushed her down, and attempted to lie on top of her, despite her resistance. (Id. ¶¶ 62-63.)

Plaintiff Serignese met Defendant in Las Vegas in 1976 and attended his show. (Id. ¶¶ 39, 42-43.) Afterwards, she was invited to a room backstage where Defendant gave her two pills and instructed her to take them. (Id. ¶¶ 43-44.) Plaintiff Serignese complied and the pills caused her to be in an altered state of consciousness. (Id. ¶¶ 44-45.) While she was in this altered state, Defendant subjected her to sexual contact without her consent. (Id. ¶¶ 47-48.) Like Plaintiff Green, Plaintiff Serignese was physically unable to defend herself. (Id. ¶ 49.)

² The court’s factual summary includes an abbreviated version of those facts alleged by Plaintiffs. The court also makes use of the full text versions of the allegedly defamatory statements. For three of those statements, the court utilizes full text versions provided by Defendant as exhibits to his memorandum in support of his motions. (Dkt. No. 25, Decl. re: Mem. Supp. Mot. to Dismiss, Exs. A, D, F.) Plaintiffs have not contested the accuracy of the full versions of these statements provided by Defendant and the court considers them as “documents sufficiently referred to in the complaint” and as “central to plaintiffs’ claims.” See *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993); see also *Fudge v. Penthouse Int’l, Ltd.*, 840 F.2d 1012, 1015 (1st Cir. 1988) (affirming District Court’s decision, under similar circumstances, to consider a copy of the article submitted by the defendant which had formed the basis of the defamation action, as it was central to the plaintiff’s complaint). Additionally, the court uses the full text version of a fourth statement provided by Plaintiffs as an exhibit to their motion for leave to file their SAC. (Dkt. No. 20, Pls.’ Mem. Supp. re: Mot. for Leave to File Second Am. Compl., Ex. C.)

Many years later, in February of 2005, the Philadelphia Daily News published an interview with Plaintiff Green in which she publicly disclosed the sexual assault that had occurred in the 1970s. (Id. ¶ 24.) Plaintiff Green also disclosed the allegations during appearances on television shows around the same time. (Id.) Nine years later, on or about February 7, 2014, Newsweek published an interview with Plaintiff Green in which she repeated her description of being sexually assaulted by Defendant in the 1970s. (Id. ¶ 27.)

On November 18, 2014, Plaintiff Tritz made an entry on her personal Facebook page publicly disclosing that Defendant had sexually assaulted her. (Id. ¶ 64.) The following day, Plaintiff Serignese publicly disclosed that she had been sexually assaulted by Defendant.³ (Id. ¶ 50.) Several days later, on November 22, 2014, details of Plaintiff Green's sexual assault were published by the Washington Post. (Id. ¶ 31.)

Plaintiffs allege that Defendant, acting through his agents,⁴ issued statements to the media in response to the public disclosures made by Plaintiffs. (Id. ¶¶ 25-26, 28-29, 30, 32-35, 37-38, 51-53, 55-56, 65-68, 70-71.) Defendant knew each statement was false at the time it was made. (Id. ¶¶ 36, 54, 69, 79, 90, 101.) Despite knowing the statements were false, Defendant directed the statements be made. (Id. ¶¶ 37, 55, 70.) Each of the statements was widely read by many people, including Plaintiffs' families, friends, and neighbors, and Plaintiffs suffered damages, including to their reputations, as a result of the publication of the statements. (Id. ¶¶ 38, 56, 71, 80-82, 91-93, 102-104.) The statements were made as follows:

A. Newsweek Statement – February 7, 2014

Prior to the publication of Newsweek's interview with Plaintiff Green in February of 2014, Defendant, acting through a publicist, believed by Plaintiffs to be David Brokaw ("Brokaw"), made a statement to Newsweek. (Id. ¶¶ 28-30.) The publicist provided the statement to Newsweek while acting as Defendant's authorized agent, employee, or authorized representative and he knew or should have known the statement was false when it was made. (Id. ¶¶ 29, 77-78) The statement was appended to the end of the story and read, in its entirety:

³ While Plaintiff Serignese is not specific as to how or where this allegation was disclosed (see SAC ¶ 50), Defendant states that it was disclosed to the Huffington Post. (Dkt. No. 24, Def.'s Mem. Supp. Mots. to Dismiss ("Def.'s Mem.") 5 (citing SAC ¶ 48).) Defendant has attached a document which he asserts to be the Huffington Post article in question. (Decl. re: Mot. to Dismiss, Ex. C.) Plaintiff Serignese has not offered a conflicting explanation.

⁴ In the SAC, Plaintiffs describe two of the individuals who issued the statements as doing so while an "agent, authorized representative, lawyer, servant, and/or employee" of Defendant and one as doing so while an "agent, authorized representative, servant, and/or employee" of Defendant. (SAC ¶¶ 26, 29, 53.) As any distinctions among the meanings of these terms are not material at this stage, throughout this opinion the court refers to these individuals as Defendant's "agents."

This is a 10-year-old, discredited accusation that proved to be nothing at the time, and is still nothing.

(Dkt. No. 25, Decl. re: Mem. Supp. Mot. to Dismiss (“Decl. re: Mot. to Dismiss”), Ex. A at 3, hereinafter “Newsweek Statement.”)

B. November 20, 2014 Statement

Two days after Plaintiff Traitz wrote on her personal Facebook page about Defendant sexually assaulting her in the 1970s, Defendant, acting through Martin D. Singer (“Singer”), released a responsive statement to numerous media outlets. (SAC ¶ 65.) Singer gave the statement while acting as Defendant’s authorized agent, employee, or authorized representative and he knew or should have known the statement was false when it was made. (Id. ¶¶ 53, 99-100.) The statement read, in its entirety, as follows:

Ms. Traitz is the latest example of people coming out of the woodwork with fabricated or unsubstantiated stories about my client.

Linda Joy Traitz is making ridiculous claims and suddenly seems to have a lot to say about a fleeting incident she says happened with my client more than 40 years ago, but she hasn’t mentioned either her 3 1/2 year incarceration or her extensive criminal record with charges spanning from the 1980’s through 2008.

For the first time, she is claiming that in approximately 1970, my client supposedly drove her to the beach and had a briefcase filled with drugs and offered her pills to relax, which she says she turned down and demanded to be taken home after Mr. Cosby came on to her. There was no briefcase of drugs, and this is an absurd fabrication.

Ms. Traitz’s long criminal record for numerous offenses including charges for criminal fraud, possession of Oxycodone, cocaine possession, marijuana possession, and possession of drug paraphernalia, speaks for itself.

As the old saying goes, “consider the source.”

(Decl. re: Mot. to Dismiss, Ex. F at 1, hereinafter “November 20, 2014 Statement.”)

C. November 21, 2014 Statement

On November 21, 2014, Defendant, again acting through Singer, released a responsive statement to numerous media outlets. (SAC ¶¶ 51, 67.) Singer gave the statement while acting as Defendant’s authorized agent, employee, or authorized representative and he knew or should have known the statement was false when it was made. (Id. ¶¶ 53, 88-89, 99-100.) The statement responded to allegations by Plaintiffs

Traitz, Serignese, and other individuals who are not parties to this suit, without directly identifying any individuals by name, and read, in its entirety, as follows:

The new, never-before-heard claims from women who have come forward in the past two weeks with unsubstantiated, fantastical stories about things they say occurred 30, 40, or even 50 years ago have escalated far past the point of absurdity.

These brand new claims about alleged decades-old events are becoming increasingly ridiculous, and it is completely illogical that so many people would have said nothing, done nothing, and made no reports to law enforcement or asserted civil claims if they thought they had been assaulted over a span of so many years.

Lawsuits are filed against people in the public eye every day. There has never been a shortage of lawyers willing to represent people with claims against rich, powerful men, so it makes no sense that not one of these new women who just came forward for the first time now ever asserted a legal claim back at the time they allege they had been sexually assaulted.

This situation is an unprecedented example of the media's breakneck rush to run stories without any corroboration or adherence to traditional journalistic standards. Over and over again, we have refuted these new unsubstantiated stories with documentary evidence, only to have a new uncorroborated story crop up out of the woodwork. When will it end?

It is long past time for this media vilification of Mr. Cosby to stop.

(Decl. re: Mot. to Dismiss, Ex. D at 1, hereinafter "November 21, 2014 Statement.")

D. Washington Post Statement, November 22, 2014

On November 22, 2014, the Washington Post published its interview with Plaintiff Green, along with a responsive statement from Defendant. (SAC ¶¶ 31-33.) Defendant, acting through Walter M. Phillips Jr. ("Phillips"), either "gave" the statement to the Washington Post in 2014, or "originally published" the statement in 2005 with the expectation and intent that the statement be republished if Plaintiff Green's allegations were reported again in the future, as occurred in November of 2014. (Id. ¶¶ 34-35.) Phillips provided the statement while acting as Defendant's authorized agent, employee, or authorized representative and he knew or should have known the statement was false when it was made. (Id. ¶¶ 26, 77-78.) The article quoted Phillips as stating Plaintiff Green's allegations were "absolutely false." (Dkt. No. 20, Pls.' Mem. Supp. re: Mot. for Leave to File Second Am. Compl. ("Mem. re: Mot. to Am.") 15, Exs. B and C.) Phillips also stated: "Mr. Cosby does not know the name Tamara Green or Tamara Lucier [her

maiden name] and the incident she describes did not happen.” (Id.) In addition, Phillips stated the publication of “an uncorroborated story of an incident that is alleged to have happened thirty years ago” was “irresponsible.” (Id.)⁵

The Washington Post publishes articles both online and in print. The online version of the article is dated November 22, 2014 (“November 22, 2014 Washington Post Online Article”) and the print version is dated November 23, 2014 (“November 23, 2014 Washington Post Print Article”). (Mem. re: Mot. to Am., Exs. B and C.) In the November 23, 2014 Washington Post Print Article, Phillips is identified as “[a]nother Cosby attorney” and the statement is identified as having been “issued this past week.” (Mem. re: Mot. to Am., Ex. B.) After publishing the original articles, the Washington Post issued slightly different correction notices with respect to both the online and print versions of the article, and, by December 12, 2014, had incorporated the correction itself into the body of the November 22, 2014 Washington Post Online Article. (Mem. re: Mot. to Am., Ex. C; Dkt. No. 28, Decl. re: Opp. to Pls.’ Mot. for Leave to File Second Am. Compl., Ex. 1.) Plaintiffs attached a copy of the corrected version of the November 22, 2014 Washington Post Online Article, which included the correction notice at the top of the article, as an exhibit in support of their motion for leave to file a second amended complaint. (Mem. re: Mot. to Am., Ex. C.) In this corrected version of the November 22, 2014 Washington Post Online Article, dated December 12, 2014, the text has been changed from the print version⁶ to identify Phillips as “[a] previous Cosby attorney” and the statement is identified as having been “issued in 2005 when the allegations first surfaced.” (Id. at 15.) The correction notice to the online version reads in its entirety: “This story originally said Cosby lawyer Walter M. Phillips Jr. had denied the allegations of Tamara Green in a statement issued during the past week. The statement was made when Green’s allegations first surfaced in 2005. The story has been corrected.” (Id. at 1.)⁷

V. DISCUSSION

A. Choice of Law

“[F]ederal courts sitting in diversity apply state substantive law and federal procedural law.” *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996). The

⁵ The court will refer to these responsive statements, collectively, as the “Washington Post Statement.”

⁶ The parties have not provided the court with a copy of the original, uncorrected version of the November 22, 2014 Washington Post Online Article.

⁷ Defendant, in turn, has also provided the court with a copy of the correction notice issued with respect to the print edition and dated December 12, 2014. (Dkt. No. 28, Decl. re: Opp. to Pls.’ Mot. for Leave to File Second Am. Compl., Ex. 1.) It reads in its entirety: “1A Nov. 23 Page One article about the allegations of sexual assault against Bill Cosby misstated the timing of a statement of denial issued by an attorney for Cosby. The statement denying Tamara Green’s allegations was issued by lawyer Walter M. Phillips Jr. when Green’s allegations first surfaced in 2005, not in the week before the article was published.” (Id. at 2.)

court “determine[s] which state’s law applies by applying the choice of law rules of the forum state,” in this case, Massachusetts. *In re Volkswagen & Audi Warranty Extension Litig.*, 692 F.3d 4, 14 (1st Cir. 2012). In tort cases, Massachusetts courts “consider choice-of-law issues ‘by assessing various choice-influencing considerations,’ . . . including those provided in the Restatement (Second) of Conflict of Laws (1971).” *Cosme v. Whittin Mach. Works, Inc.*, 632 N.E.2d 832, 834 (Mass. 1994) (internal citation omitted) (quoting *Bushkin Assocs., Inc. v. Raytheon Co.*, 473 N.E.2d 662, 668 (Mass. 1985)).

Pursuant to section 150 of the Restatement (Second) of Conflict of Laws, “the law of the state where the defamed person was domiciled at the time of publication applies ‘if the matter complained of was published in that state.’” *Davidson v. Cao*, 211 F. Supp. 2d 264, 274 (D. Mass. 2002) (quoting Restatement (Second) Conflict of Laws § 150(2) & cmt. b). The statements at issue in this case were published nationally, so the court applies the law of the state in which each Plaintiff was domiciled when the alleged publication occurred. Accordingly, California law applies relative to the claims of Plaintiff Green and Florida law applies as to the claims of Plaintiffs Tritz and Serignese.

B. Statute of Limitations as to Claim Based on the Washington Post Statement

The original cause of action asserted by Plaintiff Green referred to allegedly defamatory statements made by Defendant, through his agents, published in *Newsweek* and the *Washington Post* in 2014. Two days after this action was filed, the *Washington Post* issued the corrections indicating Phillips’ statement (on behalf of Defendant) had actually been made in 2005 when Plaintiff Green first publicly disclosed the alleged sexual assault, and not in 2014 after Green publicly repeated these allegations. Thereafter, Plaintiffs filed the SAC, in which they continued to allege that Defendant, through Phillips, “gave” the statement to the *Washington Post* in 2014. (SAC ¶ 34.) The SAC also alleges “[i]n addition, or in the alternative,” that the statement was originally published in 2005 with Defendant’s “expectation and intent that the statement would be republished by news outlets in the event that Plaintiff Green should repeat her accusations, and/or should these accusations be reported again, on a later date.” (Id. ¶ 35.) Furthermore, Plaintiffs allege, “it was reasonably foreseeable” that Defendant’s 2005 statement would be republished by news media in stories regarding Green’s repeated allegations, including the November 22, 2014 *Washington Post* article. (Id.)

Defendant argues Plaintiff Green’s claim based on the November 22, 2014 *Washington Post* article is barred by the statute of limitations. (Dkt. No. 24, Def.’s Mem. Supp. of Mot. to Dismiss (“Def.’s Mem.”) 9-11); Dkt. No. 27, Def.’s Opp’n to Pls.’ Mot. for Leave to File Second Am. Compl.) California has adopted a one-year statute of limitations for defamation claims. See Cal. Code Civ. Pro. § 340(c). According to Defendant, the “single publication rule” mandates that the limitations period commences on the date the statement was first published, in this case 2005, thereby rendering Green’s claim untimely.

As an initial matter, the parties contest whether the court may even consider the Washington Post correction in ruling on Defendant’s motion to dismiss. According to Plaintiffs, because the correction contains no actionable defamatory language, it is not central to Green’s claim and thus is not incorporated into the pleadings. Plaintiffs, however, attached a copy of the corrected November 22, 2014 Washington Post Online Article as an exhibit in support of their motion for leave to file a second amended complaint. (Mem. re: Mot. to Am., Ex. C.) Plaintiffs cannot rightfully have benefited from their own reliance on the correction and then assert they should also be shielded from what it says. Accordingly, while Plaintiffs did not attach the correction to the SAC following the court’s allowance of their motion for leave to amend, the court believes, as a matter of fair and practical application of Rule 10(c) of the Federal Rules of Civil Procedure, their strategic use of that correction should have the same effect. See *Trans-Spec Truck Serv. v. Caterpillar Inc.*, 524 F.3d 315, 321 (1st Cir. 2008) (“Exhibits attached to the complaint are properly considered part of the pleading ‘for all purposes’ including Rule 12(b)(6).” (quoting Fed R. Civ. P. 10(c))); *West v. Temple*, Civil Action No. 5:14-CV-86 (MTT), 2015 WL 757650, at *4 (M.D. Ga. Feb. 23, 2015) (“The Court will consider the information contained in the ‘carbon-copy grievance’ attached to [the plaintiff’s] motion to amend as part of his Complaint.”); cf. *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991) (“[T]he problem that arises when a court reviews statements extraneous to a complaint generally is the lack of notice to the plaintiff that they may be so considered; it is for that reason—requiring notice so that the party against whom the motion to dismiss is made may respond—that Rule 12(b)(6) motions are ordinarily converted into summary judgment motions. Where plaintiff has actual notice of all the information in the movant’s papers and has relied upon these documents in framing the complaint the necessity of translating a Rule 12(b)(6) motion into one under Rule 56 is largely dissipated.”). At the very least, therefore, the court believes it may consider the correction to the November 22, 2014 Washington Post Online Article, even though Plaintiffs did not formally attach it to the SAC.⁸

Plaintiffs next assert that even if the court considers the correction, it is not inconsistent with the allegation in paragraph 34 of the SAC that Phillips in 2014 “gave” the Washington Post the statement, even if it was originally published in 2005.⁹

⁸ As mentioned, the correction notice issued with respect to the November 23, 2014 Washington Post Print Article, provided by Defendant, is worded slightly differently than the correction notice for the November 22, 2014 Washington Post Online Article used by Plaintiff. (See Dkt. 28, Decl. re: Opp. to Pls.’ Mot. for Leave to File Second Am. Compl., Ex. 1; Mem. re: Mot. to Am., Ex. C) The court generally limits its discussion to the correction with respect to the online article, as that correction is treated as an attachment to the complaint, but recognizes both corrections make the same operative point.

⁹ Plaintiffs also argue the court may not take judicial notice of the correction because Defendant is attempting to use it to prove the truth of the matter asserted therein, i.e., that Phillips in fact provided his statement in 2005, not in 2014. See, e.g., *Kosilek v. Spencer*, 889 F. Supp. 2d 190, 215 n.6 (D. Mass. 2012), *aff’d*, 740 F.3d 733 (1st Cir. 2014), *rev’d en banc* on other grounds, 774 F.3d 63 (1st Cir. 2014). The court is not taking judicial notice of the correction pursuant to Rule 201 of the Federal

Defendant, on the other hand, contends Plaintiffs' allegation is contradicted by the correction and the court cannot now credit their allegation. See *Yacubian v. United States*, 750 F.3d 100, 108 (1st Cir. 2014) (“[W]hen a written instrument contradicts allegations in the complaint to which it is attached, the exhibit trumps the allegations.” (quoting *Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224, 229 n.1 (1st Cir. 2013))). The court agrees with Plaintiffs that the correction is not necessarily inconsistent with the allegation that Defendant (through Phillips) “gave” the statement to the Washington Post in 2014. The term “gave” does not necessarily mean verbally speaking the words but could be taken to mean, at this stage of the litigation, that Defendant’s agent referred the Washington Post to the old statement or otherwise made the newspaper aware of the statement. Defendant asserts that because this allegation is “threadbare” and “speculative,” the court should disregard it. See *Penalbert-Rosa v. Fortuno-Burset*, 631 F.3d 592, 595 (1st Cir. 2011). The Supreme Court has explained, however, that “the pleading standard Rule 8 announces does not require ‘detailed factual allegations.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). Plaintiffs have explained in their opposition to dismissal that paragraph 34 of the SAC should be read to mean “that in November of 2014, Mr. Phillips gave the Washington Post a copy of a statement that he originally published in 2005; or that, in November of 2014, Mr. Phillips directed the Washington Post to republish the older statement.” (Dkt. No. 32, Pls.’ Mem. Supp. Opp’n to Def.’s Mots. to Dismiss (“Pls.’ Mem.”) 32-33.) See *Penalbert-Rosa*, 631 F.3d at 596 (indicating that a plaintiff may supply a missing detail in an opposition to a motion to dismiss). Plaintiffs also argue the Washington Post, in 2014, originally reported in an unambiguous way the statement had been “issued this past week.” At this stage of the litigation, before the commencement of the discovery process, this provides a good-faith basis for Plaintiffs to allege Defendant, through an agent, by some means “gave” the statement to the newspaper in 2014. See *Rodriguez-Vives v. P.R. Firefighters Corps*, 743 F.3d 278, 286 (1st Cir. 2014) (explaining that the “threadbare” and “speculative” exception to assuming a plaintiff’s factual allegations as true only applies when it is “clear that the plaintiff is merely speculating about the fact alleged and therefore has not shown that it is plausible that the allegation is true”).

The online correction merely states “the statement was made when Green’s allegations first surfaced in 2005.” (Mem. re: Mot. to Am., Ex. C.) This does not rule out the possibility, consistent with paragraph 34 of the SAC, that although Phillips originally “made” the statement in 2005, he also provided or directed the same statement to the Washington Post in 2014 in response to Green’s more recent public accusations. See *Shively v. Bozanich*, 80 P.3d 676, 683 (Cal. 2003) (“The rule that each publication of a defamatory statement gives rise to a new cause of action for defamation applies when the

Rules of Evidence because Plaintiffs used it to support their motion to amend and relied on it in their SAC, effectively attaching it to their complaint. Accordingly, this limitation (documents judicially noticed under Rule 201 may not be considered for the truth of the matter asserted) is a non-issue. See, e.g., *Papadopoulos v. Amaker*, No. 12-CV-3608 (DLI)(RLM), 2013 WL 3226757, at *1 n.1 (E.D.N.Y. June 25, 2013).

original defamer repeats or recirculates his or her original remarks to a new audience.”). The discovery process may very well bear this issue out and sharpen the parties’ arguments on this point, but at this stage the court must resolve all reasonable inferences in Plaintiffs’ favor.¹⁰ Dismissal of a portion of Plaintiff Green’s claim based on a correction made to the Washington Post article is not warranted on statute of limitations grounds.

Most importantly, even if Defendant’s reading of the correction were accurate and the court declined to accord paragraph 34 of the SAC the presumption of truth, Defendant’s statute of limitations argument would still fail based on Plaintiffs’ theory asserted in paragraph 35 of the SAC. As discussed, Plaintiffs allege in paragraph 35, “[i]n addition, or in the alternative, to paragraph 34,” that Phillips “originally published” the statement in 2005 “with the expectation and intent” that the statement be republished if Plaintiff Green’s allegations were reported again in the future. (SAC ¶ 35.) In general, the repetition by a new party of another person’s earlier defamatory remark also gives rise to a separate cause of action for defamation against the original defamer, when the repetition was reasonably foreseeable.” Shively, 80 P.3d at 683; see also Mitchell v. Superior Court, 690 P.2d 625, 633 (Cal. 1984) (“According to the Restatement (Second) of Torts (1977) section 576, the original defamer is liable if either ‘the repetition was authorized or intended by the original defamer’ (subd. (b)) or ‘the repetition was reasonably to be expected’ (subd. (c)). California decisions follow the restatement rule.”); Schneider v. United Airlines, Inc., 256 Cal. Rptr. 71, 74 (Cal. Ct. App. 1989) (“[T]he originator of the defamatory matter can be liable for each ‘repetition’ of the defamatory matter by a second party, ‘if he could reasonably have foreseen the repetition.’” (quoting McKinney v. Cty. of Santa Clara, 168 Cal. Rptr. 89, 93 (Cal. Ct. App. 1980))). “It is the foreseeable subsequent repetition of the remark that constitutes publication and an actionable wrong in this situation, even though it is the original author of the remark who is being held accountable.” Shively, 80 P.3d at 683. The court does not agree with Defendant’s assertion that, under the “single publication rule,” Plaintiff Green’s defamation claim accrued exclusively in 2005 and the limitations period did not reset upon the issuance of the November 22, 2014 Washington Post article.

In Shively, the California Supreme Court extensively set forth the history and rationale of the single publication rule. The court explained:

Under the common law as it existed in the 19th century and early part of the 20th century, the principle that each communication of a defamatory remark to a new

¹⁰ The court notes that, if it were to consider both the online and print versions of the correction notices, the slightly different wording between the two, which may well be innocuous, could arguably raise questions about the manner in which the Washington Post came to include the Phillips statement in the article, further demonstrating the benefit in allowing the parties to engage the discovery process to seek clarification of these factual issues; the need for fact clarification is not a basis for dismissal at this stage.

audience constitutes a separate “publication,” giving rise to a separate cause of action, led to the conclusion that each sale or delivery of a copy of a newspaper or book containing a defamation also constitutes a separate publication of the defamation to a new audience, giving rise to a separate cause of action for defamation. . . . This conclusion had the potential to subject the publishers of books and newspapers to lawsuits stating hundreds, thousands, or even millions of causes of action for a single issue of a periodical or edition of a book. This conclusion also had the potential to disturb the repose that the statute of limitations ordinarily would afford, because a new publication of the defamation could occur if a copy of the newspaper or book were preserved for many years and then came into the hands of a new reader who had not discovered it previously. The statute of limitations could be tolled indefinitely, perhaps forever, under this approach.

Id. at 683-84 (internal citations omitted). In response to these concerns, “courts fashioned what became known as the single-publication rule, holding that, for any single edition of a newspaper or book, there was but a single potential action for a defamatory statement contained in the newspaper or book, no matter how many copies of the newspaper or the book were distributed.” Id. at 684.¹¹ Critically, however, “[n]otwithstanding the single-publication rule, a new edition or new issue of a newspaper or book still constitutes a new publication, giving rise to a new and separate cause of action and a new accrual date for the purpose of the statute of limitations.” Id. at 685 n.7; see also id. at 685 (“Accrual at that point is believed to provide adequate protection to potential plaintiffs, especially in view of the qualification that repetition of the defamatory statement in a new edition of a book or newspaper constitutes a new publication of the defamation that may give rise to a new cause of action, with a new accrual date.”).

Therefore, if Green had asserted a claim based merely on the original 2005 article containing Phillips’ statements, the single publication rule would operate to bar such a claim because accrual would have occurred “on the ‘first general distribution of the publication to the public.’” Id. at 685 (quoting *Belli v. Roberts Bros. Furs*, 49 Cal. Rptr. 625, 629 (Cal. Ct. App. 1966)). Because Green’s claim is instead based on the November 22, 2014 Washington Post article, an entirely different issuance, the single publication rule does not apply. See id. at 685 & n.7; *Schneider*, 256 Cal. Rptr. at 74-75 (“‘[T]he single publication rule . . . does not include separate aggregate publications on different occasions.’” (quoting *Kanarek v. Bugliosi*, 166 Cal. Rptr. 526, 530 (Cal. Ct. App.

¹¹ California has adopted the Uniform Single Publication Act, codifying the single publication rule at Cal. Civ. Code § 3425.3. That section provides:

No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one issue of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.

1980)); cf. *Christoff v. Nestle USA, Inc.*, 213 P.3d 132, 138 (Cal. 2009) (“The prefatory note to the uniform act states that under the single-publication rule ‘any single integrated publication, such as one edition of a newspaper or magazine, or one broadcast, is treated as a unit, giving rise to only one cause of action.’” (quoting Unif. Single Publ’n Act, 14 U.L.A. 469 (2005))). Accordingly, Defendant has not established that Plaintiff Green’s claim based on the November 22, 2014 Washington Post article is barred by California’s statute of limitations and, consistent with paragraph 35 of the SAC, he may be held liable for the foreseeable republication of Phillips’ 2005 statement. See *Shively*, 80 P.3d at 683.

Accordingly, the court will not dismiss any portion of Plaintiff Green’s claim based on a single publication theory that the statute of limitations has expired.

C. Adequacy of Plaintiffs’ Defamation Allegations

Having determined the laws of California and Florida are applicable and that the claim related to the Washington Post Statement is not barred by the statute of limitations, the court next considers the substance of Plaintiffs’ defamation claims. Both California and Florida recognize the following essential elements of defamation: (1) a publication; (2) that is false; (3) defamatory, meaning damaging to the good reputation of the person who is the subject of the statement; (4) made by an actor with the requisite degree of fault; (5) is not protected by any privilege; and (6) causes injury to the subject.¹² See, e.g., *Jews For Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1106 (Fla. 2008); *Taus v. Loftus*, 151 P.3d 1185, 1209 (Cal. 2007), abrogated on other grounds by *Oasis West Realty, LLC v. Goldman*, 250 P.3d 1115 (Cal. 2011); *Blatty v. N.Y. Times Co.*, 728 P.2d 1177, 1182-83, 1186 (Cal. 1986). Defendant moves to dismiss Plaintiffs’ claims, alleging inadequacies related to several of these elements. These challenges can generally be organized as follows. First, Defendant asserts that none of the allegedly defamatory statements contain false factual assertions that are also defamatory. As part of this argument, Defendant specifically asserts the claim based upon the November 20, 2014 Statement regarding Plaintiff Traitz fails because the statement was substantially true and the claims based upon the November 21, 2014 Statement fail because that statement was not sufficiently “of and concerning” Plaintiffs Traitz or Serignese. Second, Defendant argues he cannot be liable for defamation because Plaintiffs have failed to plead that either Defendant or his agents acted with the constitutionally required degree of fault. Third, Defendant argues the November 20, 2014 Statement did not cause Plaintiff Traitz to suffer incremental harm. Fourth, Defendant asserts the allegedly defamatory statements are protected by a “self-defense privilege.” The court addresses these arguments in turn.

¹² Relevant differences which may exist between California and Florida law regarding defamation are addressed as applicable throughout this Discussion.

1. The Statements: Factual, True, Defamatory, Of and Concerning

In order for a defamation claim to survive a motion to dismiss, the allegedly defamatory statement must contain at least one false factual assertion which is also defamatory. See, e.g., *Jews For Jesus, Inc.*, 997 So. 2d at 1106; *Taus*, 151 P.3d at 1209. Depending on the nature of the statement and the context in which it was made, courts will place different emphasis on these two components. In this case, Defendant argues three of the four statements at issue do not contain factual assertions that are false, or even capable of being false.¹³ Defendant further asserts that even if the statements can be understood as expressing false factual assertions, they are not defamatory because they do not hold Plaintiffs “up to contempt, hatred, scorn, or ridicule or tend to impair [their] standing in the community.” (Def.’s Mem. 14-15 (quoting *Yohe v. Nugent*, 321 F.3d 35, 40 (1st Cir. 2003)).) The court addresses each statement individually, applying California law to the Newsweek Statement regarding Plaintiff Green and Florida law to the November 20, 2014 and November 21, 2014 Statements as to one or both of Plaintiffs Traitz and Serignese.

Before delving into the state-specific analysis, the court considers the Supreme Court case law applicable to defamation cases in which the parties dispute whether a statement contains actionable statements of fact or protected statements of opinion. In *Milkovich v. Lorain Journal Co.*, the Supreme Court reviewed the history of the tort of defamation and development of constitutional protections to ensure the tort does not interfere with “the freedom of expression guaranteed by the First Amendment.” 497 U.S. 1, 21 (1990). The Court reviewed existing constitutional requirements, including that plaintiffs must (a) establish the requisite level of fault on the part of a defendant and (b) allege a statement that can “‘reasonably [be] interpreted as stating actual facts’ about an individual.” *Id.* at 20 (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988)). The Court considered whether to create an additional constitutional privilege for “anything that might be labeled ‘opinion.’” *Id.* at 18. In declining to adopt such a privilege, the Court explained there is not a clear division between statements of opinion and fact. “If a speaker says, ‘in my opinion John Jones is a liar,’ [the speaker] implies a knowledge of facts which lead to the conclusion that Jones told an untruth” and, as a result, such a statement may imply a false assertion of fact by failing to state what it was based on or because any facts referenced are incorrect or incomplete. *Id.* The Supreme Court directs courts to determine “whether a reasonable factfinder could conclude that the [allegedly defamatory] statements . . . imply an assertion [of fact]” and whether that assertion “is sufficiently factual to be susceptible of being proved true or false,” rather than simply determine whether a statement expresses an opinion or asserts a fact. *Id.* at 21. At this stage of the litigation, the court’s concern is whether any fact contained in or implied by an allegedly defamatory statement is susceptible to being proved true or false;

¹³ Defendant makes this argument as to the Newsweek Statement, the November 20, 2014 Statement, and the November 21, 2014 Statement, but not as to the Washington Post Statement.

if so capable, Defendant cannot avoid application of defamation law by claiming the statement expresses only opinion. See *Ferlauto v. Hamsher*, 88 Cal. Rptr. 2d 843, 849 (Cal. Ct. App. 1999); *Zambrano v. Devanesan*, 484 So. 2d 603, 606 (Fla. Dist. Ct. App. 1986). Ultimately, if Plaintiffs' claims survive this initial challenge, Defendant will have the opportunity, at the procedurally appropriate time, to fully develop a defense based on the truth of the facts contained in or implied by each statement.

a. The Newsweek Statement Pertaining to Plaintiff Green

i. Substantially True

Defendant argues the Newsweek Statement—"This is a 10-year-old, discredited accusation that proved to be nothing at the time, and is still nothing"—does not contain any defamatory content because it is true. Even if a statement is offensive, it cannot be the basis for a defamation suit if it is true. *Smith v. Maldonado*, 85 Cal. Rptr. 2d 397, 403 (Cal. Ct. App. 1999). While a "defendant need not justify the literal truth of every word," to prevail in a defamation action, the defendant must "prove[] true the substance of the charge." *Id.* An "'imputation is substantially true'" if it "justif[ies] the 'gist or sting'" of the remark. *Id.* (quoting *Campanelli v. Regents of Univ. of Cal.*, 51 Cal. Rptr. 2d 891, 897 (Cal. Ct. App. 1996)). It is uncontested that the meaning of the first part of the statement is accurate—Plaintiff Green had first made her accusations approximately ten years earlier. As to the rest of the statement, Defendant argues the substance is true because (1) Plaintiff Green's attorney disciplinary issues in California, which are not mentioned in the statement, were sufficient to discredit her and (2) the substance of the allegations was never the subject of a civil or criminal legal proceeding. The court does not agree. First, Plaintiff Green does not claim the language in the Newsweek Statement is defamatory because it describes her as being a discredited person related to her legal profession. Rather, she argues the statement asserts that her sexual assault allegation was discredited. Second, an absence of civil or criminal proceedings does not establish that an allegation was "discredited" or "proved to be nothing." In the absence of legal proceedings, Plaintiff Green's allegations could not have been established to lack legal merit at a court hearing. The statement attributable to Defendant implies the allegations were somehow truly disproven without stating how or where, thereby failing to self-authenticate as a statement of true fact. A statement is considered false for the purposes of defamation if "it would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Hughes v. Hughes*, 19 Cal. Rptr. 3d 247, 251 (Cal. Ct. App. 2004) (internal quotation marks and citation omitted). For that reason, California courts "look to what is explicitly stated as well as what insinuation and implication can be reasonably drawn from the communication." *Forsher v. Bugliosi*, 608 P.2d 716, 721 (Cal. 1980).

ii. Opinion or Fact

In addition to asserting the Newsweek Statement is not defamatory since it is substantially true, Defendant argues it is not defamatory because it expresses an opinion rather than a fact capable of being proved false. California courts have interpreted the Supreme Court’s decision in *Milkovich* as establishing that the First Amendment only prohibits defamation liability for the expression of an opinion where the factual basis for the opinion is provided, the facts provided are true, and the opinion does not imply false assertions of facts. *GetFugu, Inc. v. Patton Boggs LLP*, 162 Cal. Rptr. 3d 831, 842 (Cal. Ct. App. 2013) (citing *Milkovich*, 497 U.S. at 18-19 and *McGarry v. Univ. of San Diego*, 64 Cal. Rptr. 3d 467, 479 (Cal. Ct. App. 2007)). Accordingly, “it is not the literal truth or falsity of each word or detail used in a statement” which determines whether it is a potentially defamatory statement of fact; “rather, the determinative question is whether the ‘gist or sting’ of the statement is true or false, benign or defamatory, in substance.” *Ringler Assocs. Inc. v. Md. Cas. Co.*, 96 Cal. Rptr. 2d 136, 150 (Cal. Ct. App. 2000) (emphasis omitted) (internal quotation omitted); see also *Campanelli*, 51 Cal. Rptr. 2d at 897. The court can, as a matter of law, find a statement is not actionable, but when an allegedly defamatory statement can reasonably be interpreted as either stating or implying a false fact or articulating an opinion, California courts put the issue before a jury. See *Ferlauto*, 88 Cal. Rptr. 2d at 849 (“If the court concludes the statement could reasonably be construed as either fact or opinion, the issue should be resolved by a jury.”). In determining whether a statement is capable of being interpreted as asserting or implying a fact, California courts use the “totality of the circumstances test.” *Id.* This test has three parts: “(1) whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact, (2) whether the defendant used figurative or hyperbolic language that negates that impression, and (3) whether the statement in question is susceptible of being proved true or false.” *Lieberman v. Fieger*, 338 F.3d 1076, 1080 (9th Cir. 2003) (citations omitted) (applying California law).

As to the first part—general tenor—Defendant points out the statement was made “in response to serious charges” and argues this “is a strong contextual signal that the statement is non-actionable opinion.” (Def.’s Mem. 14.) Specifically, Defendant suggests the court should treat the response as a “predictable opinion,” which an average reader would understand as a one-sided attempt to bolster his position in a dispute.¹⁴ Several California courts have used the phrase “predictable opinion” to describe a statement that, due to the context in which it is made, is understood to be a one-sided expression of opinion rather than fact. However, California courts have only applied the principle to

¹⁴ Defendant suggests California’s treatment of “predictable opinion” is similar to a “self-defense privilege.” One obvious difference is that the phrase “predictable opinion” is used to describe a type of statement that is not defamatory because it does not assert a fact capable of being proved true or false, while a self-defense privilege, in the defamation context, generally prevents what may be a defamatory statement from being the basis for a defamation suit because of a specific exception under state law.

cases where the statements related to pending or completed litigation. See *Dreamstone Entm't Ltd. v. Maysalward Inc.*, No. 2:12-cv-02063-CAS(SSx), 2014 WL 4181026, at *6 (C.D. Cal. Aug. 18, 2014) (treating statement attributed to attorneys, and linking to recently filed complaint, as “predictable opinion” rather than statement of fact); *Amaretto Ranch Breedables, LLC v. Ozimals, Inc.*, No. CV 10-5696 CRB, 2013 WL 3460707, at *4 (N.D. Cal. July 9, 2013) (finding the broad context of a blog entry, describing reasons for bringing lawsuit, demonstrated that the statement was a “predictable opinion,” rather than an actionable statement of fact); *GetFugu, Inc.*, 162 Cal. Rptr. 3d at 842 (finding tweet by attorney identifying opposing lawsuit as frivolous was a “predictable opinion” that could not be the basis for a defamation claim); *Ferlauto*, 88 Cal. Rptr. 2d at 850 (finding statements describing lawsuit as “frivolous” expressed only “predictable opinion” and could not be the basis of a defamation action, especially because context and literary tone of work where statements appeared clearly indicated to readers they were reading the subjective views of partisan participants to litigation); *Info. Control Corp. v. Genesis One Comput. Corp.*, 611 F.2d 781, 784 (9th Cir. 1980) (coining phrase “predicable opinion” to describe a statement unlikely to be understood by audience as a statement of fact because of the litigation position of the maker of the statement).

The context in which Defendant’s agent made the Newsweek Statement was different from the context in which California courts have identified statements as “predictable opinions”; at the time this statement was made there was no pending litigation between Defendant and Plaintiff Green. Some readers may have understood any statement from Defendant to have been predictably self-serving, but there was no litigation pending when a publicist for Defendant provided the statement to the media. Accordingly, the court cannot determine at this stage that the statement fits within the “predictable opinion” doctrine recognized in California. Nor can the court conclude that the general tenor of the statement negates the impression that Defendant was asserting an objective fact.

Turning next to the specific language of the statement, the phrase—“discredited accusation that proved to be nothing at the time, and is still nothing”—has an obvious literal meaning, specifically, that Plaintiff Green’s allegations are completely without merit and have been so proven. The operative phrases are not surrounded by hyperbole or figurative language that undercuts their literal meaning. Cf. *Standing Comm. on Discipline of U.S. Dist. Court v. Yagman*, 55 F.3d 1430, 1440 (9th Cir. 1995) (applying California law) (treating as rhetorical hyperbole the word “dishonest” because it was used within a “string of colorful adjectives”); see also *Knievel v. ESPN*, 393 F.3d 1068, 1077 (9th Cir. 2005) (describing “slang phrases such as ‘[d]udes rollin’ deep’ and ‘[k]ickin’ it with much flavor’” as using loose and figurative language incapable of a “literal interpretation”). The phrasing used here allows a “reasonable factfinder [to] conclude the [statement] impl[ies] an assertion of defamatory fact,” specifically, that there was some unidentified investigation or hearing into the allegations which officially determined

Plaintiff Green's accusation was false. Ringler Assocs. Inc., 96 Cal. Rptr. 2d at 149 (emphasis omitted).

Finally, the court considers whether Defendant's response, directly or by implication, makes a statement which is susceptible of being proved true or false. To the extent Defendant's response implies an investigation into Plaintiff Green's allegations was conducted, it is provable as true or false. Additionally, the gist of the statement—that Plaintiff Green fabricated her allegations—is also provable as true or false. It may take a trial to produce such proof, but Defendant's allegations are sufficiently specific “to be susceptible to proof or disproof.” *James v. San Jose Mercury News, Inc.*, 20 Cal. Rptr. 2d 890, 898 (Cal. Ct. App. 1993) (finding statements not susceptible of being proved true or false because the statements contained too many generalizations, elastic terms, and subjective elements for it to be clear what facts were stated or implied); see also *Amaretto Ranch Breedables, LLC*, No. CV 10-5696 CRB, 2013 WL 3460707, at *5 (finding a statement might be provable as true or false, though it would require a lengthy lawsuit, but determining other factors prevented statement from being defamatory). Based on this “totality of the circumstances” analysis, the court concludes a reasonable factfinder could determine, based on the context and content, the Newsweek Statement asserted or implied factual statements that were susceptible of being proved true or false.

iii. Defamatory Meaning

The court considers next whether the statement could be understood to have a defamatory meaning. Analogizing to *Gibney v. Fitzgibbon*, 547 F. App'x 111 (3d Cir. 2013) (unpublished), Defendant argues an assertion by a person that an allegation is unfounded cannot reasonably be viewed as exposing the person who made the allegation to “scorn or ridicule.” The facts of this case are easily distinguished from those in *Gibney* and the differences require the court to reach a different conclusion here.

In *Gibney*, the plaintiff had contacted a company that did business with his employer to allege his employer was improperly billing the company. *Id.* at 112. The company responded that the allegations had been investigated and determined to be unfounded. *Id.* The Third Circuit held that the company's response, even if untrue, was not capable of a defamatory meaning because a statement that “his allegations were unfounded” would not “lower him in the estimation of the community or . . . deter third parties from associating or dealing with him.” *Id.* at 114 (quoting *Tucker v. Phila. Daily News*, 848 A.2d 113, 124 (Pa. 2004)). This conclusion makes sense where the detail of business billing procedures leaves open the possibility that a person making an allegation of wrongdoing could have made an honest mistake. In this respect, it is hard to even compare an allegation regarding billing procedures to a sexual assault allegation. A neutral-toned response relative to an investigation of billing history does not impart any flavor of fabrication or moral repugnance, both of which attach to Defendant's statement and its suggestion that Plaintiff intentionally lied about being sexually assaulted. Unlike a billing dispute, Plaintiff Green's allegations detail a specific set of events that either

occurred substantially as alleged or were fabricated, leaving no room for an honest mistake.

The potential for reputational damage is increased where the response lacks the neutral tone conveyed in Gibney by the word “unfounded,” which means “lacking a sound basis in . . . fact.” Webster’s Third New International Dictionary 2496 (1971). Defendant referred to serious sexual assault allegations as “discredited” and “nothing,” both words suggesting that the allegations were not made in good faith. *Id.* at 647, 1544. Given the different nature of the allegations in this case and the wording of the response, the court cannot conclude here that, as a matter of law, Defendant’s response is incapable of negatively impacting Plaintiff Green’s reputation within the community. Ultimately, it will be up to a jury to decide whether those who read the Newsweek Statement understood it to have been defamatory. At this stage, however, the court finds Defendant has not identified sufficient grounds for dismissal of Plaintiff Green’s claims based on the Newsweek Statement.

b. The Statements Pertaining to Plaintiffs Traitz and Serignese

In Florida, as in California, “to be actionable, a defamatory publication must convey to a reasonable reader the impression that it describes actual facts about the plaintiff or the activities in which [s]he participated.” *Fortson v. Colangelo*, 434 F. Supp. 2d 1369, 1379 (S.D. Fla. 2006). Generally, a court must decide, as a matter of law, whether a statement expresses a pure opinion or a “mixed opinion” from which unstated facts are likely to be inferred. *Scott v. Busch*, 907 So. 2d 662, 668 (Fla. Dist. Ct. App. 2005). However, where the statement could be understood in more than one way, the question should be submitted to the trier of fact. See *Ford v. Rowland*, 562 So. 2d 731, 735 (Fla. Dist. Ct. App. 1990); see also *Scott*, 907 So. 2d at 667.

Courts determining whether an allegedly defamatory statement is a protected expression of opinion “‘must construe the [allegedly defamatory] statement in its totality, examining not merely a particular phrase or sentence, but all of the words used in the publication.’” *Keller v. Miami Herald Publ’g Co.*, 778 F.2d 711, 717 (11th Cir. 1985) (applying Florida Law) (quoting *Hay v. Indep. Newspapers, Inc.*, 450 So. 2d 293, 295 (Fla. Dist. Ct. App. 1984)); accord *Morse v. Ripken*, 707 So. 2d 921, 922 (Fla. Dist. Ct. App. 1998). The context in which a statement was published and whether the publisher used cautionary terms must also be considered. *Keller*, 778 F.2d at 717. Defendant argues the potentially defamatory aspects of the November 20, 2014 Statement (against Traitz) and the November 21, 2014 Statement (against Traitz and Serignese) constitute opinions because they are mere “rhetorical hyperbole,” and they express a subjective view rather than objectively verifiable facts. (Def.’s Mem. 19-20, 22.) With respect to the November 21, 2014 Statement, Defendant also argues the statement is not defamatory as to either Traitz or Serignese because the statement is not “of and concerning” either plaintiff. The court disagrees.

i. November 20, 2014 Statement

The November 20, 2014 Statement was a press release issued by one of Defendant's agents for the purpose of further dissemination. The statement had two components: (1) descriptions of the allegations and (2) a description of Plaintiff Traitz's later, and unrelated, criminal history. Plaintiff Traitz does not contest the truth of the second component of the statement related to her criminal history and does not base her defamation claim on this portion of the statement. Plaintiff Traitz instead bases her claim on the descriptions of her sexual assault allegations as "fabricated or unsubstantiated stories," "ridiculous claims," and, as to one particular allegation—that Defendant offered her drugs from a briefcase—"an absurd fabrication." Defendant argues these words are either non-defamatory because they are technically accurate or rhetorical hyperbole that expresses opinion rather than stating fact. He asserts Plaintiff Traitz's failure to publicly present any proof beyond her own words, combined with her criminal record, make her claims "unsubstantiated."¹⁵ Defendant also argues the word "ridiculous" did not imply any false facts, but was simply rhetorical hyperbole, and the words "fabricated" and "fabrication" expressed opinions about the nature of the allegations based on her delay in coming forward and her criminal record.

These arguments are not persuasive because the court is directed to consider the allegedly defamatory statements within the context of the entire publication. *Smith v. Cuban Am. Nat'l Found.*, 731 So. 2d 702, 705 (Fla. Dist. Ct. App. 1999). Read in its entirety, one possible, and clearly defamatory, implication of the entire press release is that Plaintiff Traitz intentionally made absurdly false sexual assault allegations against Defendant. A jury must ultimately decide whether the statement asserted or implied this actual fact or merely opined that the allegations sounded far-fetched, without actually asserting or implying the allegations were false. See *Ford*, 562 So. 2d at 735 (reversing the dismissal of a libel claim because whether statements described actual facts or were merely absurd parodies depended on factual determinations to be made by jury). When making this determination, a jury can consider that the statement was made by Defendant's attorney. Perhaps, as Defendant argues, a jury will conclude the denigration of Plaintiff Traitz was a "one-sided" account expressing an opinion and providing the basis for that opinion, and therefore is not defamatory. However, at this stage it appears that a jury could conclude that the source of the statement—a person close to the subject of the allegations—made the statement in order to communicate the fact that Plaintiff Traitz's allegations were lies. Since the November 20, 2014 Statement can reasonably be understood as describing the actual fact that Plaintiff's allegations were false and since, at this stage, the court must accept Plaintiff Traitz's allegations as true, the court concludes Plaintiff Traitz has adequately pled her defamation claim related to the November 20,

¹⁵ Defendant's contention that Plaintiff Traitz has offered no corroboration is, at least arguably, factually inaccurate because of the multiplicity of similar claims, a fact acknowledged in Defendant's statements of November 20th and 21st. The similar claims could be considered by a fact finder as a form of corroboration by a recognizably unique pattern of conduct.

2014 Statement. Defendant's request to dismiss the claim based on the November 20, 2014 Statement is denied.

ii. November 21, 2014 Statement

Defendant argues the November 21, 2014 Statement cannot be the basis of a defamation claim because (1) it expresses opinions rather than stating facts, (2) any factual statements are not defamatory, or (3) any defamatory facts are not defamatory as to Plaintiffs Tritz and Serignese because this statement is not sufficiently "of and concerning" them. The November 21, 2014 Statement is the longest of the four statements attributed to Defendant in this suit and criticizes his accusers and the media for their various roles in the recent dissemination of the sexual assault allegations made against Defendant. Neither Plaintiff Tritz nor Plaintiff Serignese is identified by name within the statement, but it begins by identifying itself as a response to the "new, never-before-heard claims from women" who made allegations "in the past two weeks." Plaintiff Tritz made her allegations public on November 18, 2014, and Plaintiff Serignese made her allegations public on November 19, 2014; this timing sequence clearly indicates the statement refers to them.

In Florida, expressions of opinions are non-actionable "if the speaker states the facts on which he bases his opinion," and those facts are not "false or inaccurately presented." *Lipsig v. Ramlawi*, 760 So. 2d 170, 184 (Fla. Dist. Ct. App. 2000). A statement is also a "pure opinion, as a matter of law, when it is based on facts which are otherwise known or available to the reader or listener." *Razner v. Wellington Reg'l Med. Ctr., Inc.*, 837 So. 2d 437, 442 (Fla. Dist. Ct. App. 2002). In determining whether any portions of the statement are defamatory, the court must consider the statement "in the context of the publication, including the audience, the means by which it was delivered, and other circumstances surrounding the statement." *Ranbaxy Labs. Inc. v. First Databank, Inc.*, No. 3:13-CV-859-J-32MCR, 2015 WL 3618429, at *3 (M.D. Fla. June 9, 2015).

Defendant's attorney provided the November 21, 2014 Statement to the media with the intent that the statement be disseminated to the public. The statement begins by describing the allegations that had been made against Defendant during the previous two weeks as "new, never-before-heard claims" that are "unsubstantiated, fantastical stories" about events occurring "30, 40, or even 50 years ago." The allegations are characterized as having "escalated past the point of absurdity" and "becom[e] increasingly ridiculous." Next, the statement describes as "completely illogical" the silence, over many years, of the accusers. Implicit in this portion of the statement is the suggestion that the cause of the accusers' decades of silence was that they did not really believe they had been assaulted. The statement continues with two sentences about the opportunities the accusers had to sue Defendant and suggests "it makes no sense" that none of the accusers had brought legal action closer in time to the alleged sexual assaults. Defendant next shifts the focus from the accusers to the media, critiquing the speed with which

allegations were reported and suggesting that the reporting violated journalistic standards because the stories were run without corroboration. Finally, the statement characterizes the media's reporting on the allegations as a "vilification" of Defendant.

The truth of portions of the statement, such as the length of time between when the incidents allegedly occurred and the date on which any particular allegation became public, is uncontested. Defendant argues these statements provide readers with the truthful facts on which he based his opinion that the allegations were unsubstantiated. This analysis is flawed because when read in its entirety, the statement is capable of being understood as asserting not just that the allegations made during the previous two weeks were unsubstantiated, but also as implying they were false and entirely without merit. The court cannot predict whether a jury will actually conclude the statement implied that fact and, if so, whether the assertion of fact was false, but there is a sufficient factual question as to the meaning readers would have given to the statement to preclude dismissal at this stage.

Defendant maintains that, regardless of the analysis on whether there was a false statement of fact, the November 21, 2014 Statement was simply not defamatory. A statement is capable of a defamatory effect if it "naturally and proximately results in injury to another." *Cuban Am. Nat'l Found.*, 731 So. 2d at 705. As previously discussed, to falsely accuse another of sexual assault is morally repugnant; the natural result of the publication of a statement directly or indirectly indicating Plaintiffs made such false accusations is injury to their reputations.

Finally, the court turns to Defendant's argument that, even if the November 21, 2014 Statement contains defamatory statements, they were not "of and concerning" Plaintiffs Tritz and Serignese. As a matter of substantive law "a cause of action for group libel cannot be maintained unless it is shown that the libelous statements are 'of and concerning' the plaintiff." *Thomas v. Jacksonville TV, Inc.*, 699 So. 2d 800, 805 (Fla. Dist. Ct. App. 1997). A statement can be "of and concerning" members of a group, provided the group includes fewer than twenty-five individuals and the statement identifies and describes each plaintiff. Cf. *id.*

The November 21, 2014 Statement was released three days after Plaintiff Tritz made her public accusation and two days after Plaintiff Serignese made hers. Nothing in the statement indicates an intention to exclude any recent accusers from its sweep, and Plaintiffs assert there were eleven women who publicly made accusations against Defendant during the two weeks prior to the publication of the November 21, 2014 Statement. (Pls.' Mem., Ex. 2 at ¶ 2.) Taken together, these factors lead the court to the objectively reasonable inference that a factfinder could conclude the statement was "of and concerning" Tritz and Serignese. See *Jacksonville TV, Inc.*, 699 So. 2d at 805; see also Restatement (Second) of Torts § 617 cmt. a (explaining that the question of whether the statement was "of and concerning the plaintiff" is "ordinarily for the jury or trier of fact to determine").

2. Requisite Degree of Fault

The Supreme Court requires the respective defamation law of each state to include an element of fault. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347-48 (1974). Recognizing the tension between providing protections for individuals' reputations and encouraging an open and free press, the Supreme Court requires a plaintiff to demonstrate a higher level of fault when the allegedly defamatory statement concerns a public figure, rather than when it concerns a private individual outside the public sphere. *Id.* at 342-46. Private-figure plaintiffs need only demonstrate a defendant (or defendant's agent acting within the scope of the agency) acted negligently. See *Mile Marker, Inc. v. Petersen Publ'g, LLC*, 811 So. 2d 841, 845 (Fla. Dist. Ct. App. 2002); *Sarver v. Hurt Locker LLC*, No. 2:10-cv-09034-JHN-JCx, 2011 WL 11574477, at *8 n.11 (C.D. Cal. Oct. 13, 2011). By contrast, if a plaintiff is a public figure, then such plaintiff must show the defendant (or defendant's agent acting within the scope of the agency) acted with actual malice in uttering the defamatory remark. See *Nguyen-Lam v. Cao*, 90 Cal. Rptr. 3d 205, 212 (Cal. Ct. App. 2009); *Miami Herald Publ'g Co. v. Ane*, 423 So. 2d 376, 382 (Fla. Dist. Ct. App. 1982). Malice exists, generally, if a defendant or a defendant's agent makes the statement knowing it is false or with reckless disregard to its truth. See *Nguyen-Lam*, 90 Cal. Rptr. 3d at 212; *Ane*, 423 So. 2d at 378, 382.

The parties have not raised the issue of Plaintiffs' public or private status for this litigation, and Defendant argues a failure to plead sufficient facts to establish either level of fault. Accordingly, the court considers Plaintiffs to be private individuals at this stage of the litigation. See *Pan Am Sys., Inc. v. Hardenbergh*, 871 F. Supp. 2d 6, 16 (D. Me. 2012) (employing this approach in similar situation). Therefore, under both California and Florida law, Plaintiffs have sufficiently pled the requisite degree of fault if they allege facts demonstrating Defendant (or his agents acting within the scope of their agency) acted negligently. See *Brown v. Kelly Broad. Co.*, 771 P.2d 406, 425 (Cal. 1989); *Boyles v. Mid-Florida TV Corp.*, 431 So. 2d 627, 634 (Fla. Dist. Ct. App. 1983), *aff'd* 467 So. 2d 282, 283 (Fla. 1985). Negligence exists if the statement is made without first exercising reasonable care to determine if it is, in fact, false. *Hecimovich v. Encinal Sch. Parent Teacher Org.*, 137 Cal. Rptr. 3d 455, 471 (Cal. Ct. App. 2012); *Boyles*, 431 So. 2d at 634. Individuals not only clearly fail to exercise reasonable care if they make a statement known to be false, but also if a reasonable person would have known the statement was false. See *Brown*, 771 P.2d at 430; *Boyles*, 431 So. 2d at 634; *Carney v. Santa Cruz Women Against Rape*, 271 Cal. Rptr. 30, 34 n.2 (Cal. Ct. App. 1990).

The two legal theories for establishing fault in this case are: respondeat superior liability and direct liability. Respondeat superior is a "doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency." *Black's Law Dictionary* 1505 (10th ed. 2014). Under the direct liability theory, Defendant would be held liable on the basis of his own fault for his conduct and involvement regarding the statements.

a. Respondeat Superior Liability

Defendant asserts the SAC does not sufficiently allege his agents possessed the requisite degree of fault necessary to hold Defendant liable for defamation on the basis of respondeat superior.¹⁶ When a third party is harmed by an agent’s conduct, the principal is subject to respondeat superior liability, a form of vicarious liability, if the agent was acting within the scope of work performed for the principal and the principal controlled or had a right to control the manner of the agent’s work. Restatement (Third) of Agency §§ 7.03, 7.07 (2006); see also *Rivera v. Nat’l R.R. Passenger Corp.*, 331 F.3d 1074, 1080 (9th Cir. 2003) (“[U]nder California law [an employer] may be held liable for defamatory statements made by its employees under the doctrine of respondeat superior . . . if the defamation occurred within the scope of the employee’s employment.”); *Mercury Motors Express, Inc. v. Smith*, 393 So. 2d 545, 549 (Fla. 1991) (“An employer is vicariously liable . . . [for] the negligent acts of employees committed within the scope of their employment even if the employer is without fault.”). It follows that, under this theory, “a principal’s vicarious liability turns on whether the agent is liable.” Restatement (Third) of Agency § 7.03 cmt. b; see *id.* (“In most cases, direct liability requires fault on the part of the principal whereas vicarious liability does not require that the principal be at fault.”); accord *Estate of Miller v. Thrifty Rent-A-Car Sys., Inc.*, 637 F. Supp. 2d 1029, 1037 (M.D. Fla. 2009); *Palomares v. Bear Stearns Residential Mortg. Corp.*, No. 07cv01899 WQH (BLM), 2008 WL 686683, at *4 (S.D. Cal. Mar. 13, 2008). In order to proceed on their theory of respondeat superior liability, Plaintiffs’ SAC must include sufficient allegations supporting a finding of fault on the part of those speaking for Defendant—Phillips, Brokaw, and Singer. As discussed above, both California and Florida use a negligence standard when evaluating whether a defendant has published a defamatory statement about a private individual. See *Mile Marker, Inc.*, 811 So. 2d at 845; *Sarver*, 2011 WL 11574477, at *8 n.11. This standard applies equally to authorized agents acting in the scope of their agency. See *Estate of Miller*, 637 F. Supp. 2d at 1037; *Palomares*, 2008 WL 686683, at *4.

Defendant contends Plaintiffs’ allegations are threadbare or conclusory and cannot be the basis of a “plausible determination” that Defendant’s agents acted with fault. (Def.’s Mem. 31-32.) This argument cannot succeed if, after accepting Plaintiffs’ allegations as true, the court can reasonably infer that those speaking for Defendant—Phillips, Brokaw, and Singer—were themselves negligent. The SAC states directly and by inference that the individuals who issued the statements were professionals, employed by Defendant for purposes including speaking to the media on his behalf. (SAC ¶¶ 25-26, 29-30, 33-35, 37, 51-53, 55, 65-68, 70, 77, 88, 99.) Given Defendant’s prominence in the entertainment field, the court infers he surrounded himself with people accomplished in media relations and legal matters. The court also infers those making Defendant’s public

¹⁶ In the SAC, Plaintiffs specifically allege Defendant is liable for the statements given by his agents on the basis of respondeat superior. (SAC ¶¶ 83, 94, 105.)

statements had an open line of communication with him as well as some historical perspective on his public relations matters. Based on the facts and inferences, the court finds it plausible at this point to conclude (1) those agents would have had, at a minimum, some sense of Defendant's alleged conduct, such that their duty of care would have required them to take steps to determine the truth or falsity of the statements, and (2) the content of their responsive statements demonstrates such reasonable care was not taken.

In reaching its conclusions, the court notes that prior to the formal discovery process, facts pertaining to state of mind in defamation actions need not be alleged with extreme detail, due to the difficulty of definitively ascertaining them at this stage of litigation. See *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 58 (1st Cir. 2012) (in the defamation context, state of mind may be alleged generally); see also generally Fed. R. Civ. P. 9(b); *Grajales v. P.R. Ports Auth.*, 682 F.3d 40, 49 (1st Cir. 2012).

The court, at this stage, accepting all of Plaintiffs' well-pled averments as true, finds respondeat superior liability is sufficiently pled. Therefore, Defendant's motion for dismissal on this point is denied.

b. Direct Liability

Defendant asserts that Plaintiffs do not identify direct liability as a legal theory upon which the defamation claims can be proven. However, the SAC does state Defendant acted "by and through" each of the people who actually gave each statement alleged to be defamatory. (SAC ¶¶ 25, 30, 33-35, 38, 51-52, 56, 65-68, 71, 73-74, 77, 80-82, 85, 88, 91-93, 96, 99, 102-04.) The SAC also states that Defendant's agents gave the statements "at the direction of Defendant." (Id. ¶¶ 37, 55, 70.) Additionally, the SAC states Defendant knew the claimed defamatory statements were false at the time they were published. (Id. ¶¶ 36, 54, 69, 79, 90, 101.) If a principal purposefully directs an agent to perform an action, and that agent performs the action, then the principal is directly responsible for the consequences of the action. See Restatement (Third) of Agency § 7.03; see also *HBSC Ins. Ltd. v. Scanwell Container Line Ltd.*, No. CV 00-05729SVW(SHX), 2001 WL 940673, at *2 (C.D. Cal. Jan. 17, 2001); *Partington v. Metallic Eng'g Co.*, 792 So. 2d 498, 501 (Fla. Dist. Ct. App. 2001).

The court is not persuaded by Defendant's argument that Plaintiffs did not adequately plead direct liability as a named legal theory. Under the applicable federal procedural requirements, a complaint need only put a defendant on notice as to legal theories and this can be done, as here, without formally naming them; a plaintiff need not perfectly plead all legal theories. See *Johnson v. City of Shelby*, 135 S. Ct. 346 (2014) (reversing dismissal because "[f]ederal pleading rules . . . do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted"); see also *id.* at 347 ("The federal rules effectively abolish the restrictive theory of the pleadings doctrine, making it clear that it is unnecessary to set out a legal theory for the

plaintiff's claim for relief.'" (quoting 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1219, at 277-78 (3d ed. 2002))).

Defendant rightfully concedes that if he had "approved defamatory statements before they were issued, he would be directly liable for defamation, irrespective of whether he or his agents personally issued the statements." (Dkt. No. 41, Def.'s Reply Mem. Supp. Mot. to Dismiss 10 ("Def.'s Reply Mem.")). See *Overstock.com, Inc. v. Gradient Analytics, Inc.*, 61 Cal. Rptr. 3d 29, 48 (Cal. Ct. App. 2007); *Island City Flying Serv. v. Gen. Elec. Credit Corp.*, 585 So. 2d 274, 278 (Fla. 1991). But he asserts in his reply brief there was a failure to plead sufficient facts to infer actual approval. (Def.'s Reply Mem. at 10.) The court does not agree. From examination of all the facts in the SAC, it does not take a speculative leap for the court to conclude Defendant would be personally involved in reviewing these types of accusations against him, crafting or approving the responsive statements, and directing the dissemination. The SAC alleges Defendant was an "internationally known" entertainment figure and the people making public statements for him were acting either as attorney or publicist and/or authorized representative or employee. (SAC ¶¶ 3, 26, 29, 53.) At this stage of the litigation, it would be unreasonable to view these particular circumstances, responding to very serious accusations of the nature involved here, as not having the direct involvement of Defendant.

The court therefore finds direct liability is sufficiently pled. Accordingly, Defendant's motion for dismissal on this point is denied.

3. Self-Defense Privilege

The court turns to Defendant's argument that Plaintiffs' claims should be dismissed even if the statements at issue are potentially defamatory because these statements are protected by the common-law privilege of self-defense. (Def.'s Mem. 22-25.) Defendant relies in part on a Massachusetts case, contending "[t]he privilege of self-defense includes the right to 'brand the accusations as false and calumnious' and to 'comment upon the motives of the accuser.'" (Id. at 23 (quoting *Conroy v. Fall River Herald News Co.*, 28 N.E. 2d 729, 730 (Mass. 1940)).) Defendant also asserts, without citing any authority, "[t]here is no requirement that, to avail oneself of the self-defense privilege, the responsive statement be truthful." (Id. at 25.) The court concludes the state substantive law governing Plaintiffs' claims does not recognize this privilege and, even if it were recognized, the court at this stage could not find that it applies.

Neither California nor Florida recognize the self-defense privilege. As the parties acknowledge, California courts have rejected the notion of a privilege to defame in self-defense. (Pls.' Mem. 11; Def.'s Mem. 23 n.8.) See *Finke v. Walt Disney Co.*, 2 Cal. Rptr. 3d 436, 459 (Cal. Ct. App. 2003) ("California does not recognize 'self-help' as an independent privilege."), review granted, 79 P.3d 541 (Cal. 2003), review dismissed as

settled, 99 P.3d 5 (Cal. 2004).¹⁷ Similarly, while Florida recognizes several types of conditional defensive privileges in the context of defamation, self-defense is not one of them. See *Nodar v. Galbreath*, 462 So. 2d 803, 809-10 (Fla. 1984) (recognizing the privileges of mutuality of interest between the speaker and the listener, protection of the recipient's interest, and statements to a political authority regarding issues of public concern). Moreover, the court is not persuaded by Defendant's assertion that, because Florida courts have never explicitly rejected the self-defense privilege, it must be assumed the privilege would be recognized in Florida. In the court's view, the absence of any indication that Florida courts would adopt this privilege, especially when they have explicitly adopted other common-law defamation privileges, establishes no basis to assume the self-defense privilege would be recognized in Florida. Cf. *Klayman v. City Pages*, No. 5:13-cv-143-Oc-22PRL, 2015 WL 1546173, at *17 n.18 (M.D. Fla. Apr. 3, 2015) (declining to find that the "libel-proof plaintiff" defamation defense exists in Florida when the defendants failed to provide any authority in support of that assertion).

The court recognizes that some jurisdictions do apply a version of the conditional self-defense privilege, which allows individuals, in certain circumstances, to publish defamatory responsive statements necessary to defend their reputation. However, as recognized by the cases Defendant himself cites, as well as the Restatement, such a privilege does not permit a defendant to knowingly publish false statements of fact. See *Conroy*, 28 N.E.2d at 730 ("[O]ne has a right in good faith to brand the accusations as false and calumnious." (emphasis added)); *Shepherd v. Baer*, 53 A. 790, 791 (Md. 1902) (explaining that an individual relying on the self-defense privilege "cannot avail himself of the occasion to make false charges of fact"); Restatement (Second) of Torts § 593 (conditional privilege may not be "abused"); *id.* § 600 (conditional privilege is abused if publisher "(a) knows the matter to be false, or (b) acts in reckless disregard as to its truth or falsity"). As explained in a treatise relied upon by both Plaintiffs and Defendant, the self-defense privilege permits the speaker to "call the accuser a liar, but she or he may not include in the reply defamatory matter that is irrelevant or that the speaker knows or believes to be false. To do so is to abuse, and therefore lose, the privilege." Sack on Defamation § 9:2.1, at 9-11 (4th ed. 2010) (emphasis added).

Accordingly, even in jurisdictions recognizing this conditional privilege, there is a clash with the applicable motion to dismiss standard. At the motion to dismiss stage, Plaintiffs' allegations are presumed true, *San Geronimo Caribe Project, Inc.* 687 F.3d at 471, so Defendant's allegedly defamatory self-defense responses, made through his agents, would necessarily be viewed as knowingly false under these specific circumstances. This alone would negate the good faith requirement regarding the self-

¹⁷ Defendant nonetheless asserts statements made in self-defense fall within the "predictable opinion" doctrine recognized in California. This court, however, has already rejected Defendant's predictable opinion arguments. See Section V.C.1.a.ii., *supra*. Accordingly, his predictable opinion arguments fare no better here when linked to a purported self-defense privilege.

defense privilege at the motion to dismiss stage.¹⁸ See *Lundquist v. Reusser*, 875 P.2d 1279, 1291 (Cal. 1994) (conditional privileges which California does recognize are lost “if the person making the statement was . . . [m]otivated by hatred or ill-will toward the plaintiff which induced the publication; or . . . [w]as without a good-faith belief in the truth of the statement”); *Thomas v. Tampa Bay Downs, Inc.*, 761 So. 2d 401, 404 (Fla. Dist. Ct. App. 2000) (explaining that an essential element for conditional privileges which Florida does recognize is “good faith”); see also *Bank of Am. Corp. v. Valladares*, 141 So. 3d 714, 718 (Fla. Dist. Ct. App. 2014) (conditional privilege to report a crime is lost “if the reporter acts maliciously, meaning the reporter either knows the report is false or recklessly disregards whether the report is false”), review granted, 168 So. 3d 231 (Fla. 2015). The court would thus be constrained to infer that Defendant abused, and therefore lost, the privilege. See *Sack on Defamation* § 9:1, at 9-2 (“In some situations, a speaker will not be held liable for false defamatory statements because the freedom to speak in protection of certain interests is deemed to be more important than the ability to redress harm to reputation that such speech may cause. But for the speaker to be protected in such situations, the statement must be made in good faith and for proper motives and the occasion must not be otherwise ‘abused.’”); see also *id.* §§ 9:3.1-9:3.2, at 9-41 to 9-50 (discussing the different types of “malice” which courts find to be an abuse of conditional privileges).¹⁹ Therefore, even if Florida and California did recognize this privilege, Defendant would not be able to invoke it at this stage to support his motion to dismiss.

4. Incremental Harm as to November 20, 2014 Statement about Plaintiff Traitz

Defendant argues the defamation claim by Plaintiff Traitz that stems from the November 20, 2014 Statement should be dismissed because she has not suffered incremental harm as a result of the statement. According to Defendant, the allegedly defamatory portion of Singer’s statement is no more damaging to Traitz’s reputation than the true reporting of her criminal convictions.

The “incremental harm doctrine,” which some courts have described as related to the “libel-proof plaintiff doctrine,” see *Thomas v. Tel. Publ’g Co.*, 929 A.2d 991, 1002 (N.H. 2007); *Stern v. Cosby*, 645 F. Supp. 2d 258, 270 (S.D.N.Y. 2009), “measures the

¹⁸ Arguably, a self-defense privilege could protect a defendant who made a responsive good faith statement that later turned out to be inaccurate. See *Sack on Defamation* § 9:1, at 9-3 & n.6.

¹⁹ The court notes that in some states, a defendant’s negligence in ascertaining the truth of a conditionally privileged defamatory statement may constitute grounds for losing the privilege. See *Sack on Defamation* § 9:3.4, at 9-52 to 9-53. Under the Supreme Court’s decision in *Gertz*, 418 U.S. 323, however, each state’s defamation law must include an element of fault at least rising to negligence; therefore, “[e]stablishing the cause of action would, ipso facto, establish defeasance of qualified privilege.” *Sack on Defamation* § 9:3.4, at 9-53. In any event, the court need not delve further into the complications surrounding a self-defense privilege, the ways in which it may be lost, and the tensions with the motion to dismiss standard, because neither California nor Florida recognizes the self-defense privilege.

harm ‘inflicted by the challenged statements beyond the harm imposed by the rest of the publication. If that harm is determined to be nominal or nonexistent, the statements are dismissed as not actionable.’” *Masson v. New Yorker Magazine, Inc.*, 960 F.2d 896, 898 (9th Cir. 1992) (quoting *Herbert v. Lando*, 781 F.2d 298, 311 (2d Cir. 1986)); see also *Tel. Publ’g Co.*, 929 A.2d at 1002-03.²⁰

Defendant has not provided any authority, and the court has not found any, indicating that Florida (the jurisdiction controlling resolution of Plaintiff Trait’s claims) recognizes this defense. Accordingly, just as the court in *Klayman*, 2015 WL 1546173, at *17 n.18, refused to recognize the libel-proof plaintiff doctrine under Florida law, this court, in the absence of any indication to the contrary, cannot conclude the Florida Supreme Court would adopt the incremental harm doctrine. Cf. *Masson*, 960 F.2d at 899 (concluding that “the incremental harm doctrine is not an element of California libel law,” in part, “because the California courts have never adopted it”); *Noonan v. Staples, Inc.*, 707 F. Supp. 2d 85, 90 (D. Mass. 2010) (“Since no court in the Commonwealth has ever recognized the doctrine of incremental harm, this Court refrains from doing so here.”). Even if Florida did recognize this doctrine, the court would not conclude, especially at this stage of the litigation, that the challenged portion of Singer’s statement—asserting that Plaintiff Trait fabricated the sexual assault allegation—caused no more than nominal harm beyond the reporting of her criminal convictions. See, e.g., *Church of Scientology Int’l v. Time Warner, Inc.*, 932 F. Supp. 589, 594 (S.D.N.Y. 1996) (“[T]he doctrine requires a court to measure the harm flowing from the challenged

²⁰ The libel-proof plaintiff doctrine, in contrast, looks to a plaintiff’s previously damaged reputation. See *Tel. Publ’g Co.*, 929 A.2d at 1002-04 (explaining the differences between the incremental harm and libel-proof plaintiff doctrines). Under that doctrine, “when a plaintiff’s reputation is so diminished at the time of publication of the allegedly defamatory material that only nominal damages at most could be awarded because the person’s reputation was not capable of sustaining further harm, the plaintiff is deemed to be libel-proof as a matter of law and is not permitted to burden a defendant with a trial.” *Lamb v. Rizzo*, 391 F.3d 1133, 1137 (10th Cir. 2004) (internal citation omitted); see *Tel. Publ’g Co.*, 929 A.2d at 1005 (“To justify applying the doctrine, the evidence of record must show not only that the plaintiff engaged in criminal or anti-social behavior in the past, but also that his activities were widely reported to the public.” (internal citation omitted)). As Plaintiffs note, Defendant has only expressly requested dismissal pursuant to the incremental harm doctrine, and not the separate libel-proof plaintiff doctrine. However, even if Defendant were pressing both grounds for dismissal, his argument would fail because Florida has not adopted the libel-proof plaintiff doctrine, see *Klayman*, 2015 WL 1546173, at *17 n.18, and Defendant has not established that Trait falls into the narrow category of individuals with a sufficiently tarnished reputation such that a defamatory statement could not impair her reputation, see *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 303 (2d Cir. 1986) (“The libel-proof plaintiff doctrine is to be applied with caution . . . since few plaintiffs will have so bad a reputation that they are not entitled to obtain redress for defamatory statements.” (citation omitted)); *Church of Scientology Int’l v. Time Warner, Inc.*, 932 F. Supp. 589, 594 (S.D.N.Y. 1996) (“Dismissal based on the libel-proof plaintiff doctrine is not appropriate at this stage of the litigation, because it requires the Court to make factual findings regarding plaintiff’s reputation for a particular trait.”).

statement as compared to the harm flowing from the rest of the publication . . . and the parties have not yet conducted discovery on the issue of damages.” (citation omitted)).

VI. CONCLUSION

For the reasons set forth above, Defendant’s motions to dismiss (Dkt. Nos. 21, 22, and 23) are DENIED in their entirety.

It is So Ordered.

/s/ Mark G. Mastroianni

MARK G. MASTROIANNI
United States District Judge

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

RENITA HILL, an individual,
Plaintiff,

v.

WILLIAM HENRY COSBY, JR. aka
BILL COSBY, an individual,

Defendant.

CIVIL DIVISION

Case No.: **GD15-18156**

COMPLAINT

Filed on Behalf of the Plaintiff

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JURY TRIAL DEMANDED

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2015 OCT 14 PM 3:22
DEPT. OF COURT RECORDS
CIVIL FAMILY DIVISION
ALLEGHENY COUNTY PA

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

RENITA HILL, an individual,
Plaintiff,

CIVIL DIVISION

Case No.:

v.

WILLIAM HENRY COSBY, JR. aka BILL
COSBY, an individual,

Defendant.

NOTICE TO DEFEND

YOU HAVE BEEN SUED IN COURT. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this Complaint and Notice are served by entering a written appearance personally or by attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so, a judgment may be entered against you by the court without further notice for any money claimed in the Complaint or for any other claim or relief requested by the Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

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Pittsburgh, PA 15219

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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

RENITA HILL, an individual,
Plaintiff,

CIVIL DIVISION
Case No.:

v.

WILLIAM HENRY COSBY, JR. aka BILL
COSBY, an individual,

Defendant.

COMPLAINT

AND NOW comes the Plaintiff, Renita Hill, by and through her attorneys, George M. Kontos, Esquire, Katie A. Killion, Esquire, and Kontos Mengine Law Group and files the following Complaint, and in support thereof, aver as follows:

Jurisdiction and Parties

1. The Plaintiff, Renita Hill (sometimes hereinafter referred to as "Renita"), is an individual and a resident of the Commonwealth of Pennsylvania, County of Allegheny residing at 2773 Churchview Avenue, Pittsburgh, PA 15227.
2. The Defendant, William Henry Cosby, Jr. aka Bill Cosby (sometimes hereinafter referred to as "Cosby"), is a citizen of the Commonwealth of Pennsylvania and maintains a residence at 8210 New Second Street, Cheltenham, PA 19027
3. Defendant Cosby is an internationally known comedian, actor and author. At the time of the factual allegations hereunder, Cosby was one of the most famous television personalities and entertainers in the United States.

4. This Court has personal jurisdiction over the Defendant because he is a resident of the Commonwealth of Pennsylvania and owns real property in the Commonwealth of Pennsylvania.

Factual Timeline

5. Plaintiff incorporates by reference the prior paragraphs of this Complaint as though they were fully set forth at length.

6. In or about 1983, Renita Hill, who at the time was named Renita Chaney, first met Cosby when she was sixteen (16) years old at a local Pittsburgh establishment called "Froggy's Tavern". At the time, Renita was a high school student at Vincentian Academy in Pittsburgh, Pennsylvania.

7. Cosby was in the process of finding a co-host for an episode of the television show "Picture Pages", an educational children's television program hosted by Cosby and produced by Walt Disney Entertainment.

8. In his search for a cohost, Cosby invited Renita, as well as various other young, aspiring models and actresses, to Froggy's Tavern.

9. Cosby singled out Renita and chose her for a co-hosting position on the program.

10. Around the time of his choosing Renita to work on the Picture Pages program, Cosby also began communicating with Renita's parents. Cosby assured them that he had her best interests at heart, and further assured them that he was helping Renita with both her educational and career pursuits. He portrayed himself as a "mentor" to Renita.

11. Plaintiff accepted employment for the "Picture Pages" project and worked directly with Cosby on the program.

12. Shortly after Renita's acceptance of the position with Picture Pages, Cosby began to (as part of his "mentoring" of Renita) request that she meet him at various locations where he was performing. Such locations included Atlantic City, New York City, and Denver. It was at these various locations where the multiple abuses occurred, as further delineated below.

13. All of the travel and lodging arrangements for Renita were made by Cosby, or at Cosby's direction, and were paid for by Cosby.

14. Cosby's first abuse of Plaintiff occurred when she was still in high school, during a trip to Atlantic City, New Jersey.

15. Over the course of the next several years, Cosby continued abusing Plaintiff. During this time-span, Cosby offered to and paid for Renita's college education at both Temple University in Philadelphia, Pennsylvania, and Spelman College in Atlanta, Georgia. He also paid for her apartment during her second year of study at Spelman College.

16. These abuses continued until Renita's completion of her second year at Spelman College, when she decided to no longer meet with Cosby or have any further contact with him.

17. Cosby's funding of Renita's education ended with her refusal to further meet with him.

The Abuses and Cosby's Modus Operandi

18. During the years of abuse, which lasted approximately from 1983 to 1987, Cosby engaged in a consistent and deliberate pattern and methodology to effectuate his sexual abuse of Renita. Such pattern, or *modus operandi*, included but is not limited to the conduct enumerated below, as follows:

- a. Cosby would pay to have Plaintiff flown to a city where he was conducting business or performing in a show. He would arrange for a separate hotel room to be reserved for Plaintiff, for which he paid. This occurred most often in Atlantic City.
- b. Upon arrival to her hotel room, Renita would be provided some form of alcoholic beverage to be consumed as soon as she arrived. For example, on her first trip to Atlantic City, Cosby had a bottle of champagne on ice waiting in Renita's hotel room.
- c. Once Cosby finished his show, or business, Renita would be summoned to his room. Once there, Cosby would hand Renita a glass with some form of liquid in it and instruct her to "drink that."
- d. Renita would comply with the instruction of Cosby to drink the liquid, as he was a powerful figure both to her personally, as her "mentor," and more generally, as a revered and beloved actor and entertainer.
- e. On the majority of these occasions, upon imbibing the drink, Renita would lose consciousness and wake up in her room the next day, oftentimes nude, disheveled, confused and disoriented.

19. The first time this happened, in Atlantic City, Renita was unsure of exactly what had taken place due to her young age and inexperience with alcoholic beverages. She assumed that she perhaps drank too much, became inebriated and "blacked out."

20. However, it soon became clear to Renita that she was being assaulted and taken advantage of during these occasions, and that she was not just "blacking out" from alcohol intake.

21. Upon information and belief, Plaintiff asserts that the drinks provided to her by Cosby contained drug(s) that affected her consciousness, memory and perception, such that she would be rendered in a semi-conscious or unconscious state.

22. While she was in this semi-conscious or unconscious state, Renita was sexually assaulted by Defendant Cosby.

23. After the first few instances of abuse, Renita informed Cosby that she did not want to imbibe the drinks that he made her anymore because doing so made her uncomfortable. In response, Defendant Cosby instructed her that if she did not imbibe in the drinks he made her, she would be prevented from attending the trips and his purported tutelage of her would end. In this respect, Cosby bluntly told her: "If you don't drink the drink, you can't come."

24. On one instance in Atlantic City, Renita was given a drink (that she believes did not have an "adequate" amount of the drug in it to make her fully lose consciousness). Consequently, Renita distinctly remembers Cosby kissing her, touching her vaginal area and her breasts. She specifically recalls Cosby becoming angry when she commented on his cigar breath. Renita subsequently woke up naked in her hotel room the next day.

25. The aforementioned pattern happened numerous times over the course of several years, starting when Renita was a minor and continuing until the completion of her second year at Spelman University.

26. Cosby was extremely powerful, wealthy and influential in status. Renita was young, impressionable, and seemingly powerless. It was apparent to Renita that taking on such a powerful figure with such allegations would exact a severe emotional toll that she was incapable of undertaking. Also, she had no idea at that time of the many other woman who would ultimately come forward and share their similar experiences with Cosby.

27. Consequently, Renita was too intimidated and afraid to come forward with the abuses around the time during which they occurred.

Other Abuse Allegations Surface

28. For approximately twenty (20) years, Renita remained silent and did not reveal these abuses to any government authorities or to the public.

29. In 2005, a woman named Andrea Constand came forward and revealed publicly that Cosby had given her pills that reduced her consciousness and then he sexually assaulted her.

30. On or about March 8, 2005, Ms. Constand filed a civil complaint to this effect, alleging a fact pattern very similar to the abusive and manipulative actions Cosby had taken against Renita some twenty years earlier. Said civil complaint was filed in the Eastern District of Pennsylvania and had a case number of 05-CV-1099.

31. The civil complaint alleged that thirteen other woman, listed as Jane Doe witnesses, had similar experiences as Ms. Constand's. However, these woman were never able to testify because Ms. Constand settled with Cosby in November 2006.

32. Between the time of the civil complaint filing and the settlement, several woman had come forward revealing similar sexual abuses against them by Cosby, including Barbara Bowman, Beth Ferrier, and Tamara Green. However, upon the settlement of Ms. Constand's civil action, further action was not taken by these woman at the time.

33. For approximately eight (8) more years, there was relative silence pertaining to the public exposure of Cosby's conduct.

34. On or about November 13, 2014, Barbara Bowmen penned an op-ed in the Washington Post titled "Bill Cosby raped me. Why did it take 30 years for people to believe my story?", in which she detailed the sexual abuses that occurred in the 1980s and essentially urged the public to pay more attention to the abuse allegations that had originally been exposed eight years earlier.

35. Over the next several days, more accusers began to come forward, alleging very similar instances of being drugged and sexually abused. Such accusers include Joan Tarshis, Linda Joy Traitz, Janice Dickinson, Carla Ferrigno, Louisa Moritz, and Theresa Serignese.

Renita Comes Forward

36. Emboldened by the bravery and candor of the above-mentioned women, and realizing that their experiences with Cosby were nearly identical to her own, Renita finally came forward and shared the story of her experiences with Cosby. She did so in an interview with KDKA reporter Ralph Iannotti, on November 20, 2014.

37. In the interview, Renita revealed much of the above-mentioned fact pattern and explained that she felt compelled to come forward after hearing Cosby's criticize the other woman who came forward.

Cosby Retaliates

38. On or about November 21, 2014, in response to the multiple public statements, including Plaintiff's interview, accusing him of sexual abuse and rape, Cosby, aided by his attorney, Martin Singer, issued the following statement (henceforth referred to as the "Martin Singer Statement"):

The new, never-before-heard claims from women who have come forward in the past two weeks with unsubstantiated, fantastical stories about things they say occurred 30, 40, or even 50 years ago have escalated far past the point of absurdity.

These brand new claims about alleged decades-old events are becoming increasingly ridiculous and it is completely illogical that so many people would have said nothing, done nothing, and made no reports to law enforcement or asserted civil claims if they thought they had been assaulted over a span of so many years.

Lawsuits are filed against people in the public eye every day. There has never been a shortage of lawyers willing to represent people with claims against rich, powerful men, so it makes no sense that not one of these new women who just came forward for the first time now

ever asserted a legal claim back at the time they allege they had been sexually assaulted.

This situation is an unprecedented example of the media's breakneck rush to run stories without any corroboration or adherence to traditional journalistic standards. Over and over again, we have refuted these new unsubstantiated stories with documentary evidence, only to have a new uncorroborated story crop up out of the woodwork. When will it end?

It is long past time for this media vilification of Mr. Cosby to stop.

39. At all relevant times, Attorney Singer acted as an agent, authorized representative, lawyer, servant, and/or employee of Defendant Cosby, acting within the course and scope of his employment and/or agency, and with the full authorization, knowledge and consent of Cosby.

40. The Martin Singer Statement was given to The Washington Post for use in an article that was published on November 22, 2014 titled "Bill Cosby's legacy, recast: Accusers speak in detail about sexual-assault allegations," which provided the then-known history of the accusations by the multiple women against Defendant Cosby over the course of the past decade.

Cosby Speaks

41. On or about that same day, in an interview with Florida Today, Cosby himself was quoted as follows (henceforth referred to as the "Florida Today" statement):

"I know people are tired of me not saying anything, but a guy doesn't have to answer to innuendos. People should fact-check. People shouldn't have to go through that and shouldn't answer to innuendos."

Camille Cosby Speaks

42. On December 15, 2014, Defendant Cosby's wife, Camille Cosby, who was also Cosby's business manager, and acting on her husband's behalf in that regard, released a letter (henceforth referred to as the "Camille Cosby Statement") published by the Washington

Post, questioning the honesty of the victims who had come forward, stating that “[T]here appears to be no vetting of my husband’s accusers before stories are published or aired.”

43. In an apparent attempt to cast further doubt on the honesty of Defendant Cosby’s accusers, Camille Cosby also compared the accusations to alleged rape accusations at the University of Virginia, which eventually were proven to have been fabricated.

44. All of the above-mentioned statements were made in public and were publicized nationwide.

45. The statements made by Defendant’s attorneys, representatives, publicist, servants, agents, and/or employees are attributed to and are treated as being made by Cosby himself. Such assertion is further evidenced by a July 23, 2015 quote by one of Defendant Coby’s attorneys, Monique Pressley, in which she stated that “. . . [W]hen his attorneys speak, we’re speaking for him.”

46. During the same statement, which was uttered and/or broadcast in an interview with CNN, Attorney Pressley also stated that “Through his attorneys, Cosby from the beginning has denied repeatedly the accusations and allegations that have been lodged against him . . . [S]o when we speak and say that he denies all of the allegations and accusations, then that is the statement of Bill Cosby.”

COUNT I
RENITA HILL –vs- WILLIAM HENRY COSBY, JR aka BILL COSBY
(Defamation/Defamation per se)

47. Plaintiff incorporates by reference the allegations of all the preceding paragraphs as if fully restated herein.

48. The Martin Singer Statement, Florida Today statement, and the Camille Cosby Statement (referred herein collectively as the “Retaliatory Statements”) were defamatory.

49. It was reasonably foreseeable that the Retaliatory Statements would be published by the news media and that such Statements would garner national attention.

50. Cosby knew that these Statements were false at the time the statements were spoken and/or published and/or broadcast.

51. The Statements were made and broadcast with the intent to paint Renita; and the other woman who had come public with allegations and accusations of sexual abuse, as liars. Said statements explicitly provide that the women's stories are "unsubstantiated," "fantastical," and "absurd," among other derogatory descriptions. The statements also imply that the women were merely coming forth with the abuse stories in order to extort money from Cosby.

52. These Statements calling Plaintiff a liar and implying that she is an extortionist to the public at large were highly offensive to Renita.

53. The Statements constitute defamation *per se*, as they were broadcast by Defendant with actual malice. In the alternative, said Statements were made with wanton disregard for the truth and welfare of the Plaintiff.

54. As a direct and proximate result of the defamatory acts of the Defendant set forth above, Plaintiff has suffered harm to her reputation and emotional pain and suffering, including but not limited to:

- a. Mental anguish;
- b. Depression;
- c. Anxiety;
- d. Humiliation;
- e. Isolation; and
- f. Other injuries, the full extent of which are unknown.

55. As a result of Defendant Cosby's actions, The Plaintiff has incurred the following damages:

- a. She has suffered and may continue to suffer pain, suffering, mental anguish and embarrassment;
- b. She has sustained a loss of earnings and earning capacity;
- c. She has incurred significant medical bills for treatment;
- d. She has incurred bills for medication;
- e. She has suffered a loss of the enjoyment of life's pleasures; and
- f. Other damages, the full extent of which are unknown at this time.

56. WHEREFORE, the Plaintiff, Renita Hill, respectfully demands judgment in her favor and against the Defendant, William Henry Cosby, Jr. aka Bill Cosby, in an amount in excess of the applicable arbitration limits.

COUNT II
RENITA HILL -vs- WILLIAM HENRY COSBY, JR aka BILL COSBY
(False Light)

57. Plaintiff incorporates by reference the allegations of all the preceding paragraphs as if fully restated herein.

58. The Retaliatory Statements were highly offensive to Plaintiff and portrayed her in a false light.

59. The Retaliatory Statements were made in such a way that Defendant Cosby knew or should have known that such statement would become communicated to the public at large, as such statements were communicated to media outlets.

60. The Defendant knew or should have known that the Statements were false or recklessly disregarded the falsity of said statements.

61. The Defendant knew and intended that the Statements would cast Plaintiff in a false light by creating the false impression that Plaintiff was a liar and was lying about the sexual abuses. Said statements also implied that Renita was attempting to extort Cosby for money.

62. Naturally, these Statements calling Plaintiff a liar and implying that she is an extortionist to the public at large were highly offensive to Renita.

63. By reason of this conduct by Defendant, Plaintiff has suffered damage to her reputation, hurt feelings, mental anguish, emotional distress, embarrassment and great humiliation, as well as the other damages enumerated above, which are incorporated herein by reference.

WHEREFORE, the Plaintiff, Renita Hill, respectfully demands judgment in her favor and against the Defendant, William Henry Cosby, Jr. aka Bill Cosby, in an amount in excess of the applicable arbitration limits.

COUNT III
RENITA HILL –vs- WILLIAM HENRY COSBY, JR aka BILL COSBY
(Intentional Infliction of Emotional Distress)

64. Plaintiff incorporates by reference the allegations of all the preceding paragraphs as if fully restated herein.

65. Defendant Cosby's actions of drugging Renita and then sexually abusing her while she was in a vulnerable and unconscious or semi-conscious state of mind were egregious in nature.

66. Defendant Cosby's choice to disseminate the Retaliatory Statements and thus falsely tell the world, explicitly and implicitly, that Renita is a liar and extortionist constitutes extreme and outrageous conduct.

67. Defendant Cosby knew that his actions of sexually abusing Plaintiff and then later spreading defamatory statements about her would cause Renita significant emotional distress.

68. The retaliatory, defamatory statements directed at Plaintiff were intended to cause Renita severe emotional distress. Alternatively, these actions were undertaken with reckless disregard to Plaintiff's emotional and mental well-being.

69. As a direct and proximate cause of Defendant Cosby's conduct, Renita has suffered and will continue to suffer humiliation, mental anguish, emotional distress, embarrassment, and the other damages enumerated above, which are incorporated below by reference.

WHEREFORE, the Plaintiff, Renita Hill, respectfully demands judgment in her favor and against the Defendant, William Henry Cosby, Jr. aka Bill Cosby, in an amount in excess of the applicable arbitration limits.

Respectfully submitted,

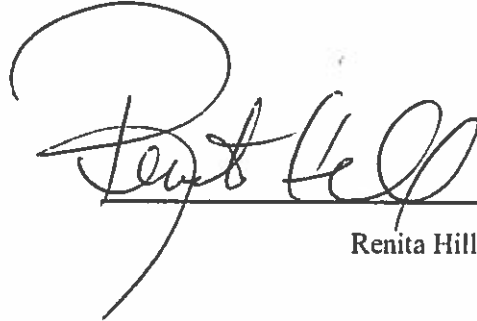
s/ George M. Kontos
George M. Kontos, Esquire
Counsel for Plaintiff

VERIFICATION

The undersigned, Renita Hill, has read the foregoing Complaint and hereby swears that the averments contained therein are, insofar as they are derived from her knowledge, true and correct to the best of her knowledge, information and belief, and insofar as they are derived from others, such facts are believed to be true and correct.

This statement and verification is made subject to the penalties of 18 Pa.C.S. §4904 relating to unsworn falsification to authorities, which statute provides that false statements are subject to criminal penalties.

Date: 10/14/15



Renita Hill

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

RENITA HILL,
Plaintiff,

v.

WILLIAM HENRY COSBY, JR., an individual also known as BILL COSBY,
Defendant.

15cv1658

January 21, 2016, Filed

For RENITA HILL, an individual, Plaintiff: George M. Kontos, LEAD ATTORNEY,
Kontos Mengine Law Group, Pittsburgh, PA.

For WILLIAM HENRY COSBY, JR., an individual, also known as BILL COSBY,
Defendant: Brian C. Bevan, Efreem M. Grail, LEAD ATTORNEY, The Grail Law Firm,
Pittsburgh, PA; Christopher Tayback, Marshall M. Searcy, III, PRO HAC VICE, Quinn
Emanuel Urquhart & Sullivan, LLP, Los Angeles, CA.

Arthur J. Schwab, United States District Judge.

Arthur J. Schwab

ELECTRONICALLY FILED

MEMORANDUM OPINION

The very detailed and complete Complaint in this case alleges that by making or causing to be made three very discreet statements: (1) Defendant defamed Plaintiff, (2) Defendant cast Plaintiff in a false light, and (3) Defendant intentionally inflicted emotional distress upon Plaintiff.¹ Presently before the Court is a Motion to Dismiss and Brief in Support filed by Defendant alleging that no justiciable claim or controversy exists. Doc. nos. 3, 4. Plaintiff filed a Response and Brief in Opposition to the Motion to Dismiss. Doc. nos. 7, 11. Defendant filed a Reply Brief. Doc. no. 18. The matter is now

¹ This case was removed to this Court by Defendant. Plaintiff originally filed her lawsuit in the Court of Common Pleas of Allegheny County, Pennsylvania (case no. GD-15-18156). Plaintiff did not challenge the removal. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332(a) .

ripe for adjudication. For the reasons set forth herein, the Court will grant the Motion to Dismiss the Complaint.

I. Standard of Review - Rule 12(b)(6)

I. Standard of Review - Rule 12(b)(6)

Under Rule 12(b)(6), a Complaint must be dismissed for “failure to state a claim upon which relief can be granted.” Detailed factual pleading is not required — Rule 8(a)(2) calls for a “short and plain statement of the claim showing that the pleader is entitled to relief” but a Complaint must set forth sufficient factual allegations that, taken as true, set forth a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662 , 678 (2009). The plausibility standard does not require a showing of probability that a claim has merit, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 , 556 (2007), but it does require that a pleading show “more than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678. Determining the plausibility of an alleged claim is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* at 679

Building upon the landmark United States Supreme Court decisions in *Twombly* and *Iqbal*, the United States Court of Appeals for the Third Circuit explained that a District Court must undertake the following three steps to determine the sufficiency of a Complaint:

First, the court must take note of the elements a plaintiff must plead to state a claim. Second, the court should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. Finally, where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief.

Connelly v. Steel Valley Sch. Dist., 706 F.3d 209 , 212 (3d Cir. 2013) (citation omitted).

The third step requires this Court to consider the specific nature of [*2] the claims presented and to determine whether the facts pled to substantiate the claims are sufficient to show a “plausible claim for relief.” *Covington v. Int’l Ass’n of Approved Basketball Officials*, 710 F.3d 114 , 118 (3d Cir. 2013); see also *Santiago v. Warminster Twp.*, 629 F.3d 121 , 130 (3d Cir. 2010) (“[W]here there are well-pleaded factual allegations, the court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief.”).

When adjudicating a motion to dismiss for failure to state a claim, the Court must view all of the allegations and facts in the complaint in the light most favorable to the plaintiff, and must grant the plaintiff the benefit of all reasonable inferences that can be derived therefrom. *Kanter v. Barella*, 489 F.3d 170 , 177 (3d Cir. 2007) (quoting *Evancho*

v. Fisher, 423 F.3d 347 , 350 (3d Cir. 2005)). However, the Court need not accept inferences or conclusory allegations that are unsupported by the facts set forth in the complaint. See Reuben v. U.S. Airways, Inc., 500 F. App'x 103 , 104 (3d Cir. 2012) (quoting Iqbal, 556 U.S. at 678); Fowler v. UPMC Shadyside, 578 F.3d 203 , 210-11 (3d Cir. 2009) (stating that District Courts “must accept all of the Complaint’s well-pleaded facts as true, but may disregard any legal conclusions”). “While legal conclusions can provide the framework of a Complaint, they must be supported by factual allegations.” Iqbal, 556 U.S. at 664 .

This Court may not dismiss a Complaint merely because it appears unlikely or improbable that Plaintiff can prove the facts alleged or will ultimately prevail on the merits. Twombly, 550 U.S. at 563 n.8. Instead, this Court must ask whether the facts alleged raise a reasonable expectation that discovery will reveal evidence of the necessary elements. Id. at 556. Generally speaking, a Complaint that provides adequate facts to establish “how, when, and where” will survive a Motion to Dismiss. Fowler, 578 F.3d at 212 .

In short, a Motion to Dismiss should be granted if a party fails to allege facts, which could, if established at trial, entitle him/her to relief. Twombly, 550 U.S. at 563 n.8.

II. Discussion

As noted above, Plaintiff’s Complaint alleges three causes of action against Defendant: (1) defamation, (2) false light, and (3) intentional infliction of emotional distress. Defendant argues that each of these three claims must be dismissed because the claims are legally unsustainable and/or are legally insufficient. Each claim will be addressed, *seriatim*.

A. Defamation

1. Pennsylvania Law

Under Pennsylvania law — the law applicable to this case² — a plaintiff must eventually prove the following seven elements to state a claim for defamation: (1) the defamatory character of the communication; (2) its publication by the defendant; (3) its application to the plaintiff; (4) the understanding by the recipient of its defamatory meaning; (5) the understanding by the recipient of it as intended to be applied to the plaintiff; (6) special harm resulting to the plaintiff from its publication; and (7) abuse of a

² The parties agree, as does this Court, that Pennsylvania substantive law applies to the claims asserted in this case. Pennsylvania has a substantial interest in this litigation as Plaintiff was (and is) domiciled in Pennsylvania at the time the allegedly defamatory communications were published, and thus Plaintiff has a reputational interest to protect in that forum.

conditionally privileged occasion. 42 Pa.C.S.A. § 8343. There is ample case law emanating from Pennsylvania state courts, as well as the United States District Courts, applying Pennsylvania substantive law which defines these elements. A brief [*3] summary of a portion of that body of law follows.

In an action for defamation, it is the Court's duty to make the threshold determination whether the challenged statements are capable of a defamatory meaning. *Thomas Merton Center v. Rockwell International Corp.*, 442 A.2d 213 (Pa. 1981), cert. den., 457 U.S. 1134 (1982); *Byars v. School Dist. of Phila.*, 942 F.Supp.2d 552 (Pa. E.D. 2013) ("Whether a statement is capable of a defamatory meaning is a question of law for the court."). If the communication could be understood as defamatory, then it is for the jury to determine whether it was so understood by the recipient. *Agriss Roadway Exp., Inc.*, 483 A.2d 456 (Pa. Super. 1984).

For purposes of the threshold determination whether a communication could be understood as defamatory, it is not necessary for the communication actually to have caused harm to a plaintiff's reputation; defamatory character depends on the general tendency of the words to have such an effect. *Id.*, citing *Corabi v. Curtis Publishing Co.*, 273 A.2d 899 (Pa. 1971); *Miller v. Hubbard*, 207 A.2d 913 (Pa. Super. 1965); Restatement, *supra*, § 559 Comment d. However, it is not sufficient for the words to merely embarrass or annoy the plaintiff. *Beckman v. Dunn*, 419 A.2d 583 (Pa. Super. 1980). A communication is defamatory if it tends to blacken a person's reputation or expose that person to public hatred, contempt, or ridicule, or injure the person in her business or profession. *Livingston v. Murray*, 612 A.2d 443 , 447 (Pa. Super. 1992), alloc. den., 617 A.2d 1275 (Pa. 1992). Defamatory communications tend to lower a person in the estimation of the community, deter third persons from associating with him or her, or adversely affect the person's fitness for the proper conduct of his or her lawful business or profession. *Id.*

A plaintiff claiming defamation need not be specifically named in the communication, if the plaintiff is pointed to by description or circumstances tending to identify him or her. *Cosgrove Studio & Camera Shop, Inc. v. Pane*, 182 A.2d 751 , 753 (Pa. 1962). The test is "whether the defamatory communication may reasonably be understood as referring to the plaintiff." *Zerpol Corp. v. DMP Corp.*, 561 F.Supp. 404 , 410 (E.D. Pa. 1983) (citing *Farrell v. Triangle Publ'ns, Inc.*, 159 A.2d 734 (Pa. 1960)).

The Pennsylvania Superior Court further explained in *Dougherty v. Boyerton Times*, 547 A.2d 778 (Pa. Super. 1988):

The nature of the audience is a critical factor in determining whether a statement is capable of defamatory meaning. . . . Injury to reputation is judged by the reaction of other persons in the community and not by the party's self-estimation. Rybas v. Wapner, 311 Pa.Super. 50 , 457 A.2d 108 (1983). Specifically, a communication is defamatory if it "ascribes to another conduct, character or a condition that would adversely affect his

fitness for the proper conduct of his lawful business, trade or profession.” Baker v. Lafayette College, 350 Pa.Super. 68, 76, 504 A.2d 247, 251 (1986) quoting Thomas Merton Center, supra, 422 A.2d at 216 .

Id. at 783.

Pennsylvania case law also has concluded that only statements of fact can afford a basis for a defamation action. Expressions of opinion cannot. Statements of fact and opinion intermingled can give rise to a claim based on the factual portions of the statement. See Dougherty, 547 A.2d at 782-83 (1988) and Restatement (Second) of Torts, § 556.

Whether a particular statement constitutes a fact or an [*4] opinion is a question of law for the trial court to determine. Veno v. Meredith, 515 A.2d 571 , 575 (Pa. Super. 1986)citing Braig v. Field Communications, 456 A.2d 1366 , 1372 (Pa. Super. 1983), cert. den., 466 U.S. 970 (1984). In Braig, the Superior Court of Pennsylvania adopted Section 566 of the Restatement (Second) of Torts, entitled Expression of Opinion, which provides as follows:

A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.

Comment (b) to § 566 of the Restatement explains the two types of expressions of opinion:

(1) *The pure type - which “occurs when the maker of the comment states the facts on which he bases his opinion of the plaintiff and then expresses a comment as to the plaintiff’s conduct, qualifications or character.”*

(2) *The mixed type - which “while an opinion in form or context, is apparently based on facts regarding the plaintiff or his conduct that have not been stated by the defendant or assumed to exist by the parties to the communication. Here the expression of opinion gives rise to the inference that there are undisclosed facts that justify the forming of the opinion expressed by the defendant.”*

Restatement (Second) of Torts, § 566, comment (b). Comment (c) of § 566 explains the constitutional significance of the distinction explained in comment (b):

A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is. But an expression of opinion that is not based on disclosed or assumed facts and therefore implies that there are undisclosed facts on which the opinion is based, is treated differently. The difference lies in the effect upon the recipient of the communication. In the first case, the communication itself indicates to

him that there is no defamatory factual statement. In the second, it does not, and if the recipient draws the reasonable conclusion that the derogatory opinion expressed in the comment must have been based on undisclosed defamatory facts, the defendant is subject to liability. The defendant cannot insist that the undisclosed facts were not defamatory but that he unreasonably formed the derogatory opinion from them. This is like the case of a communication subject to more than one meaning. As stated in § 563, the meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express.

Restatement (Second) of Torts, § 566, comment (c).

Thus, the trial court must determine whether the challenged statement is an opinion or a fact. If the challenged statement is an opinion, it is actionable only if it “may reasonably be understood to imply the existence of undisclosed defamatory facts justifying the opinion.” *Veno*, 515 A.2d at 575, quoting *Beckman*, 419 A.2d at 587, citing Restatement (Second) of Torts, § 566.

With these principles in mind, the Court proceeds to examine the three challenged statements set [*5] forth in the instant case.

2. Plaintiff’s Allegations Related to Defamation

Turning to the detailed and specific facts alleged by Plaintiff, her Complaint first notes that Plaintiff gave an interview with a reporter from KDKA on November 20, 2014 wherein she accused Defendant of sexual abuse and rape (doc. no. 1-3, ¶ 38). Plaintiff asserts that as a result of this interview, three separate communications (either made by Defendant, or on Defendant’s behalf) led to her defamation claim.

The “Martin Singer Statement” is the first of the three communications which Plaintiff alleges is defamatory. In it, Plaintiff alleges that a day or two after she gave her interview, the Washington Post published a response whereby “[Defendant], aided by his attorney, Martin Singer, issued [a] statement. . .” which set forth, in relevant part, that”. . . new, never-before-heard claims from women[,] who have come forward in the past two weeks with unsubstantiated, fantastical stories. . . have escalated far past the point of absurdity. These brand new claims about alleged decades-old events are becoming increasingly ridiculous. . . . [I]t makes no sense that not one of these new women who just came forward for the first time ever asserted a legal claim back at the time they allege they had been sexually assaulted.” The remainder of the Martin Singer Statement chastises “the media” for failing to corroborate the new “unsubstantiated stories” before publishing their accounts.³

³ The full text of the Martin Singer Statement is set forth in the Complaint at doc. no. 1-3, ¶ 38.

Second, with respect to the “Florida Today Statement,” Plaintiff alleges that the same day the Martin Singer Statement was released, Defendant himself was interviewed by Florida Today, and during that interview he declined to respond to the “innuendos” that had been made about him and stated that “[p]eople should fact-check”.⁴

Third, with respect to the “Camille Cosby Statement,” Plaintiff alleges that on December 15, 2014, a letter written by Defendant’s wife, Camille Cosby, was published by the Washington Post on Defendant’s behalf alleging that the news media failed to “vet” her husband’s accusers (of which Plaintiff was one) before publishing or airing the accusers’ stories.⁵

3. Analysis

Defendant’s Brief in Support of its Motion to Dismiss contends that none of the three statements are actionable as defamation. Doc. no. 4, p. 8. Plaintiff’s Brief in Opposition to Motion to Dismiss contends that the sum of the three statements “share a common thread of relying on undisclosed, defamatory facts to support the assertions each statement makes.” Doc. no. 11, p. 7. Plaintiff contends that “[i]f it is reasonable to infer from the statements that Defendant was actively and knowingly calling Plaintiff a liar and an extortionist, than [sic] the statements are capable of defamatory meaning.” Id.

After careful consideration of each of the three statements set forth in the Complaint, and after considering the arguments advanced by each party to this lawsuit as to how those statements could or could not be defamatory under Pennsylvania law, this Court finds that none of the three statements are defamatory.

a. The Martin Singer Statement[*6]

The Martin Singer Statement is a pure opinion. Per Plaintiff’s Complaint, the Martin Singer Statement was made “in response” to Plaintiff’s interview wherein she accused Defendant of sexually abusing and raping her. Doc. no. 1-3, ¶ 38. This statement suggests that “new” claims asserted by “new” women — which presumably included Plaintiff’s allegations of sexual abuse and rape — escalated beyond “the point of absurdity.” Id. Simply put, taking all well pled facts as true, and viewed in the light most favorable to Plaintiff, the Martin Singer Statement describes the Plaintiff’s and other women’s allegations against Defendant as “beyond absurd” and labels their accounts of past events as “unsubstantiated, fantastical stories.”

The entire Martin Singer Statement (as quoted in Plaintiff’s Complaint) is an opinionated statement; but, it is not one which implies or alleges that undisclosed,

⁴ The full text of the Florida Today Statement is set forth in the Complaint at doc. no. 1-3, ¶ 41.

⁵ The full text of the Camille Cosby Statement is set forth in the Complaint at doc. no. 1-3, ¶ 42.

defamatory facts serve as the basis for the opinion. It was a statement, made by Defendant's attorney, in response to serious allegations concerning Defendant's alleged criminal behavior. As noted above, in Pennsylvania, an opinion cannot be defamatory unless it "may reasonably be understood to imply the existence of undisclosed defamatory facts justifying the opinion." *Remick v. Manfredy*, 238 F.3d 248 , 261 (3d Cir. 2001).

Any attorney for any defendant must advance a position contrary to that of the plaintiff. Here, Plaintiff publicly claimed she was sexually abused and raped by Defendant — which is her position; and Defendant, through his attorney, publicly denied those claims by saying the "claims" are unsubstantiated and absurd — which is his legal position. This sort of purely opinionated speech articulated by Defendant's attorney is protected and not actionable as defamatory speech. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 , 339 (1974) ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact."). This Court does not find the Martin Singer Statement includes language which implies the existence of undisclosed defamatory facts about Plaintiff. As such, this Court considers the Martin Singer Statement to be purely an opinion proffered by an attorney who, while actively engaged in the zealous representation of his client, did not cross the line and defame the Plaintiff. Accordingly, the Court finds that the Martin Singer Statement fails to support Plaintiff's claim for defamation.

b. The Florida Today Statement

Next, turning to the Florida Today Statement, this Court also finds that this statement likewise is not defamatory. In this statement, Defendant refuses to respond to "innuendos" and invites "people" to "fact-check." Doc. no. 1-3, ¶ 41. Although Pennsylvania case law is clear that a plaintiff claiming defamation need not be specifically named in the defamatory statement, the Florida Today Statement fails to even generally refer to the group of women who publicly [*7] asserted their allegations of sexual misconduct against Defendant.

However, viewing this statement in a light most favorable to Plaintiff, given the timing of this statement, the Court will assume, *arguendo*, that Defendant was referring to Plaintiff's and other women's accusations as "innuendos," and was encouraging the public to "fact-check" the claims of these women. This is a far cry from labelling Plaintiff (and the other women who have made similar public assertions) as liars or extortionists.

Pennsylvania law requires that Defendant's words have the general tendency to cause harm to Plaintiff's reputation. It is not sufficient if the words are merely embarrassing or annoying to Plaintiff. The words uttered by Defendant, and made public in his Florida Today Statement, which invite the public to conduct its own investigation

and draw its own conclusions about the “innuendos,” i.e., the alleged sexual misconduct of Defendant, do not have the general tendency to cause harm to anyone’s reputation and, thus, do not rise to the level of defamatory comments.

c. The Camille Cosby Statement

Finally, the Camille Cosby Statement fails to meet Pennsylvania’s legal requirements necessary to assert a claim for defamation. The majority of this statement expresses the speaker’s opinion that the media outlets violated their own code of journalistic integrity by publishing Plaintiff’s (and the other women’s) accounts of the alleged sexual abuse without “vetting” these accusers. This statement targets the media as much, and arguably more so, than the accusers, by claiming that the media failed to properly source or “vet” Plaintiff’s and the other women’s stories before publishing them. The accusation made by Camille Cosby appears to target the media for failing to get a second source before printing Plaintiff’s, and/or other women’s very serious accusations regarding Defendant.⁶

In addition, the timing of this statement is further removed from the timing of Plaintiff’s own accusations. This Court does not find that this Statement could be read to infer that Plaintiff is a liar or an extortionist and it does not possess the general tendency to cause harm to Plaintiff’s reputation. Thus, this Statement fails to support a claim for defamation.

d. All Three Statements Together

Finally, Plaintiff’s Brief in Opposition to the Motion to Dismiss contends that the sum of the three statements “share a common thread of relying on undisclosed, defamatory facts to support the assertions each statement makes.” Plaintiff contends that “[i]f it is reasonable to infer from the statements that Defendant was actively and knowingly calling Plaintiff a liar and an extortionist, than [sic] the statements are capable of defamatory meaning.” Doc. no. 11, p. 7. Even considering these three statements together as a combined, single statement, this newly “conjoined” statement does not lead to an inference that Plaintiff is a “liar and an extortionist.” Accordingly, Defendant’s Motion to Dismiss Plaintiff’s claim for defamation will be granted.

⁶ Even assuming that the “vetting” referred to Plaintiff herself, and not Plaintiff’s “story,” the Camille Cosby Statement suggests that the media did not do its job of investigating Plaintiff prior to publishing Plaintiff’s account of the alleged sexual abuse. Even construed in a light most favorable to Plaintiff, the Camille Cosby Statement does not infer that there is some undisclosed fact or facts about this specific Plaintiff which Camille Cosby herself knew. Moreover, although Plaintiff has pled that Camille Cosby was Defendant’s business manager, and claims that Camille Cosby’s statements could be attributable to Defendant, this is a legal conclusion which Plaintiff draws with no factual support. Thus, even if the Camille Cosby Statement could be read to infer that Camille Cosby had undisclosed defamatory facts related to this specific Plaintiff, the Court has no basis upon which it can legally conclude that this Statement can be attributed to Defendant or was authorized by him.

B. False Light[*8]

Under Pennsylvania law, a claim for false light is one of four torts which can support a claim for invasion of privacy. *Santillo v. Reed*, 634 A.2d 264 (Pa. Super. 1993). To establish a false light invasion of privacy claim, Pennsylvania law requires a plaintiff to show that a highly offensive false statement was publicized by a defendant with knowledge or in reckless disregard of the falsity. *Id.*, citing, *Neish v. Beaver Newspapers, Inc.*, 581 A.2d 619, 624 (Pa. Super. 1990), alloc. den., 593 A.2d 421 (Pa. 1991).

Pennsylvania Courts have relied upon the Restatement (Second) of Torts § 652E for distinguishing a false light claim from a defamation claim. Comment “b.” to this Section of the Restatement reads as follows:

b. Relation to defamation. The interest protected by this Section is the interest of the individual in not being made to appear before the public in an objectionable false light or false position, or in other words, otherwise than as he is. In many cases to which the rule stated here applies, the publicity given to the plaintiff is defamatory, so that he would have an action for libel or slander under the rules stated in Chapter 24. In such a case the action for invasion of privacy will afford an alternative or additional remedy, and the plaintiff can proceed upon either theory, or both, although he can have but one recovery for a single instance of publicity.

It is not, however, necessary to the action for invasion of privacy that the plaintiff be defamed. It is enough that he is given unreasonable and highly objectionable publicity that attributes to him characteristics, conduct or beliefs that are false, and so is placed before the public in a false position. When this is the case and the matter attributed to the plaintiff is not defamatory, the rule here stated affords a different remedy, not available in an action for defamation.

Restatement (Second) of Torts § 652E, comment b. Comment “c.” defines the term “highly offensive” in this manner:

c. Highly offensive to a reasonable person. The rule stated in this Section applies only when the publicity given to the plaintiff has placed him in a false light before the public, of a kind that would be highly offensive to a reasonable person. In other words, it applies only when the defendant knows that the plaintiff, as a reasonable man, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity. Complete and perfect accuracy in published reports concerning any individual is seldom attainable by any reasonable effort, and most minor errors, such as a wrong address for his home, or a mistake in the date when he entered his employment or similar unimportant details of his career, would not in the absence of special circumstances give any serious offense to a reasonable person. The plaintiff’s privacy is not invaded when the unimportant false statements are made, even when they are made deliberately. It is only when there is such a major misrepresentation of his character, history, activities or

*beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position, [*9] that there is a cause of action for invasion of privacy.*

Restatement (Second) of Torts § 652E, comment c.

In the instant case, none of the three statements described above can be said to be “highly offensive” as that term is defined. Plaintiff’s Complaint asserts that the three statements were “highly offensive” (see doc. no. 1-3, ¶ 58), but this is a legal conclusion. The Complaint is otherwise devoid of any facts which support Plaintiff’s legal conclusion that the three statements are “highly offensive.”

Moreover, none of the three statements specifically malign Plaintiff individually. Even if Plaintiff need not be specifically named in the statement which forms the basis for a false light claim (as is true for a defamation claim) in order to prove that the statement cast her in a false light, Plaintiff must still show that the conduct was “highly offensive” to her, as a reasonable person. None of the three statements provide a factual basis upon which this Court could find that “serious offense” could reasonably have been expected to be taken by a reasonable person in Plaintiff’s position. As such, Plaintiff’s allegations set forth in her Complaint fall short of providing a basis for her claim for false light, and thus, the Motion to Dismiss Plaintiff’s false light claim will be granted.

C. Intentional Infliction of Emotional Distress

The Superior Court of Pennsylvania in *Britt v. Chestnut Hill Coll.* held as follows:

Intentional infliction of emotional distress is defined in the Restatement (Second) of Torts as follows:

One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Restatement (Second) of Torts, § 46(1).

In addition to requiring that a plaintiff establish that the conduct complained of was outrageous, the Pennsylvania Supreme Court has required that the plaintiff present competent medical evidence to support the claim. In Kazatsky v. King David Memorial Park, 515 Pa. 183 , 527 A.2d 988 (1987), our supreme court affirmed this court’s order sustaining a compulsory nonsuit for a claim of intentional infliction of emotional distress. Initially, the court noted that while it had previously acknowledged Section 46 , it had never “had occasion to specifically adopt section 46 as the law in Pennsylvania”. Id. With that in mind, the court ultimately held that “if section 46 of the Restatement is to be accepted in this Commonwealth, at the very least, existence of the alleged emotional distress must be supported by competent medical evidence.” Kazatsky, 515 Pa. at 197 ,

527 A.2d at 988 (1987). Applying that standard to the facts before it, the supreme court sustained the compulsory nonsuit because the record revealed that neither appellant had sought medical treatment and that they failed to support their claim with competent medical evidence.

Britt, 632 A.2d 557 , 561 (Pa. Super. 1993). The Supreme Court of Pennsylvania has held that in order to sustain a claim for intentional infliction of emotional distress, a plaintiff must [*10] allege that the defendant “has acted with intent which is tortious or even criminal, or that he had intended to inflict emotional distress, or even that his conduct has been characterized by ‘malice,’ or a degree of aggravation that would entitle the plaintiff to punitive damages for another tort.” Hoy v. Angelone, 720 A.2d 745 (Pa. 1998).

Turning to the facts of this case, Plaintiff’s claim for intentional infliction of emotional distress (“IIED”) turns on the alleged facts that Defendant drugged her, sexually abused and raped her, and then called her a “liar and extortionist” after she publicly disclosed what he had allegedly done to her. Doc. no. 1-3, ¶¶ 65–66. The three statements referenced in the Complaint, only one of which was uttered by Defendant himself, form the basis of her IIED claim. Two of these statements — the Martin Singer Statement and the Camille Cosby Statement were not made by Defendant, the alleged attacker. Even assuming those two statements could be attributable to Defendant, through his agents — his attorney and wife — these three statements would have to expressly and/or impliedly deny that Defendant sexually abused and raped Plaintiff.

While none of the three statements go so far as to expressly deny that Defendant sexually abused and raped Plaintiff, read in a light most favorable to Plaintiff, this Court will consider whether they impliedly deny that Defendant did so. Assuming, arguendo, that the statements deny Defendant sexually abused and raped Plaintiff, the question next becomes whether that language so outrageous, atrocious, and contemptible that those statements could give rise to an IIED claim. The Court finds that the language does not rise to the level of outrage necessary to sustain an IIED claim under Pennsylvania law.

In addition, the Court notes — as do both Plaintiff and Defendant in their respective briefs — that no Pennsylvania case law exists upholding an IIED claim which has been predicated upon defamatory language. See doc. no. 4, p. 14 and doc. no. 11, p. 14. Plaintiff argues that simply because Pennsylvania has not yet allowed such a cause of action, it has not prohibited one either. Doc. no. 11, p. 14. This Court takes no position on what Pennsylvania Courts may or may choose not do with respect to any future IIED claim predicated on an alleged defamatory statement(s). However, this Court does not find that the type of denials published in the three statements rise to the level of atrocious conduct necessary to preserve an IIED claim under Pennsylvania law. Without any legal support suggesting that an IIED claim can be predicated upon alleged defamatory language, and after concluding as a matter of law that the language itself is not defamatory, this Court must dismiss Plaintiff’s IIED claim.

III. Conclusion

As explained in detail above, each of the three claims asserted by Plaintiff will be dismissed. Each of the claims as asserted by Plaintiff in her Complaint fails as a matter of law. Even assuming the veracity of all that Plaintiff has pled here, the three statements do not support a claim for defamation [*11] as defined by Pennsylvania law. Likewise, the Plaintiff's Complaint fails to establish viable claims for false light or intentional infliction of emotional distress as those torts are defined by Pennsylvania law.

Typically, the Court allows a plaintiff to amend a Complaint that is legally deficient unless doing so would be futile. See *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir.1997) (" . . . a district court may exercise its discretion and deny leave to amend on the basis of . . . futility."). Given the state of the law on this matter, as will be discussed in greater detail below, any amendment would be futile, and thus Defendant's Motion to Dismiss will be granted with prejudice.

The Complaint in this case is very detailed and complete, drafted by experienced counsel. The three complained-of Statements are set forth in great detail. An Amended Complaint could not add anything to these three Statements. The Court is confident that if counsel for Plaintiff had additional complained-of statements, those additional statements would have been made part of the Complaint.

Accordingly, the Court finds that allowing Plaintiff time to amend her Complaint would be futile, and thus, the Court will grant Defendant's Motion and dismiss this case with prejudice. An appropriate Order shall follow.

/s/ Arthur J. Schwab

Arthur J. Schwab

United States District Judge

XIV. WHO IS SEAN PENN?

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK----- X
SEAN PENN, an individual,:
Index No. _____:
Plaintiff,:
- against -:
COMPLAINT
AND JURY DEMAND:
LEE DANIELS, an individual, and
JOHN DOES 1-100,:
Defendants.----- X
Plaintiff, Sean Penn (“Penn,” or “Plaintiff”), by his undersigned attorneys, as and for his
Complaint herein, alleges as follows:**NATURE OF THE ACTION**

1. This action arises from reckless, false, and defamatory statements made by Defendant Lee Daniels (“Daniels”) about one of this generation’s most highly-acclaimed and greatest artists and humanitarians, Sean Penn. As a result of Penn’s status as a public figure, he has for years been the subject of scandalous, scurrilous, and baseless attacks. But Penn, like any citizen, has a right to defend himself and will no longer tolerate the reckless and malicious behavior of others, who seek to aggrandize themselves or their projects at his expense. Accordingly, and because of Daniels’ defamatory statements, Penn brings this action for monetary relief, and to deter Daniels and others from their defamatory actions.

2. Specifically, in purporting to “defend” the ongoing legal and related troubles of actor Terrence Howard (“Howard”), the star of Daniels’ television show “Empire”—who has reportedly, and publicly, *admitted* to physically abusing at least one woman and reportedly been

arrested approximately five times for violent acts against women—Daniels has falsely asserted and/or implied that Penn is guilty of ongoing, continuous violence against women. In fact, in purported “defense” of Howard’s long reported history of domestic abuse, Daniels stated, “That poor boy, [Terrence] ain’t done nothing different than Marlon Brando or Sean Penn, and all of a sudden he’s some f-in’ demon. That’s a sign of the time, of race, of where we are right now in America.”

3. Daniels’ statements are egregious on several levels. *First*, in his purported “defense” of Howard, Daniels not only appears to acknowledge Howard’s guilt, he also seems to condone Howard’s reported misconduct. *Second*, Daniels’ “defense” of Howard (and his improper invocation of two of the greatest actors and humanitarians of our time, Brando and Penn, in doing so) is apparently part of a misguided campaign to profit and further bolster and brand his show “Empire” (on the eve of the *The Emmy Awards*, when the statements were made). *Third*, and most problematic, Daniels falsely equates Penn with Howard, even though, while he has certainly had several brushes with the law, Penn (unlike Howard) has never been arrested, much less convicted, for domestic violence, as his ex-wives (including Madonna) would confirm and attest. Nor has Penn admitted to “slap[ping]” a woman or abusing others (as Howard has also reportedly admitted, reportedly asserting that he was acting in self-defense).¹

4. In making his false and defamatory statements, Daniels well knew that they would be published throughout the United States and abroad, which they have been. Moreover,

¹ See, e.g., Whitmarsh Police Department Investigative Report, 01-08359, Sept. 17, 2001, providing that “HOWARD broke the front door down and ran through the house breaking the screen door in the kitchen. HOWARD then grabbed the victim’s left arm and punched her twice with a closed fist in the left side of her face” (Par. 4); “Officer Ward of the Whitmarsh PD was the first officer to arrive. When Officer Ward asked HOWARD what happened he stated ‘I broke the door down and hit my wife.’” (Par. 5) (emphasis added); “Upon my arrival I [Whitmarsh PD Officer] witnessed fresh damage to the front door and marks on the victim’s face and arm from being struck (Par. 6); see also “Terrence Howard’s Dangerous Mind,” *Rolling Stone Magazine* (Sept. 14, 2015) (“She was talking to me real strong, and I lost my mind and slapped her in front of the kids,” among other admissions.)

Daniels also knew or should have known that many publications would carry those statements in their headlines or as part of their cover stories, as a result of his claim that Howard “was no different than . . . Penn.” By way of illustration only, the September 16, 2015 edition of *The Daily Mail.com* carries this as its headline, in bold print: **“I slapped her in front of the kids’: Terrence Howard admits he hit his first wife and got physical with the second . . . but *Empire* creator Lee Daniels says he’s no ‘different than Marlon Brando or Sean Penn’** (emphasis in original).

THE PARTIES

5. Plaintiff Sean Penn is a citizen and resident of California. Plaintiff is an internationally-known film actor recognized for his humanitarian work, journalism, and advocacy for peace and human rights.

6. Defendant Lee Daniels is a citizen and resident of New York. Defendant is an actor, director, and producer of the television series “*Empire*,” featuring actor Terrence Howard.

7. The true names and capacities, whether corporate, associate, individual or otherwise of defendants DOES 1 through 100, inclusive, are unknown to Plaintiff, who therefore sues said defendants by such fictitious names. Upon information and belief, Plaintiff alleges that each of the defendants designated as a DOE is legally responsible in some manner for the events and happenings referred to in this Complaint and unlawfully caused his injuries and damages to Plaintiff alleged in this Complaint. Plaintiff will amend this Complaint to name such other defendants as soon as they are identified through discovery or otherwise.

JURISDICTION AND VENUE

8. This Court has jurisdiction over this matter because defendant is a resident of this State, regularly and routinely conducts business in this State, and the statements giving rise to the cause of action asserted herein were disseminated in this State.

9. Venue is proper in this Court pursuant to C.P.L.R. § 503 because defendant resides within this County.

BACKGROUND

10. Sean Penn is an American icon. His highly-successful film career has spanned over three decades and includes five Academy Award nominations and two Academy Awards for Best Actor, for his performances in “Mystic River” and “Milk.”

11. In 2002, Penn was presented with the Modern Master Award at the Santa Barbara Film Festival, and in 2003, he became the youngest recipient ever to receive the Donostia Lifetime Achievement Award from the San Sebastian Film Festival. In 2004, he was honored with the John Steinbeck Award for outspoken torch-bearers in the creative arts. In 2008, Penn received the Desert Palm Achievement Award for Acting, after being presented in 2007 with the Director of the Year Award for “Into the Wild” from the Palm Springs International Film Festival. In 2008, Penn also served as President of the Jury for the Cannes International Film Festival and later that year he was named a Knight in the French Legion of Honor.

12. Penn’s humanitarian work is also well known and prodigious. Among many other things, Penn traveled to New Orleans in the immediate aftermath of Hurricane Katrina to help its victims. More recently, in January 2010, also on his own time and at his own expense, Penn travelled to Haiti immediately after that country’s devastating earthquake, and he quickly thereafter established one of the world’s leading and most successful NGO’s in Haiti, the J/P

Haitian Relief Organization (“J/P HRO”), a charitable organization dedicated to saving lives and efficiently building sustainable programs with and for the Haitian people. Since its inception, J/P HRO has raised tens of millions of dollars in support for the country of Haiti and its residents.

13. Today, as J/P HRO’s Chief Executive Officer, Penn directs a predominantly Haitian staff of over 350 development professionals, supporting families in areas affected by the earthquake transition to resilient, sustainable, and prosperous communities through J/P HRO’s four integrated programs: (i) Medical, (ii) Camp & Relocations Management, (iii) Engineering & Construction and (iv) Community Development.

14. For his humanitarian efforts, Penn has received numerous honors and awards, including the Commander’s Award for Service (US Army 82nd Airborne Division); 82nd Airborne Award for Meritorious Service; the Operation Unified Response JTF Haiti Certificate from Lieutenant General, US Army Commander P.K. Keen; the 1st Recon 73rd Division Coin of Excellence; 2nd Brigade Combat Team Coin of Excellence; Commendation of Excellence United States Southern Command; Award of Excellence by the Deputy Commander US Southern Command; the 2010 Hollywood Humanitarian Award from the Hollywood Film Festival; the 2011 Stanley Kramer Award from the Producers Guild of America; the Children’s and Families Global Development Fund Humanitarian Award, presented by the Ambassador of the Republic of Haiti; and the International Humanitarian Service Award from the American Red Cross. In July 2010, Penn was knighted by Haitian President Rene Preval in a ceremony in Port-Au-Prince.

15. In addition, in early 2012, Penn was named Ambassador-at-Large for Haiti and was later formally presented with this honor by President Michel Martelly at a ceremony in Port-Au-Prince, Haiti.

16. Penn was also presented with the 2012 Peace Summit Award at the 12th World Summit of Nobel Peace Laureates. This extraordinary tribute was presented to Penn by the Permanent Secretariat of the World Summit of Nobel Peace Laureates for Penn's work to rebuild and aid the victims of the devastating 2010 earthquake in Haiti, as well as his ongoing advocacy for peace and human rights protections worldwide. Further, in December 2012, he was also named Special Advisor to Haiti's Prime Minister Laurent Lamothe.

17. As a journalist, Penn has written for *Time*, *Interview*, *Rolling Stone*, and *The Nation*. In 2004, Penn wrote a two-part feature in *The San Francisco Chronicle* after a second visit to war-torn Iraq. In 2005, he wrote a five-part feature in the same paper, reporting from Iran during the election leading up to the Ahmadinejad regime. Penn's landmark interviews with Venezuelan President Hugo Chavez and Cuba's President Raul Castro were published in *The Nation* and *The Huffington Post*. And Penn's interview with President Castro was Castro's first-ever interview with an international journalist.

18. Lee Daniels is a noted and successful actor, director, and producer, whose television credits include the television show "Empire," which stars Terrence Howard and on which he is the co-creator, director, writer, and producer.

19. On or about September 15, 2015 but no later than September 17, 2015, in an interview with Lacey Rose of *The Hollywood Reporter* ("THR") that was posted online in advance of its September 25 print issue, *THR* reported in its cover story article that Daniels "can't help himself" from commenting on Howard's "saga," *i.e.*, the substantial negative press he has received as a result of numerous, repeated, and ongoing allegations of domestic abuse. As Daniels stated:

“That poor boy,” [Terrence] ain’t done nothing different than Marlon Brando or Sean Penn, and all of a sudden he’s some f—in’ demon,” says Daniels. “That’s a sign of the time, of race, of where we are right now in America.”

20. Daniels’ statements were immediately disseminated through *THR*’s online magazine, <http://www.hollywoodreporter.com>, and picked up by numerous additional blogs, entertainment news sites, and mainstream news sites such as *The Huffington Post*, *Eonline*, and *The Daily Mail*, among many others.

FIRST CAUSE OF ACTION
(Defamation/Defamation Per Se)

21. Plaintiff repeats, realleges, and incorporates each and every allegation contained in Paragraphs 1 through 20 as though fully set forth herein.

22. Penn’s claims arise out of and are for damages with regard to false and defamatory statements made by Daniels. Specifically, in September, 2015, Daniels made the above-referenced defamatory statements about Penn, which were false, unprivileged, and published.

23. Daniels, upon information and belief, made his defamatory statements for improper purposes, with knowledge that the statements would be published throughout and outside of the United States. In fact, the defamatory statements have been published throughout and outside of the United States.

24. The above-pled misconduct by Daniels constitutes the tort of defamation.

25. Upon information and belief, Daniels intentionally portrayed Penn in the above-referenced manner knowing that his depiction was false and untrue or with reckless and wanton disregard for the truth.

26. The above-referenced false and defamatory statements made by Daniels have caused Penn great anguish and emotional distress and have exposed him to pre-judgments and

false judgments, which have injured Penn's credibility and reputation in his personal life, occupation, and philanthropic activities, the latter of which are particularly important in view of Penn's significant and high-profile positions as (i) CEO of J/P HRO, (ii) lead fundraiser for J/P HRO, and (iii) Ambassador-at-Large to Haiti.

27. Since Daniels' defamatory statements, both expressly and by implication, are ones that would tend to harm the reputation of Penn and/or deter third persons from associating or dealing with Penn in the conduct of his profession as actor, humanitarian, journalist, fundraiser for and CEO of his charitable organization J/P HRO, and international ambassador for peace and human rights, while also exposing him to public contempt, ridicule, aversion and disgrace, Penn is presumed to have suffered injury and damages, and Daniels has committed defamation *per se*.

28. Daniels' statements, further, both expressly and by implication, are defamatory *per se* as, when compared to Howard in particular, they falsely and outrageously impute serious criminal behavior—repeated violence against women—to Penn. In such a case, damages resulting from Defendant's defamatory statements are also presumed as a matter of law.

29. However, as a direct and proximate result of the aforementioned acts by Defendant, Defendant has, upon information and belief, caused harm to Penn, which includes, but is not limited to general and specific damages in an amount not presently known but subsequently ascertainable and believed to be not less than ten million dollars (\$10,000,000), including damage to, among other things, Penn's reputation, standing in the community, and work as CEO and lead fundraiser for J/P HRO, as a result of Defendant's actions.

30. Upon information and belief, Penn alleges that the aforementioned acts of Defendant were done intentionally or with conscious disregard of Penn's rights, and with the intent to vex, injure, or annoy Penn, such as to constitute oppression, fraud, malice, or wanton

and reckless disregard of the truth, thus entitling Penn to exemplary and punitive damages in an amount appropriate to punish or set an example of Defendant and to deter such conduct in the future, which amount will be proved at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment in his favor and against Defendant:

1. Awarding Plaintiff general and special damages against Defendant in an amount not less than ten million dollars (\$10,000,000) or according to proof, together with interest thereon at the legal rate;
2. Awarding Plaintiff compensatory, exemplary, and punitive damages in an amount sufficient to punish and deter Defendant, the exact sum of which to be determined as appropriate to the Court;
3. Awarding Plaintiff attorneys' fees and the costs of suit incurred herein, to the extent permitted by law;
4. Awarding Plaintiff pre-judgment and post-judgment interest; and
5. Such other relief as the Court deems just and proper.

Dated: September 22, 2015

Respectfully submitted,

By: 
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ATTORNEYS FOR PLAINTIFF SEAN PENN

XV. WHAT IS A CHOCOLATE SOUFFLE?

CAROL BURNETT v. NATIONAL ENQUIRER, INC.

Court of Appeals of California, Second Appellate District

July 18, 1983

Opinion by Roth.

On March 2, 1976, appellant caused to appear in its weekly publication, the National Enquirer, a “gossip column” headlined “Carol Burnett and Henry K. in Row,” wherein a four-sentence item specified in its entirety that: “In a Washington restaurant, a boisterous Carol Burnett had a loud argument with another diner, Henry Kissinger. Then she traipsed around the place offering everyone a bite of her dessert. But Carol really raised eyebrows when she accidentally knocked a glass of wine over one diner and started giggling instead of apologizing. The guy wasn’t amused and ‘accidentally’ spilled a glass of water over Carol’s dress.”

Maintaining the item was entirely false and libelous, an attorney for Ms. Burnett, by telegram the same day and by letter one week later, demanded its correction or retraction “within the time and in the manner provided for in Section 48(a) of the Civil Code of the State of California,” failing which suit would be brought by his client [respondent herein], a well known actress, comedienne and show-business personality.

In response to the demand, appellant on April 6, 1976, published the following retraction, again in the National Enquirer’s gossip column: “An item in this column on March 2 erroneously reported that Carol Burnett had an argument with Henry Kissinger at a Washington restaurant and became boisterous, disturbing other guests. We understand these events did not occur and we are sorry for any embarrassment our report may have caused Miss Burnett.”

On April 8, 1976, respondent, dissatisfied with this effort in mitigation, filed her complaint for libel in the Los Angeles Superior Court. Trial before a jury resulted in an award to respondent of \$300,000 compensatory damages and \$ 1.3 million punitive damages. The trial court by remittitur thereafter rendered its judgment in respondent’s favor for \$ 50,000 compensatory and \$750,000 punitive damages. This appeal followed.

Prior to addressing the merits of appellant’s contentions and in aid of our disposition, we set out the following further facts pertaining to the publication complained of and descriptive of the nature and character of the National Enquirer, which were adequately established in the proceedings below.

On the occasion giving rise to the gossip column item hereinabove quoted, respondent, her husband and three friends were having dinner at the Rive Gauche restaurant in the Georgetown section of Washington, D.C. The date was January 29, 1976. Respondent was in the area as a result of being invited to be a performing guest at the White House. In the course of the dinner, respondent had two or three glasses of wine. She was not inebriated. She engaged in banter with a young couple seated at a table next to hers, who had just become engaged or were otherwise celebrating. When curiosity was expressed about respondent's dessert, apparently a chocolate souffle, respondent saw to it the couple were provided with small amounts of it on plates they had passed to her table for the purpose. Perhaps from having witnessed the gesture, a family behind respondent then offered to exchange some of their baked alaska for a portion of the soufflé, and they, too, were similarly accommodated. As respondent was later leaving the restaurant, she was introduced by a friend to Henry Kissinger, who was dining at another table, and after a brief conversation, respondent left with her party.

There was no "row" with Mr. Kissinger, nor any argument between the two, and what conversation they had was not loud or boisterous. Respondent never "traipsed around the place offering everyone a bite of her dessert," nor was she otherwise boisterous, nor did she spill wine on anyone, nor did anyone spill water on her and there was no factual basis for the comment she ". . . started giggling instead of apologizing."

The impetus for what was printed about the dinner was provided to the writer of the item, Brian Walker, by Couri Hays, a freelance tipster paid by the National Enquirer on an ad hoc basis for information supplied by him which was ultimately published by it, who advised Walker he had been informed respondent had taken her Grand Marnier soufflé around the restaurant in a boisterous or flamboyant manner and given bites of it to various other people; that he had further but unverified information respondent had been involved in the wine-water spilling incident; but that, according to his sources, respondent was "specifically, emphatically" not drunk. No mention was made by Hays of anything involving respondent and Henry Kissinger.

Having received this report, Walker spoke with Steve Tinney, whose name appears at the top of the National Enquirer gossip column, expressing doubts whether Hays could be trusted. Tinney voiced his accord with those doubts. Walker then asked Gregory Lyon, a National Enquirer reporter, to verify what Walker had been told by Hays. Lyon's inquiry resulted only in his verifying respondent had shared dessert with other patrons and that she and Kissinger had carried on a good natured conversation at the restaurant.

In spite of the fact no one had told him respondent and Henry Kissinger had engaged in an argument, that the wine-water spilling story remained as totally unverified hearsay, that the dessert sharing incident was only partially bolstered, and that respondent was not under any view of the question inebriated, Walker composed the quoted item and approved the "row" headline.

Was there error associated with the award to respondent of \$ 750,000 in punitive damages? Yes.

In order, first, to provide the framework employed by us in rejecting certain contentions raised by appellant under this heading, we set out preliminarily the following considerations and principles fundamental to our conclusions.

Nearly 20 years ago, it was announced in *New York Times Co. v. Sullivan* (1964) that: “The constitutional guarantees [relating to protected speech] require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his 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.

The constitutional privilege thus defined was extended three years later in *Curtis Publishing Co. v. Butts* (1967) to include within its protection not only public officials but also “public figures,” such that: “Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public’s attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth.”

What was intended to be accomplished in each of these instances was to make available an “antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander”, which rule holds publishers responsible for their false utterances even where an absence of “malice” is positively established, as for example in the case of a defamation which mistakenly or negligently identifies a party as its subject, “intending” another.

Finally, in *Gertz v. Welch*, because it was thought “the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual,” a wholesale extension of the New York Times test to such persons was rejected as one which would abridge that legitimate state interest to an unacceptable degree, and it was held instead that: “. . . so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual,” but that: “. . . the States may not permit recovery of presumed [i.e., compensatory damages without evidence of actual loss] or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth. “ so that: “. . . In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by New York Times may recover only such damages as are sufficient to compensate him for actual injury.”

These aspects of the scope of the New York Times rule having been related, we observe additionally that, as will hereinafter be seen, the reference in the rule to “actual malice” may prove confusing when juxtaposed to similar terms commonly employed in the law relating to libel, where, as in a case like the one before us, those terms are involved with the question of punitive damages. The difference, nevertheless, between the concept of malice as the term is used respecting liability for libel and the meaning of the word as it provides the basis for recovery of punitive damages for that tort, at least in California, has been clearly articulated in the case. Thus it was there pointed out that for purposes of the distinction it is necessary only to define two of the several terms, namely malice in law and malice in fact, the former being understood as: “. . . that malice which the law presumes (either conclusively or disputably) to exist upon the production of certain designated evidence, which malice may be fictional and constructive merely, and which, arising, as it usually does, from what is conceived to be the necessity of proof following a pleading, which in turn follows a definition, is to be always distinguished from true malice or malice in fact.” and the latter referring to: “. . . a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy, or injure another person,” or to: “the motive and willingness to vex, harass, annoy, or injure,” that is to say to: “malus animus -- indicating that the party was actuated either by spite or ill will towards an individual, or by indirect or improper motives, though these may be wholly unconnected with any uncharitable feeling towards anybody.”

The matter herein was tried upon the premise respondent is a “public figure” and there was employed in establishing the liability of appellant the New York Times standard, expressed in the trial court’s instruction to the jury that: “In addition, plaintiff must prove by clear and convincing evidence that defendant published the item complained of with actual malice -- that is, that the defendant published the item either knowing that it was false or with reckless disregard for whether it was true or false.”

On the question of punitive damages, however, the jury was instructed that such damages could be imposed if appellant had been shown “by a preponderance of the evidence” to have been “guilty of malice,” which was defined as: “conduct which is intended by the defendant to cause injury to the plaintiff or carried on by the defendant with a conscious disregard for the rights of others.”

Appellant asserts this instruction constituted prejudicial error in that the law under the circumstances present requires that punitive damages may not be awarded to a public figure without proof of the publisher’s hatred or ill will by clear and convincing evidence. Stated another way, appellant maintains that a “standard” of proof expressed in the trial court’s “intended-conscious disregard” language, and a “burden” of proof based on a preponderance of the evidence, are inadequate in any libel case of the type present here.

We are of the opinion that in so contending appellant is mistaken. As can be ascertained from what we have set out above, the “actual malice” required by New York Times to be established by “clear and convincing evidence” refers to that aspect of

malice, properly denominated malice in law, necessary to find liability for libel and not to malice in fact, essential to the recovery of punitive damages, which under the cases discussed may be arrived at on the basis of applicable state standards, here on the basis of a preponderance of the evidence.

XVI. WHO IS RICHARD NIXON?

U.S. Supreme Court

Time, Inc. v. Hill, 385 U.S. 374 (1967)

Time, Inc. v. Hill

No. 22

Argued April 27, 1966

Reargued October 18-19, 1966

Decided January 9, 1967

385 U.S. 374

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

Syllabus

Appellee, Hill, and his family, in 1952, were held hostage in their home by some escaped convicts, and were ultimately released unharmed without any violence having occurred. They later moved away, and appellee discouraged further publicity efforts about the incident, which had caused extensive involuntary notoriety. A novel about a hostage incident, but depicting considerable violence, later appeared, and was subsequently made into a play, these portrayals having been shaped by several incidents. Appellant's magazine, Life, published an account of the play, relating it to the Hill incident, describing the play as a reenactment, and using as illustrations photographs of scenes staged in the former Hill home. Alleging that the Life article gave the knowingly false impression that the play depicted the Hill incident, appellee sued for damages under a New York statute providing a cause of action to a person whose name or picture is used by another without consent for purposes of trade or advertising. Appellant maintained that the article concerned a subject of general interest, and was published in good faith. The trial court instructed the jury that liability under the statute depended upon a finding that the Life article was published not to disseminate news, but as a fictionalized version of the Hill incident and for the purpose of advertising the play or increasing the magazine's circulation. The court also instructed the jury that punitive damages were justified if the jury found that the appellant falsely connected Hill with the play knowingly or through failure to make a reasonable investigation, and that personal malice need not be found if there was reckless or wanton disregard of Hill's rights. The jury awarded compensatory and punitive damages. Though liability was sustained on appeal, the Appellate Division ordered a new trial as to damages, at which only compensatory

damages were awarded, and the Court of Appeals affirmed. The New York courts have limited the reach of the statute as applied to reports of newsworthy persons or events, and have made it clear since reargument here that truth is a complete defense. (*Spahn v. Julian Messner, Inc.*, 18 N.Y.2d 324, 221 N.E.2d 543 (1966)). However, the New York courts allow recovery under the statute when such reports are “fictitious.”

Held:

1. Constitutional protections for free expression preclude applying New York’s statute to redress false reports of newsworthy matters absent proof that the publisher knew of their falsity or acted in reckless disregard of the truth. Cf. *New York Times Co. v. Sullivan*, 376 U.S. 254. Pp. 385 U.S. 380-391.

(a) Erroneous statements about a matter of public interest, like the opening of a new play linked to an actual incident, which was the subject of the *Life* article, are inevitable, and, if innocent or merely negligent, must be protected if “freedoms of expression are to have the breathing space’ that they ‘need to survive. . . .” *Id.* at 376 U.S. 271-272. Pp. 385 U.S. 388-389.

(b) But constitutional guarantees of free expression can tolerate sanctions against calculated falsehood without impairment of their essential function. P. 385 U.S. 389.

2. Since the evidence in this case would support a jury finding either (1) that appellant’s inaccurate portrayal of the Hill incident was innocent or merely negligent or (2) that it was recklessly untrue or knowingly false, the trial court’s failure properly to instruct the jury that a verdict of liability could be predicated only on a finding of knowing or reckless falsity in the publication of the *Life* article constituted reversible error. Pp. 385 U.S. 391-397.

3. A declaration would be unwarranted that the New York statute is unconstitutional on its face even if construed by the New York courts to impose liability without proof of knowing or reckless falsity, because the New York courts have been assiduous to construe the statute to avoid invasion of freedom of speech and of the press. P. 385 U.S. 397.

15 N.Y.2d 986, 207 N.E.2d 604, reversed and remanded.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question in this case is whether appellant, publisher of *Life* Magazine, was denied constitutional protections of speech and press by the application by the New York

courts of §§ 551 of the New York Civil Rights Law¹ to award appellee damages on allegations that Life falsely reported that a new play portrayed an experience suffered by appellee and his family.

The article appeared in Life in February, 1955. It was entitled “True Crime Inspires Tense Play,” with the subtitle, “The ordeal of a family trapped by convicts gives Broadway a new thriller, The Desperate Hours.” The text of the article reads as follows:

“Three years ago, Americans all over the country read about the desperate ordeal of the James Hill family, who were held prisoners in their home outside Philadelphia by three escaped convicts. Later, they read about it in Joseph Hayes’ novel, The Desperate Hour, inspired by the family’s experience. Now they can see the story reenacted in Hayes’ Broadway play based on the book, and next year will see it in his movie, which has been filmed but is being held up until the play has a chance to pay off.”

“The play, directed by Robert Montgomery and expertly acted, is a heart-stopping account of how a family rose to heroism in a crisis. LIFE photographed the play during its Philadelphia tryout, transported some of the actors to the actual house

¹ The complete text of the New York Civil Rights Law §§ 50-51 is as follows:

“§ 50. Right of privacy”

“A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.”

“§ 51. Action for injunction and for damages”

“Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof, and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person’s name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages. But nothing contained in this act shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed, and nothing contained in this act shall be so construed as to prevent any person, firm or corporation from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait or picture used in connection therewith.”

where the Hills were besieged. On the next page, scenes from the play are reenacted on the site of the crime.”

The pictures on the ensuing two pages included an enactment of the son being “roughed up” by one of the convicts, entitled “brutish convict,” a picture of the daughter biting the hand of a convict to make him drop a gun, entitled “daring daughter,” and one of the father throwing his gun through the door after a “brave try” to save his family is foiled.

The James Hill referred to in the article is the appellee. He and his wife and five children involuntarily became the subjects of a front-page news story after being held hostage by three escaped convicts in their suburban Whitemarsh, Pennsylvania, home for 19 hours on September 11-12, 1952. The family was released unharmed. In an interview with newsmen after the convicts departed, appellee stressed that the convicts had treated the family courteously, had not molested them, and had not been at all violent. The convicts were thereafter apprehended in a widely publicized encounter with the police which resulted in the killing of two of the convicts. Shortly thereafter, the family moved to Connecticut. The appellee discouraged all efforts to keep them in the public spotlight through magazine articles or appearances on television.

In the spring of 1953, Joseph Hayes’ novel, *The Desperate Hours*, was published. The story depicted the experience of a family of four held hostage by three escaped convicts in the family’s suburban home. But, unlike Hill’s experience, the family of the story suffer violence at the hands of the convicts; the father and son are beaten and the daughter subjected to a verbal sexual insult.

The book was made into a play, also entitled *The Desperate Hours*, and it is Life’s article about the play which is the subject of appellee’s action. The complaint sought damages under §§ 551 on allegations that the Life article was intended to, and did, give the impression that the play mirrored the Hill family’s experience, which, to the knowledge of defendant “. . . was false and untrue.” Appellant’s defense was that the article was “a subject of legitimate news interest,” “a subject of general interest and of value and concern to the public” at the time of publication, and that it was “published in good faith without any malice whatsoever. . . .” A motion to dismiss the complaint for substantially these reasons was made at the close of the case, and was denied by the trial judge on the ground that the proofs presented a jury question as to the truth of the article.

The jury awarded appellee \$50,000 compensatory and \$25,000 punitive damages. On appeal, the Appellate Division of the Supreme Court ordered a new trial as to damages, but sustained the jury verdict of liability. The court said as to liability:

“Although the play was fictionalized, Life’s article portrayed it as a reenactment of the Hills’ experience. It is an inescapable conclusion that this was done to advertise and attract further attention to the play, and to increase present and

future magazine circulation as well. It is evident that the article cannot be characterized as a mere dissemination of news, nor even an effort to supply legitimate newsworthy information in which the public had, or might have a proper interest.”

18 App.Div.2d 485, 489, 240 N.Y.S.2d 286, 290. At the new trial on damages, a jury was waived and the court awarded \$30,000 compensatory damages, without punitive damages.²

The New York Court of Appeals affirmed the Appellate Division “on the majority and concurring opinions at the Appellate Division,” two judges dissenting. 15 N.Y.2d 986, 207 N.E.2d 604. We noted probable jurisdiction of the appeal to consider the important constitutional questions of freedom of speech and press involved. 382 U.S. 936. After argument last Term, the case was restored to the docket for reargument, 384 U.S. 995. We reverse and remand the case to the Court of Appeals for further proceedings not inconsistent with this opinion.

I

Since the reargument, we have had the advantage of an opinion of the Court of Appeals of New York which has materially aided us in our understanding of that court’s construction of the statute. It is the opinion of Judge Keating for the court in *Spahn v. Julian Messner, Inc.*, 18 N.Y.2d 324, 221 N.E.2d 543 (1966). The statute was enacted in 1903 following the decision of the Court of Appeals in 1902 in *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442. *Roberson* was an action against defendants for adorning their flour bags with plaintiff’s picture without her consent. It was grounded upon an alleged invasion of a “right of privacy,” defined by the Court of Appeals to be

“the claim that a man has the right to pass through this world, if he wills, without having his picture published . . . or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals or newspapers. . . .”

171 N.Y. at 544, 64 N.E. at 443. The Court of Appeals traced the theory to the celebrated article of Warren and Brandeis, entitled *The Right to Privacy*, published in 1890. 4 Harv.L.Rev.193.³ The Court of Appeals, however, denied the existence of such a right at common law, but observed that

² Initially, appellee’s wife was joined in the action, and was awarded \$75,000 compensatory and \$25,000 punitive damages by the jury. However, her action was apparently dismissed by stipulation prior to remand, because the action has since proceeded solely upon appellee’s judgment.

³ The various facets of this “right” have been the subject of much comment. See, e.g., Beane, *The Constitutional Right to Privacy in the Supreme Court*, 1962 Sup.Ct.Rev. 212; Prosser, *Privacy*, 48 Calif.L.Rev. 383 (1960); Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970’s* (Part I), 66 Col.L.Rev. 1003 (1966); Feinberg, *Recent Developments in the Law of Privacy*, 48

“[t]he legislative body could very well interfere and arbitrarily provide that no one should be permitted for his own selfish purpose to use the picture or the name of another for advertising purposes without his consent.”

171 N.Y. at 545, 64 N.E. at 443. The legislature enacted §§ 50-51 in response to that observation.

Although “Right of Privacy” is the caption of §§ 50-51, the term nowhere appears in the text of the statute itself. The text of the statute appears to proscribe only conduct of the kind involved in *Roberson*, that is, the appropriation and use in advertising or to promote the sale of goods, of another’s name, portrait or picture without his consent.⁴ An application of that limited scope would present different questions of violation of the constitutional protections for speech and press. Compare *Valentine v. Chrestensen*, 316 U.S. 52, with *New York Times Co. v. Sullivan*, 376 U.S. 254, 376 U.S. 265-266.

The New York courts have, however, construed the statute to operate much more broadly. In *Spahn*, the Court of Appeals stated that,

“Over the years since the statute’s enactment in 1903, its social desirability and remedial nature have led to its being given a liberal construction consonant with its over-all purpose. . . .”

18 N.Y.2d at 327, 221 N.E.2d at 544. Specifically, it has been held in some circumstances to authorize a remedy against the press and other communications media which publish the names, pictures, or portraits of people without their consent. Reflecting the fact, however, that such applications may raise serious questions of conflict with the constitutional protections for speech and press, decisions under the statute have tended to limit the statute’s application.⁵

Col.L.Rev. 713, 717-726 (1948). The latest collection of articles appears in 31 *Law & Contemp.Prob.* 251-435 (1966). The commentary relates not so much to the assertion of constitutional protections against intrusions by government, see *Griswold v. Connecticut*, 381 U.S. 479, as to rights of action for injunctive relief or damages to combat intrusive behavior in the private sector of society.

⁴ Utah’s statute was modeled on New York’s, and, following early New York decisions, the Utah Supreme Court has construed it to afford a cause of action only in such cases. *Donahue v. Warner Bros. Pictures Dist. Corp.*, 2 Utah 2d 256, 272 P.2d 177 (1954).

⁵ See, e.g., *Sidis v. F-R Pub. Corp.*, 113 F.2d 806 (C.A.2d Cir.), cert. denied, 311 U.S. 711 (1940); *Sweenek v. Pathe News, Inc.*, 16 F.Supp. 746 (D.C.E.D.N.Y.1936); *Gautier v. Pro-Football, Inc.*, 278 App.Div. 431, 106 N.Y.S.2d 553 (1951), aff’d, 304 N.Y. 354, 107 N.E.2d 485 (1952); *Molony v. Boy Comics Pubs., Inc.*, 277 App.Div. 166, 98 N.Y.S.2d 119 (1950); *Humiston v. Universal Film Mfg. Co.*, 189 App.Div. 467, 178 N.Y.Supp. 752 (1919); *Colver v. Richard K. Fox Pub. Co.*, 162 App.Div. 297, 146 N.Y.Supp. 999 (1914); *Koussevitzky v. Allen, Towne & Heath, Inc.*, 188 Misc. 479, 68 N.Y.S.2d 779, aff’d, 272 App.Div. 759, 69 N.Y.S.2d 432 (1947); *Lahiri v. Daily Mirror, Inc.*, 162 Misc. 776, 295 N.Y.Supp. 382 (1937).

“[E]ver mindful that the written word or picture is involved, courts have engrafted exceptions and restrictions onto the statute to avoid any conflict with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest.”

Id. 18 N.Y.2d at 328, 221 N.E.2d at 54545.

In the light of questions that counsel were asked to argue on reargument,⁶ it is particularly relevant that the Court of Appeals made crystal clear in the Spahn opinion that truth is a complete defense in actions under the statute based upon reports of newsworthy people or events. The opinion states: “The factual reporting of newsworthy persons and events is in the public interest, and is protected.” 18 N.Y.2d at 328, 221 N.E.2d at 545.⁷ Constitutional questions which might arise if truth were not a defense are therefore of no concern. Cf. *Garrison v. Louisiana*, 379 U.S. 64, 379 U.S. 72-75.

⁶ “Upon reargument, counsel are requested to discuss in their further briefs and oral arguments, in addition to the other issues, the following questions: “

“(1) Is the truthful presentation of a newsworthy item ever actionable under the New York statute as construed or on its face? If so, does appellant have standing to challenge that aspect of the statute?”

“(2) Should the per curiam opinion of the New York Court of Appeals be read as adopting the following portion of the concurring opinion in the Appellate Division?”

“‘However, if it can be clearly demonstrated that the newsworthy item is presented not for the purpose of disseminating news, but rather for the sole purpose of increasing circulation, then the rationale for exemption from section 51 no longer exists and the exemption should not apply. In such circumstances, the privilege to use one’s name should not be granted even though a true account of the event be given -- let alone when the account is sensationalized and fictionalized.’”

384 U.S. 995.

⁷ This limitation to newsworthy persons and events does not, of course, foreclose an interpretation of the statute to allow damages where “Revelations may be so intimate and so unwarranted in view of the victim’s position as to outrage the community’s notions of decency.” *Sidis v. F-R Pub. Corp.*, 113 F.2d 806, 809 (C.A.2d Cir.), cert. denied, 311 U.S. 711 (1940). Cf. *Garner v. Triangle Pubs., Inc.*, 97 F.Supp. 546, 550 (D.C.S.D.N.Y.1951); Restatement, Torts § 867, comment & (1939). See *id.*, *illust.* 6. This case presents no question whether truthful publication of such matter could be constitutionally proscribed.

It has been said that a “right of privacy” has been recognized at common law in 30 States plus the District of Columbia and by statute in four States. See Prosser, *Law of Torts* 831-832 (3d ed.1964). Professor Kalven notes, however, that, since Warren and Brandeis championed an action against the press for public disclosure of truthful but private details about the individual which caused emotional upset to him,

“it has been agreed that there is a generous privilege to serve the public interest in news. . . . What is at issue, it seems to me, is whether the claim of privilege is not so overpowering as virtually to swallow the tort. What can be left of the vaunted new right after the claims of privilege have been confronted?”

But although the New York statute affords “little protection” to the “privacy” of a newsworthy person, “whether he be such by choice or involuntarily,”⁸ the statute gives him a right of action when his name, picture, or portrait is the subject of a “fictitious” report or article.⁹

Kalven, “Privacy in Tort Law -- Were Warren and Brandeis Wrong?” 31 Law & Contemp.Prob. 326, 335-336 (1966). Some representative cases in which the State “right of privacy” was held to give way to the right of the press to publish matters of public interest are *Afro-American Pub. Co. v. Jaffe*, 125 U.S.App.D.C. 70, 366 F.2d 649 (1966); *Wagner v. Fawcett Pubs.*, 307 F.2d 409 (C.A. 7th Cir.1962); *Jenkins v. Dell Pub. Co.*, 251 F.2d 447 (C.A.3d Cir.1958); *Elmhurst v. Pearson*, 80 U.S.App.D.C. 372, 153 F.2d 467 (1946); *Thompson v. Curtis Pub. Co.*, 193 F.2d 953 (C.A.3d Cir.1952); *Samuel v. Curtis Pub. Co.*, 122 F.Supp. 327 (D.C.N.D.Cal.1954); *Miller v. NBC*, 157 F.Supp. 240 (D.C. Del.1957); *Berg v. Minneapolis Star & Tribune Co.*, 79 F.Supp. 957 (D.C.Minn.1948); *Smith v. Doss*, 251 Ala. 250, 37 So.2d 118 (1948); *Smith v. Suratt*, 7 Alaska 416 (1926); *Metter v. Los Angeles Examiner*, 35 Cal.App.2d 304, 95 P.2d 491 (1939); *Barbieri v. News-Journal Co.*, ___ Del. ___, 189 A.2d 773 (1963); *Jacova v. Southern Radio & T. v. Co.*, 83 So.2d 34 (Fla.1955); *Waters v. Fleetwood*, 212 Ga. 161, 91 S.E.2d 344 (1956); *Buzinski v. Do-All Co.*, 31 Ill.App.2d 191, 175 N.E.2d 577 (1961); *Jones v. Herald Post Co.*, 230 Ky. 227, 18 S.W.2d 972 (1929); *Kelley v. Post Pub. Co.*, 327 Mass. 275, 98 N.E.2d 286 (1951); *Martin v. Dorton*, 210 Miss. 668, 50 So.2d 391 (1951); *Hubbard v. Journal Pub. Co.*, 69 N.M. 473, 368 P.2d 147 (1962); *Schnabel v. Meredith*, 378 Pa. 609, 107 A.2d 860 (1954); *Meetze v. Associated Press*, 230 S.C. 330, 95 S.E.2d 606 (1956); *Truxes v. Kenco Enterprises*, 80 S.D. 104, 119 N.W.2d 914 (1963). See Restatement, Torts § 867, comment a (1939)

⁸ “One of the clearest exceptions to the statutory prohibition is the rule that a public figure, whether he be such by choice or involuntarily, is subject to the often searching beam of publicity, and that, in balance with the legitimate public interest, the law affords his privacy little protection,”

Spahn, *supra*, at 328, 221 N.E.2d at 545.

⁹ *Binns v. Vitagraph Co.*, 210 N.Y. 51, 103 N.E. 1108 (1913); *Youssoupoff v. Columbia Broadcasting System, Inc.*, 19 App.Div.2d 865, 244 N.Y.S.2d 1 (1963); *Sutton v. Hearst Corp.*, 277 App.Div. 155, 98 N.Y.S.2d 233 (1950); *Koussevitzky v. Allen, Towne & Heath, Inc.*, 188 Misc. 479, 68 N.Y.S.2d 779, *aff'd*, 272 App.Div. 759, 69 N.Y.S.2d 432 (1947); *Lahiri v. Daily Mirror, Inc.*, 162 Misc. 776, 295 N.Y.Supp. 382 (1937). The doctrine of “fictionalization” has been applied where there is no statute. See, e.g., *Levertov v. Curtis Pub. Co.*, 192 F.2d 974 (C.A.3d Cir.1951); *Hazlitt v. Fawcett Pubs.*, 116 F.Supp. 538 (D.C. Conn.1953); *Garner v. Triangle Pubs., Inc.*, 97 F.Supp. 546 (D.C.S.D.N.Y.1951). Commentators have likened the interest protected in those “privacy” cases which focus upon the falsity of the matter to that protected in cases of libel and slander -- injury to the reputation. See *Prosser, Privacy*, 48 Calif.L.Rev. 383, 398-401 (1960); *Wade, Defamation and the Right of Privacy*, 15 Vand.L.Rev. 1093 (1962). But see *Bloustein, Privacy As An Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L.Rev. 962, 991-993 (1964). Many “right of privacy” cases could, in fact, have been brought as “libel per quod” actions, and several have been brought on both grounds. See, e.g., *Hazlitt v. Fawcett Pubs.*, *supra*; *Freeman v. Busch Jewelry Co.*, 98 F.Supp. 963 (D.C.N.D.Ga.1951); *Peay v. Curtis Pub. Co.*, 78 F.Supp. 305 (D.C.D.C.1948); *Foster-Milburn Co. v. Chinn*, 134 Ky. 424, 120 S.W. 364 (1909). Although not usually thought of in terms of “right of privacy,” all libel cases concern public exposure by false matter, but the primary harm being compensated is damage to reputation. In the “right of privacy” cases, the primary damage is the mental distress from having been exposed to public view, although injury to reputation may be an element bearing upon such damage. See *Wade, supra*, at 1124. Moreover, as *Spahn* illustrates, the published matter need not be defamatory, on its face or otherwise, and might even be laudatory and still warrant recovery. Our decision today is not to be taken to decide any constitutional questions

Spahn points up the distinction. Spahn was an action under the statute brought by the well known professional baseball pitcher, Warren Spahn. He sought an injunction and damages against the unauthorized publication of what purported to be a biography of his life. The trial judge had found that

“the record unequivocally establishes that the book publicizes areas of Warren Spahn’s personal and private life, albeit inaccurate and distorted, and consists of a host, a preponderant percentage, of factual errors, distortions and fanciful passages. . . .”

43 Misc.2d 219, 232, 250 N.Y.S.2d 529, 542. The Court of Appeals sustained the holding that, in these circumstances, the publication was proscribed by § 51 of the Civil Rights Law, and was not within the exceptions and restrictions for newsworthy events engrafted onto the statute. The Court of Appeals said:

“But it is erroneous to confuse privacy with ‘personality,’ or to assume that privacy, though lost for a certain time or in a certain context, goes forever unprotected. . . . Thus, it may be appropriate to say that the plaintiff here, Warren Spahn, is a public personality and that, insofar as his professional career is involved, he is substantially without a right to privacy. That is not to say, however, that his ‘personality’ may be fictionalized and that, as fictionalized, it may be exploited for the defendants’ commercial benefit through the medium of an unauthorized biography.”

Spahn, *supra*, at 328, 221 N.E.2d at 545.

As the instant case went to the jury, appellee, too, was regarded to be a newsworthy person “substantially without a right to privacy” insofar as his hostage experience was involved, but to be entitled to his action insofar as that experience was “fictionalized” and “exploited for the defendants’ commercial benefit.” “Fictionalization,” the Spahn opinion states, “is the heart of the cases in point.” 18 N.Y.2d at 328, 221 N.E.2d at 545.

The opinion goes on to say that the “establishment of minor errors in an otherwise accurate” report does not prove “fictionalization.” Material and substantial falsification is the test. However, it is not clear whether proof of knowledge of the falsity or that the article was prepared with reckless disregard for the truth is also required. In *New York Times Co. v. Sullivan*, 376 U.S. 254, we held that the Constitution delimits a State’s power to award damages for libel in actions brought by public officials against critics of

which may be raised in “libel per quod” actions involving publication of matters of public interest, or in libel actions where the plaintiff is not a public official. Nor do we intimate any view whether the Constitution limits state power to sanction publication of matter obtained by an intrusion into a protected area, for example, through the use of electronic listening devices.

their official conduct. Factual error, content defamatory of official reputation, or both, are insufficient for an award of damages for false statements unless actual malice -- knowledge that the statements are false or in reckless disregard of the truth -- is alleged and proved. The Spahn opinion reveals that the defendant in that case relied on New York Times as the basis of an argument that application of the statute to the publication of a substantially fictitious biography would run afoul of the constitutional guarantees. The Court of Appeals held that New York Times had no application. The court, after distinguishing the cases on the ground that Spahn did not deal with public officials or official conduct, then says,

“The free speech which is encouraged and essential to the operation of a healthy government is something quite different from an individual’s attempt to enjoin the publication of a fictitious biography of him. No public interest is served by protecting the dissemination of the latter. We perceive no constitutional infirmities in this respect.”

18 N.Y.2d at 329, 221 N.E.2d at 546.

If this is meant to imply that proof of knowing or reckless falsity is not essential to a constitutional application of the statute in these cases, we disagree with the Court of Appeals.¹⁰ We hold that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.

The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.

“Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.”

Thornhill v. Alabama, 310 U.S. 88, 310 U.S. 102.

¹⁰ Of course, Spahn is not before us, and we in no wise imply any view of the merits of the judgment or remedy afforded the plaintiff in that case. Our reliance is solely on Judge Keating’s opinion as an aid to understanding the construction placed on the statute by the New York courts.

“No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression.”

Bridges v. California, 314 U.S. 252, 314 U.S. 269. We have no doubt that the subject of the Life article, the opening of a new play linked to an actual incident, is a matter of public interest. “The line between the informing and the entertaining is too elusive for the protection of . . . [freedom of the press].” *Winters v. New York*, 333 U.S. 507, 333 U.S. 510. Erroneous statement is no less inevitable in such a case than in the case of comment upon public affairs, and in both, if innocent or merely negligent, “. . . it must be protected if the freedoms of expression are to have the breathing space’ that they ‘need . . . to survive’ . . .” *New York Times Co. v. Sullivan*, *supra*, at 376 U.S. 271-272. As James Madison said, “Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press.” 4 *Elliot’s Debates on the Federal Constitution* 571 (1876 ed.). We create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person’s name, picture or portrait, particularly as related to nondefamatory matter. Even negligence would be a most elusive standard, especially when the content of the speech itself affords no warning of prospective harm to another through falsity. A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait.

In this context, sanctions against either innocent or negligent misstatement would present a grave hazard of discouraging the press from exercising the constitutional guarantees. Those guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society. Fear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to “steer . . . wider of the unlawful zone,” *New York Times Co. v. Sullivan*, 376 U.S. at 376 U.S. 279; see also *Speiser v. Randall*, 357 U.S. 513, 357 U.S. 526; *Smith v. California*, 361 U.S. 147, 361 U.S. 153-154, and thus “create the danger that the legitimate utterance will be penalized.” *Speiser v. Randall*, *supra*, at 357 U.S. 526.

But the constitutional guarantees can tolerate sanctions against calculated falsehood without significant impairment of their essential function. We held in *New York Times* that calculated falsehood enjoyed no immunity in the case of alleged defamation of a public official concerning his official conduct. Similarly, calculated falsehood should enjoy no immunity in the situation here presented us. What we said in *Garrison v. Louisiana*, *supra*, at 379 U.S. 75, is equally applicable:

“The use of calculated falsehood . . . would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published . . . should enjoy a like immunity. . . . For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which ‘are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .’
Chaplinsky v. New Hampshire, 315 U.S. 568, 315 U.S. 572. Hence, the knowingly false statement and the false statement made with reckless disregard of the truth do not enjoy constitutional protection.”

We find applicable here the standard of knowing or reckless falsehood, not through blind application of *New York Times Co. v. Sullivan*, relating solely to libel actions by public officials, but only upon consideration of the factors which arise in the particular context of the application of the New York statute in cases involving private individuals. This is neither a libel action by a private individual nor a statutory action by a public official. Therefore, although the First Amendment principles pronounced in *New York Times* guide our conclusion, we reach that conclusion only by applying these principles in this discrete context. It therefore serves no purpose to distinguish the facts here from those in *New York Times*. Were this a libel action, the distinction which has been suggested between the relative opportunities of the public official and the private individual to rebut defamatory charges might be germane. And the additional state interest in the protection of the individual against damage to his reputation would be involved. Cf. *Rosenblatt v. Baer*, 383 U.S. 75, 383 U.S. 91 (STEWART, J., concurring). Moreover, a different test might be required in a statutory action by a public official, as opposed to a libel action by a public official or a statutory action by a private individual. Different considerations might arise concerning the degree of “waiver” of the protection the State might afford. But the question whether the same standard should be applicable both to persons voluntarily and involuntarily thrust into the public limelight is not here before us.

II

Turning to the facts of the present case, the proofs reasonably would support either a jury finding of innocent or merely negligent misstatement by Life, or a finding that Life portrayed the play as a reenactment of the Hill family’s experience reckless of the truth or with actual knowledge that the portrayal was false. The relevant testimony is as follows:

Joseph Hayes, author of the book, also wrote the play. The story theme was inspired by the desire to write about “true crime,” and, for years before writing the book,

he collected newspaper clippings of stories of hostage incidents. His story was not shaped by any single incident, but by several, including incidents which occurred in California, New York, and Detroit. He said that he did not consciously portray any member of the Hill family, or the Hill family's experience, although admitting that, "in a very direct way," the Hill experience "triggered" the writing of the book and the play.

The Life article was prepared at the direction and under the supervision of its entertainment editor, Prideaux. He learned of the production of the play from a news story. ~ The play's director, Robert Montgomery, later suggested to him that its interesting stage setting would make the play a worthwhile subject for an article in Life. At about the same time, Prideaux ran into a friend of author Hayes, a freelance photographer, who told Prideaux in casual conversation that the play had a "substantial connection with a true life incident of a family being held by escaped convicts near Philadelphia." As the play was trying out in Philadelphia, Prideaux decided to contact the author. Hayes confirmed that an incident somewhat similar to the play had occurred in Philadelphia, and agreed with Prideaux to find out whether the former Hill residence would be available for the shooting of pictures for a Life article. Prideaux then met with Hayes in Philadelphia where he saw the play and drove with Hayes to the former Hill residence to test its suitability for a picture story. Neither then nor thereafter did Prideaux question Hayes about the extent to which the play was based on the Hill incident.

"A specific question of that nature was never asked, but a discussion of the play itself, what the play was about, in the light of my own knowledge of what the true incident was about, confirmed in my mind beyond any doubt that there was a relationship, and Mr. Hayes' presence at this whole negotiation was tacit proof of that."

Prideaux sent photographers to the Hill residence for location photographs of scenes of the play enacted in the home, and proceeded to construct the text of the article.

In his "story file" were several news clippings about the Hill incident which revealed its nonviolent character, and a New York Times article by Hayes in which he stated that the play "was based on various news stories," mentioning incidents in New York, California, Detroit and Philadelphia.

Prideaux's first draft made no mention of the Hill name except for the caption of one of the photographs. The text related that a true story of a suburban Philadelphia family had "sparked off" Hayes to write the novel, that the play was a "somewhat fictionalized" account of the family's heroism in time of crisis. Prideaux's research assistant, whose task it was to check the draft for accuracy, put a question mark over the words "somewhat fictionalized." Prideaux testified that the question mark "must have been" brought to his attention, although he did not recollect having seen it. The draft was also brought before the copy editor, who, in the presence of Prideaux, made several changes in emphasis and substance. The first sentence was changed to focus on the Hill

incident, using the family's name; the novel was said to have been "inspired" by that incident, and the play was referred to as a "reenactment." The words "somewhat fictionalized" were deleted.

Prideaux labeled as "emphatically untrue" defense counsel's suggestion during redirect examination that, from the beginning, he knew that the play had no relationship to the Hill incident apart from being a hostage incident. Prideaux admitted that he knew the play was "between a little bit and moderately fictionalized," but stated that he thought beyond doubt that the important quality, the "heart and soul" of the play, was the Hill incident.

The jury might reasonably conclude from this evidence -- particularly that the New York Times article was in the story file, that the copy editor deleted "somewhat fictionalized" after the research assistant questioned its accuracy, and that Prideaux admitted that he knew the play was "between a little bit and moderately fictionalized" -- that Life knew the falsity of, or was reckless of the truth in, stating in the article that "the story reenacted" the Hill family's experience. On the other hand, the jury might reasonably predicate a finding of innocent or only negligent misstatement on the testimony that a statement was made to Prideaux by the freelance photographer that linked the play to an incident in Philadelphia, that the author Hayes cooperated in arranging for the availability of the former Hill home, and that Prideaux thought beyond doubt that the "heart and soul" of the play was the Hill incident.¹¹

III

We do not think, however, that the instructions confined the jury to a verdict of liability based on a finding that the statements in the article were made with knowledge of their falsity or in reckless disregard of the truth. The jury was instructed that liability could not be found under §§ 50-51 "merely because of some incidental mistake of fact, or some incidental incorrect statement," and that a verdict of liability could rest only on findings that (1) Life published the article "not to disseminate news, but was using plaintiffs' names, in connection with a fictionalized episode as to plaintiffs' relationship to *The Desperate Hours*"; the Court variously restated this "fictionalization" requirement in terms such as whether appellant

"altered or changed the true facts concerning plaintiffs' relationship to *The Desperate Hours*, so that the article, as published, constituted substantially fiction or a fictionalized version . . . ,"

¹¹ Where either result finds reasonable support in the record, it is for the jury, not for this Court, to determine whether there was knowing or reckless falsehood. Cf. *New York Times Co. v. Sullivan*, supra, 376 U.S. 284-285.

whether the article constituted “fiction,” or was “fictionalized”, and that (2) the article was published to advertise the play or “for trade purposes.” This latter purpose was variously defined as one “to amuse, thrill, astonish or move the reading public so as to increase the circulation of the magazine or for some other material benefit,” “to increase circulation or enhance the standing of the magazine with its readers,” and “for the publisher’s profits through increased circulation, induced by exploitation of the plaintiffs.”

The court also instructed the jury that an award of punitive damages was justified if the jury found that the appellant falsely connected appellee to the play “knowingly or through failure to make a reasonable investigation,” adding

“You do not need to find that there was any actual ill will or personal malice toward the plaintiffs if you find a reckless or wanton disregard of the plaintiffs’ rights.”

Appellee argues that the instructions to determine whether Life “altered or changed” the true facts, and whether, apart from incidental errors, the article was a “substantial fiction” or a “fictionalized version” were tantamount to instructions that the jury must find that Life knowingly falsified the facts. We do not think that the instructions bear that interpretation, particularly in light of the marked contrast in the instructions on compensatory and punitive damages. The element of “knowingly” is mentioned only in the instruction that punitive damages must be supported by a finding that Life falsely connected the Hill family with the play “knowingly or through failure to make a reasonable investigation.” Moreover, even as to punitive damages, the instruction that such damages were justified on the basis of “failure to make a reasonable investigation” is an instruction that proof of negligent misstatement is enough, and we have rejected the test of negligent misstatement as inadequate.¹² Next, the trial judge plainly did not regard his instructions as limiting the jury to a verdict of liability based on a finding of knowing or reckless falsity; he denied appellant’s motion to dismiss after the close of the evidence because he perceived that it was for the jury to find “whether the Life article was true, or whether an inference could be obtained from reading it that it was not true.” This implies a view that “fictionalization” was synonymous with “falsity” without regard to knowledge or even negligence, except for the purpose of an award of punitive damages. Finally, nothing in the New York cases decided at the time of trial

¹² Although the court qualified this instruction by requiring a finding of “reckless or wanton disregard of the plaintiffs’ rights” in absence of a finding of “actual ill will or personal malice,” this reasonably could have been taken by the jury to relate not to truth or falsity, but to appellant’s attitude toward appellee’s privacy. Therefore, even this instruction would have been constitutionally infirm. Even had the Appellate Division not found prejudicial error affecting the jury’s award of punitive damages, the judgment before us could not be sustained on the basis of the jury’s finding on that issue.

limited liability to cases of knowing or reckless falsity, and Spahn, decided since, has left the question in doubt.¹³

The requirement that the jury also find that the article was published “for trade purposes,” as defined in the charge, cannot save the charge from constitutional infirmity.

“That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.”

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 343 U.S. 501-502; see New York Times Co. v. Sullivan, 376 U.S. at 376 U.S. 266; Smith v. California, 361 U.S. 147, 361 U.S. 150; cf. Ex parte Jackson, 96 U.S. 727, 96 U.S. 733; Grosjean v. American Press Co., 297 U.S. 233; Lovell v. Griffin, 303 U.S. 444.

IV

The appellant argues that the statute should be declared unconstitutional on its face if construed by the New York courts to impose liability without proof of knowing or reckless falsity.¹⁴ Such a declaration would not be warranted even if it were entirely clear that this had previously been the view of the New York courts. The New York Court of Appeals, as the Spahn opinion demonstrates, has been assiduous in construing the statute to avoid invasion of the constitutional protections of speech and press. We, therefore, confidently expect that the New York courts will apply the statute consistently with the constitutional command. Any possible difference with us as to the thrust of the constitutional command is narrowly limited in this case to the failure of the trial judge to instruct the jury that a verdict of liability could be predicated only on a finding of knowing or reckless falsity in the publication of the Life article.

¹³ The Appellate Division, in *Spahn v. Julian Messner, Inc.*, 23 App.Div.2d 216, 220, 260 N.Y.S.2d 451, 454 (1965), stated that the concept of fictionalization rested on a

“distinction between an intentionally fictionalized treatment and a straight factual treatment (subject to inadvertent or superficial inaccuracies). . . .”

(Emphasis supplied.) In light of the Court of Appeals opinion, we cannot accept this as an accurate statement of New York law.

¹⁴ Appellant further contends that the threat of criminal penalty invalidates the statute. However, there have been only two cases of criminal proceedings under the statute, and both resulted in dismissal. *People v. Charles Scribner’s Sons*, 205 Misc. 818, 130 N.Y.S.2d 514 (1954); *People v. McBride & Co.*, 159 Misc. 5, 288 N.Y.Supp. 501 (1936). There is therefore little realistic threat of prosecution. Cf. *United States v. Raines*, 362 U.S. 17, 362 U.S. 224 (1960).

The judgment of the Court of Appeals is set aside, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring.

I concur in reversal of the judgment in this case based on the grounds and reasons stated in the Court's opinion. I do this, however, in order for the Court to be able at this time to agree on an opinion in this important case based on the prevailing constitutional doctrine expressed in *New York Times Co. v. Sullivan*, 376 U.S. 254. The Court's opinion decides the case in accordance with this doctrine, to which the majority adhere. In agreeing to the Court's opinion, I do not recede from any of the views I have previously expressed about the much wider press and speech freedoms I think the First and Fourteenth Amendments were designed to grant to the people of the Nation. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. at 376 U.S. 293 (concurring opinion); *Rosenblatt v. Baer*, 383 U.S. 75, 383 U.S. 94 (concurring and dissenting opinion).

I

I acquiesce in the application here of the narrower constitutional view of *New York Times* with the belief that this doctrine too is bound to pass away as its application to new cases proves its inadequacy to protect freedom of the press from destruction in libel cases and other cases like this one. The words "malicious" and particularly "reckless disregard of the truth" can never serve as effective substitutes for the First Amendment words: "... make no law ... abridging the freedom of speech, or of the press. ...". Experience, I think, is bound to prove that First Amendment freedoms can no more be permanently diluted or abridged by this Court's action than could the Sixth Amendment's guarantee of right to counsel. I think the fate that befell *Betts v. Brady*, 316 U.S. 455 (cf. *Gideon v. Wainwright*, 372 U.S. 335), is already foreseeable, even if only dimly, for the *New York Times*' dilution of First Amendment rights.

II

I think it not inappropriate to add that it would be difficult, if not impossible, for the Court ever to sustain a judgment against *Time* in this case without using the recently popularized weighing and balancing formula. Some of us have pointed out from time to time that the First Amendment freedoms could not possibly live with the adoption of that Constitution-ignoring and -destroying technique,¹ when there are, as here, palpable penalties imposed on speech or press specifically because of the views that are spoken or printed. The prohibitions of the Constitution were written to prohibit certain specific things, and one of the specific things prohibited is a law which abridges freedom of the press. That freedom was written into the Constitution, and that Constitution is or should be binding on judges, as well as other public officers. The "weighing" doctrine plainly encourages and actually invites judges to choose for themselves between conflicting

¹ See, e.g., *In re Anastaplo*, 366 U.S. 82, 366 U.S. 97 (dissenting opinion); *Braden v. United States*, 365 U.S. 431, 365 U.S. 438 (dissenting opinion); *Barenblatt v. United States*, 360 U.S. 109, 360 U.S. 140-145 (dissenting opinion).

values, even where, as in the First Amendment, the Founders made a choice of values, one of which is a free press. Though the Constitution requires that judges swear to obey and enforce it, it is not altogether strange that all judges are not always dead set against constitutional interpretations that expand their powers, and that, when power is once claimed by some, others are loath to give it up.

Finally, if the judicial balancing choice of constitutional changes is to be adopted by this Court, I could wish it had not started on the First Amendment. The freedoms guaranteed by that Amendment are essential freedoms in a government like ours. That Amendment was deliberately written in language designed to put its freedoms beyond the reach of government to change while it remained unrepealed.² If judges have, however, by their own fiat, today created a right of privacy equal to or superior to the right of a free press that the Constitution created, then tomorrow and the next day and the next, judges can create more rights that balance away other cherished Bill of Rights freedoms. If there is any one thing that could strongly indicate that the Founders were wrong in reposing so much trust in a free press, I would suggest that it would be for the press itself not to wake up to the grave danger to its freedom inherent and certain in this “weighing process.” Life’s conduct here was, at most, a mere understandable and incidental error of fact in reporting a newsworthy event. One does not have to be a prophet to foresee that judgments like the one we here reverse can frighten and punish the press so much that publishers will cease trying to report news in a lively and readable fashion as long as there is -- and there always will be -- doubt as to the complete accuracy of the newsworthy facts.³ Such a consummation hardly seems consistent with the clearly expressed purpose of the Founders to guarantee the press a favored spot in our free society.

MR. JUSTICE DOUGLAS, concurring.

As intimated in my separate opinion in *Rosenblatt v. Baer*, 383 U.S. 75, 383 U.S. 88, and in the opinion of my Brother BLACK in the same case, *id.* at 383 U.S. 94, state action to abridge freedom of the press is barred by the First and Fourteenth Amendments where the discussion concerns matters in the public domain. The episode around which

² Jefferson wrote that the purpose of the First Amendment is

“ . . . guarding in the same sentence, and under the same words, the freedom of religion, of speech, and of the press insomuch, that whatever violates either, throws down the sanctuary which covers the others, and that libels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals.”

8 Jefferson, Works 464-465 (Ford ed. 1904).

³ See, for example, *Curtis Publishing Co. v. Butts*, 351 F.2d 702 (3,000,000 libel judgment, cut to \$460,000 on appeal), cert. granted, post, p. 811; *Associated Press v. Walker*, 393 S.W.2d 671 (Tex.Civ.App.) (\$500,000 libel judgment), cert. granted, post, p. 812; *New York Times Co. v. Sullivan*, 376 U.S. 254 (\$500,000 libel judgment), reversed.

this book was written had been news of the day for some time. The most that can be said is that the novel, the play, and the magazine article revived that interest. A fictionalized treatment of the event is, in my view, as much in the public domain as would be a watercolor of the assassination of a public official. It seems to me irrelevant to talk of any right of privacy in this context. Here, a private person is catapulted into the news by events over which he had no control. He and his activities are then in the public domain as fully as the matters at issue in *New York Times Co. v. Sullivan*, 376 U.S. 254. Such privacy as a person normally has ceases when his life has ceased to be private.

Once we narrow the ambit of the First Amendment, creative writing is imperiled and the “chilling effect” on free expression which we feared in *Dombrowski v. Pfister*, 380 U.S. 479, 380 U.S. 487,^{*} is almost sure to take place. That is, I fear, the result once we allow an exception for “knowing or reckless falsity.” Such an elusive exception gives the jury, the finder of the facts, broad scope and almost unfettered discretion. A trial is a chancy thing, no matter what safeguards are provided. To let a jury on this record return a verdict or not as it chooses is to let First Amendment rights ride on capricious or whimsical circumstances, for emotions and prejudice often do carry the day. The exception for “knowing or reckless falsity” is therefore, in my view, an abridgment of speech that is barred by the First and Fourteenth Amendments. But, as indicated in my Brother BLACK’s opinion, I have joined the Court’s opinion in order to make possible an adjudication that controls this litigation. Cf. Mr. Justice Rutledge, concurring, *Screws v. United States*, 325 U.S. 91, 325 U.S. 113, 325 U.S. 134.

^{*} And see *Baggett v. Bullitt*, 377 U.S. 360; *NAACP v. Button*, 371 U.S. 415.

MR. JUSTICE HARLAN, concurring in part and dissenting in part.

While I find much with which I agree in the opinion of the Court, I am constrained to express my disagreement with its view of the proper standard of liability to be applied on remand. Were the jury on retrial to find negligent, rather than, as the Court requires, reckless or knowing “fictionalization,” I think that federal constitutional requirements would be met.

I

The Court’s opinion demonstrates that the fictionalization doctrine upon which New York premises liability is one which would strip newsworthy material, otherwise protected, of its constitutional shield upon a mere showing of substantial falsity. I agree that the compensatory damage instruction given by the trial court required only such a determination and a finding of “commercial purpose” to sustain liability. And reading the opinion of the Appellate Division in the light of other New York decisions, I believe that this was the theory upon which the jury finding was sustained.¹ True, the trial court told the jury that it must find that the appellant “altered or changed the true facts.” But it did not specify whether this alteration or change would have to be reckless or negligent, or whether innocent variation from the facts as found by the jury would suffice for the award of damages. Clearly, knowing falsification was not required, for the court refused appellant’s request to charge that the jury must find in its favor unless it found knowing falsification.

The instructions on punitive damages required the jury to find at least “failure to make a reasonable investigation,” in my view, a crucial determination. However, the entire damage award was set aside as excessive by the Appellate Division, which found it unduly influenced by inflammatory evidence. On remand for reconsideration of damages, only a compensatory award was made. This was the award affirmed by the Court of Appeals in the decision we are reviewing. With the case in this posture, I do not think it

¹ The majority in the New York Appellate Division denied that the article could “be characterized as a mere dissemination of news, nor even an effort to supply legitimate newsworthy information. . . .” They added that

“points of similarity in the book and the occurrence . . . justified neither the identification nor the commercial exploitation of plaintiffs’ name and family with the play.”

Justice Rabin, concurring, agreed that the subject could have been presented without liability “albeit the presentation of such newsworthy material increases the publisher’s circulation.” The New York Court of Appeals affirmed “on the majority and concurring opinions at the Appellate Division.” The decision below seems to have ample support in New York law. See, e.g., *Spahn v. Julian Messner, Inc.*, 18 N.Y.2d 324, 221 N.E.2d 543; *Binns v. Vitagraph Co.*, 147 App.Div. 783, 132 N.Y.Supp. 237, *aff’d*, 210 N.Y. 51, 103 N.E. 1108; *Yousoupoff v. CBS, Inc.*, 41 Misc.2d 42, 244 N.Y.S.2d 701, *aff’d*, 19 App.Div.2d 865, 244 N.Y.S.2d 1; *Koussevitzky v. Allen, Towne & Heath, Inc.*, 188 Misc. 479, 68 N.Y.S.2d 779, *aff’d*, 272 App.Div. 759, 69 N.Y.S.2d 432.

can fairly be said that there has been a binding jury interpretation of the degree of fault involved in the fictionalization, and I agree with the Court that the conduct involved would bear a variety of interpretations.

Like the Court, I consider that only a narrow problem is presented by these facts. To me, this is not “privacy” litigation in its truest sense. See Prosser, *Law of Torts* § 112; Silver, *Privacy and the First Amendment*, 34 *Ford.L.Rev.* 553; but see Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 *N.Y.U.L.Rev.* 962. No claim is made that there was any intrusion upon the Hills’ solitude or private affairs in order to obtain information for publication. The power of a State to control and remedy such intrusion for newsgathering purposes cannot be denied, cf. *Mapp v. Ohio*, 367 U.S. 643, but is not here asserted. Similarly it may be strongly contended that certain facts are of such limited public interest and so intimate and potentially embarrassing to an individual that the State may exercise its power to deter publication. *Feeney v. Young*, 191 App.Div. 501, 181 *N.Y.Supp.* 481; see *Sidis v. F-R Pub. Corp.*, 113 F.2d 806, 808. But the instructions to the jury, the opinions in the New York appellate courts, and indeed the arguments advanced by both sides before this Court all recognize that the theme of the article in question was a perfectly proper one, and that an article of this type could have been prepared without liability. *Winters v. New York*, 333 U.S. 507, 333 U.S. 510. The record is replete with articles commenting on the genesis of *The Desperate Hours*, one of which was prepared by the author himself and used by appellee to demonstrate the supposed falsity of the *Life* piece. Finally, no claim is made that appellant published the article to advance a commercial interest in the play. There is no evidence to show that *Time, Inc.*, had any financial interest in the production, or even that the article was published as an advertisement. Thus, the question whether a State may apply more stringent limitations to the use of the personality in “purely commercial advertising” is not before the Court. See *Valentine v. Chrestensen*, 316 U.S. 52.

II

Having come this far in step with the Court’s opinion, I must part company with its sweeping extension of the principles of *New York Times Co. v. Sullivan*, 376 U.S. 254. It was established in *New York Times* that mere falsity will not suffice to remove constitutional protection from published matter relating to the conduct of a public official that is of public concern. But that decision and those in which the Court has developed its doctrine, *Rosenblatt v. Baer*, 383 U.S. 75, *Garrison v. Louisiana*, 379 U.S. 64, have never found independent value in false publications,² nor any reason for their protection except

² The passage from *Garrison v. Louisiana*, *supra*, quoted in the opinion of the Court makes clear that the only interest in protecting falsehood is to give added “breathing space” to truth. It is undeniable that falsity may be published, especially in the political arena, with what may be considered “good” motives -- for example, a good faith belief in the absolute necessity of defeating an “evil” candidate. But the Court does not remove state power to control such conduct, thus underlining the strong social interest in discouraging false publication.

to add to the protection of truthful communication. And the Court has been quick to note that, where private actions are involved, the social interest in individual protection from falsity may be substantial. *Rosenblatt v. Baer*, supra, at 383 U.S. 86-87, n. 13. Thus, I believe that rigorous scrutiny of the principles underlying the rejection of the mere falsity criterion and the imposition of ancillary safeguards, as well as the interest which the State seeks to protect, is necessary to reach a proper resolution of this case.

Two essential principles seem to underlie the Court's rejection of the mere falsity criterion in *New York Times*. The first is the inevitability of some error in the situation presented in free debate, especially when abstract matters are under consideration. Certainly that is illustrated here in the difficulty to be encountered in making a precise description of the relationship between the Hill incident and *The Desperate Hours*. The second is the Court's recognition that, in many areas which are at the center of public debate, "truth" is not a readily identifiable concept, and putting to the preexisting prejudices of a jury the determination of what is "true" may effectively institute a system of censorship. Any nation which counts the Scopes trial as part of its heritage cannot so readily expose ideas to sanctions on a jury finding of falsity. See *Cantwell v. Connecticut*, 310 U.S. 296, 310 U.S. 310. "The marketplace of ideas," where it functions, still remains the best testing ground for truth.

But these arguments against suppressing what is found to be "false" on that ground alone do not negative a State's interest in encouraging the publication of well researched materials more likely to be true. Certainly it is within the power of the State to use positive means -- the provision of facilities³ and training of students⁴ -- to further this end. The issue presented in this case is the constitutionality of a State's employment of sanctions to accomplish that same goal. The Court acknowledges that sanctions may be employed against knowing or reckless falsehoods, but would seem to grant a "talismanic immunity" to all unintentional errors. However, the distinction between the facts presented to us here and the situation at issue in the *New York Times* case and its progeny casts serious doubt on that grant of immunity, and calls for a more limited "breathing space" than that granted in criticism of public officials

First, we cannot avoid recognizing that we have entered an area where the "marketplace of ideas" does not function, and where conclusions premised on the existence of that exchange are apt to be suspect. In *Rosenblatt v. Baer*, supra, the Court made the *New York Times* rationale operative where

³ Thus, the State may take land for the construction of library facilities. E.g., *Hayford v. Bangor*, 102 Me. 340, 66 A. 731; *Laird v. Pittsburgh*, 205 Pa. 1, 54 A. 324.

⁴ Thus, many state universities have professional schools of journalism. See 3 Department of Health, Educ. & Welfare, Education Directory -- Higher Education.

“the public has an independent interest in the qualifications and performance of the person who holds it [government position], beyond the general public interest in the qualifications and performance of all government employees. . . .”

Id. at 383 U.S. 86. In elaboration, the Court said:

“The employee’s position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.”

Id. at 383 U.S. 87, n. 13. To me, this seems a clear recognition of the fact that falsehood is more easily tolerated where public attention creates the strong likelihood of a competition among ideas. Here, such competition is extremely unlikely, for the scrutiny and discussion of the relationship of the Hill incident and the play is “occasioned by the particular charges in controversy,” and the matter is not one in which the public has an “independent interest.” It would be unreasonable to assume that Mr. Hill could find a forum for making a successful refutation of the Life material, or that the public’s interest in it would be sufficient for the truth to win out by comparison, as it might in that area of discussion central to a free society. Thus, the state interest in encouraging careful checking and preparation of published material is far stronger than in *New York Times*. The dangers of unchallengeable untruth are far too well documented to be summarily dismissed.⁵

Second, there is a vast difference in the state interest in protecting individuals like Mr. Hill from irresponsibly prepared publicity and the state interest in similar protection for a public official. In *New York Times*, we acknowledged public officials to be a breed from whom hardness to exposure to charges, innuendoes, and criticisms might be demanded and who voluntarily assumed the risk of such things by entry into the public arena. 376 U.S. at 376 U.S. 273. But Mr. Hill came to public attention through an unfortunate circumstance not of his making, rather than his voluntary actions, and he can in no sense be considered to have “waived” any protection the State might justifiably

⁵ See Riesman, *Democracy and Defamation: Fair Game and Fair Comment I*, 42 Col.L.Rev. 1085; *Beauharnais v. Illinois*, 343 U.S. 250; *State v. Klapprott*, 127 N.J.L. 395, 22 A.2d 877. And despite the Court’s denial that the opportunity for rebuttal is germane, it must be the circulation of falsity and the harm stemming from it which lead the Court to allow the imposition of liability at all. For the Court finds the subject of the Life article “a matter of public interest.” And it states that “[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community.” Thus, it could not permit *New York Times* to allow compensation for mere exposure unless it is holding, as I am sure it is not, that the presence of some reckless falsehood in written material strips it of all constitutional protection. The Court’s suggestion that Mr. Hill might not be anxious to rebut the falsehood because it might increase his harm from exposure is equally applicable to libel actions where the opportunity to rebut may be limited by fear of reiterating the libel. And this factor emphasizes, rather than lessens, the state interest in discouraging falsehood, for it increases the likelihood that falsity will continue to circulate to the detriment of some when truth should be encouraged “for the benefit of all of us.”

afford him from irresponsible publicity. Not being inured to the vicissitudes of journalistic scrutiny, such an individual is more easily injured, and his means of self-defense are more limited. The public is less likely to view with normal skepticism what is written about him, because it is not accustomed to seeing his name in the press and expects only a disinterested report.

The coincidence of these factors in this situation leads me to the view that a State should be free to hold the press to a duty of making a reasonable investigation of the underlying facts and limiting itself to “fair comment”⁶ on the materials so gathered. Theoretically, of course, such a rule might slightly limit press discussion of matters touching individuals like Mr Hill. But, from a pragmatic standpoint, until now, the press, at least in New York, labored under the more exacting handicap of the existing New York privacy law and has certainly remained robust. Other professional activity of great social value is carried on under a duty of reasonable care,⁷ and there is no reason to suspect the press would be less hardy than medical practitioners or attorneys, for example. The “freedom of the press” guaranteed by the First Amendment, and as reflected in the Fourteenth, cannot be thought to insulate all press conduct from review and responsibility for harm inflicted.⁸ The majority would allow sanctions against such conduct only when it is morally culpable. I insist that it can also be reached when it creates a severe risk of irreparable harm to individuals involuntarily exposed to it and powerless to protect

⁶ A negligence standard has been applied in libel actions both where the underlying facts are alleged to be libelous, *Layne v. Tribune Co.*, 108 Fla. 177, 146 So. 234, and where comment is the subject of the action, *Clancy v. Daily News Corp.*, 202 Minn. 1, 277 N.W. 264. Similarly the press should not be constitutionally insulated from privacy actions brought by parties in the position of Mr. Hill when reasonable care has not been taken in ascertaining or communicating the underlying facts, or where the publisher has not kept within the traditional boundaries of “fair comment” with relation to underlying facts and honest opinion. See Prosser, *Law of Torts* § 110, at 815-816. Similar standards of reasonable investigation and presentation have long been applied in misrepresentation cases. See, e.g., *International Products Co. v. Erie R. Co.*, 244 N.Y. 331, 155 N.E. 662; *Nash v. Minnesota Title Ins. Trust Co.*, 163 Mass. 574, 40 N.E. 1039. Under such a standard, the fact that the publication involved in this case was not defamatory would enter into a determination of the amount of care which would have been reasonable in the preparation of the article.

⁷ See, e.g., *McCoid*, *The Care Required of Medical Practitioners*, 12 *Vand.L.Rev.* 549; *Wade*, *The Attorney’s Liability for Negligence*, 12 *Vand.L.Rev.* 755. It may be argued that other professions are distinguishable because practitioners may insure against liability. But this course is also open to the press. *Developments in the Law, Defamation*, 69 *Harv.L.Rev.* 875, 906.

⁸ This Court has never held that the press has an absolute privilege to publish falsity. There is nothing in the history of the First Amendment, or the Fourteenth, to indicate that the authors contemplated restrictions on the ability of private persons to seek legal redress for press-inflicted injury. See generally *Levy*, *Legacy of Suppression*; *Duniway*, *The Development of Freedom of the Press in Massachusetts*. The Founders rejected an attempt by Madison to add to Art. I, § 10, a guarantee of freedom of the press against state action. The main argument advanced against it was that it would unduly interfere with the proper powers of the States. See 5 *Madison’s Writings* 378 (Hunt ed.); 1 *Annals of Cong.* 756.

themselves against it. I would remand the case to the New York courts for possible retrial under that principle.

A constitutional doctrine which relieves the press of even this minimal responsibility in cases of this sort seems to me unnecessary and ultimately harmful to the permanent good health of the press itself. If the New York Times case has ushered in such a trend, it will prove, in its long-range impact, to have done a disservice to the true values encompassed in the freedoms of speech and press.

MR. JUSTICE FORTAS, with whom THE CHIEF JUSTICE and MR. JUSTICE CLARK join, dissenting.

The Court's holding here is exceedingly narrow. It declines to hold that the New York "Right of Privacy" statute is unconstitutional. I agree. The Court concludes, however, that the instructions to the jury in this case were fatally defective because they failed to advise the jury that a verdict for the plaintiffs could be predicated only on a finding of knowing or reckless falsity in the publication of the Life article. Presumably, the appellee is entitled to a new trial. If he can stand the emotional and financial burden, there is reason to hope that he will recover damages for the reckless and irresponsible assault upon himself and his family which this article represents. But he has litigated this case for 11 years. He should not be subjected to the burden of a new trial without significant cause. This does not exist. Perhaps the purpose of the decision here is to indicate that this Court will place insuperable obstacles in the way of recovery by persons who are injured by reckless and heedless assaults, provided they are in print and even though they are totally divorced from fact. If so, I should think that the Court would cast its decision in constitutional terms. Short of that purpose, with which I would strongly disagree, there is no reason here to order a new trial. The instructions in this case are acceptable even within the principles today announced by the Court.

I fully agree with the views of my Brethren who have stressed the need for a generous construction of the First Amendment. I, too, believe that freedom of the press, of speech, assembly, and religion, and the freedom to petition are of the essence of our liberty, and fundamental to our values. See, e.g., *Brown v. Louisiana*, 383 U.S. 131 (1966). I agree with the statement of my Brother BRENNAN, speaking for the Court in *NAACP v. Button*, 371 U.S. 415, 371 U.S. 433 (1963), that "[t]hese freedoms are delicate and vulnerable, as well as supremely precious in our society." But I do not believe that whatever is in words, however much of an aggression it may be upon individual rights, is beyond the reach of the law, no matter how heedless of others' rights -- how remote from public purpose, how reckless, irresponsible, and untrue it may be. I do not believe that the First Amendment precludes effective protection of the right of privacy -- or, for that matter, an effective law of libel. I do not believe that we must or should, in deference to those whose views are absolute as to the scope of the First Amendment, be ingenious to strike down all state action, however circumspect, which penalizes the use of words as instruments of aggression and personal assault. There are great and important values in our society, none of which is greater than those reflected in the First Amendment, but which are also fundamental and entitled to this Court's careful respect and protection. Among these is the right to privacy, which has been eloquently extolled by scholars and members of this Court. Judge Cooley long ago referred to this right as the right "to be let alone."¹ In 1890, Warren and Brandeis published their famous article "The Right to Privacy," in which they eloquently argued that the "excesses" of the

¹ Cooley, *Law of Torts* 29 (2d ed. 1888).

press in “overstepping in every direction the obvious bounds of propriety and of decency” made it essential that the law recognize a right to privacy, distinct from traditional remedies for defamation, to protect private individuals against the unjustifiable infliction of mental pain and distress.² A distinct right of privacy is now recognized, either as a “common law” right or by statute, in at least 35 States.³ Its exact scope varies in the respective jurisdictions. It is, simply stated, the right to be let alone; to live one’s life as one chooses, free from assault, intrusion or invasion except as they can be justified by the clear needs of community living under a government of law. As Mr. Justice Brandeis said in his famous dissent in *Olmstead v. United States*, 277 U.S. 438, 277 U.S. 478 (1928), the right of privacy is “the most comprehensive of rights and the right most valued by civilized men.”

This Court has repeatedly recognized this principle. As early as 1886, in *Boyd v. United States*, 116 U.S. 616, 116 U.S. 630, this Court held that the doctrines of the Fourth and Fifth Amendments

“apply to all invasions on the part of the government and its employes of the sanctity of a man’s home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property. . . .”

In 1949, the Court, in *Wolf v. Colorado*, 338 U.S. 25, 338 U.S. 229, described the immunity from unreasonable search and seizure in terms of “the right of privacy.”⁴

Then, in the landmark case of *Mapp v. Ohio*, 367 U.S. 643 (1961), this Court referred to “the right to privacy,” “no less important than any other right carefully and particularly reserved to the people,” as “basic to a free society.” *Id.* at 367 U.S. 656. MR. JUSTICE CLARK, speaking for the Court, referred to “the freedom from unconscionable invasions of privacy” as intimately related to the freedom from convictions based upon coerced confessions. He said that both served the cause of perpetuating “principles of humanity and civil liberty [secured] . . . only after years of struggle.” *Id.* at 367 U.S. 657 quoting from *Bram v. United States*, 168 U.S. 532 544 (1897). He said that they express “supplementing phases of the same constitutional purpose to maintain inviolate large areas of personal privacy.” *Ibid.*, quoting from *Feldman v. United States*, 322 U.S. 487, 322 U.S. 489-490 (1944).

² 4 Harv.L.Rev.193, 196 (1890). See Prosser, *Law of Torts* 829 et seq. (3d ed.1964).

³ Prosser, *op. cit.* supra, 831, 832.

⁴ *Wolf* held that the basic values of the Fourth Amendment apply to the States via the Fourteenth, but declined to require the States to exclude illegally seized evidence in criminal trials. In this latter respect, it was overruled by *Mapp v. Ohio*, *infra*.

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court held unconstitutional a state law under which petitioners were prosecuted for giving married persons information and medical advice on the use of contraceptives. The holding was squarely based upon the right of privacy which the Court derived by implication from the specific guarantees of the Bill of Rights. Citing a number of prior cases, the Court (per Douglas, J.) held that “These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.” *Id.* at 381 U.S. 485. As stated in the concurring opinion of Mr. Justice Goldberg, with whom THE CHIEF JUSTICE and MR. JUSTICE BRENNAN joined: “the right of privacy is a fundamental personal right, emanating from the totality of the constitutional scheme under which we live.” *Id.* at 381 U.S. 494.⁵

Privacy, then, is a basic right. The States may, by appropriate legislation and within proper bounds, enact laws to vindicate that right. *Cf. Kovacs v. Cooper*, 336 U.S. 77 (1949), sustaining a local ordinance regulating the use of sound trucks, and *Breard v. Alexandria*, 341 U.S. 622 (1951), sustaining a state law restricting solicitation in private homes of magazine subscriptions. Difficulty presents itself because the application of such state legislation may impinge upon conflicting rights of those accused of invading the privacy of others. But this is not automatically a fatal objection.⁶ Particularly where the right of privacy is invaded by words -- by the press or in a book or pamphlet -- the most careful and sensitivities appraisal of the total impact of the claimed tort upon the congeries of rights is required. I have no hesitancy to say, for example, that, where political personalities or issues are involved or where the event as to which the alleged invasion of privacy occurred is, in itself, a matter of current public interest, First Amendment values are supreme, and are entitled to at least the types of protection that this Court extended in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). But I certainly concur with the Court that the greatest solicitude for the First Amendment does not compel us to deny to a State the right to provide a remedy for reckless falsity in writing and publishing an article which irresponsibly and injuriously invades the privacy of a quiet family for no purpose except dramatic interest and commercial appeal. My difficulty is that, while the Court gives lip service to this principle, its decision, which it

⁵ Last Term, in *Rosenblatt v. Baer*, 383 U.S. 75, 383 U.S. 92 (1966), MR. JUSTICE STEWART, concurring, referred to the “right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt” as reflecting “our basic concept of the essential dignity and worth of every human being -- a concept at the root of an decent system of ordered liberty.” He referred to the “protection of private personality, like the protection of life itself,” as entitled to “recognition by this Court as a basic of our constitutional system.” See also MR. JUSTICE DOUGLAS, dissenting, in *Poe v. Ullman*, 367 U.S. 497, 367 U.S. 521 (1961).

⁶ *Cf. Breard*, *supra*, at 341 U.S. 625-626:

“... There is equal unanimity that opportunists, for private gain, cannot be permitted to arm themselves with an acceptable principle, such as that of a right to work, a privilege to engage in interstate commerce, or a free press, and proceed to use it as an iron standard to smooth their path by crushing the living rights of others to privacy and repose.”

claims to be based on erroneous instructions, discloses hesitancy to go beyond the verbal acknowledgment.

The Court today does not repeat the ringing words of so many of its members on so many occasions in exaltation of the right of privacy. Instead, it reverses a decision under the New York “Right of Privacy” statute because of the “failure of the trial judge to instruct the jury that a verdict of liability could be predicated only on a finding of knowing or reckless falsity in the publication of the Life article.” In my opinion, the jury instructions, although they were not a textbook model, satisfied this standard.

In the first place, the Court does not adequately deal with the fact that the jury returned a verdict for exemplary or punitive damages, under special instructions dealing with them, as well as for compensatory damages. As to exemplary damages, the jury was specifically instructed that these might be awarded “only” if the jury found from the evidence that the defendant

“falsely connected plaintiffs with The Desperate Hours, and that this was done knowingly or through failure to make a reasonable investigation.”

The jury was then informed that

“You do not need to find that there was any actual ill will or personal malice toward the plaintiffs if you find reckless or wanton disregard of the plaintiffs’ rights.”

(Emphasis supplied.) The jury awarded appellee \$50,000 compensatory and \$25,000 punitive damages. The judgment was reversed solely on the quantum of damages, the Appellate Division sustaining the finding of liability for both compensatory and exemplary damages. The Appellate Division’s conclusion was that the award of damages was excessive, and it criticized the admission of certain evidence as improperly tending to cause the jury to return inflated damages. In subsequent proceedings before the trial court on assessment of damages, a jury was waived by stipulation of the parties, the case proceeded to reassessment of damages, and the judge fixed the amount of damages at \$30,000, compensatory only. Judgment thereupon was affirmed by the Court of Appeals. It is this judgment that is before us -- namely, jury findings of liability based on instructions covering both exemplary and compensatory damages, and an award stated to be for compensatory damages alone.⁷

The Court refers only to that part of the instructions as to exemplary damages which speaks in terms of the “failure to make a reasonable investigation,” and condemns it as permitting a verdict based solely on “negligent misstatement.” I respectfully submit

⁷ There is no indication in the record that the court’s award was intended to set aside or otherwise nullify the jury’s finding under the punitive damage restrictions.

that the instruction cannot fairly be so read. The instruction requires the jury to find both that (1) defendant “falsely connected” plaintiffs with the play, and (2) did so knowingly, or through failure to make a reasonable investigation. This is certainly a charge satisfying the Court’s requirement that “a verdict of liability could be predicated only on a finding of knowing or reckless falsity in the publication of the Life article.” An error in the course of investigation might be mere negligent misstatement. Failure to make a reasonable investigation is something else. The standard of a “reasonable investigation” is certainly a minimum yardstick by which to measure the liability of publishers. It is certainly not incompatible with the full flavor of the First Amendment, and disregard of this standard in the circumstances is recklessness. It might well be that what constitutes an adequate basis for a jury finding of failure to make a reasonable investigation would differ, for example, in the case of a daily newspaper as compared with a feature magazine. But here, no such problem arises. The truth was in a folder on the desk of the author of the story. It was deliberately disregarded by his editor. Lead time on the story was three months.⁸

In addition, however, even if appellee had to rely only upon the instructions to the jury on compensatory damages, I do not agree that we should set aside the jury verdict and reverse the New York Court of Appeals. Such drastic action -- the reversal of a jury verdict by this remote Court -- is justified by the Court on the ground that the standard of liability on which the jury was instructed contravenes the First Amendment. But a jury instruction is not abracadabra. It is not a magical incantation, the slightest deviation from which will break the spell. Only its poorer examples are formalistic codes recited by a trial judge to please appellate masters. At its best, it is simple, rugged communication from a trial judge to a jury of ordinary people, entitled to be appraised in terms of its net effect. Instructions are to be viewed in this common sense perspective, and not through the remote and distorting knothole of a distant appellate fence. Read in this perspective, the core of the instructions here on compensatory damages -- even if we disregard the fact that the jury found liability under the more exacting instructions relating to exemplary damages -- was sufficient to meet the majority’s test. The gravamen of the court’s charge, repeated three times in virtually the same words, was the following:

“It is for you to determine whether, in publishing the article, the defendant Time, Incorporated, altered or changed the true facts concerning plaintiffs’ relationship to The Desperate Hours, so that the article, as published, constituted substantially fiction or a fictionalized version for trade purposes. . . .”

(Emphasis supplied.) The jury was also instructed that

⁸ The majority seek to avoid the impact of the instruction’s reference to the necessity of finding “a reckless or wanton disregard of the plaintiffs’ rights” by speculating that this referred only to failure to obtain consent, and not to falsity. Not only is there no basis for this speculation, but the placing of this part of the instruction -- immediately after the discussion of falsity -- suggests that the contrary is true.

“Before the plaintiffs can be entitled to a verdict . . . , you must find that the statements concerning the plaintiffs in the article constituted fiction, as compared with news, or matters which were newsworthy.”

(Emphasis supplied.) With all respect, I submit that this is close enough to this Court’s insistence upon “knowing or reckless falsity” as to render a reversal arbitrary and unjustified. If the defendant altered or changed the true facts so that the article as published was a fictionalized version, this, in my judgment, was a knowing or reckless falsity. “Alteration” or “change” denotes a positive act -- not a negligent or inadvertent happening. “Fictionalization” and “fiction,” to the ordinary mind, mean so departing from fact and reality as to be deliberately divorced from the fact -- not merely in detail, but in general and pervasive impact.⁹

The English language is not so esoteric as to permit serious consequences to turn upon a supposed difference between the instructions to the jury and this Court’s formulation. Nor is the First Amendment in such delicate health that it requires or permits this kind of surgery, the net effect of which is not only an individual injustice, but an encouragement to recklessness and careless readiness to ride roughshod over the interests of others.

The courts may not and must not permit either public or private action that censors or inhibits the press. But part of this responsibility is to preserve values and procedures which assure the ordinary citizen that the press is not above the reach of the law -- that its special prerogatives, granted because of its special and vital functions, are reasonably equated with its needs in the performance of these functions. For this Court totally to immunize the press -- whether forthrightly or by subtle indirection -- in areas

⁹ The court’s charge and the New York cases emphasize this definition. The most important recent case is *Spahn v. Messner, Inc.*, 18 N.Y.2d 324, 221 N.E.2d 543 (1966). In *Spahn*, the Supreme Court of New York observed:

“While untrue statements do not necessarily transform a book into the category of fiction, the all-pervasive distortions, inaccuracies, invented dialogue, and the narration of happenings out of context, clearly indicate, at the very best, a careless disregard for the responsibility of the press and within the context of this action, an abuse of the public’s limited privilege to inquire into an individual’s life.”

43 Misc.2d 219, 230, 250 N.Y.S.2d 529, 541 (1964). Affirming, the Appellate Division (per Breitel, J.) observed that the book in question had been “fictionalized, concededly, in order to make it suitable for a juvenile readership,” and the publishers “made no effort, and had no intention, to follow the facts concerning plaintiff’s life except in broad outline.” 23 App.Div.2d 216, 219, 260 N.Y.S.2d 451, 454 (1st Dept.1965). The Appellate Division surveyed the earlier New York cases, including the present *Hill* case, and concluded they were all based on the

“distinction between an intentionally fictionalized treatment and a straight factual treatment (subject to inadvertent or superficial inaccuracies). . . .”

Id. at 220, 260 N.Y.S.2d at 454. (Emphasis supplied.)

far beyond the needs of news, comment on public persons and events, discussion of public issues and the like would be no service to freedom of the press, but an invitation to public hostility to that freedom. This Court cannot and should not refuse to permit, under state law, the private citizen who is aggrieved by the type of assault which we have here, and which is not within the specially protected core of the First Amendment, to recover compensatory damages for recklessly inflicted invasion of his rights.

Accordingly, I would affirm.

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XVII. WHO IS ALEXANDER HAMILTON?

People v. Croswell

3 Johns. Cas. 337 N.Y. 1804

An indictment was found against the defendant on a libel, at the general sessions of the peace in Columbia county, which was removed, by certiorari, into this court, in January term, 1803, and the issue of traverse thereon was tried, at the Columbia circuit, in July, 1803, before Mr. Chief Justice Lewis.

The indictment was as follows, to wit: “At a court of general sessions of the peace, holden, &c. It is represented that Harry Croswell, late of the city of Hudson, in the county of Columbia aforesaid, printer, being a malicious and seditious man, of a depraved mind and wicked and diabolical disposition, and also deceitfully, wickedly, and maliciously devising, contriving and intending, Thomas Jefferson, Esq., President of the United States of America, to detract from, scandalize, traduce, vilify, and to represent him, the said Thomas Jefferson, as unworthy the confidence, respect, and attachment of the people of the said United States, and to alienate and withdraw from the said Thomas Jefferson, Esq., President as aforesaid, the obedience, fidelity, and allegiance of the citizens of the state of New York, and also of the said United States; and wickedly and seditiously to disturb the peace and tranquility, as well of the people of the state of New York, as of the United States; and also to bring the said Thomas Jefferson, Esq., (as much as in him the said Harry Croswell lay) into great hatred, contempt, and disgrace, not only with the people of the state of New York, and the said people of the United States, but also with the citizens and subjects of other nations; and for that purpose the said Harry Croswell did, on the ninth day of September, in the year of our Lord one thousand eight hundred and two, with force and arms, at the said city of Hudson, in the said county of Columbia, wickedly, maliciously, and seditiously, print and publish, and cause and procure to be printed and published, a certain scandalous, malicious, and seditious libel, in a certain paper or publication, entitled ‘The Wasp;’ containing therein, among other things, certain scandalous, malicious, inflammatory, and seditious matters, of and concerning the said Thomas Jefferson, Esq., then and yet being President of the United States of America, that is to say, in one part thereof, according to the tenor and effect following, that is to say: Jefferson (the said Thomas Jefferson, Esq., meaning,) paid Callender (meaning one James Thompson Callender) for calling Washington (meaning George Washington, Esq., deceased, late President of the said United States,) a traitor, a robber, and a perjurer; for calling Adams (meaning John Adams, Esq., late President of the said United States,) a hoary-headed incendiary, and for most grossly slandering the private characters of men who he (meaning the said Thomas Jefferson) well knew to be virtuous; to the great scandal and infamy of the said Thomas Jefferson, Esq., President of the said United States, in contempt of the people of the said state of New York, in open violation of the laws of the said state, to the evil example of all others in like case

offending, and against the peace of the people of the state of New York, and their dignity.”

The defendant applied to the judge, at the circuit, to put off the trial of the cause, on affidavit, which stated that James Thompson Callender, of the state of Virginia, was a material witness for the defendant, without the benefit of whose testimony the defendant could not, as he was advised, safely proceed to the trial of the cause; that the defendant expected to be able to prove, by the said witness, the truth of the charge set forth in the indictment, so far forth as this; that the said James Thompson Callender was the writer of a certain pamphlet called “The Prospect before us,” and that he caused the same to be printed, which pamphlet contains the charges against Washington and Adams, as in the publication set forth in the indictment, &c., &c., and that Mr. Jefferson, well knowing the contents of the said publication, paid, or caused to be paid, to the said J. T. Callender, two several sums of 50 dollars each, one of which was prior to the publication of the said pamphlet, and the other subsequent to the publication thereof, as a reward, thereby showing his approbation thereof, &c., &c. That it had been wholly out of the power of the defendant to procure the voluntary attendance of the said Callender, at that court, though he had, at the last general sessions of the peace, and since, until a few days past, good reason to believe, that he would attend, as a witness, at the then court; and that the defendant expected to be able to procure the voluntary attendance of the said Callender at the next circuit court, to be held in the said county, &c., unless the court would grant a commission to examine the said Callender, upon the application of the defendant, which he intended to make, at the next term of the court, for that purpose.

The Chief Justice refused to put off the trial, on this affidavit. It was proved, on the part of the public prosecutor, that the defendant was editor of a newspaper entitled “The Wasp,” a series of which were printed and published in the city of Hudson. In one of them (number 7,) was contained a piece, from which was extracted the matter charged in the indictment, as the libel, the whole of which piece was read by the prosecutor, in the following words: “Holt says, the burden of the federal song is, that Mr. Jefferson paid Callender for writing against the late administration. This is wholly false. The charge is explicitly this: Jefferson paid Callender for calling Washington a traitor, a robber and a perjurer; for calling Adams a hoary-headed incendiary; and for most grossly slandering the private characters of men whom he well knew were virtuous. These charges, not a democratic editor has yet dared, or ever will dare, to meet in an open and manly discussion.” It was further proved, on the part of the prosecutor, that a file of The Wasp, from number 1 to number 12, inclusive, was purchased at the office where they had been printed; from number 1 to number 5 had been sold by the defendant, and the residue by one of the journeymen in his office. The prosecutor then called a witness, to prove the truth of the innuendoes; to this the counsel for the defendant objected; but the Chief Justice overruled the objection. The witness was examined and testified, that he understood the epithets Jefferson, Washington and Adams, mentioned in the alleged libel, to be as stated in the innuendoes in the indictment, and that he had seen similar charges,

in other papers, previous to the publication in *The Wasp*; which was one of the reasons which induced his opinion, that the innuendoes were correct.

The prosecutor having rested on this evidence, the defendant offered to prove, that he had no agency in devising, writing, or inditing the publication in question, and that the same was handed to be printed to a person in his employ, and in his absence, without his knowledge. To the introduction of this testimony, the prosecutor objected, and the Chief Justice refused to receive the same, unless the defendant meant also to prove, that he was not privy to the printing and publication of the alleged libel. This the defendant's counsel did not offer to prove. The defendant's counsel proceeded to sum up the evidence, and read a paragraph in *The Bee*, a newspaper printed in Hudson by Holt, the person in the alleged libellous piece mentioned, to show that he declared the burden of the federal song to be such, as mentioned in the libel. Though this had not been previously proved or read in evidence, it was not objected to. In the course of the summing up, on the part of the prosecution, the Attorney-General offered to read certain passages, from number 7 of "*The Wasp*," and the prospectus contained in the first number, which had not before been shown, or pointed out to the defendant's counsel, or read in evidence. To this, objections were made, but the Chief Justice decided that the prosecutor had a right to read such passages, from such numbers of *The Wasp*, as he thought fit. The Attorney-General accordingly read, in order to show the intent of the defendant in publishing the alleged libel to be such as charged in the indictment, from number 1 of *The Wasp*, the prospectus, and another piece from number 7, in neither of which passages was there anything alleged against Thomas Jefferson, in his private or official capacity. The Attorney-General further stated, that from an examination of every number of *The Wasp*, it would be manifest, that the intent of the defendant was malicious.

The judge charged the jury, among other things, that the rule of law which confined jurors to the consideration of facts alone, was strictly applicable to the case of libels, where the question of libel or no libel was an inference of law from the fact; and that it was, perhaps, the only case in which courts invariably regarded a general as a special verdict; and where they would, *ex mero motu*, arrest the judgment, if the law was with the defendant.

His honor then read to the jury the opinion of Lord Mansfield, in the case of *The Dean of St. Asaph*, (as reported in a note in 3 Term Rep. 428,) and charged them, that the law therein laid down was the law of this state; that it was no part of the province of a jury to inquire or decide on the intent of the defendant; or whether the publication in question was true, or false, or malicious; that the only questions for their consideration and decision were, first, whether the defendant was the publisher of the piece charged in the indictment; and, second, as to the truth of the innuendoes; that if they were satisfied as to these two points, it was their duty to find him guilty; that the intent of the publisher, and whether the publication in question was libellous or not, was, upon the return of the

postea, to be decided exclusively by the court, and, therefore, it was not his duty to give any opinion to them, on these points; and accordingly no opinion was given.

A motion was made, in behalf of the defendant, for a new trial, on the following grounds:

1. Because the trial ought to have been put off, in order to give an opportunity to the defendant to procure the testimony in the affidavit mentioned.
2. That the piece alleged to be libellous, and which was read in evidence, from number 7 of The Wasp, is materially and substantially different from that charged in the indictment, and the piece so read is not libellous.
3. For the misdirection of the judge, in his charge to the jury, that in cases of libel, they were not the judges of law and fact; that in case of libel only, could a court set aside a general verdict of guilty; that the law laid down in the case of The Dean of St. Asaph, is the law of this state; that the intent was simply a question of law, and, therefore, not to be left to the jury, but to be decided exclusively by the court on the return of the postea; and that whether the piece in question was libellous or not, was not to be decided by the jury; and because the judge did not, as he ought to have done, give his opinion to the jury, on the point last mentioned.

.....

The following is a brief summary of the argument of [Alexander] Hamilton, in reply.

He said, that the two great questions that arose in the cause were: 1. Can the truth be given in evidence? 2. Are the jury to judge of the intent and the law? The first point might be more embarrassing, but the second was clear.

The liberty of the press consisted in publishing with impunity, truth with good motives, and for justifiable ends, whether it related to men or to measures. To discuss measures without reference to men, was impracticable. Why examine measures, but to prove them bad, and to point out their pernicious authors, so that the people might correct the evil by removing the men? There was no other way to preserve liberty, and bring down a tyrannical faction. If this right was not permitted to exist in vigor and in exercise, good men would become silent; corruption and tyranny would go on, step by step, in usurpation, until at last, nothing that was worth speaking, or writing, or acting for, would be left in our country.

But he did not mean to be understood as being the advocate of a press wholly without control. He reprobated the novel, the visionary, the pestilential doctrine of an unchecked press, and ill fated would be our country, if this doctrine was to prevail. It

would encourage vice, compel the virtuous to retire, destroy confidence, and confound the innocent with the guilty. Single drops of water constantly falling may wear out adamant. The best character of our country, he to whom it was most indebted, and who is now removed beyond the reach of calumny, felt its corrosive effects. No, he did not contend for this terrible liberty of the press, but he contended for the right of publishing truth, with good motives, although the censure might light upon the government, magistrates, or individuals.

The check upon the press ought to be deposited, not in a permanent body of magistrates, as the court, but in an occasional and fluctuating body, the jury, who are to be selected by lot. Judges might be tempted to enter into the views of government, and to extend, by arbitrary constructions, the law of libels. In the theory of our government, the executive and legislative departments are operated upon by one influence, and act in one course, by means of popular election. How, then, are our judges to be independent? How can they withstand the combined force and spirit of the other departments? The judicial is less independent here than in England, and, of course, we have more reason, and stronger necessity, to cling to the trial by jury, as our greatest safety.

Men are not to be implicitly trusted, in elevated stations. The experience of mankind teaches us, that persons have often arrived at power by means of flattery and hypocrisy; but instead of continuing humble lovers of the people, have changed into their most deadly persecutors.

Lord Camden said, that he had not been able to find a satisfactory definition of a libel. He would venture, however, but with much diffidence, after the embarrassment which that great man had discovered, to submit to the court the following definition. A libel is a censorious or ridiculing writing, picture or sign, made with a mischievous and malicious intent towards government, magistrates or individuals. According to Blackstone, it is a malicious defamation made public, with intent to provoke or expose to public hatred and ridicule. The malice and intent enter into the essence of the crime, and must be proved, and are, accordingly, to be left to the jury, as parcel of the fact. The definition of Lord Coke does not oppose this result. He speaks of a libel, as having a tendency to break the peace. This, also, is a fact to be proved to the jury, for the tendency depends upon time, manner, circumstance, and must of necessity be a question of fact.

Texts taken from the holy scriptures and scattered among the people, may, in certain times, and under certain circumstances, become libellous, nay, treasonable. These texts are, then, innocent, libellous, or treasonable, according to the time and intent; and surely the time, manner, and intent are matters of fact for a jury. It is the intent that constitutes the crime. This is a fundamental principle of jurisprudence. . . . Whether crime or not, will always depend upon intent, tendency, quality, manner, &c., and these must be matters of fact for the jury. The law cannot adjudge a paper to be a libel, until a jury have found the circumstances connected with the publication.

But it is not only the province of the jury, in all criminal cases, to judge of the intent with which the act was done, as being parcel of the fact; they are also authorized to judge of the law as connected with the fact. In civil cases, the court are the exclusive judges of the law, and this arose from the nature of pleadings in civil suits; for anciently, matters of law arising in the defence, were required to be spread upon the record, by a special plea, and the jury were liable to an attain for finding a verdict contrary to law. But in criminal cases, the law and fact are necessarily blended by the general issue, and a general verdict was always final and conclusive, both upon the law and the fact. Nor were the jury ever exposed to an attain for a verdict in a criminal case; and this is decisive to prove that they had a concurrent jurisdiction with the court on questions of law; for where the law allows an act to be valid or definitive, it presupposes a legal and rightful authority to do it. This is a sure and infallible test of a legal power.

In England trial by jury has always been cherished, as the great security of the subject against the oppression of government; but it never could have been a solid refuge and security, unless the jury had the right to judge of the intent, and the law.

The jury ought undoubtedly to pay every respectful regard to the opinion of the court; but suppose a trial in a capital case, and the jury are satisfied from the arguments of counsel, the law authorities that are read, and their own judgment, upon the application of the law to the facts, (for the criminal law consists in general of plain principles,) that the law arising in the case is different from that which the court advances, are they not bound by their oaths, by their duty to their creator and themselves, to pronounce according to their own convictions? To oblige them, in such a case, to follow implicitly the direction of the court, is to make them commit perjury, and homicide, under the forms of law.

The case of the Seven Bishops, and Fuller's and Tuchin's Cases, are a series of precedents in favor of the right of the jury. The opposite precedents begin with Lord Raymond, but they have not been uniform nor undisputed. It has been constantly a floating and litigious question in Westminster Hall. A series of precedents only can form law. There can be no embarrassment in the court; they are at liberty to examine the question upon principles. The English declaratory act recites that doubts had existed, and being declaratory, it is evidence of the sense of the nation. The Marquis of Lansdowne observed, in the house of lords, that the same declaratory bill had been brought in twenty years before, and was then deemed unnecessary.

The question how far the truth is to be given in evidence, depends much on the question of intent; for if the intent be a subject of inquiry for the jury, the giving the truth in evidence is requisite as a means to determine the intent. Truth is a material ingredient in the evidence of intent. In the whole system of law there is no other case in which the truth cannot be shown; and this is sufficient to prove the proposition, which denies it in the present case, to be a paradox.

The Roman law permitted the truth to justify a libel. The ancient English statutes prove also, that in the root and origin of our law, falsity was an ingredient in the crime, and those statutes were declaratory of the common law. The ancient records and precedents prove the same thing, and they are the most authoritative evidence of the ancient law. In the celebrated case of the Seven Bishops, the court permitted the defendants to prove the truth of the facts stated in the petition. That case is also very important, in various views. It establishes the necessity of inquiring into the circumstances and intent of the act. It was an instance of a firm and successful effort to recall the principles of the common law, and was an important link in the chain of events that led on to the glorious era of their revolution.

In Fuller's Case, Lord Holt allowed the defendant to go into proof of the truth of the charge. But while, he said, he advocated the admission of the truth, he subscribed to the doctrine of *Want's Case*, in *Moore*, that the truth ought only to be given in evidence, to determine *quo animo* the act was done. It ought not to be a justification in every case, for it may be published maliciously. It may be abused, to the gratification of the worst of passions, as in the promulgation of a man's personal defects or deformity.

The court of Star Chamber was the polluted source from whence the prosecutor's doctrine was derived. That is not the court from which we are to expect principles and precedents friendly to freedom. It was a most arbitrary, tyrannical and hated tribunal, under the control of a permanent body of magistrates, without the wholesome restraints of a jury. The Whigs in England, after the revolution, in order to prop up their power, adopted, as in *Franklin's Case*, the arbitrary maxims of that court which had been reprobated at the revolution; and this ought to serve as a monitory lesson to rulers at the present day, for such is the nature, progress and effect of the human passions.

The right of giving the truth in evidence, in cases of libels, is all-important to the liberties of the people. Truth is an ingredient in the eternal order of things, in judging of the quality of acts. He hoped to see the axiom, that truth was admissible, recognized by our legislative and judicial bodies. He always had a profound reverence for this doctrine, and he felt a proud elevation of sentiment in reflecting, that the act of congress, which had been the object of so much unmerited abuse, and had been most grossly misrepresented by designing men, established this great vital principle. It was an honorable, a worthy and glorious effort in favor of public liberty. He reflected also, with much pleasure, on the fact, that so illustrious a patriot as Mr. Jay had laid down, correctly and broadly, the power of the jury. These acts were monuments, were consoling vestiges of the wisdom and virtue of the administration and character that produced them.

He maintained that the common law applied to the United States. That the common law was principally the application of natural law to the state and condition of society.

That the constitution of the United States used terms and ideas which had a reference to the common law, and were inexplicable without its aid. That the definition of treason, of the writ of habeas corpus, of crimes and misdemeanors, &c., were all to be expounded by the rules of the common law. That the constitution would be frittered away or borne down by factions, (the evil genii, the pest of republics,) if the common law was not applicable. That without this guide, any political tenet or indiscretion might be made a crime or pretext to impeach, convict and remove from office the judges of the federal courts. That if we departed from common law principles, we would degenerate into anarchy, and become the sport of the fury of conflicting passions. The transition from anarchy was to despotism, to an armed master.

The real danger to our liberties was not from a few provisional troops. The road to tyranny will be opened by making dependent judges, by packing juries, by stifling the press, by silencing leaders and patriots. His apprehensions were not from single acts of open violence. Murder rouses to vengeance; it awakens sympathy, and spreads alarm. But the most dangerous, the most sure, the most fatal of tyrannies, was by selecting and sacrificing single individuals, under the mask and forms of law, by dependent and partial tribunals. Against such measures we ought to keep a vigilant eye, and take a manly stand. Whenever they arise, we ought to resist, and resist, till we have hurled the demagogues and tyrants from their imagined thrones. He concurred most readily with the learned counsel opposed to him, in the opinion that the English were a free, a gloriously free people. That country is free where the people have a representation in the government, so that no law can pass without their consent; and where they are secured in the administration of justice, by the trial by jury. We have gone further in this country into the popular principle, and he cordially united his prayers with the opposite counsel, that the experiment with us might be successful.

The question on the present libel ought to be again tried. It concerns the reputation of Mr. Jefferson. It concerned deeply the honor of our country. It concerned the fame of that bright and excellent character General Washington, in which he had left a national legacy of inestimable value.

He concluded, by recapitulating the substance of the doctrine for which he contended, in the following words:

- “1. The liberty of the press consists in the right to publish, with impunity, truth, with good motives, for justifiable ends, though reflecting on government, magistracy, or individuals.
- “2. That the allowance of this right is essential to the preservation of a free government; the disallowance of it fatal.
- “3. That its abuse is to be guarded against by subjecting the exercise of it to the animadversion and control of the tribunals of justice; but that this control

cannot safely be intrusted to a permanent body of magistracy, and requires the effectual co-operation of court and jury.

“4. That to confine the jury to the mere question of publication, and the application of terms, without the right of inquiry into the intent or tendency, reserving to the court the exclusive right of pronouncing upon the construction, tendency, and intent of the alleged libel, is calculated to render nugatory the function of the jury; enabling the court to make a libel of any writing whatsoever, the most innocent or commendable.

“5. That it is the general rule of criminal law, that the intent constitutes the crime; and that it is equally a general rule, that the intent, mind, or quo animo, is an inference of fact to be drawn by the jury.

“6. That if there are exceptions to this rule, they are confined to cases in which not only the principal fact, but its circumstances, can be, and are, specifically defined by statute or judicial precedent.

“7. That, in respect to libel, there is no such specific and precise definition of facts and circumstances to be found; that, consequently, it is difficult, if not impossible, to pronounce that any writing is per se, and exclusive of all circumstances, libellous; that its libellous character must depend on intent and tendency; the one and the other being matter of fact.

“8. That the definitions or descriptions of libels to be met with in the books, founded them upon some malicious or mischievous intent or tendency, to expose individuals to hatred or contempt, or to occasion a disturbance or a breach of the peace.

“9. That in determining the character of a libel, the truth or falsehood is, in the nature of things, a material ingredient, though the truth may not always be decisive; but being abused may still admit of a malicious and mischievous intent, which may constitute a libel.

“10. That, in the Roman law, one source of the doctrine of a libel, the truth, in cases interesting to the public, was given in evidence; that the ancient statutes, probably declaratory of the common law, make the falsehood an ingredient of the crime; that the ancient precedents in the courts of justice correspond, and that the precedents to this day charge a malicious intent.

“11. That the doctrine of excluding the truth, as immaterial, originated in a tyrannical and polluted source, in the court of Star Chamber; and though it prevailed a considerable length of time, yet there are leading precedents down to the revolution, and ever since, in which a contrary practice prevailed.

“12. That the doctrine being against reason and natural justice, and contrary to the original principles of the common law, enforced by statutory provisions, the precedents which support it deserve to be considered in no better light than as a *malus usus*, which ought to be abolished.

“13. That, in the general distribution of power, in any system of jurisprudence, the cognizance of law belongs to the court, of fact to the jury; that as often as they are not blended, the power of the court is absolute and exclusive. That, in civil cases, it is always so, and may rightfully be so exerted. That, in criminal cases, the law and fact being always blended, the jury, for reasons of a political and peculiar nature, for the security of life and liberty, are intrusted with the power of deciding both law and fact.”

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The following are the opinions of Kent, J., and Lewis, Ch. J., as prepared, and intended to have been delivered by them.

Kent, J. The defendant was convicted, at the last circuit court in Columbia county, of printing and publishing a scandalous, malicious and seditious libel upon Thomas Jefferson, the President of the United States. . . .

1. The criminality of the charge in the indictment consisted in a malicious and seditious intention. (Hawk. tit. Libel, s. 1. 2 Wils. 403. 1 Esp. Cas. 228.) There can be no crime without an evil mind. . . . The simple act of publication, which was all that was left to the jury, in the present case, was not, in itself, criminal. It is the applications to times, persons and circumstances; it is the particular intent and tendency that constitutes the libel. Opinions and acts may be innocent under one set of circumstances, and criminal under another. This application to circumstances, and this particular intent, are as much matters of fact, as the printing and publishing. (Winne’s *Eunomus*, dial. 3, s. 53.) Where an act, innocent in itself, becomes criminal, when done with a particular intent, that intent is the material fact to constitute the crime. (Lord Mansfield, 3 Term Rep. 429, in the note.) And I think there cannot be a doubt, that the mere publication of a paper is not, per se, criminal; for otherwise, the copying of the indictment by the clerk, or writing a friendly and admonitory letter to a father, on the vices of his son, would be criminal. The intention of the publisher, and every circumstance attending the act, must therefore be cognizable by the jury, as questions of fact. And if they are satisfied that the publication is innocent; that it has no mischievous or evil tendency; that the mind of the writer was not in fault; that the publication was inadvertent, or from any other cause was no libel, how can they conscientiously pronounce the defendant guilty, from the mere fact of publication? A verdict of guilty, embraces the whole charge upon the record, and are the jury not permitted to take into consideration the only thing that constitutes the crime, which is the malicious intent? According to the doctrine laid down at the trial, all that results from a verdict of guilty is, that the defendant has published a certain paper, and

that it applies to certain persons, according to the innuendoes; but whether the paper be lawful or unlawful; whether it be criminal, or innocent, or meritorious; whether the intent was wicked or virtuous, are matters of law which do not belong to the jury, but are reserved for the determination of the court. . . .

To deny to the jury the right of judging of the intent and tendency of the act, is to take away the substance, and with it the value and security of this mode of trial. It is to transfer the exclusive cognizance of crimes from the jury to the court, and to give the judges the absolute control of the press. There is nothing peculiar in the law of libels, to withdraw it from the jurisdiction of the jury. The twelve judges, in their opinion to the house of lords, (April, 1792,) admitted that the general criminal law of England was the law of libel. And by the general criminal law of England, the office of the jury is judicial. “They only are the judges,” as Lord Somers observes, (Essay on the Power and Duty of Grand Juries, p. 7,) “from whose sentence the indicted are to expect life or death. Upon their integrity and understanding, the lives of all that are brought into judgment do ultimately depend. From their verdict there lies no appeal. They resolve both law and fact, and this has always been their custom and practice.”

If the criminal intent be in this case an inference of law, the right of the jury is still the same. In every criminal case, upon the plea of not guilty, the jury may, and indeed they must, unless they choose to find a special verdict, take upon themselves the decision of the law, as well as the fact, and bring in a verdict as comprehensive as the issue; because, in every such case, they are charged with the deliverance of the defendant from the crime of which he is accused. The indictment not only sets forth the particular fact committed, but it specifies the nature of the crime. Treasons are laid to be done traitorously, felonies feloniously, and public libels to be published seditiously. . . . So in the case of a public libeller, the jury are to try, not only whether he published such a writing, but whether he published it seditiously. In all these cases, from the nature of the issue, the jury are to try not only the fact, but the crime, and in doing so they must judge of the intent, in order to determine whether the charge be true, as set forth in the indictment. (Dagge on Criminal Law, b. 1, c. 11, s. 2.) The law and fact are so involved, that the jury are under an indispensable necessity to decide both, unless they separate them by a special verdict.

This right in the jury to determine the law as well as the fact has received the sanction of some of the highest authorities in the law. . . .

To meet and resist directly this stream of authority, is impossible. But while the power of the jury is admitted, it is denied that they can rightfully or lawfully exercise it, without compromising their consciences, and that they are bound implicitly, in all cases, to receive the law from the court. The law must, however, have intended, in granting this power to a jury, to grant them a lawful and rightful power, or it would have provided a remedy against the undue exercise of it. The true criterion of a legal power is its capacity

to produce a definitive effect liable neither to censure nor review. And the verdict of not guilty, in a criminal case, is, in every respect, absolutely final. . . .

The first case I have met with, in which the question arose between the jurisdiction of the court and jury, was upon the trial of Lilburne for high treason, in 1549. (2 St. Tr. 69, 81, 82.) He insisted, in coarse but intelligible language, that the jury were judges of law and fact, but the court, in language equally rude, denied it. He insisted upon the privilege of reading law to the jury, but the court refused it. The jury, however, acquitted him, and they declared that they took themselves to be judges of the law as well as of the fact, notwithstanding the court had said otherwise. Bushell's Case followed soon after, and it is in every view important. (Vaughan, 132. Sir T. Jones, 13.) He was one of the jurors, on the trial of an indictment for a misdemeanor, before the court of oyer and terminer in London, and was fined and committed, because he and the other jurors acquitted the defendant against full proof, and against the direction of the court, in matter of law. He was brought into the court of C. B. upon habeas corpus and discharged; and Lord Ch. J. Vaughan delivered, upon that occasion, in behalf of the court, a learned and profound argument in favor of the rights of the jury. He admitted that where the law and fact were distinct, the provinces of the court and jury were exclusive of each other, so that if it be demanded what is a fact, the judge cannot answer it, and if what is the law, the jury cannot answer it. But that upon all general issues, where the jury find a general verdict, they resolve both law and fact completely, and not the fact by itself.

Upon the trial of Algernon Sidney, (3 St. Tr. 817,) the question did not distinctly arise, but Lord Ch. J. Jeffries, in his charge to the jury, told them it was the duty of the court to declare the law to the jury, and the jury were bound to receive their declaration of the law. They did, in that case, unfortunately, receive the law from the court, and convicted the prisoner, but his attainder was afterwards reversed by parliament; and the law, as laid down on that trial, was denied and reprobated, and the violence of the judge, and the severity of the jury, held up to the reproach and detestation of posterity. The case of the Seven Bishops (4 St. Tr.) is a precedent of a more consoling kind; it was an auspicious and memorable instance of the exercise of the right of the jury to determine both the law and the fact. I shall have occasion to notice this case hereafter, and shall only observe for the present, that the counsel on the trial went at large into the consideration of the law, the intent and the fact; and although the judges differed in opinion, as to what constituted a libel, they all gave their opinions in the style of advice, not of direction, and expressly referred the law and the fact to the jury. Mr. J. Holloway, in particular, observed, that whether libel or not, depended upon the ill intent, and concluded by telling the jury, it was left to them to determine.

In the case of Tuchin, (5 St. Tr. 542,) who was tried for a libel before Ch. J. Holt, in 1704, the judge, in his charge to the jury, expressly submitted to them the whole question on the libel. After reasoning on the libellous nature of the publication, he

observes that now they are to consider whether the words he had read to them, did not tend to beget an ill opinion of the administration of the government.

The weight of the decisions thus far, was clearly in favor of the right of the jury to decide generally upon the law and the fact. But, since the time of Lord Holt, the question before us has been an unsettled and litigious one in Westminster Hall. Lord Mansfield was of opinion (3 Term Rep. 429) that the formal direction of every judge, since the revolution, had been agreeable to that given in the case of the Dean of St. Asaph; but the earliest case he mentions is that of Franklin, before Lord Raymond, in 1751; (9 St. Tr. 255,) and that has been considered as the formal introduction of the doctrine now under review. The charge of Sir John Holt, in Tuchin's Case, appears to me to be decidedly to the contrary; and in another case before Holt, (11 Mod. 86, Queen v. Brown,) the attorney-general admitted that the jury were the judges quo animo the libel was made. The new doctrine, as laid down in the present case, may, therefore, be referred to the case of Franklin. But in Oneby's Case, (2 Ld. Raym. 1485; 2 Str. 766,) who was tried a few years before, for murder, Lord Raymond and the court of K. B. advanced a general doctrine, which may perhaps be supposed to curtail the power of the jury as much as the decision in the case before us. He said, that all the judges agreed in the proposition, that the court were the judges of the malice, and not the jury; that upon the trial the judge directs the jury, as to the law arising upon the facts, and the jury may, if they think proper, give a general verdict; or if they find a special verdict, the court is to form their judgment from the facts found, whether there was malice or not; because, in special verdicts, the jury never find, in express terms, the malice, but it is left to be drawn by the court.

The case to which this opinion applied, was that of a special verdict, and taking it together, I see nothing in it inconsistent with my view of the subject. . . .

. . . To say that the jury cannot rightfully judge of the malus animus of the prisoner, in which his crime consists, is, in my opinion, a monstrous proposition, destructive of the essence and excellence of trial by jury, and inconsistent with the genius of the English judiciary, as drawn from its history and constitutional policy.

To return to the case of Franklin; the counsel for the defendant, who were very able lawyers, contended that the jury had a right to judge of the intent and tendency of the publication; but Lord Raymond, in his direction to the jury, went the whole length of the charge in the present case. He told the jury that there were two things only for their consideration; 1st. Whether the defendant was guilty of publishing; and, 2d. Whether the innuendoes were justly stated and applied, and that the third question, whether the publication was libellous, belonged exclusively to the court as matter of law. The same doctrine was laid down by Ch. J. Lee, in the case of Owen; (10 St. Tr. Appendix, 196,) by Sir Dudley Ryder, in the case of Nutt; and by Lord Mansfield, in the cases of Shebbeare, Woodfall and others. (5 Burr. 2661. 3 Term Rep. 430.) It is to be observed, however, that in none of these cases did the counsel for the defendants renounce what they conceived to

be the privilege of the defendants, and the right of the jury. Lord Camden was counsel for the defendants, in the cases of Owen and Shebbeare, and he claimed and exercised the right of addressing the jury, on the whole matter of the libel. (Parliamentary Senator, vol. 5, p. 822.) In the case of Woodfall, the defendant's counsel likewise pressed the jury to acquit him, on the ground that the intent was innocent, and the paper not libellous; and the counsel for the crown, on the other hand, urged to the jury the criminal intent and pernicious tendency of the paper. The same steps were followed by counsel, in the case of the Dean of St. Asaph. (3 Term Rep. 428.) This uniform practice of counsel of the first rank at the bar, is pretty strong evidence that the rule laid down in Franklin's Case was never acquiesced in, nor regarded as the settled law. But it was not the counsel only who dissented from this doctrine. Lord Camden and Lord Loughborough did, as judges, uniformly resist it, and one of them declared, that it had always been his practice, in cases of libel, to state the law as it bore on the facts, and to refer the combined consideration to the jury. (Senator, vol. 3, pp. 647, 650, 651; vol. 5, pp. 686, 822.) So Lord Mansfield departed from Lord Raymond's rule, upon the trial of John Horne. (11 St. Tr. 283.) He told the jury there were two points for them to satisfy themselves in, in order to form their verdict. 1st. Did the defendant compose and publish? 2d. Was the sense of the paper libellous, as charged? He concluded by telling them, that they would judge of the meaning of it; that it was a matter for their judgment. His lordship admits to us, in another place, (3 Term Rep. 418,) that the counsel for the crown and the judges have sometimes expatiated to the jury on the enormity of the libel, with the view to remove prejudices, and obviate captivating harangues; and this confession shows the difficulty and danger of attempting to separate the law and the fact, the publication and the intent, when the issue, the arguments of counsel, and the verdict, comprehended both.

The constant struggle of counsel and of the jury, against the rule, so emphatically laid down by Lord Raymond, the disagreement among the judges, and the dangerous tendency of the doctrine, as it affected two very conspicuous and proud monuments of English liberty, trial by jury, and the freedom of the press, at length attracted and roused the attention of the nation. The question was brought before the parliament, and debated in two successive sessions. (In 1791 and 1792, see Debates in the Senator, vols. 3, 4, 5.) There was combined, in the discussion of this dry law question, an assemblage of talents, of constitutional knowledge, of practical wisdom, and of professional erudition, rarely if ever before surpassed. It underwent a patient investigation and severe scrutiny, upon principle and precedent, and a bill declaratory of the right of the jury to give a general verdict upon the whole matter put in issue, without being required or directed to find the defendant guilty merely on the proof of publication and the truth of the innuendoes, was at length agreed to and passed with uncommon unanimity. It is entitled "An act to remove doubts respecting the functions of juries in cases of libel;" and, although I admit, that a declaratory statute is not to be received as conclusive evidence of the common law, yet it must be considered as a very respectable authority in the case; and especially, as the circumstances attending the passage of this bill, reflect the highest honor on the moderation, the good sense, and the free and independent spirit of the British parliament.

It was, no doubt, under similar impressions of the subject, that the act of congress, for punishing certain libels against the United States, (Laws U.S. vol. 4, p. 204,) enacted and declared that the jury who should try the cause, should have a right to determine the law and fact, under the direction of the court, as in other cases; and before the passing of that statute, the same doctrine was laid down in full latitude, and in explicit terms, by the supreme court of the United States. (3 Dallas, 4.)

The result, from this view, is, to my mind, a firm conviction that this court is not bound by the decisions of Lord Raymond, and his successors. By withdrawing from the jury the consideration of the essence of the charge, they render their function nugatory and contemptible. Those opinions are repugnant to the more ancient authorities which had given to the jury the power, and with it the right, to judge of the law and fact, when they were blended by the issue, and which rendered their decisions, in criminal cases, final and conclusive. The English bar steadily resisted those decisions, as usurpations on the rights of the jury. Some of the judges treated the doctrine as erroneous, and the parliament, at last, declared it an innovation, by restoring the trial by jury, in cases of libel, to that ancient vigor and independence, by which it had grown so precious to the nation as the guardian of liberty and life, against the power of the court, the vindictive persecution of the prosecutor, and the oppression of the government.

I am aware of the objection to the fitness and competency of a jury to decide upon questions of law, and especially, with a power to overrule the directions of the judge. In the first place, however, it is not likely often to happen, that the jury will resist the opinion of the court on the matter of law. That opinion will generally receive its due weight and effect; and in civil cases it can, and always ought to be, ultimately enforced by the power of setting aside the verdict. But in human institutions, the question is not, whether every evil contingency can be avoided, but what arrangement will be productive of the least inconvenience. And it appears to be most consistent with the permanent security of the subject, that in criminal cases the jury should, after receiving the advice and assistance of the judge, as to the law, take into their consideration all the circumstances of the case, and the intention with which the act was done, and to determine upon the whole, whether the act done, be, or be not, within the meaning of the law. This distribution of power, by which the court and jury mutually assist, and mutually check each other, seems to be the safest, and, consequently, the wisest, arrangement, in respect to the trial of crimes. The constructions of judges on the intention of the party may often be (with the most upright motives) too speculative and refined, and not altogether just in their application to every case. Their rules may have too technical a cast, and become, in their operation, severe and oppressive. To judge accurately of motives and intentions, does not require a master's skill in the science of law. It depends more on a knowledge of the passions, and of the springs of human action, and may be the lot of ordinary experience and sagacity.

My conclusion on this first point then, is, that upon every indictment or information for a libel, where the defendant puts himself upon the country, by a plea of not guilty, the jury have a right to judge, not only of the fact of the publication, and the truth of the innuendoes, but of the intent and tendency of the paper, and whether it be a libel or not; and, in short, of “the whole matter put in issue upon such indictment or information.” (Stat. 32 Geo. III.) That in this, as in other criminal cases, it is the duty of the court, “according to their discretion, to give their opinion and direction to the jury on the matter in issue;” and it is the duty of the jury to receive the same with respectful deference and attention, and, unless they choose to find a special verdict, they are then to exercise their own judgments on the matter in issue, with discretion and integrity.

2. The second point in the case, although a question of evidence merely, is equally important, and still more difficult. It was made a very prominent point upon the argument, and the decision of it is essential for the direction of the judge who is to preside at the new trial that may be awarded.

As a libel is a defamatory publication, made with a malicious intent, the truth or falsehood of the charge may, in many cases, be a very material and pertinent consideration with the jury, in order to ascertain that intent. There can be no doubt that it is competent for the defendant to rebut the presumption of malice, drawn from the fact of publication; and it is consonant to the general theory of evidence, and the dictates of justice, that the defendant should be allowed to avail himself of every fact and circumstance that may serve to repel that presumption. And what can be a more important circumstance than the truth of the charge, to determine the goodness of the motive in making it, if it be a charge against the competency or purity of a character in public trust, or of a candidate for public favor, or a charge of actions in which the community have an interest, and are deeply concerned? To shut out wholly the inquiry into the truth of the accusation, is to abridge essentially the means of defence. It is to weaken the arm of the defendant, and to convict him, by means of a presumption, which he might easily destroy by proof that the charge was true, and that, considering the nature of the accusation, the circumstances and time under which it was made, and the situation of the person implicated, his motive could have been no other than a pure and disinterested regard for the public welfare. At the same time, this doctrine will not go to tolerate libels upon private character or the circulation of charges for seditious and wicked ends, or to justify exposing to the public eye one’s personal defects or misfortunes. The public have no concern with, nor are they injured by such information, and the truth of the charge would rather aggravate than lessen the baseness and evil tendency of the publication. It will, therefore, still remain, in every case, a question for the jury, what was the intent and tendency of the paper, and how far the truth, in the given case, has been used for commendable, or abused for malicious purposes.

This principle in the law of libels is considered as rational and sound, in an ethical point of view; (Paley's Moral Philosophy, p. 188,) and to this extent, the writers on the civil law have allowed the truth to excuse a defamatory accusation. . . .

That falsehood is a material ingredient in a public libel, is a doctrine not without precedent in former times; it has always been asserted, and occasionally admitted, by the English courts. In this country it has taken firmer root, and in regard to the measures of government, and the character and qualifications of candidates for public trust, it is considered as the vital support of the liberty of the press.

The English decisions on the subject of libels have not been consistent in principle. The reason assigned for the punishment of libels, whether true or false, is because they tend to a breach of the peace, by inciting the libelled party to revenge, or the people to sedition. It is not the matter, but the manner, say the books, which is punishable. (1 Hawk. tit. Libel, s. 3, 6, 7. Hudson on the Star Chamber, p. 102.) This reason, however, according to some late decisions, is made to yield to stronger reasons of a public nature, although the instances given come equally within the rule, as they equally tend to defame and provoke. It is no libel to publish a true account of proceedings in parliament or courts of justice, notwithstanding the paper may be very injurious to the character of individuals or of magistrates; because those proceedings are open to all the world, and it is of vast importance to the public, that they should be generally known. (8 Term Rep. 297, 298; 1 Bos. & Pull. 226.) It was held no libel to treat with asperity the character of the officers of Greenwich hospital, where the publication was distributed only among the governors of the hospital, because they are the persons who, from their situation, are called upon to redress the grievance, and have the power to do it. (Rex v. Baillie, Mich. 20 Geo. III, by Lord Mansfield. Esp. Dig. 506.) It might be easily perceived, that according to the same doctrine, it ought not to be a libel to publish generally a true account of the character and conduct of public rulers, because it is of vast importance that their character and actions should be accurately understood, and especially by the public, to whom alone they are responsible. This rule of decision, in the different cases, varies, but the principle applies equally to each.

The doctrine that the truth of the matter charged was no defence to a public prosecution for a libel, came from the court of Star Chamber. William Hudson, who was an eminent practiser in that court, in the reign of James I., compiled, early under his successor, a very copious and learned treatise on its jurisdiction and practice. (See 2 Collectanea Juridica.) He says, that libels had in all ages been severely punished there, but especially when they began to grow frequent, about the reign of Elizabeth. This fact would lead to interesting reflection. The era here referred to, was the very time when the use of printing had grown familiar, when learning was disseminated, when civil and political rights became objects of inquiry, and, to use the words of Mr. Hume, when "symptoms had appeared of a more free and independent genius in the nation." Hudson cites upwards of twenty adjudged cases, in the Star Chamber, upon libels, and says that

there were two gross errors, which had crept into the world concerning libels, one of which was, that it was not a libel, if true, but this, he adds, had been long since expelled out of that court; and he mentions the case of *Breverton*, (Mich. 2 Jac. I.) in which that species of defence was attempted to a charge of bribery and extortion in a public trust, and was overruled. This treatise of Hudson establishes two very important facts; the one that the court of Star Chamber established the doctrine in question, and the other, that it was still the public sentiment, which he calls “a gross error in the world,” that the truth might be a defence to a libel; and this defence was attempted in that court as late as the reign of James. Mr. Barrington (*Observations on the Statutes*, 68,) has given us a part of a curious letter, written at that time by the Dean of St. Paul’s, from which we may infer his alarm and disgust at the new libel doctrines of the Star Chamber. “There be many cases,” he observes, “where a man may do his country good service, by libelling; for where a man is either too great, or his vices too general to be brought under a judiciary accusation, there is no way but this extraordinary method of accusation. Sealed letters in the Star Chamber have nowadays been judged libels.” Lord Coke has reported some of those Star Chamber decisions, on this very subject, and in one of which we find the same point resolved, that had been ruled the year before in the case of *Breverton*, (Pasch. 3 Jac. I.; 5 Co. 125.) He was, in his time, says Hudson, as well exercised in the case of libels, as all the attorneys that ever were before him; and yet it appears he was not so well disciplined in the new doctrine, but that in the case of *Lake v. Hutton*, (Hob. 252,) which afterwards arose in the Star Chamber, he insisted, that if the libel was true, the defendant might justify it. These cases and facts are sufficient to show that the doctrine in question was not considered then as the settled law; that it was regarded as an innovation, for it gave dissatisfaction, and met with opposition.

The proceedings in the star chamber were according to the course of those courts which follow the civil law. They proceeded by bill, without a jury, and compelled the party accused to answer upon oath. The decisions of that court upon libels, were probably borrowed, in a great degree, from Justinian’s code. The very definition of a libel, and the title of one of Coke’s cases, was taken from thence, and *Halliwood’s Case*, in the 43 and 44 Eliz. (5 Co. 125, 126, a.) was grounded entirely upon the severe edict of Valentinian and Valens. (Code lib. 9, tit. 36.) And yet there is good reason to believe, that in the best ages of the Roman law, it spoke a milder and more rational language; for Paulus, in the Digest, (lib. 47, tit. 10, c. 18,) holds it to be against good conscience, to condemn a man for publishing the truth; and the civilians are generally of opinion, that the truth will excuse defamation, if the charge relate to matter proper for public information. (Vinnius, *ubi supra*, *Perezii Praelec.* vol. 2, 208.)

Mr. Barrington, who is so well known to the profession as a legal antiquarian, admits (*Observations on the Statutes*, 68,) that the rule of refusing evidence of the truth of a libel, was adopted by the more modern determination of the common law courts, from the star chamber decisions. And if we recur back to the more ancient English statutes and

records, which are the highest evidence of the common law, we shall find that the falsity of the charge was always made a material ingredient in the libel. . . .

Sir E. Coke, in his Commentary on the statute of Westm. 1, (2 Inst. 226,) uniformly describes the offence, by the epithets false and feigned; and he says, that no punishment was inflicted by this statute, upon the devisor or inventor himself of such false scandal, but he was left to the common law to be punished according to the offence which was aggravated, inasmuch as it was prohibited by statute. This passage shows conclusively, that in the opinion of Coke, this statute was in affirmance of the common law, and this was the opinion of Atkins, J., in the case of *Townsend v. Hughes*, (2 Mod. 151, 152.) This statute is, therefore, a very sure index of the meaning of defamation at common law; and as a further evidence on the subject, I refer to *Fleta*, (lib. 2, c. 1, s. 10,) which was written under Edw. I., and was a treatise upon the whole law, as it then stood. It is there stated that there are certain atrocious injuries which are punished by imprisonment, such as the inventors of evil rumors, (*sicut de inventoribus malorum rumorum*,) by whom the public peace is destroyed.

The form of the record of a conviction of one John Northampton in the K. B., for a libellous letter upon the court, is given by Coke, in his 3d Institute (p. 174.) The defendant confessed a libel, and was imprisoned and bound to his good behavior, and the record stated that the libel was false: *quae litera continet in se nullam veritatem*. The records of the courts have always been esteemed as the most authentic memorials of the law; and it is an important fact, which may now be noticed, that the indictments for libels have always charged the libel to be false, as well as malicious; and it was not until very lately that this epithet has been omitted. (7 Term Rep. 4.) I am aware that it has been said, (9 St. Tr. 302,) that the falsehood of the libel was not the ground of the judgment in this case of Northampton; but I see no reason for that assertion, for the words could have no other use or meaning upon the record; and it is absurd to suppose they were inserted by the judges, in order to acquit themselves to the king.

It appears clear, from this historical survey, that the doctrine now under review, originated in the court of Star Chamber, and was introduced and settled there about the beginning of the reign of James I. . . .

After the abolition of the Star Chamber under Charles I. we hear very little of the doctrine of libels, till we have followed the judicial precedents down to the era of the revolution. During the reign of the Stuarts, the press was stifled by the imprimaturs of government, which were first introduced by the acts of uniformity and borrowed from the inquisition. (1 Bl. Rep. 114, 115. 4 Bl. Comm. 152, note.) After the Star Chamber had ceased, the parliament subjected all publications to the arbitrary control of a license. Whoever has the curiosity to examine the licensing act of 13 and 14 Car. II. c. 33, will at once perceive that there was no longer any need, either of the jurisdiction or doctrines of the Star Chamber, to control seditious and libellous publications. The case of the seven bishops (4 St. Tr.) is the first instance in which the new doctrine of libel was brought into

the court of K. B. and submitted to the test of a jury; and here we consult once more the genuine oracles of the common law, and although their responses may not be altogether consistent or unequivocal, we listen to them with delight and instruction. On this trial, the Attorney-General contended that it was not to be made a question, whether the libel was true or false, and he grounded himself entirely upon the decisions in the Star Chamber, as he cited no other. But the counsel for the defendants, under the permission of the court, went at large into argument and proof, to show the dispensing power of the crown illegal, and that the allegation in the petition was true. And when the judges came to charge the jury, which they did separately, two of them were of opinion that the petition was a libel, and that whether true or false, was immaterial. The third judge placed the question altogether upon the *quo animo* of the defendants, but the fourth judge (Mr. Justice Powell) told the jury, that to make a libel, it must be false, it must be malicious, and it must tend to sedition; and that if there was no dispensing power in the king, which he believed, then it was no libel to say that the king's declaration was illegal. The jury were of his opinion, and acquitted the defendants.

The next case that meets our attention is that of Fuller, (5 St. Tr. 442, 444; 8 St. Tr. 78,) who was tried before Lord Ch. J. Holt, on an information for a libel upon the government; and when the defendant came to his defence, being without counsel, the Chief Justice asked him, in these words: "Can you make it appear that these books are true? If you take it on you to write such things as you are charged with, it lies upon you to prove them, at your peril. These persons are scandalized, if you produce no proof of what you charge them with. If you can offer any matter to prove what you have written, let us hear it. If you have any witnesses, produce them." Nothing can be plainer or more decisive than this language of the Ch. J. To do away the force of this case, it has been urged (9 St. Tr. 303,) that Fuller was prosecuted as a cheat and impostor. But the information says no such thing. The charge is expressly laid to consist in publishing two false, scandalous and defamatory libels. The judge calls them libels, and charges the jury to convict him of publishing the scandalous books. . . .

After this we meet only with two dicta, the one of Holt himself, and the other of Ch. J. Pratt, (11 Mod. 99, Str. 498,) declaring generally, that the truth was no justification on an indictment for a libel, until we come to Franklin's Case, in 1731. (9 St. Tr. 269.) There the defendant's counsel (Mr. Bootle and Sir J. Strange) offered evidence to prove the libel true, but Lord Ch. J. Raymond overruled the evidence, and observed, that it was not material whether the facts charged in the libel were true or false. "Then I submit," replies Mr. Bootle, "whether this will not tend to the utter suppression of the liberty of the press, which has been so beneficial to the nation. As the Star Chamber is now abolished, I don't know how far that doctrine may be adhered to. I should be glad to have one instance or authority of this, where a publisher of news is not allowed to say this piece of news is true. Is there no distinction to be made between false news and true news, and cannot we now animadvert or take notice of public affairs as well as formerly?" The attorney-general, although thus pressed for his authorities, produced no case to the point,

but the case *de libellis famosus*, in 5 Coke; and he laid down a doctrine totally incompatible with any freedom of the press, which was, that a printer may lawfully print what belongs to his own trade, but he is not to publish anything reflecting on the character and reputation and administration of his majesty or his ministers.

It is a little remarkable, that the prohibition to the jury to judge of the criminality of the libel, and the prohibition to the defendant to give the truth in evidence, received together their first authoritative sanction in a court of common law, by this *nisi prius* decision of Lord Raymond. It seems, however, to have been acquiesced in, and to have been, from that time, generally taken as a law, without further inquiry or examination. And yet upon the trial of John Horne, (11 St. Tr. 283), before Lord Mansfield, upon an information, for a libel, in charging the king's troops with murdering the Americans, at Lexington, the defendant was permitted to call witnesses to prove the truth of the libel; and the Attorney-General, (Thurlow,) in his reply, observed, that the defendant was to prove the charge, and that it was the first hour that it ever entered his imagination, that that species of proof could be allowed. Lord Mansfield, in charging the jury, observed that, if it was a criminal arraignment of the king's troops, they would find their verdict one way; but that if they were of opinion that the contest was to reduce innocent subjects to slavery, and that they were all murdered, why then they might form a different conclusion with regard to the meaning and application of the paper.

This case, and the others I have mentioned, show that the admission of the truth in evidence, and that the jury are to judge of the intent, have been considered as very much connected together, and have shared the same fate. In this case of Horne, Lord Mansfield placed the question undoubtedly on its true ground, which is, that if the libel be false, the jury are to conclude one way, but if true, they may then form a different conclusion as to the meaning and application of the libel.

In addition to this case, there are decisive proofs that the opinions even of the highest professional characters were unsettled and at variance, so late as the year 1792, on this interesting and litigious question. It was one of the questions proposed, in that year, by the house of lords to the judges; and Lord Kenyon, (Senator, vol. 5, p. 684,) after vindicating the practice of the courts as to the control of the jury, said, that the only doubt in practice was, whether the truth should be taken as part of the defence, and that he thought a clause to determine that point would be necessary to the bill. Lord Camden (Senator, vol. 3, p. 649,) went further and made a vigorous and eloquent defence of the freedom of the press. "A paper," he observed, "that tended to excite sedition, was libellous; but a paper that reflected upon the conduct of the ministry, that pointed out their base and mischievous proceedings, that went to open the eyes of the world, ought not to be considered as libellous. The jury must judge of the seditious tendency of the libel. Some would have every censure on the measures of government a libel. If this were the case, the voice of truth would cease to be heard amidst the notes of adulation. It ought to be left to a jury to decide, whether what was called calumny, was well or ill founded."

I have thus shown, that the rule denying permission to give the truth in evidence, was not an original rule of the common law. The ancient statutes and precedents, which are the only memorials to which we can resort, all place the crime on its falsity. The court of Star Chamber originated the doctrine, and it was considered an innovation. When it was brought into a court of common law, it was resisted and denied; the court dared not practice upon it, and the jury gave it their negative. Lord Holt totally disregarded the rule, in the case of Fuller; and it did not become an express decision of a court of common law till Franklin's case, in 1731; and there the counsel made a zealous struggle against it, as new, dangerous and arbitrary. In the trial of Horne, Lord Mansfield laid the rule aside, and the counsel for the crown rejoiced at an opportunity to meet the defendant upon the merits of the accusation. In 1792, it was made a questionable point, in the house of lords, and one of the highest law characters in the house seems to have borne his testimony against it. I feel myself, therefore, at full liberty to examine this question upon principle, and to lay the doctrine aside, if it shall appear unjust in itself or incompatible with public liberty, and the rights of the press.

But, whatever may be our opinion on the English law, there is another and a very important view of the subject to be taken, and that is with respect to the true standard of the freedom of the American press. In England they have never taken notice of the press in any parliamentary recognition of the principles of the government, or of the rights of the subject, whereas the people of this country have always classed the freedom of the press among their fundamental rights. This I can easily illustrate by a few examples.

The first American congress, in 1774, in one of their public addresses, (Journals, vol. 1, p. 57,) enumerated five invaluable rights, without which a people cannot be free and happy, and under the protecting and encouraging influence of which these colonies had hitherto so amazingly flourished and increased. One of these rights was the freedom of the press, and the importance of this right consisted, as they observed, "besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honorable and just modes of conducting affairs." The next high authority I shall mention, is the Convention of the people of this state, which met in 1788. They declared unanimously, (Journals, pp. 44, 51, 52, 73, 74,) that the freedom of the press was a right which could not be abridged or violated. The same opinion is contained in the amendment to the constitution of the United States, and to which this state was a party. It is also made an article in most of the state constitutions, that the liberty of the press was essential to the security of freedom, and ought to be inviolably preserved; and in two of those constitutions, (Pennsylvania and Ohio,) this freedom of the press is specifically defined, by saying that in prosecutions for any publications, respecting the official conduct of men in a public capacity, or where the matter is proper for public information, the truth may always be given in evidence. I shall mention, lastly, the act of congress, of the 14th July, 1798, which prescribed

penalties for certain specified libels upon the government of the United States, and allowed the truth to be given in evidence, on every prosecution under that act; and it is worthy of notice that the part of the act allowing the truth to be given in evidence, was declaratory, and thereby conveyed the sense of congress that such was the already existing law.

These multiplied acts and declarations are the highest, the most solemn, and commanding authorities, that the state or the nation can produce. They are generally the acts of the people themselves, when they came forward in their original character, to change the constitution of the country, and to assert their indubitable rights. And it seems impossible that they could have spoken with so much explicitness and energy, if they had intended nothing more than that restricted and slavish press, which may not publish anything, true or false, that reflects on the character and administration of public men. Such is the English doctrine of the liberty of the press, as asserted in *Franklin's Case*. (See also, *Hawk. tit. Libels, 7.*) A treatise on hereditary right has been held a libel, although it contained no reflections on any part of the subsisting government. (*Queen v. Bedford, Str. 189; Gilbert's Rep. K. B. 297.*) And if the theory of the prevailing doctrine in England, (for even there it is now scarcely anything more than theory,) had been strictly put in practice with us, where would have been all those enlightened and manly discussions which prepared and matured the great events of our revolution, or which, in a more recent period, pointed out the weakness and folly of the confederation, and roused the nation to throw it aside, and to erect a better government upon its ruins? They were, no doubt, libels upon the existing establishments, because they tended to defame them, and to expose them to the contempt and hatred of the people. They were, however, libels founded in truth, and dictated by worthy motives.

I am far from intending that these authorities mean, by the freedom of the press, a press wholly beyond the reach of the law, for that would be emphatically Pandora's box, the source of every evil. And yet the house of delegates in Virginia, by their resolution of the 7th January, 1800, and which appears to have been intended for the benefit and instruction of the union, came forward as the advocates of a press totally unshackled, and declare, in so many words, that "the baneful tendency of the sedition act was but little diminished by the privilege of giving in evidence the truth of the matter contained in political writings." They seem also to consider it as the exercise of a pernicious influence, and as striking at the root of free discussion, to punish, even for a false and malicious writing, published with intent to defame those who administer the government. If this doctrine was to prevail, the press would become a pest, and destroy the public morals. Against such a commentary upon the freedom of the American press, I beg leave to enter my protest. The founders of our governments were too wise and too just, ever to have intended, by the freedom of the press, a right to circulate falsehood as well as truth, or that the press should be the lawful vehicle of malicious defamation, or an engine for evil and designing men, to cherish, for mischievous purposes, sedition, irreligion, and impurity. Such an abuse of the press would be incompatible with the existence and good

order of civil society. The true rule of law is, that the intent and tendency of the publication is, in every instance, to be the substantial inquiry on the trial, and that the truth is admissible in evidence, to explain that intent, and not in every instance to justify it. I adopt, in this case, as perfectly correct, the comprehensive and accurate definition of one of the counsel at the bar, (Gen. Hamilton,) that the liberty of the press consists in the right to publish, with impunity, truth, with good motives, and for justifiable ends, whether it respects government, magistracy, or individuals.

Thompson, J., concurred in the opinion of Kent. Lewis, Ch. J., reviewing the same English authorities came to the conclusion that the law required the affirmance of the conviction.

The Founders' Constitution

Volume 5, Amendment I (Speech and Press), Document 28

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XVIII. WHO IS THURGOOD MARSHALL?

United States Supreme Court

LINN v. PLANT GUARD WORKERS, (1966)

No. 45

Argued: November 18, 1965

Decided: February 21, 1966

Petitioner, an official of the employer, filed this civil libel action under state law against an employee, a union, and two of its officers, alleging that statements in leaflets circulated in connection with a campaign to organize the employees, applied to him, were “false, defamatory and untrue” and libelous per se. The suit was filed in federal court on the basis of diversity of citizenship. A dismissal motion was made on the ground that the NLRB had exclusive jurisdiction of the subject matter. The employer had previously filed unfair labor practice charges with the NLRB’s Regional Director, asserting that the leaflets and other material restrained and coerced the employees in violation of 8 (b) (1) (A) of the National Labor Relations Act. The Regional Director refused to issue a complaint, finding that the leaflets were circulated by respondent employee, who was not a member or agent of the union, and that the union was not responsible for their distribution. The Board’s General Counsel sustained the ruling. The District Court dismissed the libel complaint holding that the alleged conduct “would arguably constitute an unfair labor practice under Section 8 (b)” of the Act, and that *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, compelled dismissal on pre-emption grounds. The Court of Appeals affirmed, assuming without deciding that the statements were “false, malicious, clearly libelous and damaging” though “relevant to the union’s campaign.” Held: Where a party to a labor dispute circulates false and defamatory statements during a union organizing campaign the court has jurisdiction to apply state remedies if the complainant pleads and proves that the statements were made with malice and injured him. Pp. 55-67.

(a) The States need not yield jurisdiction to the Federal Government where the activity regulated is but a peripheral concern of the Act or touches local interests so deeply rooted that it cannot be assumed that Congress, absent contrary direction, had deprived States of the power to act. *San Diego Building Trades Council*, supra. Pp. 59-60. [383 U.S. 53, 54]

(b) While the NLRB tolerates intemperate, abusive and inaccurate statements made by a union during organizing efforts, it does not interpret the Act as giving either

party license to injure the other intentionally by circulating defamatory or insulting material known to be false. P. 61.

(c) The exercise of state jurisdiction limited to redressing libel issued with knowledge of its falsity, or with reckless disregard of whether it was true or false, would reflect an overriding state interest in protecting its residents and would be a “merely peripheral concern” of the Act. Pp. 61-62.

(d) Section 8 (c) of the Act manifests congressional intent to encourage free debate on labor-management issues; but malicious utterance of defamatory statements cannot be condoned and malicious libel enjoys no protection in any context. Pp. 62-63.

(e) The fact that defamation arises during a labor dispute does not give the NLRB exclusive jurisdiction thereof, as the malicious publication of libelous statements does not of itself constitute an unfair labor practice. P. 63.

(f) The NLRB is concerned with the effect on a representation election, while state remedies are designed to compensate the victim. Pp. 63-64.

(g) To prevent interference with effective administration of national labor policy the availability of state remedies for libel is limited to instances where the defamatory statements were circulated maliciously and caused damage to the complainant. Pp. 64-65.

(h) The availability of a state judicial remedy for malicious libel will not impinge upon the national labor policy by causing employers and unions to spurn the administrative remedies offered by the NLRB; both remedies, which are not inconsistent, will be available in appropriate cases. Pp. 66-67.

337 F.2d 68, reversed and remanded.

Donald F. Welday argued the cause for petitioner. With him on the brief was Donald F. Welday, Jr.

Winston L. Livingston argued the cause for respondents. With him on the brief were Harold A. Cranefield and Nancy Jean Van Lopik.

Solicitor General Marshall argued the cause for the United States, as amicus curiae, by special leave of Court, [383 U.S. 53, 55] urging reversal. With him on the brief were Arnold Ordman, Dominick L. Manoli, Norton J. Come and Laurence S. Gold.

Paul L. Jaffe filed a brief for Schnell Tool & Die Corp. et al., as amici curiae.

MR. JUSTICE CLARK delivered the opinion of the Court.

The case before us presents the question whether, and to what extent, the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. 141 et seq. (1964 ed.), bars the maintenance of a civil action for libel instituted under state law by an official of an employer subject to the Act, seeking damages for defamatory statements published during a union organizing campaign by the union and its officers. The District Court dismissed the complaint on the ground that the National Labor Relations Board had exclusive jurisdiction over the subject matter. It held that such conduct “would arguably constitute an unfair labor practice under Section 8 (b)” of the Act and that *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), compelled a dismissal on pre-emption grounds. The Court of Appeals affirmed, 337 F.2d 68, assuming without deciding that the statements in question were “false, malicious, clearly libelous and damaging to plaintiff Linn, albeit they were relevant to the union’s campaign.” At p. 69. We granted certiorari, 381 U.S. 923. We conclude that where either party to a labor dispute circulates false and defamatory statements during a union organizing campaign, the court does have jurisdiction to apply state remedies if the complainant pleads and proves that the statements were made with malice and injured him. The judgment is, therefore, reversed.

I.

Petitioner Linn, an assistant general manager of Pinkerton’s National Detective Agency, Inc., filed this [383 U.S. 53, 56] suit against the respondent union, two of its officers and a Pinkerton employee, Leo J. Doyle. The complaint alleged that, during a campaign to organize Pinkerton’s employees in Detroit, the respondents had circulated among the employees leaflets which stated inter alia:

“(7) Now we find out that Pinkerton’s has had a large volume of work in Saginaw they have had it for years. “United Plant Guard Workers now has evidence

“A That Pinkerton has 10 jobs in Saginaw, Michigan.

“B Employing 52 men.

“C Some of these jobs are 10 yrs. old!

“(8) Make you feel kind sick & foolish.

“(9) The men in Saginaw were deprived of their right to vote in three N. L. R. B. elections. Their names were not summited [sic]. These guards were voted into the Union in 1959! These Pinkerton guards were robbed of pay increases. The Pinkerton manegers [sic] were lying to us - all the time the contract was in effect. No doubt the Saginaw men will file criminal charges. Somebody may go to Jail!”

The complaint further alleged that Linn was one of the managers referred to in the leaflet, and that the statements in the leaflet were “wholly false, defamatory and untrue” as respondents well knew. It did not allege any actual or special damage but prayed for the recovery of \$1,000,000 on the ground that the accusations were libelous per se. Federal jurisdiction was based on diversity of citizenship.

All respondents, save Doyle, moved to dismiss, asserting that the subject matter was within the exclusive jurisdiction of the Board. The record indicates that prior to the institution of this action Pinkerton had filed unfair labor practice charges with the Regional Director [383 U.S. 53, 57] of the Board, alleging that the distribution of the leaflets, as well as other written material, had restrained and coerced Pinkerton's employees in the exercise of their 7 rights, in violation of 8 (b) (1) (A) of the Act. The Regional Director refused to issue a complaint. Finding that the leaflets were circulated by Doyle, who was "not an officer or member of the charged union, nor was there any evidence that he was acting as an agent of such union," he concluded that the union was not responsible for the distribution of the leaflets and that the charge was, therefore, "wholly without basis." This ruling was sustained by the General Counsel of the Board some two months after this suit was filed.

In an unpublished opinion the District Judge dismissed the complaint holding, as we have already noted, that even if the union were responsible for distributing the material the case was controlled by *Garmon*, *supra*. The Court of Appeals affirmed, limiting its holding "to a suit for libelous statements growing out of and relevant to a union's campaign to organize the employees of an employer subject to the National Labor Relations Act." At 72.

II.

The question before us has been a recurring one in both state and federal tribunals,¹ involving the extent to which the National Labor Relations Act, as amended, supersedes state law with respect to libels published during labor disputes. Its resolution entails accommodation of the federal interest in uniform regulation of labor relations with the traditional concern and responsibility of the State to protect its citizens against defamatory [383 U.S. 53, 58] attacks. The problem is aggravated by the fact that the law in many States presumes damages from the publication of certain statements characterized as actionable *per se*.² Labor disputes are ordinarily heated affairs; the language that is commonplace there might well be deemed actionable *per se* in some state jurisdictions. Indeed, representation campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and

¹ E.g., *Brantley v. Devereaux*, 237 F. Supp. 156 (D.C. E. D. S. C. 1965); *Meyer v. Joint Council 53, Int'l Bro. of Teamsters*, 416 Pa. 401, 206 A. 2d 382, petition for cert. dismissed under Rule 60, 382 U.S. 897 (1965). *Blum v. International Assn. of Machinists*, 42 N. J. 389, 201 A. 2d 46 (1964).

² We adopt this terminology to avoid confusion with the concept of libel *per se*, applied in many States simply to designate words whose defamatory nature appears without consideration of extrinsic facts. Although Linn's complaint alleges that the leaflets were "libelous *per se*," his failure to specify the manner in which their publication harmed him indicates that he meant to rely on the presumption of damages. Under our present holding Linn must show that he was injured by the circulation of the statements; this necessarily includes proof that the words had a defamatory meaning.

recklessly, embellishing their respective positions with imprecatory language. *Cafeteria Union v. Angelos*, 320 U.S. 293, 295 (1943). It is therefore necessary to determine whether libel actions in such circumstances might interfere with the national labor policy.

Our task is rendered more difficult by the failure of the Congress to furnish precise guidance in either the language of the Act or its legislative history.³ As Mr. [383 U.S. 53, 59] Justice Jackson said for a unanimous Court in *Garner v. Teamsters Union*, 346 U.S. 485, 488 (1953): “The . . . Act . . . leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible.”

The Court has dealt with specific pre-emption problems arising under the National Labor Relations Act on many occasions, going back as far as *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 740 (1942). However, in framing the pre-emption question before us we need look primarily to *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). There in most meticulous language this Court spelled out the “extent to which the variegated laws of the several States are displaced by a single, uniform, national rule . . .” At 241. The Court emphasized that it was for the Board and the Congress to define the “precise and closely limited demarcations that can be adequately fashioned only by legislation and administration,” while “[o]ur task is confined to dealing with classes of situations.” At 242. In this respect, the Court concluded that the States need not yield jurisdiction “where the activity regulated was a merely peripheral concern of the Labor Management Relations Act . . . [o]r where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.” At 243-244. In short, as we said in *Plumbers’ Union v. Borden*, 373 U.S. 690, 693-694 (1963):

“[I]n the absence of an overriding state interest such as that involved in the maintenance of domestic [383 U.S. 53, 60] peace, state courts must defer to the exclusive competence of the National Labor Relations Board in cases in which the activity that is the subject matter of the litigation is arguably subject to the protections of 7 or the prohibitions of 8 of the National Labor Relations Act. This relinquishment of state jurisdiction . . . is essential ‘if the danger of state interference with national policy is to be averted,’ . . . and

³ The Congress has declared in the Act that employees have the right to self-organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activity for mutual aid and protection. 7. In 8 (a) Congress has made it an unfair labor practice for an employer to restrain or coerce employees in the exercise of 7 rights. Likewise, 8 (b) protects these rights against interference by a labor organization or its agents. And 8 (c) provides that the expression of any views or opinions “shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit.” In addition, 9 (c) (1) authorizes the [383 U.S. 53, 59] Board, under certain conditions, to conduct representation elections and certify the results thereof. Finally, 10 grants the Board exclusive power to enforce the prohibitions of the Act.

is as necessary in a suit for damages as in a suit seeking equitable relief. Thus the first inquiry, in any case in which a claim of federal preemption is raised, must be whether the conduct called into question may reasonably be asserted to be subject to Labor Board cognizance.”

We note that the Board has given frequent consideration to the type of statements circulated during labor controversies, and that it has allowed wide latitude to the competing parties.⁴ It is clear that the Board does not “police or censor propaganda used in the elections it conducts, but rather leaves to the good sense of the voters the appraisal of such matters, and to opposing parties the task of correcting inaccurate and untruthful statements.” *Stewart-Warner Corp.*, 102 N. L. R. B. 1153, 1158 (1953). It will set aside an election only where a material fact has been misrepresented in the representation campaign; opportunity for reply has been lacking; and the misrepresentation has had an impact on the free choice of the employees participating in the election. *Hollywood Ceramics Co.*, 140 N. L. R. B. 221, 223-224 (1962); *F. H. Snow Canning Co.*, 119 N. L. R. B. 714, 717-718 (1957). Likewise, in a number of cases, the Board has concluded that epithets such as “scab,” “unfair,” and “liar” are commonplace [383 U.S. 53, 61] in these struggles and not so indefensible as to remove them from the protection of 7, even though the statements are erroneous and defame one of the parties to the dispute. Yet the Board indicated that its decisions would have been different had the statements been uttered with actual malice, “a deliberate intention to falsify” or “a malevolent desire to injure.” E. g., *Bettcher Mfg. Corp.*, 76 N. L. R. B. 526 (1948); *Atlantic Towing Co.*, 75 N. L. R. B. 1169, 1170-1173 (1948). In sum, although the Board tolerates intemperate, abusive and inaccurate statements made by the union during attempts to organize employees, it does not interpret the Act as giving either party license to injure the other intentionally by circulating defamatory or insulting material known to be false. See *Maryland Drydock Co. v. Labor Board*, 183 F.2d 538 (C. A. 4th Cir. 1950). In such case the one issuing such material forfeits his protection under the Act. *Walls Manufacturing Co.*, 137 N. L. R. B. 1317, 1319 (1962).

In the light of these consideration it appears that the exercise of state jurisdiction here would be a “merely peripheral concern of the Labor Management Relations Act,” provided it is limited to redressing libel issued with knowledge of its falsity, or with reckless disregard of whether it was true or false. Moreover, we believe that “an overriding state interest” in protecting its residents from malicious libels should be recognized in these circumstances. This conclusion is buttressed by our holding in *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656 (1954), where Mr. Justice Burton writing for the Court held:

⁴ See Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 66 (1964).

“To the extent . . . that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been [383 U.S. 53, 62] eliminated. The care we took in the Garner case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed, the state procedure would have survived.” At 665.

In *United Automobile Workers v. Russell*, 356 U.S. 634 (1958), we again upheld state jurisdiction to entertain a compensatory and punitive damage action by an employee for malicious interference with his lawful occupation. In each of these cases the “type of conduct” involved, i. e., “intimidation and threats of violence,” affected such compelling state interests as to permit the exercise of state jurisdiction. *Garmon*, *supra*, at 248. We similarly conclude that a State’s concern with redressing malicious libel is “so deeply rooted in local feeling and responsibility” that it fits within the exception specifically carved out by *Garmon*.

We acknowledge that the enactment of 8 (c) manifests a congressional intent to encourage free debate on issues dividing labor and management.⁵ And, as we stated in another context, cases involving speech are to be considered “against the background of a profound . . . commitment to the principle that debate . . . should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Such considerations likewise [383 U.S. 53, 63] weigh heavily here; the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth. But it must be emphasized that malicious libel enjoys no constitutional protection in any context. After all, the labor movement has grown up and must assume ordinary responsibilities. The malicious utterance of defamatory statements in any form cannot be condoned, and unions should adopt procedures calculated to prevent such abuses.

III.

Nor should the fact that defamation arises during a labor dispute give the Board exclusive jurisdiction to remedy its consequences. The malicious publication of libelous statements does not in and of itself constitute an unfair labor practice. While the Board

⁵ The wording of the statute indicates, however, that 8 (c) was not designed to serve this interest by immunizing all statements made in the course of a labor controversy. Rather, 8 (c) provides that the “expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit.” 61 Stat. 142 (1947), 29 U.S.C. 158 (c) (1964 ed.). It is more likely that Congress adopted this section for a narrower purpose, i.e., to prevent the Board from attributing anti-union [383 U.S. 53, 63] motive to an employer on the basis of his past statements. See H. R. Rep. No. 510, 80th Cong., 1st Sess., 45 (1947). Comparison with the express protection given union members to criticize the management of their unions and the conduct of their officers, 73 Stat. 523 (1959), 29 U.S.C. 411 (a) (2) (1964 ed.), strengthens this interpretation of congressional intent.

might find that an employer or union violated 8 by deliberately making false statements, or that the issuance of malicious statements during an organizing campaign had such a profound effect on the election as to require that it be set aside, it looks only to the coercive or misleading nature of the statements rather than their defamatory quality. The injury that the statement might cause to an individual's reputation - whether he be an employer or union official - has no relevance to the Board's function. Cf. *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261 (1940). The Board can award no damages, impose no penalty, or give any other relief to the defamed individual.

On the contrary, state remedies have been designed to compensate the victim and enable him to vindicate his [383 U.S. 53, 64] reputation. The Board's lack of concern with the "personal" injury caused by malicious libel, together with its inability to provide redress to the maligned party, vitiates the ordinary arguments for pre-emption.⁶ As stressed by THE CHIEF JUSTICE in his dissenting opinion in *Russell*, supra:

"The unprovoked infliction of personal injuries during a period of labor unrest is neither to be expected nor to be justified, but economic loss inevitably attends work stoppages. Furthermore, damages for personal injuries maybe assessed without regard to the merits of the labor controversy . . ." At 649.

Judicial condemnation of the alleged attack on Linn's character would reflect no judgment upon the objectives of the union. It would not interfere with the Board's jurisdiction over the merits of the labor controversy. But it has been insisted that not only would the threat of state libel suits dampen the ardor of labor debate and truncate the free discussion envisioned by the Act, but that such suits might be used as weapons of economic coercion. Moreover, in view of the propensity of juries to award excessive damages for defamation, the availability of libel actions may pose a threat to the stability of labor unions and smaller employers. In order that the recognition of legitimate state interests does not interfere with effective administration of national labor policy the possibility of such consequences must be minimized. We therefore limit the availability of state remedies for libel [383 U.S. 53, 65] to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage.

The standards enunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), are adopted by analogy, rather than under constitutional compulsion. We apply the malice test to effectuate the statutory design with respect to pre-emption. Construing the Act to permit recovery of damages in a state cause of action only for defamatory

⁶ The fact that the Board has no authority to grant effective relief aggravates the State's concern since the refusal to redress an otherwise actionable wrong creates disrespect for the law and encourages the victim to take matters into his own hands. The function of libel suits in preventing violence has long been recognized. *Developments in the Law - Defamation*, 69 Harv. L. Rev. 875, 933 (1956). But as to criminal libel suits see *Garrison v. Louisiana*, 379 U.S. 64 (1964).

statements published with knowledge of their falsity or with reckless disregard of whether they were true or false guards against abuse of libel actions and unwarranted intrusion upon free discussion envisioned by the Act.

As we have pointed out, certain language characteristic of labor disputes may be held actionable per se in some state courts. These categories of libel have developed without specific reference to labor controversies. However, even in those jurisdictions, the amount of damages which maybe recovered depends upon evidence as to the severity of the resulting harm. This is a salutary principle. We therefore hold that a complainant may not recover except upon proof of such harm, which may include general injury to reputation, consequent mental suffering, alienation of associates, specific items of pecuniary loss, or whatever form of harm would be recognized by state tort law.⁷ The fact that courts are generally not in close contact with the pressures of labor disputes makes it especially necessary that this rule be followed. If the amount of damages awarded is excessive, [383 U.S. 53, 66] it is the duty of the trial judge to require a remittitur or a new trial. Likewise, the defamed party must establish that he has suffered some sort of compensable harm as a prerequisite to the recovery of additional punitive damages.⁸

Since the complaint here does not make the specific allegations that we find necessary in such actions, leave should be given Linn on remand to amend his complaint, if he so desires, to meet these requirements. In the event of a new trial he, of course, bears the burden of proof of such allegations.

IV.

Finally, it has been argued that permitting state action here would impinge upon national labor policy because the availability of a judicial remedy for malicious libel would cause employers and unions to spurn appropriate administrative sanctions for contemporaneous violations of the Act. We disagree. When the Board and state law frown upon the publication of malicious libel, albeit for different reasons, it may be expected that the injured party will request both administrative and judicial relief. The Board would not be ignored since its sanctions alone can adjust the equilibrium disturbed by an unfair labor practice. If a malicious libel contributed to union victory in a closely fought election, few employers would be satisfied with simply damages for “personal” injury caused by the defamation. An unsuccessful union would also seek to set the election results aside as the fruits of an employer’s malicious libel. And a union may be expected to request similar relief for defamatory statements which contribute to the

⁷ The Government, as amicus curiae, has urged us to go further. It would limit liability to “grave” defamations - those which accuse the defamed person of having engaged in criminal, homosexual, treasonable, or other infamous conduct. We cannot agree. This would impose artificial characterizations that would encroach too heavily upon state jurisdiction.

⁸ It should be noted that punitive damages were awarded in *Laburnum* and *Russell*. In both instances there was proof of compensatory injury resulting from the defendants’ violence.

victory of a competing union. [383 U.S. 53, 67] Nor would the courts and the Board act at cross purposes since, as we have seen, their policies would not be inconsistent.

As was said in *Garrison v. Louisiana*, 379 U.S. 64, 75: “[T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.” We believe that under the rules laid down here it can be appropriately redressed without curtailment of state libel remedies beyond the actual needs of national labor policy. However, if experience shows that a greater curtailment, even a total one, should be necessary to prevent impairment of that policy, the Court will be free to reconsider today’s holding. We deal here not with a constitutional issue but solely with the degree to which state remedies have been pre-empted by the Act.

Reversed and remanded.

MR. JUSTICE BLACK, dissenting.

The Court holds that an individual participant on the employer’s side of a labor dispute can sue the union for libel on account of charges made by the union in the heat of the dispute. By the same token I assume that under the Court’s holding, individual labor union members now have the right to sue their employers when they say naughty things during labor disputes. This new Court-made law tosses a monkey wrench into the collective bargaining machinery Congress set up to try to settle labor disputes, and at the same time exalts the law of libel to an even higher level of importance in the regulation of day-to-day life in this country.

When Congress passed the National Labor Relations Act, it must have known, as almost all people do, that in labor disputes both sides are masters of the arts of [383 U.S. 53, 68] vilification, invective and exaggeration. In passing this law Congress indicated no purpose to try to purify the language of labor disputes or force the disputants to say nice things about one another. Nor do I believe Congress intended to leave participants free to sue one another for libel for insults they hurl at one another in the heat of battle. The object of the National Labor Relations Act was to bring about agreements by collective bargaining, not to add fuel to the fire by encouraging libel suits with their inevitable irritations and dispute-prolonging tendencies. Yet it is difficult to conceive of an element more certain to create irritations guaranteed to prevent fruitful collective bargaining discussions than the threat or presence of a large monetary judgment gained in a libel suit generating anger and a desire for vengeance on the part of one or the other of the bargaining parties. I think, therefore, that libel suits are not only “arguably” but inevitably in conflict with the basic purpose of the Act to settle disputes peaceably - not to aggravate them, but to end them. For this reason I would affirm the judgment of the two lower courts.

Moreover, we held in *Thornhill v. Alabama*, 310 U.S. 88, 102 , that “In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.” Discussion is not free, however, within the meaning of our First Amendment, if that discussion may be penalized by judgments for damages in libel actions. See the concurring opinions of MR. JUSTICE DOUGLAS and myself in *New York Times Co. v. Sullivan*, 376 U.S. 254 , and *Garrison v. Louisiana*, 379 U.S. 64 , and my opinion in *Rosenblatt v. Baer*, post, p. 94. It is rather strange for this Court to import its novel ideas on libel suits into the area of labor controversies where the effect is bound to [383 U.S. 53, 69] abridge the freedom of the parties to discuss their disputes and to settle them through peaceful negotiations. It is strange because one of the hopes of those responsible for modern collective bargaining was that peaceful settlements among the parties working by themselves under the aegis of federal law would be substituted for the old-time labor feuds too frequently accompanied by bitter strife and wasteful, dangerous conflicts verging on private war. Because libel suits in my judgment are inconsistent with both the Constitution of the United States and the policies of the Act, I dissent from the holding of the Court reversing the judgment below.

MR. JUSTICE FORTAS, with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS join, dissenting.

In my opinion, the Court’s decision in the present case opens a major breach in the wall which has heretofore confined labor disputes to the area and weaponry defined by federal labor law, except where violence or intimidation is involved. By arming the disputants with the weapon of libel suits and the threat of punitive damages the Court jeopardizes the measure of stability painstakingly achieved in labor-management relations. It introduces a potentially disruptive device into the comprehensive structure created by Congress for resolving these disputes. In so doing, the Court not only sanctions an arrangement inconsistent with the intent of Congress, but, I think, departs from its own decisions narrowly limiting the occasions on which the disputants may, outside of the statutory framework, litigate issues arising in labor disputes.

In my judgment, the structure provided by Congress for the handling of labor-management controversies precludes any court from entertaining a libel suit between parties to a labor dispute or their agents where the allegedly defamatory statement is confined to matters [383 U.S. 53, 70] which are part of the fabric of the dispute. The present controversy is just such a case.

Petitioner Linn is an officer of the employer sought to be organized by respondent union. The allegedly defamatory statements, set out in the opinion of the Court, relate to management conduct during the course of the dispute. The leaflets in question allegedly accuse management of lying both to the NLRB and to employees in order to deprive some employees of their right to vote in NLRB elections and to certain pay increases.

As an illustration of the kind of hyperbole characteristic of labor-management strife, this “libel” is hardly incendiary. To the experienced eye, it is pale and anemic when compared with the rich and colorful charges freely exchanged in the heat of many labor disputes.⁹

In response to such a pallid “libel,” the Court today holds that petitioner, perceiving himself the target of a purportedly false and defamatory statement, may sue the union and several of its officers for damages - so long as he pleads that the statement is defamatory, was made with malice, and caused some injury to him. Should he succeed in clearing the hurdles thus set in his path, he may recover not only compensation for his “injuries,” but punitive or exemplary damages as well. These requirements that petitioner plead and prove both malice and special damages - arising from what I regard as the Court’s well-founded concern that libel suits might otherwise “pose a threat to the stability of labor unions and smaller employers” - may be cold comfort to the potential defendant in a libel suit. “Malice,” which the Court defines as a deliberate intention to falsify or a malevolent [383 U.S. 53, 71] desire to injure, is, after all, a largely subjective standard, responsive to the ingenuity of trial counsel and the predilections of judge and jury. And “injury” resulting from words is not limited to tangible trauma. These requirements afford dubious defense on a battlefield from which the qualified umpire - the NLRB - has been removed. In a libel suit, the outcome is determined by standards alien to the subject matter of labor relations, by considerations which do not take into account the complex and subtle values that are at stake, and by a jury unfamiliar with the quality of rhetoric customary in labor disputes. The outcome, in fact, is more apt to reflect immediate community attitudes toward unionization than appreciation for the underlying, long-term perplexities of the interplay of management and labor in a democratic society.

Until today, the decisions of this Court have consistently held that the federal structure for resolving labor disputes may not be breached or encumbered by state remedies where the tortious conduct allegedly involved is either protected or prohibited by federal labor legislation, or even “arguably subject to” federal law¹⁰ - and despite the inability of the NLRB to redress the pecuniary harm suffered by the victim. In *Garner v. Teamsters Union*, 346 U.S. 485, the Court held that state courts may not enjoin peaceful picketing where plaintiff’s grievance is within the jurisdiction of the NLRB. In *Guss v. Utah Labor Board*, 353 U.S. 1, the Court held that even where the NLRB declines to exercise its conceded jurisdiction over a labor dispute “affecting commerce,” a parallel

⁹ Compare, for example, the considerably more imaginative use of vituperation reflected in the allegedly defamatory statement in *United Steelworkers of America v. R. H. Bouligny, Inc.*, 382 U.S. 145. A description of the statement is found in Brief for Respondent, p. 2 (No. 19, O. T. 1965).

¹⁰ Suits to enforce collective bargaining agreements have been held to arise under 29 U.S.C. 185 (a) (1964 ed.) and hence are not within the reach of the pre-emption doctrine. See *Smith v. Evening News Assn.*, 371 U.S. 195 ; *Sovern*, Section 301 and the Primary Jurisdiction of the NLRB, 76 Harv. L. Rev. 529 (1963).

remedy before a state board [383 U.S. 53, 72] is nonetheless pre-empted. And in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, the Court concluded that state courts may not award damages for peaceful picketing, although the conduct involved was only “arguably subject” to the federal statute and despite the NLRB’s decision not to exercise jurisdiction.¹¹ See also *Liner v. Jafco, Inc.*, 375 U.S. 301; *Plumbers’ Union v. Borden*, 373 U.S. 690; *Local 438, Constr. Laborers v. Curry*, 371 U.S. 542. Today marks the first departure from what has become a well-established rule that only where the public’s compelling interest in preventing violence or the threat of violence is involved can the exclusiveness of the federal structure for resolving labor disputes be breached. As was said in *Garmon*, 359 U.S., at 247: “Even the States’ salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.” The majority’s opinion fails to make clear why the participant’s interest in protecting his reputation from the sting of words uttered as part of a labor dispute is a compelling concern which this Court must allow the States to protect, while his interest in preserving his economic well-being from illegal picketing is not.

By narrowly restricting the permissible exceptions to the general rule of pre-emption and by excluding generally the right to compensation for purely private wrongs, the Court has contributed to the Nation’s success in domesticating the potentially explosive warfare between labor and management. The decision announced today [383 U.S. 53, 73] threatens the degree of equilibrium which has been achieved. I think that the Court’s decision both underestimates the damage libel suits may inflict on the equilibrium, and overestimates the effectiveness of the restraint which will result from superimposed requirements of malice and special damages.

I find support for my view in the evidence as to the intent of Congress. As the majority concedes, Congress has in unmistakable terms recognized the importance of labor-management dialogue untrammelled by fear of retribution for strong utterances. It has manifested awareness that lusty speech provides a useful safety valve for the tensions which often accompany these controversies. For example, Congress has provided that an unfair labor practice charge may not be based on the “expressing of any views, argument, or opinion . . . if such expression contains no threat of reprisal or force or promise of benefit.” 29 U.S.C. 158 (c) (1964 ed.).¹² And one of its statutes, 29 U.S.C. 411 (a) (2) (1964 ed.), has been construed to prevent unions from disciplining members who utter defamatory statements during the course of internal union disputes. *Salzhandler v.*

¹¹ Subsequent to *Garmon* and *Guss*, Congress has explicitly removed the obstacles to state-court treatment of labor disputes as to which the NLRB has declined to exercise jurisdiction on the ground of insufficient effect on interstate commerce. 29 U.S.C. 164 (c) (2) (1964 ed.).

¹² Although libelous statements cannot serve as the predicate for an unfair labor practice charge, like any other misleading statement they may in certain circumstances induce the NLRB to set aside the results of an election. See Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 82-84 (1964).

Caputo, 316 F.2d 445 (C. A. 2d Cir.), cert. denied, 375 U.S. 946; *Cole v. Hall*, 339 F.2d 881 (C. A. 2d Cir.); *Stark v. Twin City Carpenters Dist. Council*, 219 F. Supp. 528 (D.C. D. Minn.). Where Congress wishes to create an exception to the general rule of exclusive NLRB jurisdiction, it does so explicitly. See 29 U.S.C. 187 (1964 ed.), authorizing suits for damages arising out of violations of [383 U.S. 53, 74] 29 U.S.C. 158, and 29 U.S.C. 164, authorizing judicial remedies where the NLRB declines to assert jurisdiction under 29 U.S.C. 151 (1964 ed.).

The foregoing considerations do not apply to the extent that the use of verbal weapons during labor disputes is not confined to any issue in the dispute, or involves a person who is neither party to nor agent of a party to the dispute. In such instances, perhaps the courts ought to be free to redress whatever private wrong has been suffered. But this is not such a case. The fact that the Court today rules that, after appropriate amendment of the complaint, a libel action may be maintained on the basis of the circumscribed accusation contained in the leaflet in question demonstrates how very substantial is the breach opened in the wall which has heretofore insulated labor disputes from the vagaries of lawsuits.¹³ I would affirm the decision below.

¹³ Resort to libel suits as an auxiliary weapon in resolving labor disputes presents much more than an abstract threat. For evidence of a growing tendency to invoke these suits see the list of such cases recently pending in the Fourth Circuit alone in Brief for Petitioner, p. 15, *United Steelworkers of America v. R. H. Bouligny, Inc.*, supra; and those discussed at pp. 18-39 of the Appendix to the brief filed by respondents in Nos. 89 and 94, O. T. 1965, and in the present case as amici curiae. [383 U.S. 53, 75]

XIX. WHO IS KENNETH STARR?

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MORSE ET AL. v. FREDERICK

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06–278. Argued March 19, 2007—Decided June 25, 2007

At a school-sanctioned and school-supervised event, petitioner Morse, the high school principal, saw students unfurl a banner stating “BONG HiTS 4 JESUS,” which she regarded as promoting illegal drug use. Consistent with established school policy prohibiting such messages at school events, Morse directed the students to take down the banner. When one of the students who had brought the banner to the event—respondent Frederick—refused, Morse confiscated the banner and later suspended him. The school superintendent upheld the suspension, explaining, *inter alia*, that Frederick was disciplined because his banner appeared to advocate illegal drug use in violation of school policy. Petitioner school board also upheld the suspension. Frederick filed suit under 42 U.S.C. §1983, alleging that the school board and Morse had violated his First Amendment rights. The District Court granted petitioners summary judgment, ruling that they were entitled to qualified immunity and that they had not infringed Frederick’s speech rights. The Ninth Circuit reversed. Accepting that Frederick acted during a school-authorized activity and that the banner expressed a positive sentiment about marijuana use, the court nonetheless found a First Amendment violation because the school punished Frederick without demonstrating that his speech threatened substantial disruption. It also concluded that Morse was not entitled to qualified immunity because Frederick’s right to display the banner was so clearly established that a reasonable principal in Morse’s position would have understood that her actions were unconstitutional.

Held: Because schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use, the school

officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending Frederick. Pp. 5–15.

(a) Frederick’s argument that this is not a school speech case is rejected. The event in question occurred during normal school hours and was sanctioned by Morse as an approved social event at which the district’s student-conduct rules expressly applied. Teachers and administrators were among the students and were charged with supervising them. Frederick stood among other students across the street from the school and directed his banner toward the school, making it plainly visible to most students. Under these circumstances, Frederick cannot claim he was not at school. Pp. 5–6.

(b) The Court agrees with Morse that those who viewed the banner would interpret it as advocating or promoting illegal drug use, in violation of school policy. At least two interpretations of the banner’s words—that they constitute an imperative encouraging viewers to smoke marijuana or, alternatively, that they celebrate drug use—demonstrate that the sign promoted such use. This pro-drug interpretation gains further plausibility from the paucity of alternative meanings the banner might bear. Pp. 6–8.

(c) A principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. In *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, the Court declared, in holding that a policy prohibiting high school students from wearing antiwar armbands violated the First Amendment, *id.*, at 504, that student expression may not be suppressed unless school officials reasonably conclude that it will “materially and substantially disrupt the work and discipline of the school,” *id.*, at 513. The Court in *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, however, upheld the suspension of a student who delivered a high school assembly speech employing “an elaborate, graphic, and explicit sexual metaphor,” *id.*, at 678. Analyzing the case under *Tinker*, the lower courts had found no disruption, and therefore no basis for discipline. 478 U.S., at 679–680. This Court reversed, holding that the school was “within its permissible authority in imposing sanctions . . . in response to [the student’s] offensively lewd and indecent speech.” *Id.*, at 685. Two basic principles may be distilled from *Fraser*. First, it demonstrates that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.” *Id.*, at 682. Had *Fraser* delivered the same speech in a public forum outside the school context, he would have been protected. See, *id.*, at 682–683. In school, however, his First Amendment rights were circumscribed “in light of the special characteristics of the school environment.” *Tinker*, *supra*, at 506. Second, *Fraser* established that *Tinker*’s mode of analysis is not absolute, since the *Fraser* Court did not conduct the “substantial disruption” analysis. Subsequently, the Court has held in the Fourth Amendment context that “while children assuredly do not ‘shed their constitutional rights . . . at the schoolhouse gate,’ . . . the nature of those rights is what is appropriate for children in school,” *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 655–656, and has recognized

that deterring drug use by schoolchildren is an “important—indeed, perhaps compelling” interest, *id.*, at 661. Drug abuse by the Nation’s youth is a serious problem. For example, Congress has declared that part of a school’s job is educating students about the dangers of drug abuse, see, e.g., the Safe and Drug-Free Schools and Communities Act of 1994, and petitioners and many other schools have adopted policies aimed at implementing this message. Student speech celebrating illegal drug use at a school event, in the presence of school administrators and teachers, poses a particular challenge for school officials working to protect those entrusted to their care. The “special characteristics of the school environment,” *Tinker*, 393 U.S., at 506, and the governmental interest in stopping student drug abuse allow schools to restrict student expression that they reasonably regard as promoting such abuse. *Id.*, at 508, 509, distinguished. Pp. 8–15.

439 F. 3d 1114, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion. ALITO, J., filed a concurring opinion, in which KENNEDY, J., joined. BREYER, J., filed an opinion concurring in the judgment in part and dissenting in part. STEVENS, J., filed a dissenting opinion, in which SOUTER and GINSBURG, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 06–278

DEBORAH MORSE, ET AL., PETITIONERS v. JOSEPH
FREDERICK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

[June 25, 2007]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

At a school-sanctioned and school-supervised event, a high school principal saw some of her students unfurl a large banner conveying a message she reasonably regarded as promoting illegal drug use. Consistent with established school policy prohibiting such messages at school events, the principal directed the students to take down the banner. One student—among those who had brought the banner to the event—refused to do so. The principal confiscated the banner and later suspended the student. The Ninth Circuit held that the principal’s actions violated the First Amendment, and that the student could sue the principal for damages.

Our cases make clear that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969). At the same time, we have held that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,” *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986), and that the rights of students “must be ‘applied in light of the special characteristics of the school environment.’” *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (quoting *Tinker*, *supra*, at 506). Consistent with these principles, we hold that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use. We conclude that the school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending the student responsible for it.

I

On January 24, 2002, the Olympic Torch Relay passed through Juneau, Alaska, on its way to the winter games in Salt Lake City, Utah. The torchbearers were to proceed along a street in front of Juneau-Douglas High School (JDHS) while school was in session. Petitioner Deborah Morse, the school principal, decided to permit staff and students to participate in the Torch Relay as an approved social event or class trip. App. 22–23. Students were allowed to leave class to observe the relay from either side of the street. Teachers and administrative officials monitored the students’ actions.

Respondent Joseph Frederick, a JDHS senior, was late to school that day. When he arrived, he joined his friends (all but one of whom were JDHS students) across the street from the school to watch the event. Not all the students waited patiently. Some became rambunctious, throwing plastic cola bottles and snowballs and scuffling with their classmates. As the torchbearers and camera crews passed by, Frederick and his friends unfurled a 14-foot banner bearing the phrase: “BONG HiTS 4 JESUS.” App. to Pet. for Cert. 70a. The large banner was easily readable by the students on the other side of the street.

Principal Morse immediately crossed the street and demanded that the banner be taken down. Everyone but Frederick complied. Morse confiscated the banner and told Frederick to report to her office, where she suspended him for 10 days. Morse later explained that she told Frederick to take the banner down because she thought it encouraged illegal drug use, in violation of established school policy. Juneau School Board Policy No. 5520 states: “The Board specifically prohibits any assembly or public expression that . . . advocates the use of substances that are illegal to minors” Id., at 53a. In addition, Juneau School Board Policy No. 5850 subjects “[p]upils who participate in approved social events and class trips” to the same student conduct rules that apply during the regular school program. Id., at 58a.

Frederick administratively appealed his suspension, but the Juneau School District Superintendent upheld it, limiting it to time served (8 days). In a memorandum setting forth his reasons, the superintendent determined that Frederick had displayed his banner “in the midst of his fellow students, during school hours, at a school-sanctioned activity.” Id., at 63a. He further explained that Frederick “was not disciplined because the principal of the school ‘disagreed’ with his message, but because his speech appeared to advocate the use of illegal drugs.” Id., at 61a.

The superintendent continued:

“The common-sense understanding of the phrase ‘bong hits’ is that it is a reference to a means of smoking marijuana. Given [Frederick’s] inability or unwillingness to express any other credible meaning for the phrase, I can only agree with the principal and countless others who saw the banner as advocating

the use of illegal drugs. [Frederick’s] speech was not political. He was not advocating the legalization of marijuana or promoting a religious belief. He was displaying a fairly silly message promoting illegal drug usage in the midst of a school activity, for the benefit of television cameras covering the Torch Relay. [Frederick’s] speech was potentially disruptive to the event and clearly disruptive of and inconsistent with the school’s educational mission to educate students about the dangers of illegal drugs and to discourage their use.” *Id.*, at 61a–62a.

Relying on our decision in *Fraser*, *supra*, the superintendent concluded that the principal’s actions were permissible because Frederick’s banner was “speech or action that intrudes upon the work of the schools.” App. to Pet. for Cert. 62a (internal quotation marks omitted). The Juneau School District Board of Education upheld the suspension.

Frederick then filed suit under 42 U.S.C. §1983, alleging that the school board and Morse had violated his First Amendment rights. He sought declaratory and injunctive relief, unspecified compensatory damages, punitive damages, and attorney’s fees. The District Court granted summary judgment for the school board and Morse, ruling that they were entitled to qualified immunity and that they had not infringed Frederick’s First Amendment rights. The court found that Morse reasonably interpreted the banner as promoting illegal drug use—a message that “directly contravened the Board’s policies relating to drug abuse prevention.” App. to Pet. for Cert. 36a–38a. Under the circumstances, the court held that “Morse had the authority, if not the obligation, to stop such messages at a school-sanctioned activity.” *Id.*, at 37a.

The Ninth Circuit reversed. Deciding that Frederick acted during a “school-authorized activit[y],” and “proceed[ing] on the basis that the banner expressed a positive sentiment about marijuana use,” the court nonetheless found a violation of Frederick’s First Amendment rights because the school punished Frederick without demonstrating that his speech gave rise to a “risk of substantial disruption.” 439 F. 3d 1114, 1118, 1121–1123 (2006). The court further concluded that Frederick’s right to display his banner was so “clearly established” that a reasonable principal in Morse’s position would have understood that her actions were unconstitutional, and that Morse was therefore not entitled to qualified immunity. *Id.*, at 1123–1125.

We granted certiorari on two questions: whether Frederick had a First Amendment right to wield his banner, and, if so, whether that right was so clearly established that the principal may be held liable for damages. 549 U.S. ____ (2006). We resolve the first question against Frederick, and therefore have no occasion to reach the second.¹

¹ JUSTICE BREYER would rest decision on qualified immunity without reaching the underlying First Amendment question. The problem with this approach is the rather significant one that it is inadequate to decide the case before us. Qualified immunity shields public officials from money

II

At the outset, we reject Frederick’s argument that this is not a school speech case—as has every other authority to address the question. See App. 22–23 (Principal Morse); App. to Pet. for Cert. 63a (superintendent); *id.*, at 69a (school board); *id.*, at 34a–35a (District Court); 439 F. 3d, at 1117 (Ninth Circuit). The event occurred during normal school hours. It was sanctioned by Principal Morse “as an approved social event or class trip,” App. 22–23, and the school district’s rules expressly provide that pupils in “approved social events and class trips are subject to district rules for student conduct.” App. to Pet. for Cert. 58a. Teachers and administrators were interspersed among the students and charged with supervising them. The high school band and cheerleaders performed. Frederick, standing among other JDHS students across the street from the school, directed his banner toward the school, making it plainly visible to most students. Under these circumstances, we agree with the superintendent that Frederick cannot “stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school.” *Id.*, at 63a. There is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents, see *Porter v. Ascension Parish School Bd.*, 393 F. 3d 608, 615, n. 22 (CA5 2004), but not on these facts.

III

The message on Frederick’s banner is cryptic. It is no doubt offensive to some, perhaps amusing to others. To still others, it probably means nothing at all. Frederick himself claimed “that the words were just nonsense meant to attract television cameras.” 439 F. 3d, at 1117–1118. But Principal Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one.

As Morse later explained in a declaration, when she saw the sign, she thought that “the reference to a ‘bong hit’ would be widely understood by high school students and others as referring to smoking marijuana.” App. 24. She further believed that “display of the banner would be construed by students, District personnel, parents and others witnessing the display of the banner, as advocating or promoting illegal drug use”—in violation of school policy. *Id.*, at 25; see *ibid.* (“I told Frederick and the other members of

damages only. See *Wood v. Strickland*, 420 U.S. 308, 314, n. 6 (1975). In this case, Frederick asked not just for damages, but also for declaratory and injunctive relief. App. 13. JUSTICE BREYER’s proposed decision on qualified immunity grounds would dispose of the damages claims, but Frederick’s other claims would remain unaddressed. To get around that problem, JUSTICE BREYER hypothesizes that Frederick’s suspension—the target of his request for injunctive relief—“may well be justified on non-speech-related grounds.” See post, at 9. That hypothesis was never considered by the courts below, never raised by any of the parties, and is belied by the record, which nowhere suggests that the suspension would have been justified solely on non-speech-related grounds.

his group to put the banner down because I felt that it violated the [school] policy against displaying . . . material that advertises or promotes use of illegal drugs”).

We agree with Morse. At least two interpretations of the words on the banner demonstrate that the sign advocated the use of illegal drugs. First, the phrase could be interpreted as an imperative: “[Take] bong hits . . .”—a message equivalent, as Morse explained in her declaration, to “smoke marijuana” or “use an illegal drug.” Alternatively, the phrase could be viewed as celebrating drug use—“bong hits [are a good thing],” or “[we take] bong hits”—and we discern no meaningful distinction between celebrating illegal drug use in the midst of fellow students and outright advocacy or promotion. See *Guiles v. Marineau*, 461 F. 3d 320, 328 (CA2 2006) (discussing the present case and describing the sign as “a clearly pro-drug banner”).

The pro-drug interpretation of the banner gains further plausibility given the paucity of alternative meanings the banner might bear. The best Frederick can come up with is that the banner is “meaningless and funny.” 439 F. 3d, at 1116. The dissent similarly refers to the sign’s message as “curious,” post, at 1, “ambiguous,” *ibid.*, “nonsense,” post, at 2, “ridiculous,” post, at 6, “obscure,” post, at 7, “silly,” post, at 12, “quixotic,” post, at 13, and “stupid,” *ibid.* Gibberish is surely a possible interpretation of the words on the banner, but it is not the only one, and dismissing the banner as meaningless ignores its undeniable reference to illegal drugs.

The dissent mentions Frederick’s “credible and uncontradicted explanation for the message—he just wanted to get on television.” Post, at 12. But that is a description of Frederick’s motive for displaying the banner; it is not an interpretation of what the banner says. The way Frederick was going to fulfill his ambition of appearing on television was by unfurling a pro-drug banner at a school event, in the presence of teachers and fellow students.

Elsewhere in its opinion, the dissent emphasizes the importance of political speech and the need to foster “national debate about a serious issue,” post, at 16, as if to suggest that the banner is political speech. But not even Frederick argues that the banner conveys any sort of political or religious message. Contrary to the dissent’s suggestion, see post, at 14–16, this is plainly not a case about political debate over the criminalization of drug use or possession.

IV

The question thus becomes whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. We hold that she may.

In *Tinker*, this Court made clear that “First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and

students.” 393 U.S., at 506. *Tinker* involved a group of high school students who decided to wear black armbands to protest the Vietnam War. School officials learned of the plan and then adopted a policy prohibiting students from wearing armbands. When several students nonetheless wore armbands to school, they were suspended. *Id.*, at 504. The students sued, claiming that their First Amendment rights had been violated, and this Court agreed.

Tinker held that student expression may not be suppressed unless school officials reasonably conclude that it will “materially and substantially disrupt the work and discipline of the school.” *Id.*, at 513. The essential facts of *Tinker* are quite stark, implicating concerns at the heart of the First Amendment. The students sought to engage in political speech, using the armbands to express their “disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them.” *Id.*, at 514. Political speech, of course, is “at the core of what the First Amendment is designed to protect.” *Virginia v. Black*, 538 U.S. 343, 365 (2003). The only interest the Court discerned underlying the school’s actions was the “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint,” or “an urgent wish to avoid the controversy which might result from the expression.” *Tinker*, 393 U.S., at 509, 510. That interest was not enough to justify banning “a silent, passive expression of opinion, unaccompanied by any disorder or disturbance.” *Id.*, at 508.

This Court’s next student speech case was *Fraser*, 478 U.S. 675. Matthew Fraser was suspended for delivering a speech before a high school assembly in which he employed what this Court called “an elaborate, graphic, and explicit sexual metaphor.” *Id.*, at 678. Analyzing the case under *Tinker*, the District Court and Court of Appeals found no disruption, and therefore no basis for disciplining Fraser. 478 U.S., at 679–680. This Court reversed, holding that the “School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech.” *Id.*, at 685.

The mode of analysis employed in *Fraser* is not entirely clear. The Court was plainly attuned to the content of Fraser’s speech, citing the “marked distinction between the political ‘message’ of the armbands in *Tinker* and the sexual content of [Fraser’s] speech.” *Id.*, at 680. But the Court also reasoned that school boards have the authority to determine “what manner of speech in the classroom or in school assembly is inappropriate.” *Id.*, at 683. *Cf. id.*, at 689 (Brennan, J., concurring in judgment) (“In the present case, school officials sought only to ensure that a high school assembly proceed in an orderly manner. There is no suggestion that school officials attempted to regulate [Fraser’s] speech because they disagreed with the views he sought to express”).

We need not resolve this debate to decide this case. For present purposes, it is enough to distill from *Fraser* two basic principles. First, *Fraser*’s holding demonstrates that “the constitutional rights of students in public school are not automatically

coextensive with the rights of adults in other settings.” *Id.*, at 682. Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected. See *Cohen v. California*, 403 U.S. 15 (1971); *Fraser*, *supra*, at 682–683. In school, however, Fraser’s First Amendment rights were circumscribed “in light of the special characteristics of the school environment.” *Tinker*, *supra*, at 506. Second, Fraser established that the mode of analysis set forth in *Tinker* is not absolute. Whatever approach Fraser employed, it certainly did not conduct the “substantial disruption” analysis prescribed by *Tinker*, *supra*, at 514. See *Kuhlmeier*, 484 U.S., at 271, n. 4 (disagreeing with the proposition that there is “no difference between the First Amendment analysis applied in *Tinker* and that applied in *Fraser*,” and noting that the holding in *Fraser* was not based on any showing of substantial disruption).

Our most recent student speech case, *Kuhlmeier*, concerned “expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.” 484 U.S., at 271. Staff members of a high school newspaper sued their school when it chose not to publish two of their articles. The Court of Appeals analyzed the case under *Tinker*, ruling in favor of the students because it found no evidence of material disruption to classwork or school discipline. 795 F. 2d 1368, 1375 (CA8 1986). This Court reversed, holding that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” *Kuhlmeier*, *supra*, at 273.

Kuhlmeier does not control this case because no one would reasonably believe that Frederick’s banner bore the school’s imprimatur. The case is nevertheless instructive because it confirms both principles cited above. *Kuhlmeier* acknowledged that schools may regulate some speech “even though the government could not censor similar speech outside the school.” *Id.*, at 266. And, like *Fraser*, it confirms that the rule of *Tinker* is not the only basis for restricting student speech.²

Drawing on the principles applied in our student speech cases, we have held in the Fourth Amendment context that “while children assuredly do not ‘shed their constitutional rights . . . at the schoolhouse gate,’ . . . the nature of those rights is what is appropriate for children in school.” *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 655–656 (1995) (quoting *Tinker*, *supra*, at 506). In particular, “the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily

² The dissent’s effort to find inconsistency between our approach here and the opinion in *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. ____ (2007), *see post*, at 12 (opinion of STEVENS, J.), overlooks what was made clear in *Tinker*, *Fraser*, and *Kuhlmeier*: student First Amendment rights are “applied in light of the special characteristics of the school environment.” *Tinker*, 393 U.S., at 506. See *Fraser*, 478 U.S., at 682; *Kuhlmeier*, 484 U.S., at 266. And, as discussed above, *supra*, at 8, there is no serious argument that Frederick’s banner is political speech of the sort at issue in *Wisconsin Right to Life*.

subject.” *New Jersey v. T. L. O.*, 469 U.S. 325, 340 (1985). See *Vernonia*, *supra*, at 656 (“Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere . . .”); *Board of Ed. of Independent School Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 829-830 (2002) (“‘special needs’ inhere in the public school context”; “[w]hile schoolchildren do not shed their constitutional rights when they enter the schoolhouse, Fourth Amendment rights . . . are different in public schools than elsewhere; the ‘reasonableness’ inquiry cannot disregard the schools’ custodial and tutelary responsibility for children” (quoting *Vernonia*, 515 U.S., at 656; citation and some internal quotation marks omitted)).

Even more to the point, these cases also recognize that deterring drug use by schoolchildren is an “important—indeed, perhaps compelling” interest. *Id.*, at 661. Drug abuse can cause severe and permanent damage to the health and well-being of young people:

“School years are the time when the physical, psychological, and addictive effects of drugs are most severe. Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound; children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor. And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted.” *Id.*, at 661–662 (citations and internal quotation marks omitted).

Just five years ago, we wrote: “The drug abuse problem among our Nation’s youth has hardly abated since *Vernonia* was decided in 1995. In fact, evidence suggests that it has only grown worse.” *Earls*, *supra*, at 834, and n. 5.

The problem remains serious today. See generally 1 National Institute on Drug Abuse, National Institutes of Health, *Monitoring the Future: National Survey Results on Drug Use, 1975–2005, Secondary School Students* (2006). About half of American 12th graders have used an illicit drug, as have more than a third of 10th graders and about one-fifth of 8th graders. *Id.*, at 99. Nearly one in four 12th graders has used an illicit drug in the past month. *Id.*, at 101. Some 25% of high schoolers say that they have been offered, sold, or given an illegal drug on school property within the past year. Dept. of Health and Human Services, Centers for Disease Control and Prevention, *Youth Risk Behavior Surveillance—United States, 2005*, 55 *Morbidity and Mortality Weekly Report*, *Surveillance Summaries*, No. SS–5, p. 19 (June 9, 2006).

Congress has declared that part of a school’s job is educating students about the dangers of illegal drug use. It has provided billions of dollars to support state and local drug-prevention programs, Brief for United States as Amicus Curiae 1, and required that schools receiving federal funds under the Safe and Drug-Free Schools and Communities Act of 1994 certify that their drug prevention programs “convey a clear and consistent

message that . . . the illegal use of drugs [is] wrong and harmful.” 20 U.S.C. §7114(d)(6) (2000 ed., Supp. IV).

Thousands of school boards throughout the country— including JDHS—have adopted policies aimed at effectuating this message. See Pet. for Cert. 17–21. Those school boards know that peer pressure is perhaps “the single most important factor leading schoolchildren to take drugs,” and that students are more likely to use drugs when the norms in school appear to tolerate such behavior. *Earls*, supra, at 840 (BREYER, J., concurring). Student speech celebrating illegal drug use at a school event, in the presence of school administrators and teachers, thus poses a particular challenge for school officials working to protect those entrusted to their care from the dangers of drug abuse.

The “special characteristics of the school environment,” *Tinker*, 393 U.S., at 506, and the governmental interest in stopping student drug abuse—reflected in the policies of Congress and myriad school boards, including JDHS— allow schools to restrict student expression that they reasonably regard as promoting illegal drug use. *Tinker* warned that schools may not prohibit student speech because of “undifferentiated fear or apprehension of disturbance” or “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” *Id.*, at 508, 509. The danger here is far more serious and palpable. The particular concern to prevent student drug abuse at issue here, embodied in established school policy, App. 92–95; App. to Pet. for Cert. 53a, extends well beyond an abstract desire to avoid controversy.

Petitioners urge us to adopt the broader rule that Frederick’s speech is proscribable because it is plainly “offensive” as that term is used in *Fraser*. See Reply Brief for Petitioners 14–15. We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of “offensive.” After all, much political and religious speech might be perceived as offensive to some. The concern here is not that Frederick’s speech was offensive, but that it was reasonably viewed as promoting illegal drug use.

Although accusing this decision of doing “serious violence to the First Amendment” by authorizing “viewpoint discrimination,” post, at 2, 5 (opinion of STEVENS, J.), the dissent concludes that “it might well be appropriate to tolerate some targeted viewpoint discrimination in this unique setting,” post, at 6–7. Nor do we understand the dissent to take the position that schools are required to tolerate student advocacy of illegal drug use at school events, even if that advocacy falls short of inviting “imminent” lawless action. See post, at 7 (“[I]t is possible that our rigid imminence requirement ought to be relaxed at schools”). And even the dissent recognizes that the issues here are close enough that the principal should not be held liable in damages, but should instead enjoy qualified immunity for her actions. See post, at 1. Stripped of rhetorical flourishes, then, the debate between the dissent and this opinion is less about constitutional first principles than about whether Frederick’s banner constitutes promotion of illegal drug use. We have explained our view that it does. The dissent’s

contrary view on that relatively narrow question hardly justifies sounding the First Amendment bugle.

* * *

School principals have a difficult job, and a vitally important one. When Frederick suddenly and unexpectedly unfurled his banner, Morse had to decide to act—or not act—on the spot. It was reasonable for her to conclude that the banner promoted illegal drug use—in violation of established school policy—and that failing to act would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use. The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers.

The judgment of the United States Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Cite as: 551 U.S. ____ (2007)

Thomas, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 06–278

DEBORAH MORSE, ET AL., PETITIONERS v. JOSEPH FREDERICK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[June 25, 2007]

JUSTICE THOMAS, concurring.

The Court today decides that a public school may prohibit speech advocating illegal drug use. I agree and therefore join its opinion in full. I write separately to state my view that the standard set forth in *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969), is without basis in the Constitution.

I

The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech.” As this Court has previously observed, the First Amendment was not originally understood to permit all sorts of speech; instead, “[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571– 572 (1942); see also *Cox v. Louisiana*, 379 U.S. 536, 554 (1965). In my view, the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools. Although colonial schools were exclusively private, public education proliferated in the early 1800’s. By the time the States ratified the Fourteenth Amendment, public schools had become relatively common. W. Reese, *America’s Public Schools: From the Common School to “No Child Left Behind”* 11–12 (2005) (hereinafter Reese). If students in public schools were originally understood as having free-speech rights, one would have expected 19th-century public schools to have respected those rights and courts to have enforced them.¹ They did not.

¹ Although the First Amendment did not apply to the States until at least the ratification of the Fourteenth Amendment, most state constitutions included free-speech guarantees during the period when public education expanded. E.g., Cal. Const., Art. I, §9 (1849); Conn. Const., Art. I, §5 (1818); Ind. Const., Art. I, §9 (1816).

A

During the colonial era, private schools and tutors offered the only educational opportunities for children, and teachers managed classrooms with an iron hand. R. Butts & L. Cremin, *A History of Education in American Culture* 121, 123 (1953) (hereinafter Butts). Public schooling arose, in part, as a way to educate those too poor to afford private schools. See Kaestle & Vinovskis, *From Apron Strings to ABCs: Parents, Children, and Schooling in Nineteenth-Century Massachusetts*, 84 *Am. J. Sociology* S39, S49 (Supp. 1978). Because public schools were initially created as substitutes for private schools, when States developed public education systems in the early 1800's, no one doubted the government's ability to educate and discipline children as private schools did. Like their private counterparts, early public schools were not places for freewheeling debates or exploration of competing ideas. Rather, teachers instilled "a core of common values" in students and taught them self-control. Reese 23; A. Potter & G. Emerson, *The School and the Schoolmaster: A Manual* 125 (1843) ("By its discipline it contributes, insensibly, to generate a spirit of subordination to lawful authority, a power of self-control, and a habit of postponing present indulgence to a greater future good . . ."); D. Parkerson & J. Parkerson, *The Emergence of the Common School in the U.S. Countryside* 6 (1998) (hereinafter Parkerson) (noting that early education activists, such as Benjamin Rush, believed public schools "help[ed] control the innate selfishness of the individual").

Teachers instilled these values not only by presenting ideas but also through strict discipline. Butts 274–275. Schools punished students for behavior the school considered disrespectful or wrong. Parkerson 65 (noting that children were punished for idleness, talking, profanity, and slovenliness). Rules of etiquette were enforced, and courteous behavior was demanded. Reese 40. To meet their educational objectives, schools required absolute obedience. C. Northend, *The Teacher's Assistant or Hints and Methods in School Discipline and Instruction* 44, 52 (1865) ("I consider a school judiciously governed, where order prevails; where the strictest sense of propriety is manifested by the pupils towards the teacher, and towards each other . . ." (internal quotation marks omitted)).²

In short, in the earliest public schools, teachers taught, and students listened. Teachers commanded, and students obeyed. Teachers did not rely solely on the power of ideas to persuade; they relied on discipline to maintain order.

² Even at the college level, strict obedience was required of students: "The English model fostered absolute institutional control of students by faculty both inside and outside the classroom. At all the early American schools, students lived and worked under a vast array of rules and restrictions. This one-sided relationship between the student and the college mirrored the situation at English schools where the emphasis on hierarchical authority stemmed from medieval Christian theology and the unique legal privileges afforded the university corporation." Note, 44 *Vand. L. Rev.* 1135, 1140 (1991) (footnote omitted).

B

Through the legal doctrine of *in loco parentis*, courts upheld the right of schools to discipline students, to enforce rules, and to maintain order.³ Rooted in the English common law, *in loco parentis* originally governed the legal rights and obligations of tutors and private schools. 1 W. Blackstone, *Commentaries on the Laws of England* 441 (1765) (“[A parent] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then in *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed”). Chancellor James Kent noted the acceptance of the doctrine as part of American law in the early 19th century. 2 J. Kent, *Commentaries on American Law* *205, *206–*207 (“So the power allowed by law to the parent over the person of the child may be delegated to a tutor or instructor, the better to accomplish the purpose of education”).

As early as 1837, state courts applied the *in loco parentis* principle to public schools:

“One of the most sacred duties of parents, is to train up and qualify their children, for becoming useful and virtuous members of society; this duty cannot be effectually performed without the ability to command obedience, to control stubbornness, to quicken diligence, and to reform bad habits The teacher is the substitute of the parent; . . . and in the exercise of these delegated duties, is invested with his power.” *State v. Pendergrass*, 19 N. C. 365, 365–366, (1837).

Applying *in loco parentis*, the judiciary was reluctant to interfere in the routine business of school administration, allowing schools and teachers to set and enforce rules and to maintain order. *Sheehan v. Sturges*, 53 Conn. 481, 483–484, 2 A. 841, 842 (1885). Thus, in the early years of public schooling, schools and teachers had considerable discretion in disciplinary matters:

“To accomplish th[e] desirable ends [of teaching self-restraint, obedience, and other civic virtues], the master of a school is necessarily invested with much discretionary power. . . . He must govern these pupils, quicken the slothful, spur the indolent, restrain the impetuous, and control the stubborn. He must make rules, give commands, and punish disobedience. What rules, what commands, and

³ My discussion is limited to elementary and secondary education. In these settings, courts have applied the doctrine of *in loco parentis* regardless of the student’s age. See, e.g., *Stevens v. Fassett*, 27 Me. 266, 281 (1847) (holding that a student over the age of 21 is “liab[le] to punishment” on the same terms as other students if he “present[s] himself as a pupil, [and] is received and instructed by the master”); *State v. Mizner*, 45 Iowa 248, 250–252 (1876) (same); *Sheehan v. Sturges*, 53 Conn. 481, 484, 2 A. 841, 843 (1885) (same). Therefore, the fact that Frederick was 18 and not a minor under Alaska law, 439 F. 3d 1114, 1117, n. 4 (CA9 2006), is inconsequential.

what punishments shall be imposed, are necessarily largely within the discretion of the master, where none are defined by the school board.” *Patterson v. Nutter*, 78 Me. 509, 511, 7 A. 273, 274 (1886).⁴

A review of the case law shows that in loco parentis allowed schools to regulate student speech as well. Courts routinely preserved the rights of teachers to punish speech that the school or teacher thought was contrary to the interests of the school and its educational goals. For example, the Vermont Supreme Court upheld the corporal punishment of a student who called his teacher “Old Jack Seaver” in front of other students. *Lander v. Seaver*, 32 Vt. 114, 115 (1859). The court explained its decision as follows:

“[L]anguage used to other scholars to stir up disorder and subordination, or to heap odium and disgrace upon the master; writings and pictures placed so as to suggest evil and corrupt language, images and thoughts to the youth who must frequent the school; all such or similar acts tend directly to impair the usefulness of the school, the welfare of the scholars and the authority of the master. By common consent and by the universal custom in our New England schools, the master has always been deemed to have the right to punish such offences. Such power is essential to the preservation of order, decency, decorum and good government in schools.” *Id.*, at 121.

Similarly, the California Court of Appeal upheld the expulsion of a student who gave a speech before the student body that criticized the administration for having an unsafe building “because of the possibility of fire.” *Wooster v. Sunderland*, 27 Cal. App. 51, 52, 148 P. 959, (1915). The punishment was appropriate, the court stated, because the speech “was intended to discredit and humiliate the board in the eyes of the students, and tended to impair the discipline of the school.” *Id.*, at 55, 148 P., at 960. Likewise, the Missouri Supreme Court explained that a “rule which forbade the use of profane language [and] quarrelling” “was not only reasonable, but necessary to the orderly conduct of the school.” *Deskins v. Gose*, 85 Mo. 485, 487, 488 (1885). And the Indiana Supreme Court upheld the punishment of a student who made distracting demonstrations in class for “a breach of good deportment.” *Vanvactor v. State*, 113 Ind. 276, 281, 15 N. E. 341, 343 (1888).⁵

⁴ Even courts that did not favor the broad discretion given to teachers to impose corporal punishment recognized that the law provided it. *Cooper v. McJunkin*, 4 Ind. 290, 291 (1853) (stating that “[t]he public seem to cling to a despotism in the government of schools which has been discarded everywhere else”).

⁵ Courts also upheld punishment when children refused to speak after being requested to do so by their teachers. See *Board of Ed. v. Helston*, 32 Ill. App. 300, 305–307 (1890) (upholding the suspension of a boy who refused to provide information about who had defaced the school building); cf. *Sewell v. Board of Ed. of Defiance Union School*, 29 Ohio St. 89, 92 (1876) (upholding the suspension of a student who failed to complete a rhetorical exercise in the allotted time).

The doctrine of *in loco parentis* limited the ability of schools to set rules and control their classrooms in almost no way. It merely limited the imposition of excessive physical punishment. In this area, the case law was split. One line of cases specified that punishment was wholly discretionary as long as the teacher did not act with legal malice or cause permanent injury. E.g., *Boyd v. State*, 88 Ala. 169, 170–172, 7 So. 268, 269 (1890) (allowing liability where the “punishment inflicted is immoderate or excessive, and . . . it was induced by legal malice, or wickedness of motive”). Another line allowed courts to intervene where the corporal punishment was “clearly excessive.” E.g., *Lander, supra*, at 124. Under both lines of cases, courts struck down only punishments that were excessively harsh; they almost never questioned the substantive restrictions on student conduct set by teachers and schools. E.g., *Sheehan, supra*, at 483–484, 2 A., at 842; *Gardner v. State*, 4 Ind. 632, 635 (1853); *Anderson v. State*, 40 Tenn. 455, 456 (1859); *Hardy v. James*, 5 Ky. Op. 36 (1872).⁶

II

Tinker effected a sea change in students’ speech rights, extending them well beyond traditional bounds. The case arose when a school punished several students for wearing black armbands to school to protest the Vietnam War. *Tinker*, 393 U.S., at 504. Determining that the punishment infringed the students’ First Amendment rights, this Court created a new standard for students’ freedom of speech in public schools:

“[W]here there is no finding and no showing that engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school, the prohibition cannot be sustained.” *Id.*, at 509 (internal quotation marks omitted).

Accordingly, unless a student’s speech would disrupt the educational process, students had a fundamental right to speak their minds (or wear their armbands)—even on matters the school disagreed with or found objectionable. *Ibid.* (“[The school] must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint”).

⁶ At least nominally, this Court has continued to recognize the applicability of the *in loco parentis* doctrine to public schools. See *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 654, 655 (1995) (“Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination They are subject . . . to the control of their parents or guardians. When parents place minor children in private schools for their education, the teachers and administrators of those schools stand *in loco parentis* over the children entrusted to them” (citation omitted)); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986) (“These cases recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech”).

Justice Black dissented, criticizing the Court for “subject[ing] all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students.” *Id.*, at 525. He emphasized the instructive purpose of schools: “[T]axpayers send children to school on the premise that at their age they need to learn, not teach.” *Id.*, at 522. In his view, the Court’s decision “surrender[ed] control of the American public school system to public school students.” *Id.*, at 526.

Of course, *Tinker*’s reasoning conflicted with the traditional understanding of the judiciary’s role in relation to public schooling, a role limited by *in loco parentis*. Perhaps for that reason, the Court has since scaled back *Tinker*’s standard, or rather set the standard aside on an *ad hoc* basis. In *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 677, 678 (1986), a public school suspended a student for delivering a speech that contained “an elaborate, graphic, and explicit sexual metaphor.” The Court of Appeals found that the speech caused no disruption under the *Tinker* standard, and this Court did not question that holding. 478 U.S., at 679–680. The Court nonetheless permitted the school to punish the student because of the objectionable content of his speech. *Id.*, at 685 (“A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students”). Signaling at least a partial break with *Tinker*, *Fraser* left the regulation of indecent student speech to local schools.⁷ 478 U.S., at 683.

Similarly, in *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), the Court made an exception to *Tinker* for school-sponsored activities. The Court characterized newspapers and similar school-sponsored activities “as part of the school curriculum” and held that “[e]ducators are entitled to exercise greater control over” these forms of student expression. 484 U.S., at 271. Accordingly, the Court expressly refused to apply *Tinker*’s standard. 484 U.S., at 272–273. Instead, for school-sponsored activities, the Court created a new standard that permitted school regulations of student speech that are “reasonably related to legitimate pedagogical concerns.” *Id.*, at 273.

Today, the Court creates another exception. In doing so, we continue to distance ourselves from *Tinker*, but we neither overrule it nor offer an explanation of when it operates and when it does not. *Ante*, at 10–14. I am afraid that our jurisprudence now says that students have a right to speak in schools except when they don’t—a standard continuously developed through litigation against local schools and their administrators. In my view, petitioners could prevail for a much simpler reason: As originally understood, the Constitution does not afford students a right to free speech in public schools.

⁷ Distancing itself from *Tinker*’s approach, the *Fraser* Court quoted Justice Black’s dissent in *Tinker*. 478 U.S., at 686.

III

In light of the history of American public education, it cannot seriously be suggested that the First Amendment “freedom of speech” encompasses a student’s right to speak in public schools. Early public schools gave total control to teachers, who expected obedience and respect from students. And courts routinely deferred to schools’ authority to make rules and to discipline students for violating those rules. Several points are clear: (1) under *in loco parentis*, speech rules and other school rules were treated identically; (2) the *in loco parentis* doctrine imposed almost no limits on the types of rules that a school could set while students were in school; and (3) schools and teachers had tremendous discretion in imposing punishments for violations of those rules.

It might be suggested that the early school speech cases dealt only with slurs and profanity. But that criticism does not withstand scrutiny. First, state courts repeatedly reasoned that schools had discretion to impose discipline to maintain order. The substance of the student’s speech or conduct played no part in the analysis. Second, some cases involved punishment for speech on weightier matters, for instance a speech criticizing school administrators for creating a fire hazard. See *Wooster*, 27 Cal. App., at 52–53, 148 P., at 959. Yet courts refused to find an exception to *in loco parentis* even for this advocacy of public safety.

To be sure, our educational system faces administrative and pedagogical challenges different from those faced by 19th-century schools. And the idea of treating children as though it were still the 19th century would find little support today. But I see no constitutional imperative requiring public schools to allow all student speech. Parents decide whether to send their children to public schools. Cf. *Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245, 262 (1934) (“California has not drafted or called them to attend the university. They are seeking education offered by the State and at the same time insisting that they be excluded from the prescribed course . . .”); *id.*, at 266 (Cardozo, J., concurring). If parents do not like the rules imposed by those schools, they can seek redress in school boards or legislatures; they can send their children to private schools or home school them; or they can simply move. Whatever rules apply to student speech in public schools, those rules can be challenged by parents in the political process.

In place of that democratic regime, *Tinker* substituted judicial oversight of the day-to-day affairs of public schools. The *Tinker* Court made little attempt to ground its holding in the history of education or in the original understanding of the First Amendment.⁸ Instead, it imposed a new and malleable standard: Schools could not inhibit

⁸ The *Tinker* Court claimed that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.” 393 U.S., at 506. But the cases the Court cited in favor of that bold proposition do not support it. *Tinker* chiefly relies upon *Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking down a law prohibiting the teaching of German). However, *Meyer* involved a challenge by a private school, *id.*, at 396, and the *Meyer* Court was quick to note that no

student speech unless it “substantially interfere[d] with the requirements of appropriate discipline in the operation of the school.” 393 U.S., at 509 (internal quotation marks omitted). Inherent in the application of that standard are judgment calls about what constitutes interference and what constitutes appropriate discipline. See *id.*, at 517–518 (Black, J., dissenting) (arguing that the armbands in fact caused a disruption). Historically, courts reasoned that only local school districts were entitled to make those calls. The Tinker Court usurped that traditional authority for the judiciary.

And because Tinker utterly ignored the history of public education, courts (including this one) routinely find it necessary to create ad hoc exceptions to its central premise. This doctrine of exceptions creates confusion without fixing the underlying problem by returning to first principles. Just as I cannot accept Tinker’s standard, I cannot subscribe to Kuhlmeier’s alternative. Local school boards, not the courts, should determine what pedagogical interests are “legitimate” and what rules “reasonably relat[e]” to those interests. 484 U.S., at 273.

Justice Black may not have been “a prophet or the son of a prophet,” but his dissent in Tinker has proved prophetic. 393 U.S., at 525. In the name of the First Amendment, Tinker has undermined the traditional authority of teachers to maintain order in public schools. “Once a society that generally respected the authority of teachers, deferred to their judgment, and trusted them to act in the best interest of school children, we now accept defiance, disrespect, and disorder as daily occurrences in many of our public schools.” Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 Geo. Wash. L. Rev. 49, 50 (1996). We need look no further than this case for an example: Frederick asserts a constitutional right to utter at a school event what is either “[g]ibberish,” ante, at 7, or an open call to use illegal drugs. To elevate such impertinence to the status of constitutional protection would be farcical and would indeed be to “surrender control of the American public school system to public school students.” Tinker, *supra*, at 526 (Black, J., dissenting).

* * *

I join the Court’s opinion because it erodes Tinker’s hold in the realm of student speech, even though it does so by adding to the patchwork of exceptions to the Tinker

“challenge [has] been made of the State’s power to prescribe a curriculum for institutions which it supports.” *Id.*, at 402. Meyer provides absolutely no support for the proposition that that free-speech rights apply within schools operated by the State. And notably, Meyer relied as its chief support on the *Lochner v. New York*, 198 U.S. 45 (1905), line of cases, 262 U.S., at 399, a line of cases that has long been criticized, *United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. ____ (2007). Tinker also relied on *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). *Pierce* has nothing to say on this issue either. *Pierce* simply upheld the right of parents to send their children to private school. *Id.*, at 535.

standard. I think the better approach is to dispense with Tinker altogether, and given the opportunity, I would do so.

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Alito, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 06–278

DEBORAH MORSE, ET AL., PETITIONERS v. JOSEPH FREDERICK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[June 25, 2007]

JUSTICE ALITO, with whom JUSTICE KENNEDY joins, concurring.

I join the opinion of the Court on the understanding that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as “the wisdom of the war on drugs or of legalizing marijuana for medicinal use.” See post, at 13 (STEVENS, J., dissenting).

The opinion of the Court correctly reaffirms the recognition in *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969), of the fundamental principle that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” The Court is also correct in noting that *Tinker*, which permits the regulation of student speech that threatens a concrete and “substantial disruption,” *id.*, at 514, does not set out the only ground on which in-school student speech may be regulated by state actors in a way that would not be constitutional in other settings.

But I do not read the opinion to mean that there are necessarily any grounds for such regulation that are not already recognized in the holdings of this Court. In addition to *Tinker*, the decision in the present case allows the restriction of speech advocating illegal drug use; *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), permits the regulation of speech that is delivered in a lewd or vulgar manner as part of a middle school program; and *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), allows a school to regulate what is in essence the school’s own speech, that is, articles that appear in a publication that is an official school organ. I join the opinion of the Court on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions.

The opinion of the Court does not endorse the broad argument advanced by petitioners and the United States that the First Amendment permits public school officials to censor any student speech that interferes with a school’s “educational mission.” See Brief for Petitioners 21; Brief for United States as Amicus Curiae 6. This argument can easily be manipulated in dangerous ways, and I would reject it before such abuse occurs. The “educational mission” of the public schools is defined by the elected and appointed public officials with authority over the schools and by the school administrators and faculty. As a result, some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups.

During the Tinker era, a public school could have defined its educational mission to include solidarity with our soldiers and their families and thus could have attempted to outlaw the wearing of black armbands on the ground that they undermined this mission. Alternatively, a school could have defined its educational mission to include the promotion of world peace and could have sought to ban the wearing of buttons expressing support for the troops on the ground that the buttons signified approval of war. The “educational mission” argument would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed. The argument, therefore, strikes at the very heart of the First Amendment.

The public schools are invaluable and beneficent institutions, but they are, after all, organs of the State. When public school authorities regulate student speech, they act as agents of the State; they do not stand in the shoes of the students’ parents. It is a dangerous fiction to pretend that parents simply delegate their authority—including their authority to determine what their children may say and hear—to public school authorities. It is even more dangerous to assume that such a delegation of authority somehow strips public school authorities of their status as agents of the State. Most parents, realistically, have no choice but to send their children to a public school and little ability to influence what occurs in the school. It is therefore wrong to treat public school officials, for purposes relevant to the First Amendment, as if they were private, nongovernmental actors standing in loco parentis.

For these reasons, any argument for altering the usual free speech rules in the public schools cannot rest on a theory of delegation but must instead be based on some special characteristic of the school setting. The special characteristic that is relevant in this case is the threat to the physical safety of students. School attendance can expose students to threats to their physical safety that they would not otherwise face. Outside of school, parents can attempt to protect their children in many ways and may take steps to monitor and exercise control over the persons with whom their children associate. Similarly, students, when not in school, may be able to avoid threatening individuals and situations. During school hours, however, parents are not present to provide protection and guidance, and students’ movements and their ability to choose the persons with

whom they spend time are severely restricted. Students may be compelled on a daily basis to spend time at close quarters with other students who may do them harm. Experience shows that schools can be places of special danger.

In most settings, the First Amendment strongly limits the government's ability to suppress speech on the ground that it presents a threat of violence. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam). But due to the special features of the school environment, school officials must have greater authority to intervene before speech leads to violence. And, in most cases, *Tinker's* "substantial disruption" standard permits school officials to step in before actual violence erupts. See 393 U.S., at 508–509.

Speech advocating illegal drug use poses a threat to student safety that is just as serious, if not always as immediately obvious. As we have recognized in the past and as the opinion of the Court today details, illegal drug use presents a grave and in many ways unique threat to the physical safety of students. I therefore conclude that the public schools may ban speech advocating illegal drug use. But I regard such regulation as standing at the far reaches of what the First Amendment permits. I join the opinion of the Court with the understanding that the opinion does not endorse any further extension.

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Opinion of Breyer, J.

SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[June 25, 2007]

JUSTICE BREYER, concurring in the judgment in part and dissenting in part.

This Court need not and should not decide this difficult First Amendment issue on the merits. Rather, I believe that it should simply hold that qualified immunity bars the student’s claim for monetary damages and say no more.

I

Resolving the First Amendment question presented in this case is, in my view, unwise and unnecessary. In part that is because the question focuses upon specific content narrowly defined: May a school board punish students for speech that advocates drug use and, if so, when? At the same time, the underlying facts suggest that Principal Morse acted as she did not simply because of the specific content and viewpoint of Joseph Frederick’s speech but also because of the surrounding context and manner in which Frederick expressed his views. To say that school officials might reasonably prohibit students during school-related events from unfurling 14-foot banners (with any kind of irrelevant or inappropriate message) designed to attract attention from television cameras seems unlikely to undermine basic First Amendment principles. But to hold, as the Court does, that “schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use” (and that “schools” may “restrict student expression that they reasonably regard as promoting illegal drug use”) is quite a different matter. Ante, at 2, 14. This holding, based as it is on viewpoint restrictions, raises a host of serious concerns.

One concern is that, while the holding is theoretically limited to speech promoting the use of illegal drugs, it could in fact authorize further viewpoint-based restrictions. Illegal drugs, after all, are not the only illegal substances. What about encouraging the underage consumption of alcohol? Moreover, it is unclear how far the Court’s rule regarding drug advocacy extends. What about a conversation during the lunch period where one student suggests that glaucoma sufferers should smoke marijuana to relieve

the pain? What about deprecating commentary about an antidrug film shown in school? And what about drug messages mixed with other, more expressly political, content? If, for example, Frederick's banner had read "LEGALIZE BONG HiTS," he might be thought to receive protection from the majority's rule, which goes to speech "encouraging illegal drug use." Ante, at 2 (emphasis added). But speech advocating change in drug laws might also be perceived of as promoting the disregard of existing drug laws.

Legal principles must treat like instances alike. Those principles do not permit treating "drug use" separately without a satisfying explanation of why drug use is *sui generis*. To say that illegal drug use is harmful to students, while surely true, does not itself constitute a satisfying explanation because there are many such harms. During a real war, one less metaphorical than the war on drugs, the Court declined an opportunity to draw narrow subject-matter-based lines. Cf. *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943) (holding students cannot be compelled to recite the Pledge of Allegiance during World War II). We should decline this opportunity today.

Although the dissent avoids some of the majority's pitfalls, I fear that, if adopted as law, it would risk significant interference with reasonable school efforts to maintain discipline. What is a principal to do when a student unfurls a 14-foot banner (carrying an irrelevant or inappropriate message) during a school-related event in an effort to capture the attention of television cameras? Nothing? In my view, a principal or a teacher might reasonably view Frederick's conduct, in this setting, as simply beyond the pale. And a school official, knowing that adolescents often test the outer boundaries of acceptable behavior, may believe it is important (for the offending student and his classmates) to establish when a student has gone too far.

Neither can I simply say that Morse may have taken the right action (confiscating Frederick's banner) but for the wrong reason ("drug speech"). Teachers are neither lawyers nor police officers; and the law should not demand that they fully understand the intricacies of our First Amendment jurisprudence. As the majority rightly points out, the circumstances here called for a quick decision. See ante, at 15 (noting that "Morse had to decide to act—or not act—on the spot"). But this consideration is better understood in terms of qualified immunity than of the First Amendment. See *infra*, at 5-8.

All of this is to say that, regardless of the outcome of the constitutional determination, a decision on the underlying First Amendment issue is both difficult and unusually portentous. And that is a reason for us not to decide the issue unless we must.

In some instances, it is appropriate to decide a constitutional issue in order to provide "guidance" for the future. But I cannot find much guidance in today's decision. The Court makes clear that school officials may "restrict" student speech that promotes "illegal drug use" and that they may "take steps" to "safeguard" students from speech that encourages "illegal drug use." Ante, at 2, 8. Beyond "steps" that prohibit the unfurling of

banners at school outings, the Court does not explain just what those “re-strict[ions]” or those “steps” might be.

Nor, if we are to avoid the risk of interpretations that are too broad or too narrow, is it easy to offer practically valuable guidance. Students will test the limits of acceptable behavior in myriad ways better known to schoolteachers than to judges; school officials need a degree of flexible authority to respond to disciplinary challenges; and the law has always considered the relationship between teachers and students special. Under these circumstances, the more detailed the Court’s supervision becomes, the more likely its law will engender further disputes among teachers and students. Consequently, larger numbers of those disputes will likely make their way from the schoolhouse to the courthouse. Yet no one wishes to substitute courts for school boards, or to turn the judge’s chambers into the principal’s office.

In order to avoid resolving the fractious underlying constitutional question, we need only decide a different question that this case presents, the question of “qualified immunity.” See Pet. for Cert. 23–28. The principle of qualified immunity fits this case perfectly and, by saying so, we would diminish the risk of bringing about the adverse consequences I have identified. More importantly, we should also adhere to a basic constitutional obligation by avoiding unnecessary decision of constitutional questions. See *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (“The Court will not pass upon a constitutional question although properly presented on the record, if there is also present some other ground upon which the case may be disposed of”).

II

A

The defense of “qualified immunity” requires courts to enter judgment in favor of a government employee unless the employee’s conduct violates “clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The defense is designed to protect “all but the plainly incompetent or those who knowingly violated the law.” *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Qualified immunity applies here and entitles Principal Morse to judgment on Frederick’s monetary damages claim because she did not clearly violate the law during her confrontation with the student. At the time of that confrontation, *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 513 (1969), indicated that school officials could not prohibit students from wearing an armband in protest of the Vietnam War, where the conduct at issue did not “materially and substantially disrupt the work and discipline of the school;” *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), indicated that school officials could restrict a student’s freedom to give a school assembly speech containing an elaborate sexual metaphor; and *Hazelwood School Dist.*

v. Kuhlmeier, 484 U.S. 260 (1988), indicated that school officials could restrict student contributions to a school-sponsored newspaper, even without threat of imminent disruption. None of these cases clearly governs the case at hand.

The Ninth Circuit thought it “clear” that these cases did not permit Morse’s actions. See 439 F. 3d 1114, 1124 (2006). That is because, in the Ninth Circuit’s view, this case involved neither lewd speech, cf. Fraser, supra, nor school sponsored speech, cf. Kuhlmeier, supra, and hence Tinker’s substantial disruption test must guide the inquiry. See 439 F. 3d, at 1123. But unlike the Ninth Circuit, other courts have described the tests these cases suggest as complex and often difficult to apply. See, e.g., Guiles ex rel. Guiles v. Marineau, 461 F. 3d 320, 326 (CA2 2006) (“It is not entirely clear whether Tinker’s rule applies to all student speech that is not sponsored by schools, subject to the rule of Fraser, or whether it applies only to political speech or to political viewpoint-based discrimination”); Baxter v. Vigo Cty. School Corp., 26 F. 3d 728, 737 (CA7 1994) (pointing out that Fraser “cast some doubt on the extent to which students retain free speech rights in the school setting”). Indeed, the fact that this Court divides on the constitutional question (and that the majority reverses the Ninth Circuit’s constitutional determination) strongly suggests that the answer as to how to apply prior law to these facts was unclear.

The relative ease with which we could decide this case on the qualified immunity ground, and thereby avoid deciding a far more difficult constitutional question, underscores the need to lift the rigid “order of battle” decisionmaking requirement that this Court imposed upon lower courts in Saucier v. Katz, 533 U.S. 194, 201–202 (2001). In Saucier, the Court wrote that lower courts’ “first inquiry must be whether a constitutional right would have been violated on the facts alleged.” Id., at 200. Only if there is a constitutional violation, can lower courts proceed to consider whether the official is entitled to “qualified immunity.” See *ibid.*

I have previously explained why I believe we should abandon Saucier’s order-of-battle rule. See Scott v. Harris, 550 U.S. ___, ___ (2007) (slip op., at 1–2) (BREYER, J., concurring); Brosseau v. Haugen, 543 U.S. 194, 201–202 (2004) (BREYER, J., concurring). Sometimes the rule will require lower courts unnecessarily to answer difficult constitutional questions, thereby wasting judicial resources. Sometimes it will require them to resolve constitutional issues that are poorly presented. Sometimes the rule will immunize an incorrect constitutional holding from further review. And often the rule violates the longstanding principle that courts should “not . . . pass on questions of constitutionality . . . unless such adjudication is unavoidable.” Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101, 105 (1944).

This last point warrants amplification. In resolving the underlying constitutional question, we produce several differing opinions. It is utterly unnecessary to do so. Were we to decide this case on the ground of qualified immunity, our decision would be unanimous, for the dissent concedes that Morse should not be held liable in damages for

confiscating Frederick's banner. Post, at 1 (opinion of STEVENS, J.). And the "cardinal principle of judicial restraint" is that "if it is not necessary to decide more, it is necessary not to decide more." *PDK Labs., Inc. v. Drug Enforcement Admin.*, 362 F. 3d 786, 799 (CA10 2004) (Roberts, J., concurring in part and concurring in judgment).

If it is *Saucier* that tempts this Court to adhere to the rigid "order of battle" that binds lower courts, it should resist that temptation. *Saucier* does not bind this Court. Regardless, the rule of *Saucier* has generated considerable criticism from both commentators and judges. See Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N. Y. U. L. Rev. 1249, 1275 (2006) (calling the requirement "a puzzling misadventure in constitutional dictum"); *Dirrane v. Brookline Police Dept.*, 315 F. 3d 65, 69–70 (CA1 2002) (referring to the requirement as "an uncomfortable exercise" when "the answer whether there was a violation may depend on a kaleidoscope of facts not yet fully developed"); *Lyons v. Xenia*, 417 F. 3d 565, 580–584 (CA6 2005) (Sutton, J., concurring). While *Saucier* justified its rule by contending that it was necessary to permit constitutional law to develop, see 533 U.S., at 201, this concern is overstated because overruling *Saucier* would not mean that the law prohibited judges from passing on constitutional questions, only that it did not require them to do so. Given that *Saucier* is a judge-made procedural rule, *stare decisis* concerns supporting preservation of the rule are weak. See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) ("Considerations in favor of *stare decisis*" are at their weakest in cases "involving procedural and evidentiary rules").

Finally, several Members of this Court have previously suggested that always requiring lower courts first to answer constitutional questions is misguided. See *County of Sacramento v. Lewis*, 523 U.S. 833, 859 (1998) (STEVENS, J., concurring in judgment) (resolving the constitutional question first is inappropriate when that "question is both difficult and unresolved"); *Bunting v. Mellen*, 541 U.S. 1019, 1025 (2004) (SCALIA, J., dissenting from denial of certiorari) ("We should either make clear that constitutional determinations are not insulated from our review . . . or else drop any pretense at requiring the ordering in every case"); *Saucier*, supra, at 210 (GINSBURG, J., concurring in judgment) ("The two-part test today's decision imposes holds large potential to confuse"); *Siegert v. Gilley*, 500 U.S. 226, 235 (1991) (KENNEDY, J., concurring) ("If it is plain that a plaintiff's required malice allegations are insufficient but there is some doubt as to the constitutional right asserted, it seems to reverse the usual ordering of issues to tell the trial and appellate courts that they should resolve the constitutional question first"). I would end the failed *Saucier* experiment now.

B

There is one remaining objection to deciding this case on the basis of qualified immunity alone. The plaintiff in this case has sought not only damages; he has also sought an injunction requiring the school district to expunge his suspension from its records. A "qualified immunity" defense applies in respect to damages actions, but not to

injunctive relief. See, e.g., *Wood v. Strickland*, 420 U.S. 308, 314, n. 6 (1975). With respect to that claim, the underlying question of constitutionality, at least conceivably, remains.

I seriously doubt, however, that it does remain. At the plaintiff's request, the school superintendent reviewed Frederick's 10-day suspension. The superintendent, in turn, reduced the suspension to the eight days that Frederick had served before the appeal. But in doing so the superintendent noted that several actions independent of Frederick's speech supported the suspension, including the plaintiff's disregard of a school official's instruction, his failure to report to the principal's office on time, his "defiant [and] disruptive behavior," and the "belligerent attitude" he displayed when he finally reported. App. to Pet. for Cert. 65a. The superintendent wrote that "were" he to "concede" that Frederick's "speech . . . is protected, . . . the remainder of his behavior was not excused." *Id.*, at 66a.

The upshot is that the school board's refusal to erase the suspension from the record may well be justified on non-speech-related grounds. In addition, plaintiff's counsel appeared to agree with the Court's suggestion at oral argument that Frederick "would not pursue" injunctive relief if he prevailed on the damages question. Tr. of Oral Arg. 46–48. And finding that Morse was entitled to qualified immunity would leave only the question of injunctive relief.

Given the high probability that Frederick's request for an injunction will not require a court to resolve the constitutional issue, see *Ashwander*, 297 U.S., at 347 (Brandeis, J., concurring), I would decide only the qualified immunity question and remand the rest of the case for an initial consideration.

Cite as: 551 U.S. ____ (2007)

Stevens, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 06–278

DEBORAH MORSE, ET AL., PETITIONERS v. JOSEPH FREDERICK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF

APPEALS FOR THE NINTH CIRCUIT

[June 25, 2007]

JUSTICE STEVENS, with whom JUSTICE SOUTER and JUSTICE GINSBURG join, dissenting.

A significant fact barely mentioned by the Court sheds a revelatory light on the motives of both the students and the principal of Juneau-Douglas High School (JDHS). On January 24, 2002, the Olympic Torch Relay gave those Alaska residents a rare chance to appear on national television. As Joseph Frederick repeatedly explained, he did not address the curious message—“BONG HiTS 4 JESUS”—to his fellow students. He just wanted to get the camera crews’ attention. Moreover, concern about a nationwide evaluation of the conduct of the JDHS student body would have justified the principal’s decision to remove an attention-grabbing 14-foot banner, even if it had merely proclaimed “Glaciers Melt!”

I agree with the Court that the principal should not be held liable for pulling down Frederick’s banner. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). I would hold, however, that the school’s interest in protecting its students from exposure to speech “reasonably regarded as promoting illegal drug use,” ante, at 1, cannot justify disciplining Frederick for his attempt to make an ambiguous statement to a television audience simply because it contained an oblique reference to drugs. The First Amendment demands more, indeed, much more.

The Court holds otherwise only after laboring to establish two uncontroversial propositions: first, that the constitutional rights of students in school settings are not coextensive with the rights of adults, see ante, at 8–12; and second, that deterring drug use by schoolchildren is a valid and terribly important interest, see ante, at 12–14. As to the first, I take the Court’s point that the message on Frederick’s banner is not necessarily protected speech, even though it unquestionably would have been had the banner been unfurled elsewhere. As to the second, I am willing to assume that the Court is correct that the pressing need to deter drug use supports JDHS’s rule prohibiting willful conduct that

expressly “advocates the use of substances that are illegal to minors.” App. to Pet. for Cert. 53a. But it is a gross non sequitur to draw from these two unremarkable propositions the remarkable conclusion that the school may suppress student speech that was never meant to persuade anyone to do anything.

In my judgment, the First Amendment protects student speech if the message itself neither violates a permissible rule nor expressly advocates conduct that is illegal and harmful to students. This nonsense banner does neither, and the Court does serious violence to the First Amendment in upholding—indeed, lauding—a school’s decision to punish Frederick for expressing a view with which it disagreed.

I

In December 1965, we were engaged in a controversial war, a war that “divided this country as few other issues ever have.” *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 524 (1969) (Black, J., dissenting). Having learned that some students planned to wear black armbands as a symbol of opposition to the country’s involvement in Vietnam, officials of the Des Moines public school district adopted a policy calling for the suspension of any student who refused to remove the armband. As we explained when we considered the propriety of that policy, “[t]he school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners.” *Id.*, at 508. The district justified its censorship on the ground that it feared that the expression of a controversial and unpopular opinion would generate disturbances. Because the school officials had insufficient reason to believe that those disturbances would “materially and substantially interfere with the requirements of discipline in the operation of the school,” we found the justification for the rule to lack any foundation and therefore held that the censorship violated the First Amendment. *Id.*, at 509 (internal quotation marks omitted).

Justice Harlan dissented, but not because he thought the school district could censor a message with which it disagreed. Rather, he would have upheld the district’s rule only because the students never cast doubt on the district’s anti-disruption justification by proving that the rule was motivated “by other than legitimate school concerns—for example, a desire to prohibit the expression of an unpopular point of view while permitting expression of the dominant opinion.” *Id.*, at 526.

Two cardinal First Amendment principles animate both the Court’s opinion in *Tinker* and Justice Harlan’s dissent. First, censorship based on the content of speech, particularly censorship that depends on the viewpoint of the speaker, is subject to the most rigorous burden of justification:

“Discrimination against speech because of its message is presumed to be unconstitutional. . . . When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First

Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828–829 (1995) (citation omitted).

Second, punishing someone for advocating illegal conduct is constitutional only when the advocacy is likely to provoke the harm that the government seeks to avoid. See *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (*per curiam*) (distinguishing “mere advocacy” of illegal conduct from “incitement to imminent lawless action”).

However necessary it may be to modify those principles in the school setting, *Tinker* affirmed their continuing vitality. 393 U.S., at 509 (“In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in that conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school, the prohibition cannot be sustained” (internal quotation marks omitted)). As other federal courts have long recognized, under *Tinker*,

“regulation of student speech is generally permissible only when the speech would substantially disrupt or interfere with the work of the school or the rights of other students. . . . *Tinker* requires a specific and significant fear of disruption, not just some remote apprehension of disturbance.” *Saxe v. State College Area School Dist.*, 240 F. 3d 200, 211 (CA3 2001) (Alito, J.) (*emphasis added*).

Yet today the Court fashions a test that trivializes the two cardinal principles upon which *Tinker* rests. See *ante*, at 14 (“[S]chools [may] restrict student expression that they reasonably regard as promoting illegal drug use”). The Court’s test invites stark viewpoint discrimination. In this case, for example, the principal has unabashedly acknowledged that she disciplined Frederick because she disagreed with the pro-drug viewpoint she ascribed to the message on the banner, see App. 25—a viewpoint, incidentally, that Frederick has disavowed, see *id.*, at 28. Unlike our recent decision in *Tennessee Secondary School Athletic Assn. v. Brentwood Academy*, 551 U.S. ___, ___ (2007) (*slip op.*, at 3), see also *ante*, at 3 (ALITO, J., concurring), the Court’s holding in this case strikes at “the heart of the First Amendment” because it upholds a punishment meted out on the basis of a listener’s disagreement with her understanding (or, more likely, misunderstanding) of the speaker’s viewpoint. “If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

It is also perfectly clear that “promoting illegal drug use,” ante, at 14, comes nowhere close to proscribable “incitement to imminent lawless action.” *Brandenburg*, 395 U.S., at 447. Encouraging drug use might well increase the likelihood that a listener will try an illegal drug, but that hardly justifies censorship:

“Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. . . . Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted upon.” *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

No one seriously maintains that drug advocacy (much less Frederick’s ridiculous sign) comes within the vanishingly small category of speech that can be prohibited because of its feared consequences. Such advocacy, to borrow from Justice Holmes, “ha[s] no chance of starting a present conflagration.” *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (dissenting opinion).

II

The Court rejects outright these twin foundations of *Tinker* because, in its view, the unusual importance of protecting children from the scourge of drugs supports a ban on all speech in the school environment that promotes drug use. Whether or not such a rule is sensible as a matter of policy, carving out pro-drug speech for uniquely harsh treatment finds no support in our case law and is inimical to the values protected by the First Amendment.¹ See *infra*, at 14–16.

I will nevertheless assume for the sake of argument that the school’s concededly powerful interest in protecting its students adequately supports its restriction on “any assembly or public expression that . . . advocates the use of substances that are illegal to minors” App. to Pet. for Cert. 53a. Given that the relationship between schools and students “is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults,” *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995), it might well be appropriate to tolerate some targeted viewpoint discrimination in this unique setting. And while conventional speech may be restricted only when likely to “incit[e] imminent lawless action,” *Brandenburg*, 395 U.S., at 449, it is possible that our rigid imminence requirement ought to be relaxed at schools. See *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) (“[T]he constitutional

¹ I also seriously question whether such a ban could really be enforced. Consider the difficulty of monitoring student conversations between classes or in the cafeteria.

rights of students in public school are not automatically coextensive with the rights of adults in other settings”).

But it is one thing to restrict speech that advocates drug use. It is another thing entirely to prohibit an obscure message with a drug theme that a third party subjectively—and not very reasonably—thinks is tantamount to express advocacy. Cf. *Masses Publishing Co. v. Patten*, 244 F. 535, 540, 541 (SDNY 1917) (Hand, J.) (distinguishing sharply between “agitation, legitimate as such” and “the direct advocacy” of unlawful conduct). Even the school recognizes the paramount need to hold the line between, on the one hand, non-disruptive speech that merely expresses a viewpoint that is unpopular or contrary to the school’s preferred message, and on the other hand, advocacy of an illegal or unsafe course of conduct. The district’s prohibition of drug advocacy is a gloss on a more general rule that is otherwise quite tolerant of non-disruptive student speech:

“Students will not be disturbed in the exercise of their constitutionally guaranteed rights to assemble peaceably and to express ideas and opinions, privately or publicly, provided that their activities do not infringe on the rights of others and do not interfere with the operation of the educational program.

“The Board will not permit the conduct on school premises of any willful activity . . . that interferes with the orderly operation of the educational program or offends the rights of others. The Board specifically prohibits . . . any assembly or public expression that . . . advocates the use of substances that are illegal to minors . . .” App. to Pet. for Cert. 53a; see also ante, at 3 (quoting rule in part).

There is absolutely no evidence that Frederick’s banner’s reference to drug paraphernalia “willful[ly]” infringed on anyone’s rights or interfered with any of the school’s educational programs.² On its face, then, the rule gave Frederick wide berth “to express [his] ideas and opinions” so long as they did not amount to “advoca[cy]” of drug use. *Ibid.* If the school’s rule is, by hypothesis, a valid one, it is valid only insofar as it scrupulously preserves adequate space for constitutionally protected speech. When First Amendment rights are at stake, a rule that “sweep[s] in a great variety of conduct under a general and indefinite characterization” may not leave “too wide a discretion in its application.” *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940). Therefore, just as we insisted in *Tinker* that the school establish some likely connection between the armbands and their feared consequences, so too JDHS must show that Frederick’s supposed advocacy stands a meaningful chance of making otherwise-abstemious students try marijuana.

² It is also relevant that the display did not take place “on school premises,” as the rule contemplates. App. to Pet. for Cert. 53a. While a separate district rule does make the policy applicable to “social events and class trips,” *id.*, at 58a, Frederick might well have thought that the Olympic Torch Relay was neither a “social event” (for example, prom) nor a “class trip.”

But instead of demanding that the school make such a showing, the Court punts. Figuring out just how it punts is tricky; “[t]he mode of analysis [it] employ[s] is not entirely clear,” see ante, at 9. On occasion, the Court suggests it is deferring to the principal’s “reasonable” judgment that Frederick’s sign qualified as drug advocacy.³ At other times, the Court seems to say that it thinks the banner’s message constitutes express advocacy.⁴ Either way, its approach is indefensible.

To the extent the Court defers to the principal’s ostensibly reasonable judgment, it abdicates its constitutional responsibility. The beliefs of third parties, reasonable or otherwise, have never dictated which messages amount to proscribable advocacy. Indeed, it would be a strange constitutional doctrine that would allow the prohibition of only the narrowest category of speech advocating unlawful conduct, see *Brandenburg*, 395 U.S., at 447–448, yet would permit a listener’s perceptions to determine which speech deserved constitutional protection.⁵

Such a peculiar doctrine is alien to our case law. In *Abrams v. United States*, 250 U.S. 616 (1919), this Court affirmed the conviction of a group of Russian “rebels, revolutionists, [and] anarchists,” id., at 617–618 (internal quotation marks omitted), on the ground that the leaflets they distributed were thought to “incite, provoke, and encourage resistance to the United States,” id., at 617 (internal quotation marks omitted). Yet Justice Holmes’ dissent—which has emphatically carried the day—never inquired into the reasonableness of the United States’ judgment that the leaflets would likely undermine the war effort. The dissent instead ridiculed that judgment: “nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so.” Id., at 628. In *Thomas v. Collins*, 323 U.S. 516 (1945) (opinion for the Court by Rutledge, J.), we overturned the conviction of a union organizer who violated a restraining order forbidding him from

³ See ante, at 1 (stating that the principal “reasonably regarded” Frederick’s banner as “promoting illegal drug use”); ante, at 6 (explaining that “Principal Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one”); ante, at 8 (asking whether “a principal may . . . restrict student speech . . . when that speech is reasonably viewed as promoting illegal drug use”); ante, at 14 (holding that “schools [may] restrict student expression that they reasonably regard as promoting illegal drug use”); see also ante, at 1 (ALITO, J., concurring) (“[A] public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use”).

⁴ See ante, at 7 (“We agree with Morse. At least two interpretations of the words on the banner demonstrate that the sign advocated the use of illegal drugs”); ante, at 15 (observing that “[w]e have explained our view” that “Frederick’s banner constitutes promotion of illegal drug use”).

⁵ The reasonableness of the view that Frederick’s message was unprotected speech is relevant to ascertaining whether qualified immunity should shield the principal from liability, not to whether her actions violated Frederick’s constitutional rights. Cf. *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (“The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted”).

exhorting workers. In so doing, we held that the distinction between advocacy and incitement could not depend on how one of those workers might have understood the organizer’s speech. That would “pu[t] the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.” *Id.*, at 535. In *Cox v. Louisiana*, 379 U.S. 536, 543 (1965), we vacated a civil rights leader’s conviction for disturbing the peace, even though a Baton Rouge sheriff had “deem[ed]” the leader’s “appeal to . . . students to sit in at the lunch counters to be ‘inflammatory.’” We never asked if the sheriff’s in-person, on-the-spot judgment was “reasonable.” Even in *Fraser*, we made no inquiry into whether the school administrators reasonably thought the student’s speech was obscene or profane; we rather satisfied ourselves that “[t]he pervasive sexual innuendo in *Fraser*’s speech was plainly offensive to both teachers and students—indeed, to any mature person.” 478 U.S., at 683. Cf. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (“[I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression” (internal quotation marks omitted)).⁶

To the extent the Court independently finds that “BONG HiTS 4 JESUS” objectively amounts to the advocacy of illegal drug use—in other words, that it can most reasonably be interpreted as such—that conclusion practically refutes itself. This is a nonsense message, not advocacy. The Court’s feeble effort to divine its hidden meaning is strong evidence of that. Ante, at 7 (positing that the banner might mean, alternatively, “[Take] bong hits,” “bong hits [are a good thing],” or “[we take] bong hits”). Frederick’s credible and uncontradicted explanation for the message—he just wanted to get on television—is also relevant because a speaker who does not intend to persuade his audience can hardly be said to be advocating anything.⁷ But most importantly, it takes

⁶ This same reasoning applies when the interpreter is not just a listener, but a legislature. We have repeatedly held that “[d]eference to a legislative finding” that certain types of speech are inherently harmful “cannot limit judicial inquiry when First Amendment rights are at stake,” reasoning that “the judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution.” *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843, 844 (1978); see also *Whitney v. California*, 274 U.S. 357, 378–379 (1927) (Brandeis, J., concurring) (“[A legislative declaration] does not preclude enquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the Federal Constitution. . . . Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was so substantial as to justify the stringent restriction interposed by the legislature”). When legislatures are entitled to no deference as to whether particular speech amounts to a “clear and present danger,” *id.*, at 379, it is hard to understand why the Court would so blithely defer to the judgment of a single school principal.

⁷ In affirming Frederick’s suspension, the JDHS superintendent acknowledged that Frederick displayed his message “for the benefit of television cameras covering the Torch Relay.” App. to Pet. for Cert. 62a.

real imagination to read a “cryptic” message (the Court’s characterization, not mine, see *ibid.*, at 6) with a slanting drug reference as an incitement to drug use. Admittedly, some high school students (including those who use drugs) are dumb. Most students, however, do not shed their brains at the schoolhouse gate, and most students know dumb advocacy when they see it. The notion that the message on this banner would actually persuade either the average student or even the dumbest one to change his or her behavior is most implausible. That the Court believes such a silly message can be proscribed as advocacy underscores the novelty of its position, and suggests that the principle it articulates has no stopping point.

Even if advocacy could somehow be wedged into Frederick’s obtuse reference to marijuana, that advocacy was at best subtle and ambiguous. There is abundant precedent, including another opinion THE CHIEF JUSTICE announces today, for the proposition that when the “First Amendment is implicated, the tie goes to the speaker,” *Federal Election Comm’n v. Wisconsin Right to Life, Inc.*, 551 U.S. ____ (2007) (slip op., at 21) and that “when it comes to defining what speech qualifies as the functional equivalent of express advocacy . . . we give the benefit of the doubt to speech, not censorship,” *post*, at 29. If this were a close case, the tie would have to go to Frederick’s speech, not to the principal’s strained reading of his quixotic message.

Among other things, the Court’s ham-handed, categorical approach is deaf to the constitutional imperative to permit unfettered debate, even among high-school students, about the wisdom of the war on drugs or of legalizing marijuana for medicinal use.⁸ See *Tinker*, 393 U.S., at 511 (“[Students] may not be confined to the expression of those sentiments that are officially approved”). If Frederick’s stupid reference to marijuana can in the Court’s view justify censorship, then high school students everywhere could be forgiven for zipping their mouths about drugs at school lest some “reasonable” observer censor and then punish them for promoting drugs. See also *ante*, at 2 (BREYER, J., concurring in judgment in part and dissenting in part).

⁸ The Court’s opinion ignores the fact that the legalization of marijuana is an issue of considerable public concern in Alaska. The State Supreme Court held in 1975 that Alaska’s constitution protects the right of adults to possess less than four ounces of marijuana for personal use. *Ravin v. State*, 537 P. 2d 494 (Alaska). In 1990, the voters of Alaska attempted to undo that decision by voting for a ballot initiative recriminalizing marijuana possession. Initiative Proposal No. 2, §§1–2 (effective Mar. 3, 1991), 11 Alaska Stat., p. 872 (Lexis 2006). At the time Frederick unfurled his banner, the constitutionality of that referendum had yet to be tested. It was subsequently struck down as unconstitutional. See *Noy v. State*, 83 P. 3d 538 (Alaska App. 2003). In the meantime, Alaska voters had approved a ballot measure decriminalizing the use of marijuana for medicinal purposes, 1998 Ballot Measure No. 8 (approved Nov. 3, 1998), 11 Alaska Stat., p. 882 (codified at Alaska Stat. §§11.71.090, 17.37.010–17.37.080), and had rejected a much broader measure that would have decriminalized marijuana possession and granted amnesty to anyone convicted of marijuana-related crimes, see 2000 Ballot Measure No. 5 (failed Nov. 7, 2000), 11 Alaska Stat., p. 886.

Consider, too, that the school district's rule draws no distinction between alcohol and marijuana, but applies evenhandedly to all "substances that are illegal to minors." App. to Pet. for Cert. 53a; see also App. 83 (expressly defining "'drugs'" to include "all alcoholic beverages"). Given the tragic consequences of teenage alcohol consumption—drinking causes far more fatal accidents than the misuse of marijuana—the school district's interest in deterring teenage alcohol use is at least comparable to its interest in preventing marijuana use. Under the Court's reasoning, must the First Amendment give way whenever a school seeks to punish a student for any speech mentioning beer, or indeed anything else that might be deemed risky to teenagers? While I find it hard to believe the Court would support punishing Frederick for flying a "WINE SiPS 4 JESUS" banner—which could quite reasonably be construed either as a protected religious message or as a pro-alcohol message—the breathtaking sweep of its opinion suggests it would.

III

Although this case began with a silly, nonsensical banner, it ends with the Court inventing out of whole cloth a special First Amendment rule permitting the censorship of any student speech that mentions drugs, at least so long as someone could perceive that speech to contain a latent pro-drug message. Our First Amendment jurisprudence has identified some categories of expression that are less deserving of protection than others—fighting words, obscenity, and commercial speech, to name a few. Rather than reviewing our opinions discussing such categories, I mention two personal recollections that have no doubt influenced my conclusion that it would be profoundly unwise to create special rules for speech about drug and alcohol use.

The Vietnam War is remembered today as an unpopular war. During its early stages, however, "the dominant opinion" that Justice Harlan mentioned in his *Tinker* dissent regarded opposition to the war as unpatriotic, if not treason. 393 U.S., at 526. That dominant opinion strongly supported the prosecution of several of those who demonstrated in Grant Park during the 1968 Democratic Convention in Chicago, see *United States v. Dellinger*, 472 F. 2d 340 (CA7 1972), and the vilification of vocal opponents of the war like Julian Bond, cf. *Bond v. Floyd*, 385 U.S. 116 (1966). In 1965, when the Des Moines students wore their armbands, the school district's fear that they might "start an argument or cause a disturbance" was well founded. *Tinker*, 393 U.S., at 508. Given that context, there is special force to the Court's insistence that "our Constitution says we must take that risk; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society." *Id.*, at 508–509 (citation omitted). As we now know, the then-dominant opinion about the Vietnam War was not etched in stone.

Reaching back still further, the current dominant opinion supporting the war on drugs in general, and our anti-marijuana laws in particular, is reminiscent of the opinion

that supported the nationwide ban on alcohol consumption when I was a student. While alcoholic beverages are now regarded as ordinary articles of commerce, their use was then condemned with the same moral fervor that now supports the war on drugs. The ensuing change in public opinion occurred much more slowly than the relatively rapid shift in Americans' views on the Vietnam War, and progressed on a state-by-state basis over a period of many years. But just as prohibition in the 1920's and early 1930's was secretly questioned by thousands of otherwise law-abiding patrons of bootleggers and speakeasies, today the actions of literally millions of otherwise law-abiding users of marijuana,⁹ and of the majority of voters in each of the several States that tolerate medicinal uses of the product,¹⁰ lead me to wonder whether the fear of disapproval by those in the majority is silencing opponents of the war on drugs. Surely our national experience with alcohol should make us wary of dampening speech suggesting—however inarticulately—that it would be better to tax and regulate marijuana than to persevere in a futile effort to ban its use entirely.

Even in high school, a rule that permits only one point of view to be expressed is less likely to produce correct answers than the open discussion of countervailing views. *Whitney*, 274 U.S., at 377 (Brandeis, J., concurring); *Abrams*, 250 U.S., at 630 (Holmes, J., dissenting); *Tinker*, 393 U.S., at 512. In the national debate about a serious issue, it is the expression of the minority's viewpoint that most demands the protection of the First Amendment. Whatever the better policy may be, a full and frank discussion of the costs and benefits of the attempt to prohibit the use of marijuana is far wiser than suppression of speech because it is unpopular.

I respectfully dissent.

⁹ See *Gonzales v. Raich*, 545 U.S. 1, 21, n. 31 (2005) (citing a Government estimate “that in 2000 American users spent \$10.5 billion on the purchase of marijuana”).

¹⁰ *Id.*, at 5 (noting that “at least nine States . . . authorize the use of marijuana for medicinal purposes”).

XX. WHO IS JOHNNIE COCHRAN?

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TORY ET AL. v. COCHRAN

**CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA,
SECOND APPELLATE DISTRICT**

No. 03–1488. Argued March 22, 2005—Decided May 31, 2005

In a state-law defamation action filed by attorney Johnnie L. Cochran, Jr., a California trial court found that petitioner Tory, assisted by petitioner Craft and others, had, *inter alia*, falsely claimed that Cochran owed him money, picketed Cochran’s office with signs containing insults and obscenities, and pursued Cochran while chanting similar threats and insults, in order to coerce Cochran into paying Tory money to desist from such libelous and slanderous activity. Because Tory indicated that he would continue to engage in the activity absent a court order, the court permanently enjoined petitioners and their agents from, among other things, picketing, displaying signs, and making oral statements about Cochran and his firm in any public forum. The California Court of Appeal affirmed, and this Court granted certiorari. After oral argument, Cochran’s counsel informed the Court of Cochran’s death, moved to substitute Cochran’s widow as respondent, and suggested that the case be dismissed as moot. Petitioners agreed to the substitution, but denied that the case was moot.

Held: Cochran’s widow is substituted as respondent, but the case is not moot. Despite Cochran’s death, the injunction remains in effect. Nothing in its language says to the contrary. Cochran’s counsel argues that the injunction is still necessary, valid, and enforceable, and no source of California law says that it automatically became invalid upon Cochran’s death. As this Court understands that law, a person cannot definitively know whether an injunction is legally void until a court has ruled that it is. Given this uncertainty, the injunction here continues significantly to restrain petitioners’ speech, thus presenting an ongoing federal controversy. Cochran’s death, however, makes it unnecessary for this Court to explore petitioners’ basic claims.

Rather, the Court need only point out that the injunction, as written, has lost its underlying rationale. Since picketing Cochran and his law offices while engaging in injunction-forbidden speech could no longer coerce Cochran to pay for desisting in this activity, the grounds for the injunction are much diminished or have disappeared altogether. Consequently the injunction amounts to an overly broad prior restraint upon speech, lacking plausible justification. Pp. 2–4.

Vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O’CONNOR, KENNEDY, SOUTER, and GINSBURG, JJ., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 03–1488

ULYSSES TORY, ET AL., PETITIONERS v. JOHNNIE L. COCHRAN, JR.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF
CALIFORNIA, SECOND APPELLATE DISTRICT

[May 31, 2005]

JUSTICE BREYER delivered the opinion of the Court.

Johnnie Cochran brought a state-law defamation action against petitioner Ulysses Tory. The state trial court determined that Tory (with the help of petitioner Ruth Craft and others) had engaged in unlawful defamatory activity. It found, for example, that Tory, while claiming falsely that Cochran owed him money, had complained to the local bar association, had written Cochran threatening letters demanding \$10 million, had picketed Cochran’s office holding up signs containing various insults and obscenities; and, with a group of associates, had pursued Cochran while chanting similar threats and insults. App. 38, 40–41. The court concluded that Tory’s claim that Cochran owed him money was without foundation, that Tory engaged in a continuous pattern of libelous and slanderous activity, and that Tory had used false and defamatory speech to “coerce” Cochran into paying “amounts of money to which Tory was not entitled” as a “tribute” or a “premium” for “desisting” from this libelous and slanderous activity. *Id.*, at 39, 42–43.

After noting that Tory had indicated that he would continue to engage in this activity in the absence of a court order, the Superior Court issued a permanent injunction. The injunction, among other things, prohibited Tory, Craft, and their “agents” or “representatives” from “picketing,” from “displaying signs, placards or other written or printed material,” and from “orally uttering statements” about Johnnie L. Cochran, Jr., and about Cochran’s law firm in “any public forum.” *Id.*, at 34.

Tory and Craft appealed. The California Court of Appeal affirmed. Tory and Craft then filed a petition for a writ of certiorari, raising the following question:

“Whether a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure, violates the First Amendment.” Pet. for Cert. i.

We granted the petition. 542 U.S. ____ (2004).

After oral argument, Cochran’s counsel informed the Court of Johnnie Cochran’s recent death. Counsel also moved to substitute Johnnie Cochran’s widow, Sylvia Dale Mason Cochran, as respondent, and suggested that we dismiss the case as moot. Tory and Craft filed a response agreeing to the substitution of Ms. Cochran. But they denied that the case was moot.

We agree with Tory and Craft that the case is not moot. Despite Johnnie Cochran’s death, the injunction remains in effect. Nothing in its language says to the contrary. Cochran’s counsel tells us that California law does not recognize a “cause of action for an injury to the memory of a deceased person’s reputation,” see *Kelly v. Johnson Pub. Co.*, 160 Cal. App. 2d 718, 325 P. 2d 659 (1958), which circumstance, counsel believes, “moots” a “portion” of the injunction (the portion “personal to Cochran”). Respondent’s Suggestion of Death, etc., 4 (emphasis added). But counsel adds that “[t]he [i]njunction continues to be necessary, valid and enforceable.” *Id.*, at 9. The parties have not identified, nor have we found, any source of California law that says the injunction here automatically becomes invalid upon Cochran’s death, not even the portion personal to Cochran. Counsel also points to the “value of” Cochran’s “law practice” and adds that his widow has an interest in enforcing the injunction. *Id.*, at 11—12. And, as we understand California law, a person cannot definitively know whether an injunction is legally void until a court has ruled that it is. See *Mason v. United States Fidelity & Guaranty Co.*, 60 Cal. App. 2d 587, 591, 141 P. 2d 475, 477–478 (1943) (“[W]here the party served believes” a court order “invalid he should take the proper steps to have it dissolved”); *People v. Gonzalez*, 12 Cal. 4th 804, 818, 910 P. 2d 1366, 1375 (1996) (“[A] person subject to a court’s injunction may elect whether to challenge the constitutional validity of the injunction when it is issued, or to reserve that claim until a violation of the injunction is charged as a contempt of court”). Given the uncertainty of California law, we take it as a given that the injunction here continues significantly to restrain petitioners’ speech, presenting an ongoing federal controversy. See, e.g., *Dombrowski v. Pfister*, 380 U.S. 479, 486–487 (1965); *NAACP v. Button*, 371 U.S. 415, 432–433 (1963). Consequently, we need not, and we do not, dismiss this case as moot. Cf. *Firefighters v. Stotts*, 467 U.S. 561, 569 (1984) (case not moot in part because it appears from “terms” of the injunction that it is “still in force” and “unless set aside must be complied with”).

At the same time, Johnnie Cochran’s death makes it unnecessary, indeed unwarranted, for us to explore petitioners’ basic claims, namely (1) that the First Amendment forbids the issuance of a permanent injunction in a defamation case, at least when the plaintiff is a public figure, and (2) that the injunction (considered prior to

Cochran's death) was not properly tailored and consequently violated the First Amendment. See Brief for Petitioners ii, iii. Rather, we need only point out that the injunction, as written, has now lost its underlying rationale. Since picketing Cochran and his law offices while engaging in injunction-forbidden speech could no longer achieve the objectives that the trial court had in mind (i.e., coercing Cochran to pay a "tribute" for desisting in this activity), the grounds for the injunction are much diminished, if they have not disappeared altogether. Consequently the injunction, as written, now amounts to an overly broad prior restraint upon speech, lacking plausible justification. See *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 559 (1976) ("[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights"); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973) (a prior restraint should not "swee[p]" any "more broadly than necessary"). As such, the Constitution forbids it. See *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 183–184 (1968) (An "order" issued in "the area of First Amendment rights" must be "precis[e]" and narrowly "tailored" to achieve the "pin-pointed objective" of the "needs of the case"); see also *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 575, 577 (1987) (regulation prohibiting "all 'First Amendment activities' substantially overbroad).

We consequently grant the motion to substitute Sylvia Dale Mason Cochran for Johnnie Cochran as respondent. We vacate the judgment of the California Court of Appeal, and we remand the case for proceedings not inconsistent with this opinion. If, as the Cochran supplemental brief suggests, injunctive relief may still be warranted, any appropriate party remains free to ask for such relief. We express no view on the constitutional validity of any such new relief, tailored to these changed circumstances, should it be entered.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 03–1488

ULYSSES TORY, ET AL., PETITIONERS v. JOHNNIE L. COCHRAN, JR.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF
CALIFORNIA, SECOND APPELLATE DISTRICT

[May 31, 2005]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

I would dismiss the writ of certiorari as improvidently granted. We granted the writ, as the Court notes, to decide

“[w]hether a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure, violates the First Amendment.”
Pet. for Cert. i; ante, at 2.

Whether or not Johnnie Cochran’s death moots this case, it certainly renders the case an inappropriate vehicle for resolving the question presented. The Court recognizes this, ante, at 3, but nevertheless vacates the judgment below, ante, at 4. It does so only after deciding, as it must to exercise jurisdiction, that in light of the uncertainty in California law, the case is not moot. Ante, at 2–3; *ASARCO Inc. v. Kadish*, 490 U.S. 605, 621, n. 1 (1989) (when a case coming from a state court becomes moot, this Court “lack[s] jurisdiction and thus also the power to disturb the state court’s judgment”); see also *City News & Novelty, Inc. v. Waukesha*, 531 U.S. 278, 283–284 (2001).

In deciding the threshold mootness issue, a complicated problem in its own right, the Court strains to reach the validity of the injunction after Cochran’s death. Whether the injunction remains valid in these changed circumstances is neither the reason we took this case nor an important question, but merely a matter of case-specific error correction. Petitioners remain free to seek relief on both constitutional and state-law grounds in the California courts. And, if the injunction is invalid, they need not obey it: California does not recognize the “collateral bar” rule, and thus permits collateral challenges to injunctions in contempt proceedings. *People v. Gonzalez*, 12 Cal. 4th 804, 818, 910 P. 2d 1366, 1375 (1996) (a person subject to an injunction may challenge “the constitutional validity of the injunction when it is issued, or . . . reserve that claim until a violation of the injunction is charged as a contempt of court”). The California courts can resolve the matter and, given the new state of affairs, might very well adjudge the case moot or the injunction invalid on state-law grounds rather than the constitutional grounds the Court rushes to embrace. As a prudential matter, the better course is to avoid passing

unnecessarily on the constitutional question. See *Ashwander v. TVA*, 297 U.S. 288, 345–348 (1936) (Brandeis, J., concurring).

The Court purports to save petitioners the uncertainty of possible enforcement of the injunction, and thereby to prevent any chill on their First Amendment rights, by vacating the decision below. But what the Court gives with the left hand it takes with the right, for it only invites further litigation by pronouncing that “injunctive relief may still be warranted,” conceding that “any appropriate party remains free to ask for such relief,” and “ex-press[ing] no view on the constitutional validity of any such new relief.” Ante, at 4. What the Court means by “any appropriate party” is unclear. Perhaps the Court means Sylvia Dale Mason Cochran, Cochran’s widow, who has taken his place in this suit. Or perhaps it means the Cochran firm, which has never been a party to this case, but may now (if “appropriate”) intervene and attempt to enjoin the defamation of a now-deceased third party. The Court’s decision invites the doubts it seeks to avoid. Its decision is unnecessary and potentially self-defeating. The more prudent course is to dismiss the writ as improvidently granted. I respectfully dissent.

XXI. WHO ARE JUSTICES BLACK AND GOLDBERG?

376 U.S. 254

New York Times Co. v. Sullivan (No. 39)

Argued: January 6, 1964

Decided: March 9, 1964

273 Ala. 656, 144 So.2d 25, reversed and remanded.

- Syllabus
 - Opinion, Brennan
 - Concurrence, Black
 - Concurrence, Goldberg
- Syllabus

Respondent, an elected official in Montgomery, Alabama, brought suit in a state court alleging that he had been libeled by an advertisement in corporate petitioner's newspaper, the text of which appeared over the names of the four individual petitioners and many others. The advertisement included statements, some of which were false, about police action allegedly directed against students who participated in a civil rights demonstration and against a leader of the civil rights movement; respondent claimed the statements referred to him because his duties included supervision of the police department. The trial judge instructed the jury that such statements were "libelous per se," legal injury being implied without proof of actual damages, and that, for the purpose of compensatory damages, malice was presumed, so that such damages could be awarded against petitioners if the statements were found to have been published by them and to have related to respondent. As to punitive damages, the judge instructed that mere negligence was not evidence of actual malice, and would not justify an award of punitive damages; he refused to instruct that actual intent to harm or recklessness had to be found before punitive damages could be awarded, or that a verdict for respondent should differentiate between compensatory and punitive damages. The jury found for respondent, and the State Supreme Court affirmed.

Held: A State cannot, under the First and Fourteenth Amendments, award damages to a public official for defamatory falsehood relating to his official conduct unless he proves "actual malice" -- that the statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false. Pp. 265-292.

(a) Application by state courts of a rule of law, whether statutory or not, to award a judgment in a civil action, is "state action" under the Fourteenth Amendment. P. 265.

(b) Expression does not lose constitutional protection to which it would otherwise be entitled because it appears in the form of a paid advertisement. Pp. 265-266. [p255]

(c) Factual error, content defamatory of official reputation, or both, are insufficient to warrant an award of damages for false statements unless “actual malice” -- knowledge that statements are false or in reckless disregard of the truth -- is alleged and proved. Pp. 279-283.

(d) State court judgment entered upon a general verdict which does not differentiate between punitive damages, as to which, under state law, actual malice must be proved, and general damages, as to which it is “presumed,” precludes any determination as to the basis of the verdict, and requires reversal, where presumption of malice is inconsistent with federal constitutional requirements. P. 284.

(e) The evidence was constitutionally insufficient to support the judgment for respondent, since it failed to support a finding that the statements were made with actual malice or that they related to respondent. Pp. 285-292.

[p256]

TOP

Opinion

BRENNAN, J., Opinion of the Court

MR. JUSTICE BRENNAN delivered the opinion of the Court.

We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State’s power to award damages in a libel action brought by a public official against critics of his official conduct.

Respondent L. B. Sullivan is one of the three elected Commissioners of the City of Montgomery, Alabama. He testified that he was Commissioner of Public Affairs, and the duties are supervision of the Police Department, Fire Department, Department of Cemetery and Department of Scales.

He brought this civil libel action against the four individual petitioners, who are Negroes and Alabama clergymen, and against petitioner the New York Times Company, a New York corporation which publishes the New York Times, a daily newspaper. A jury in the Circuit Court of Montgomery County awarded him damages of \$500,000, the full amount claimed, against all the petitioners, and the Supreme Court of Alabama affirmed. 273 Ala. 656, 144 So.2d 25.

Respondent's complaint alleged that he had been libeled by statements in a full-page advertisement that was carried in the New York Times on March 29, 1960.¹ Entitled "Heed Their Rising Voices," the advertisement began by stating that,

As the whole world knows by now, thousands of Southern Negro students are engaged in widespread nonviolent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights.

It went on to charge that, in their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom. . . .

Succeeding [p257] paragraphs purported to illustrate the "wave of terror" by describing certain alleged events. The text concluded with an appeal for funds for three purposes: support of the student movement, "the struggle for the right to vote," and the legal defense of Dr. Martin Luther King, Jr., leader of the movement, against a perjury indictment then pending in Montgomery.

The text appeared over the names of 64 persons, many widely known for their activities in public affairs, religion, trade unions, and the performing arts. Below these names, and under a line reading "We in the south who are struggling daily for dignity and freedom warmly endorse this appeal," appeared the names of the four individual petitioners and of 16 other persons, all but two of whom were identified as clergymen in various Southern cities. The advertisement was signed at the bottom of the page by the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South," and the officers of the Committee were listed.

Of the 10 paragraphs of text in the advertisement, the third and a portion of the sixth were the basis of respondent's claim of libel. They read as follows:

Third paragraph:

In Montgomery, Alabama, after students sang "My Country, 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to reregister, their dining hall was padlocked in an attempt to starve them into submission.

Sixth paragraph:

¹ A copy of the advertisement is printed in the Appendix [omitted].

Again and again, the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home, almost killing his wife and child. They have [p258] assaulted his person. They have arrested him seven times -- for "speeding," "loitering" and similar "offenses." And now they have charged him with "perjury" -- a felony under which they could imprison him for ten years. . . .

Although neither of these statements mentions respondent by name, he contended that the word "police" in the third paragraph referred to him as the Montgomery Commissioner who supervised the Police Department, so that he was being accused of "ringing" the campus with police. He further claimed that the paragraph would be read as imputing to the police, and hence to him, the padlocking of the dining hall in order to starve the students into submission.² As to the sixth paragraph, he contended that, since arrests are ordinarily made by the police, the statement "They have arrested [Dr. King] seven times" would be read as referring to him; he further contended that the "They" who did the arresting would be equated with the "They" who committed the other described acts and with the "Southern violators." Thus, he argued, the paragraph would be read as accusing the Montgomery police, and hence him, of answering Dr. King's protests with "intimidation and violence," bombing his home, assaulting his person, and charging him with perjury. Respondent and six other Montgomery residents testified that they read some or all of the statements as referring to him in his capacity as Commissioner.

It is uncontroverted that some of the statements contained in the two paragraphs were not accurate descriptions of events which occurred in Montgomery. Although Negro students staged a demonstration on the State Capitol steps, they sang the National Anthem and not "My [p259] Country, 'Tis of Thee." Although nine students were expelled by the State Board of Education, this was not for leading the demonstration at the Capitol, but for demanding service at a lunch counter in the Montgomery County Courthouse on another day. Not the entire student body, but most of it, had protested the expulsion, not by refusing to register, but by boycotting classes on a single day; virtually all the students did register for the ensuing semester. The campus dining hall was not padlocked on any occasion, and the only students who may have been barred from eating there were the few who had neither signed a preregistration application nor requested temporary meal tickets. Although the police were deployed near the campus in large numbers on three occasions, they did not at any time "ring" the campus, and they were not called to the campus in connection with the demonstration on the State Capitol steps, as the third paragraph implied. Dr. King had not been arrested seven times, but only four, and although he claimed to have been assaulted some years earlier in connection with his arrest for loitering outside a courtroom, one of the officers who made the arrest denied that there was such an assault.

² Respondent did not consider the charge of expelling the students to be applicable to him, since "that responsibility rests with the State Department of Education."

On the premise that the charges in the sixth paragraph could be read as referring to him, respondent was allowed to prove that he had not participated in the events described. Although Dr. King's home had, in fact, been bombed twice when his wife and child were there, both of these occasions antedated respondent's tenure as Commissioner, and the police were not only not implicated in the bombings, but had made every effort to apprehend those who were. Three of Dr. King's four arrests took place before respondent became Commissioner. Although Dr. King had, in fact, been indicted (he was subsequently acquitted) on two counts of perjury, each of which carried a possible five-year sentence, respondent had nothing to do with procuring the indictment. [p260]

Respondent made no effort to prove that he suffered actual pecuniary loss as a result of the alleged libel.³ One of his witnesses, a former employer, testified that, if he had believed the statements, he doubted whether he "would want to be associated with anybody who would be a party to such things that are stated in that ad," and that he would not reemploy respondent if he believed "that he allowed the Police Department to do the things that the paper say he did." But neither this witness nor any of the others testified that he had actually believed the statements in their supposed reference to respondent. The cost of the advertisement was approximately \$4800, and it was published by the Times upon an order from a New York advertising agency acting for the signatory Committee. The agency submitted the advertisement with a letter from A. Philip Randolph, Chairman of the Committee, certifying that the persons whose names appeared on the advertisement had given their permission. Mr. Randolph was known to the Times' Advertising Acceptability Department as a responsible person, and, in accepting the letter as sufficient proof of authorization, it followed its established practice. There was testimony that the copy of the advertisement which accompanied the letter listed only the 64 names appearing under the text, and that the statement, "We in the south . . . warmly endorse this appeal," and the list of names thereunder, which included those of the individual petitioners, were subsequently added when the first proof of the advertisement was received. Each of the individual petitioners testified that he had not authorized the use of his name, and that he had been unaware of its use until receipt of respondent's demand for a retraction. The manager of the Advertising Acceptability [p261] Department testified that he had approved the advertisement for publication because he knew nothing to cause him to believe that anything in it was false, and because it bore the endorsement of "a number of people who are well known and whose reputation" he "had no reason to question." Neither he nor anyone else at the Times made an effort to confirm the accuracy of the advertisement, either by checking it against recent Times news stories relating to some of the described events or by any other means.

³ Approximately 394 copies of the edition of the Times containing the advertisement were circulated in Alabama. Of these, about 35 copies were distributed in Montgomery County. The total circulation of the Times for that day was approximately 650,000 copies.

Alabama law denies a public officer recovery of punitive damages in a libel action brought on account of a publication concerning his official conduct unless he first makes a written demand for a public retraction and the defendant fails or refuses to comply. Alabama Code, Tit. 7, § 914. Respondent served such a demand upon each of the petitioners. None of the individual petitioners responded to the demand, primarily because each took the position that he had not authorized the use of his name on the advertisement, and therefore had not published the statements that respondent alleged had libeled him. The Times did not publish a retraction in response to the demand, but wrote respondent a letter stating, among other things, that “we . . . are somewhat puzzled as to how you think the statements in any way reflect on you,” and “you might, if you desire, let us know in what respect you claim that the statements in the advertisement reflect on you.” Respondent filed this suit a few days later without answering the letter. The Times did, however, subsequently publish a retraction of the advertisement upon the demand of Governor John Patterson of Alabama, who asserted that the publication charged him with grave misconduct and . . . improper actions and omissions as Governor of Alabama and Ex-Officio Chairman of the State Board of Education of Alabama.

When asked to explain why there had been a retraction for the Governor but not for respondent, the [p262] Secretary of the Times testified:

We did that because we didn’t want anything that was published by The Times to be a reflection on the State of Alabama, and the Governor was, as far as we could see, the embodiment of the State of Alabama and the proper representative of the State, and, furthermore, we had by that time learned more of the actual facts which the and purported to recite and, finally, the ad did refer to the action of the State authorities and the Board of Education, presumably of which the Governor is the ex-officio chairman. . . .

On the other hand, he testified that he did not think that “any of the language in there referred to Mr. Sullivan.”

The trial judge submitted the case to the jury under instructions that the statements in the advertisement were “libelous per se,” and were not privileged, so that petitioners might be held liable if the jury found that they had published the advertisement and that the statements were made “of and concerning” respondent. The jury was instructed that, because the statements were libelous per se, “the law . . . implies legal injury from the bare fact of publication itself,” “falsity and malice are presumed,” “general damages need not be alleged or proved, but are presumed,” and “punitive damages may be awarded by the jury even though the amount of actual damages is neither found nor shown.” An award of punitive damages -- as distinguished from “general” damages, which are compensatory in nature -- apparently requires proof of actual malice under Alabama law, and the judge charged that mere negligence or carelessness is not evidence of actual malice or malice in fact, and does not justify an award of exemplary or punitive damages.

He refused to charge, however, that the jury must be “convinced” of malice, in the sense of “actual intent” to harm or “gross negligence and recklessness,” to make such an award, and he also refused to require that a verdict for respondent differentiate between compensatory and punitive damages. The judge rejected petitioners’ contention [p263] that his rulings abridged the freedoms of speech and of the press that are guaranteed by the First and Fourteenth Amendments.

In affirming the judgment, the Supreme Court of Alabama sustained the trial judge’s rulings and instructions in all respects. 273 Ala. 656, 144 So.2d 25. It held that, where the words published tend to injure a person libeled by them in his reputation, profession, trade or business, or charge him with an indictable offense, or tend to bring the individual into public contempt, they are “libelous per se”; that “the matter complained of is, under the above doctrine, libelous per se, if it was published of and concerning the plaintiff”, and that it was actionable without “proof of pecuniary injury . . . such injury being implied.” Id. at 673, 676, 144 So.2d at 37, 41. It approved the trial court’s ruling that the jury could find the statements to have been made “of and concerning” respondent, stating:

We think it common knowledge that the average person knows that municipal agents, such as police and firemen, and others, are under the control and direction of the city governing body, and, more particularly, under the direction and control of a single commissioner. In measuring the performance or deficiencies of such groups, praise or criticism is usually attached to the official in complete control of the body.

Id. at 674-675, 144 So.2d at 39. In sustaining the trial court’s determination that the verdict was not excessive, the court said that malice could be inferred from the Times’ “irresponsibility” in printing the advertisement while the Times, in its own files, had articles already published which would have demonstrated the falsity of the allegations in the advertisement; from the Times’ failure to retract for respondent while retracting for the Governor, whereas the falsity of some of the allegations was then known to the Times and “the matter contained in the advertisement was equally false as to both parties”, and from the testimony of the Times’ Secretary that, [p264] apart from the statement that the dining hall was padlocked, he thought the two paragraphs were “substantially correct.” Id. at 686-687, 144 So.2d at 50-51. The court reaffirmed a statement in an earlier opinion that “There is no legal measure of damages in cases of this character.” Id. at 686, 144 So.2d at 50. It rejected petitioners’ constitutional contentions with the brief statements that “The First Amendment of the U.S. Constitution does not protect libelous publications,” and “The Fourteenth Amendment is directed against State action, and not private action.” Id. at 676, 144 So.2d at 40.

Because of the importance of the constitutional issues involved, we granted the separate petitions for certiorari of the individual petitioners and of the Times. 371 U.S. 946 (<http://www.law.cornell.edu/supremecourt/text/371/946/>). We reverse the judgment.

We hold that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct.⁴ We [p265] further hold that, under the proper safeguards, the evidence presented in this case is constitutionally insufficient to support the judgment for respondent.

I.

We may dispose at the outset of two grounds asserted to insulate the judgment of the Alabama courts from constitutional scrutiny. The first is the proposition relied on by the State Supreme Court -- that “The Fourteenth Amendment is directed against State action, and not private action.” That proposition has no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. See, e.g., Alabama Code, Tit. 7, §§ 908-917. The test is not the form in which state power has been applied but, whatever the form, whether such power has, in fact, been exercised. See *Ex parte Virginia*, 100 U.S. 339 (<http://www.law.cornell.edu/supremecourt/text/100/339/>), 346-347 (<http://www.law.cornell.edu/supremecourt/text/100/339/>); *American Federation of Labor v. Swing*, 312 U.S. 321 (<http://www.law.cornell.edu/supremecourt/text/312/321/>).

The second contention is that the constitutional guarantees of freedom of speech and of the press are inapplicable here, at least so far as the Times is concerned, because the allegedly libelous statements were published as part of a paid, “commercial” advertisement. The argument relies on *Valentine v. Chrestensen*, 316 U.S. 52 (<http://www.law.cornell.edu/supremecourt/text/316/52/>), where the Court held that a city ordinance forbidding street distribution of commercial and business advertising matter did not abridge the First Amendment freedoms, even as applied to a handbill having a

⁴ Since we sustain the contentions of all the petitioners under the First Amendment’s guarantees of freedom of speech and of the press as applied to the States by the Fourteenth Amendment, we do not decide the questions presented by the other claims of violation of the Fourteenth Amendment. The individual petitioners contend that the judgment against them offends the Due Process Clause because there was no evidence to show that they had published or authorized the publication of the alleged libel, and that the Due Process and Equal Protection Clauses were violated by racial segregation and racial bias in the courtroom. The Times contends that the assumption of jurisdiction over its corporate person by the Alabama courts overreaches the territorial limits of the Due Process Clause. The latter claim is foreclosed from our review by the ruling of the Alabama courts that the Times entered a general appearance in the action, and thus waived its jurisdictional objection; we cannot say that this ruling lacks “fair or substantial support” in prior Alabama decisions. See *Thompson v. Wilson*, 224 Ala. 299, 140 So. 439 (1932); compare *NAACP v. Alabama*, 357 U.S. 449 (<http://www.law.cornell.edu/supremecourt/text/357/449/>), 454-458.

commercial message on one side but a protest against certain official action, on the other. The reliance is wholly misplaced. The Court in *Chrestensen* reaffirmed the constitutional protection for “the freedom of communicating [p266] information and disseminating opinion”; its holding was based upon the factual conclusions that the handbill was “purely commercial advertising” and that the protest against official action had been added only to evade the ordinance.

The publication here was not a “commercial” advertisement in the sense in which the word was used in *Chrestensen*. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern. See *NAACP v. Button*, 371 U.S. 415 (<http://www.law.cornell.edu/supremecourt/text/371/415/>), 435. That the *Times* was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold. *Smith v. California*, 361 U.S. 147 (<http://www.law.cornell.edu/supremecourt/text/361/147/>), 150; cf. *Bantam Books, Inc., v. Sullivan*, 372 U.S. 58 (<http://www.law.cornell.edu/supremecourt/text/372/58/>), 64, n. 6. Any other conclusion would discourage newspapers from carrying “editorial advertisements” of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities -- who wish to exercise their freedom of speech even though they are not members of the press. Cf. *Lovell v. Griffin*, 303 U.S. 444 (<http://www.law.cornell.edu/supremecourt/text/303/444/>), 452; *Schneider v. State*, 308 U.S. 147 (<http://www.law.cornell.edu/supremecourt/text/308/147/>), 164. The effect would be to shackle the First Amendment in its attempt to secure “the widest possible dissemination of information from diverse and antagonistic sources.” *Associated Press v. United States*, 326 U.S. 1 (<http://www.law.cornell.edu/supremecourt/text/326/1/>), 20. To avoid placing such a handicap upon the freedoms of expression, we hold that, if the allegedly libelous statements would otherwise be constitutionally protected from the present judgment, they do not forfeit that protection because they were published in the form of a paid advertisement.⁵ [p267]

II

Under Alabama law, as applied in this case, a publication is “libelous per se” if the words “tend to injure a person . . . in his reputation” or to “bring [him] into public contempt”; the trial court stated that the standard was met if the words are such as to “injure him in his public office, or impute misconduct to him in his office, or want of official integrity, or want of fidelity to a public trust. . . .” The jury must find that the words were published “of and concerning” the plaintiff, but, where the plaintiff is a public official, his place in the governmental hierarchy is sufficient evidence to support a

⁵ See American Law Institute, *Restatement of Torts*, § 593, Comment b (1938).

finding that his reputation has been affected by statements that reflect upon the agency of which he is in charge. Once “libel per se” has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars. *Alabama Ride Co. v. Vance*, 235 Ala. 263, 178 So. 438 (1938); *Johnson Publishing Co. v. Davis*, 271 Ala. 474, 494 495, 124 So.2d 441, 457-458 (1960). His privilege of “fair comment” for expressions of opinion depends on the truth of the facts upon which the comment is based. *Parsons v. Age-Herald Publishing Co.*, 181 Ala. 439, 450, 61 So. 345, 350 (1913). Unless he can discharge the burden of proving truth, general damages are presumed, and may be awarded without proof of pecuniary injury. A showing of actual malice is apparently a prerequisite to recovery of punitive damages, and the defendant may, in any event, forestall a punitive award by a retraction meeting the statutory requirements. Good motives and belief in truth do not negate an inference of malice, but are relevant only in mitigation of punitive damages if the jury chooses to accord them weight. *Johnson Publishing Co. v. Davis*, *supra*, 271 Ala., at 495, 124 So.2d at 458. [p268]

The question before us is whether this rule of liability, as applied to an action brought by a public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments.

Respondent relies heavily, as did the Alabama courts, on statements of this Court to the effect that the Constitution does not protect libelous publications.⁶ Those statements do not foreclose our inquiry here. None of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials. The dictum in *Pennekamp v. Florida*, 328 U.S. 331 (<http://www.law.cornell.edu/supremecourt/text/328/331/>), 348-349, that “when the statements amount to defamation, a judge has such remedy in damages for libel as do other public servants,” implied no view as to what remedy might constitutionally be afforded to public officials. In *Beauharnais v. Illinois*, 343 U.S. 250 (<http://www.law.cornell.edu/supremecourt/text/343/250/>), the Court sustained an Illinois criminal libel statute as applied to a publication held to be both defamatory of a racial group and “liable to cause violence and disorder.” But the Court was careful to note that it “retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel”; for “public men are, as it were, public property,” and “discussion cannot be denied, and the right, as well as the duty, of criticism must not be stifled.” *Id.* at 263-264,

⁶ *Konigsberg v. State Bar of California*, 366 U.S. 36 (<http://www.law.cornell.edu/supremecourt/text/366/36/>), 49, and n. 10; *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (<http://www.law.cornell.edu/supremecourt/text/365/43/>), 48; *Roth v. United States*, 354 U.S. 476 (<http://www.law.cornell.edu/supremecourt/text/354/476/>), 486-487; *Beauharnais v. Illinois*, 343 U.S. 250 (<http://www.law.cornell.edu/supremecourt/text/343/250/>), 266; *Pennekamp v. Florida*, 328 U.S. 331 (<http://www.law.cornell.edu/supremecourt/text/328/331/>), 348-349; *Chaplinsky v. New Hampshire*, 315 U.S. 568 (<http://www.law.cornell.edu/supremecourt/text/315/568/>), 572; *Near v. Minnesota*, 283 U.S. 697 (<http://www.law.cornell.edu/supremecourt/text/283/697/>), 715.

and n. 18. In the only previous case that did present the question of constitutional limitations upon the power to award damages for libel of a public official, the Court was equally divided and the question was not decided. *Schenectady Union Pub. Co. v. Sweeney*, 316 U.S. 642 (<http://www.law.cornell.edu/supremecourt/text/316/642/>). [p269] In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet “libel” than we have to other “mere labels” of state law. *NAACP v. Button*, 371 U.S. 415 (<http://www.law.cornell.edu/supremecourt/text/371/415/>), 429. Like insurrection,⁷ contempt,⁸ advocacy of unlawful acts,⁹ breach of the peace,¹⁰ obscenity,¹¹ solicitation of legal business,¹² and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.

The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *Roth v. United States*, 354 U.S. 476 (<http://www.law.cornell.edu/supremecourt/text/354/476/>), 484.

The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. *Stromberg v. California*, 283 U.S. 359 (<http://www.law.cornell.edu/supremecourt/text/283/359/>), 369. “[I]t is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions,” *Bridges v. California*, 314 U.S. 252 (<http://www.law.cornell.edu/supremecourt/text/314/252/>), 270, and this opportunity is to be afforded for “vigorous advocacy” no less than “abstract discussion.” *NAACP v. Button*, 371 U.S. 415 (<http://www.law.cornell.edu/supremecourt/text/371/415/>), 429. [p270] The First Amendment, said Judge Learned Hand, presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. To many, this is, and always will be, folly, but we have staked upon it our all. *United States v. Associated Press*, 52 F.Supp. 362, 372 (D.C.S.D.N.Y.1943). Mr. Justice

⁷ *Herndon v. Lowry*, 301 U.S. 242 (<http://www.law.cornell.edu/supremecourt/text/301/242/>).

⁸ *Bridges v. California*, 314 U.S. 252 (<http://www.law.cornell.edu/supremecourt/text/314/252/>); *Pennekamp v. Florida*, 328 U.S. 331 (<http://www.law.cornell.edu/supremecourt/text/328/331/>).

⁹ *De Jonge v. Oregon*, 299 U.S. 353 (<http://www.law.cornell.edu/supremecourt/text/299/353/>).

¹⁰ *Edwards v. South Carolina*, 372 U.S. 229 (<http://www.law.cornell.edu/supremecourt/text/372/229/>).

¹¹ *Roth v. United States*, 354 U.S. 476 (<http://www.law.cornell.edu/supremecourt/text/354/476/>).

¹² *NAACP v. Button*, 371 U.S. 415 (<http://www.law.cornell.edu/supremecourt/text/371/415/>).

Brandeis, in his concurring opinion in *Whitney v. California*, 274 U.S. 357 (<http://www.law.cornelledu/supremecourt/text/274/357/>), 375-376, gave the principle its classic formulation:

Those who won our independence believed . . . that public discussion is a political duty, and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law -- the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Thus, we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. See *Terminiello v. Chicago*, 337 U.S. 1 (<http://www.law.cornell.edu/supremecourt/text/337/1/>), 4; *De Jonge v. Oregon*, 299 U.S. 353 (<http://www.law.cornell.edu/supremecourt/text/299/353/>), [p271] 365. The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent.

Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth -- whether administered by judges, juries, or administrative officials -- and especially one that puts the burden of proving truth on the speaker. Cf. *Speiser v. Randall*, 357 U.S. 513 (<http://www.law.cornell.edu/supremecourt/text/357/513/>), 525-526. The constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." *NAACP v. Button*, 371 U.S. 415 (<http://www.law.cornell.edu/supremecourt/text/371/415/>), 445. As Madison said, "Some degree of abuse is inseparable from the proper use of every thing, and in no instance is this more true than in that of the press." 4 Elliot's Debates on the Federal Constitution (1876), p. 571. In *Cantwell v. Connecticut*, 310 U.S. 296 (<http://www.law.cornell.edu/supremecourt/text/310/296/>), 310, the Court declared:

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields, the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know,

at times resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained, in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression [p272] are to have the “breathing space” that they “need . . . to survive,” *NAACP v. Button*, 371 U.S. 415 (<http://www.law.cornell.edu/supremecourt/text/371/415/>), 433, was also recognized by the Court of Appeals for the District of Columbia Circuit in *Sweeney v. Patterson*, 76 U.S.App.D.C. 23, 24, 128 F.2d 457, 458 (1942), cert. denied, 317 U.S. 678 (<http://www.law.cornell.edu/supremecourt/text/317/678/>). Judge Edgerton spoke for a unanimous court which affirmed the dismissal of a Congressman’s libel suit based upon a newspaper article charging him with anti-Semitism in opposing a judicial appointment. He said:

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 interest of the public here outweighs the interest of appellant or any other individual. The protection of the public requires not merely discussion, but information. Political conduct and views which some respectable people approve, and others condemn, are constantly imputed to Congressmen. Errors of fact, particularly in regard to a man’s mental states and processes, are inevitable. . . . Whatever is added to the field of libel is taken from the field of free debate.¹³

Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity and [p273] reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. *Bridges v. California*, 314 U.S. 252 (<http://www.law.cornell.edu/supremecourt/text/314/252/>). This is true even though the utterance contains “half-truths” and “misinformation.” *Pennekamp v. Florida*, 328 U.S. 331 (<http://www.law.cornell.edu/supremecourt/text/328/331/>), 342, 343, n. 5, 345. Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. See also *Craig v. Harney*, 331 U.S. 367 (<http://www.law.cornell.edu/supremecourt/text/331/367/>); *Wood*

¹³ See also Mill, *On Liberty* (Oxford: Blackwell, 1947), at 47:

. . . [T]o argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion . . . , all this, even to the most aggravated degree, is so continually done in perfect good faith by persons who are not considered, and in many other respects may not deserve to be considered, ignorant or incompetent that it is rarely possible, on adequate grounds, conscientiously to stamp the misrepresentation as morally culpable, and still less could law presume to interfere with this kind of controversial misconduct.

v. Georgia, 370 U.S. 375 (<http://www.law.cornell.edu/supremecourt/text/370/375/>). If judges are to be treated as “men of fortitude, able to thrive in a hardy climate,” *Craig v. Harney*, supra, 331 U.S. at 376, surely the same must be true of other government officials, such as elected city commissioners.¹⁴ Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism, and hence diminishes their official reputations.

If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate. This is the lesson to be drawn from the great controversy over the Sedition Act of 1798, 1 Stat. 596, which first crystallized a national awareness of the central meaning of the First Amendment. See Levy, *Legacy of Suppression* (1960), at 258 et seq.; Smith, *Freedom’s Fetters* (1956), at 426, 431, and passim. That statute made it a crime, punishable by a \$5,000 fine and five years in prison, if any person shall write, print, utter or publish . . . any false, scandalous and malicious [p274] writing or writings against the government of the United States, or either house of the Congress . . . or the President . . . with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States.

The Act allowed the defendant the defense of truth, and provided that the jury were to be judges both of the law and the facts. Despite these qualifications, the Act was vigorously condemned as unconstitutional in an attack joined in by Jefferson and Madison. In the famous Virginia Resolutions of 1798, the General Assembly of Virginia resolved that it doth particularly protest against the palpable and alarming infractions of the Constitution in the two late cases of the “Alien and Sedition Acts,” passed at the last session of Congress. . . . [The Sedition Act] exercises . . . a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto -- a power which, more than any other, ought to produce universal alarm because it is leveled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right. 4 Elliot’s *Debates*, supra, pp. 553-554. Madison prepared the Report in support of the protest. His premise was that the Constitution created a form of government under which “The people, not the

¹⁴ The climate in which public officials operate, especially during a political campaign, has been described by one commentator in the following terms:

Charges of gross incompetence, disregard of the public interest, communist sympathies, and the like usually have filled the air, and hints of bribery, embezzlement, and other criminal conduct are not infrequent.

Noel, *Defamation of Public Officers and Candidates*, 49 Col.L.Rev. 875 (1949).

For a similar description written 60 years earlier, see Chase, *Criticism of Public Officers and Candidates for Office*, 23 Am.L.Rev. 346 (1889).

government, possess the absolute sovereignty.” The structure of the government dispersed power in reflection of the people’s distrust of concentrated power, and of power itself at all levels. This form of government was “altogether different” from the British form, under which the Crown was sovereign and the people were subjects. “Is [p275] it not natural and necessary, under such different circumstances,” he asked, “that a different degree of freedom in the use of the press should be contemplated?” *Id.*, pp. 569-570. Earlier, in a debate in the House of Representatives, Madison had said:

If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.

4 *Annals of Congress*, p. 934 (1794). Of the exercise of that power by the press, his Report said:

In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing, the freedom of the press has stood; on this foundation it yet stands. . . .

4 *Elliot’s Debates*, *supra*, p. 570. The right of free public discussion of the stewardship of public officials was thus, in Madison’s view, a fundamental principle of the American form of government.¹⁵ [p276]

Although the Sedition Act was never tested in this Court,¹⁶ the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional. See, e.g., Act of July 4, 1840, c. 45, 6 Stat. 802, accompanied by H.R.Rep. No. 86, 26th Cong., 1st Sess.

¹⁵ The Report on the Virginia Resolutions further stated:

[I]t is manifestly impossible to punish the intent to bring those who administer the government into disrepute or contempt, without striking at the right of freely discussing public characters and measures, . . . which, again, is equivalent to a protection of those who administer the government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it by free animadversions on their characters and conduct. Nor can there be a doubt . . . that a government thus entrenched in penal statutes against the just and natural effects of a culpable administration will easily evade the responsibility which is essential to a faithful discharge of its duty.

Let it be recollected, lastly, that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.

4 *Elliot’s Debates*, *supra*, p. 575.

¹⁶ The Act expired, by its terms, in 1801.

(1840). Calhoun, reporting to the Senate on February 4, 1836, assumed that its invalidity was a matter “which no one now doubts.” Report with Senate bill No. 122, 24th Cong., 1st Sess., p. 3. Jefferson, as President, pardoned those who had been convicted and sentenced under the Act and remitted their fines, stating:

I discharged every person under punishment or prosecution under the sedition law because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image.

Letter to Mrs. Adams, July 22, 1804, 4 Jefferson’s Works (Washington ed.), pp. 555, 556. The invalidity of the Act has also been assumed by Justices of this Court. See Holmes, J., dissenting and joined by Brandeis, J., in *Abrams v. United States*, 250 U.S. 616 (<http://www.law.cornell.edu/supremecourt/text/250/616/>), 630; Jackson, J., dissenting in *Beauharnais v. Illinois*, 343 U.S. 250 (<http://www.law.cornell.edu/supremecourt/text/343/250/>), 288-289; Douglas, *The Right of the People* (1958), p. 47. See also Cooley, *Constitutional Limitations* (8th ed., Carrington, 1927), pp. 899-900; Chafee, *Free Speech in the United States* (1942), pp. 27-28. These views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.

There is no force in respondent’s argument that the constitutional limitations implicit in the history of the Sedition Act apply only to Congress, and not to the States. It is true that the First Amendment was originally addressed only to action by the Federal Government, and [p277] that Jefferson, for one, while denying the power of Congress “to controul the freedom of the press,” recognized such a power in the States. See the 1804 Letter to Abigail Adams quoted in *Dennis v. United States*, 341 U.S. 494 (<http://www.law.cornell.edu/supremecourt/text/341/494/>), 522, n. 4 (concurring opinion). But this distinction was eliminated with the adoption of the Fourteenth Amendment and the application to the States of the First Amendment’s restrictions. See, e.g., *Gitlow v. New York*, 268 U.S. 652 (<http://www.law.cornell.edu/supremecourt/text/268/652/>), 666; *Schneider v. State*, 308 U.S. 147 (<http://www.law.cornell.edu/supremecourt/text/308/147/>), 160; *Bridges v. California*, 314 U.S. 252 (<http://www.law.cornell.edu/supremecourt/text/314/252/>), 268; *Edwards v. South Carolina*, 372 U.S. 229 (<http://www.law.cornell.edu/supremecourt/text/372/229/>), 235.

What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel.¹⁷ The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. See *City of Chicago v. Tribune Co.*,

¹⁷ Cf. *Farmers Union v. WDAY*, 360 U.S. 525 (<http://www.law.cornell.edu/supremecourt/text/360/525/>), 535.

307 Ill. 595, 607, 139 N.E. 86, 90 (1923). Alabama, for example, has a criminal libel law which subjects to prosecution “any person who speaks, writes, or prints of and concerning another any accusation falsely and maliciously importing the commission by such person of a felony, or any other indictable offense involving moral turpitude,” and which allows as punishment upon conviction a fine not exceeding \$500 and a prison sentence of six months. Alabama Code, Tit. 14, § 350. Presumably, a person charged with violation of this statute enjoys ordinary criminal law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action. The judgment awarded in this case -- without the need for any proof of actual pecuniary loss -- was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the Sedition Act. [p278] And since there is no double jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded against petitioners for the same publication.¹⁸ Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive. Plainly the Alabama law of civil libel is a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (<http://www.law.cornell.edu/supremecourt/text/372/58/>), 70.

The state rule of law is not saved by its allowance of the defense of truth. A defense for erroneous statements honestly made is no less essential here than was the requirement of proof of guilty knowledge which, in *Smith v. California*, 361 U.S. 147 (<http://www.law.cornell.edu/supremecourt/text/361/147/>), we held indispensable to a valid conviction of a bookseller for possessing obscene writings for sale. We said:

For, if the bookseller is criminally liable without knowledge of the contents, . . . He will tend to restrict the books he sells to those he has inspected, and thus the State will have imposed a restriction upon the distribution of constitutionally protected, as well as obscene, literature. . . . And the bookseller’s burden would become the public’s burden, for, by restricting him, the public’s access to reading matter would be restricted. . . . [H]is timidity in the face of his absolute criminal liability thus would tend to restrict the public’s access to forms of the printed word which the State could not constitutionally [p279] suppress directly. The bookseller’s self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded. (361 U.S. 147 (<http://www.law.cornell.edu/supremecourt/text/361/147/>), 153-154.) A rule compelling the critic of official conduct to guarantee the truth of

¹⁸ The Times states that four other libel suits based on the advertisement have been filed against it by others who have served as Montgomery City Commissioners and by the Governor of Alabama; that another \$500,000 verdict has been awarded in the only one of these cases that has yet gone to trial, and that the damages sought in the other three total \$2,000,000.

all his factual assertions -- and to do so on pain of libel judgments virtually unlimited in amount -- leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.¹⁹ Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. See, e.g., *Post Publishing Co. v. Hallam*, 59 F. 530, 540 (C.A. 6th Cir. 1893); see also Noel, *Defamation of Public Officers and Candidates*, 49 Col.L.Rev. 875, 892 (1949). Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is, in fact, true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." *Speiser v. Randall*, supra, 357 U.S. at 526. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments. The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made [p280] with "actual malice" -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not. An oft-cited statement of a like rule, which has been adopted by a number of state courts,²⁰ is found in the Kansas case of *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908). The State Attorney General, a candidate for reelection and a member of the commission charged with the management and control of the state school fund, sued a newspaper publisher for alleged libel in an article purporting to state facts relating to his

¹⁹ Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about "the clearer perception and livelier impression of truth, produced by its collision with error." Mill, *On Liberty* (Oxford: Blackwell, 1947), at 15; see also Milton, *Areopagitia*, in *Prose Works* (Yale, 1959), Vol. II, at 561.

²⁰ E.g., *Ponder v. Cobb*, 257 N.C. 281, 299, 126 S.E.2d 67, 80 (1962); *Lawrence v. Fox*, 357 Mich. 134, 146, 97 N.W.2d 719, 725 (1959); *Stice v. Beacon Newspaper Corp.*, 185 Kan. 61, 65-67, 340 P.2d 396, 400-401 (1959); *Bailey v. Charleston Mail Assn.*, 126 W.Va. 292, 307, 27 S.E.2d 837, 844 (1943); *Salinger v. Cowles*, 195 Iowa 873, 889, 191 N.W. 167, 174 (1922); *Snively v. Record Publishing Co.*, 185 Cal. 565, 571-576, 198 P. 1 (1921); *McLean v. Merriman*, 42 S.D. 394, 175 N.W. 878 (1920). Applying the same rule to candidates for public office, see, e.g., *Phoenix Newspapers v. Choisser*, 82 Ariz. 271, 276-277, 312 P.2d 150, 154 (1957); *Friedell v. Blakely Printing Co.*, 163 Minn. 226, 230, 203 N.W. 974, 975 (1925). And see *Chagnon v. Union-Leader Corp.*, 103 N.H. 426, 438, 174 A.2d 825, 833 (1961), cert. denied, 369 U.S. 830 (<http://www.law.cornell.edu/supremecourt/text/369/830/>).

The consensus of scholarly opinion apparently favors the rule that is here adopted. E.g., Harper and James, *Torts*, § 5.26, at 449-450 (1956); Noel, *Defamation of Public Officers and Candidates*, 49 Col.L.Rev. 875, 891-895, 897, 903 (1949); Hallen, *Fair Comment*, 8 Tex.L.Rev. 41, 61 (1929); Smith, *Charges Against Candidates*, 18 Mich.L.Rev. 1, 115 (1919); Chase, *Criticism of Public Officers and Candidates for Office*, 23 Am.L.Rev. 346, 367-371 (1889); Cooley, *Constitutional Limitations* (7th ed., Lane, 1903), at 604, 616-628. But see, e.g., American Law Institute, *Restatement of Torts*, § 598, Comment a (1938) (reversing the position taken in Tentative Draft 13, § 1041(2) (1936)); Veeder, *Freedom of Public Discussion*, 23 Harv.L.Rev. 413, 419 (1910).

official conduct in connection with a school-fund transaction. The defendant pleaded privilege and the trial judge, over the plaintiff's objection, instructed the jury that where an article is published and circulated among voters for the sole purpose of giving what the defendant [p281] believes to be truthful information concerning a candidate for public office and for the purpose of enabling such voters to cast their ballot more intelligently, and the whole thing is done in good faith and without malice, the article is privileged, although the principal matters contained in the article may be untrue, in fact, and derogatory to the character of the plaintiff, and in such a case the burden is on the plaintiff to show actual malice in the publication of the article.

In answer to a special question, the jury found that the plaintiff had not proved actual malice, and a general verdict was returned for the defendant. On appeal, the Supreme Court of Kansas, in an opinion by Justice Burch, reasoned as follows (78 Kan., at 724, 98 P. at 286):

It is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great, that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great, and the chance of injury to private character so small, that such discussion must be privileged.

The court thus sustained the trial court's instruction as a correct statement of the law, saying:

In such a case the occasion gives rise to a privilege, qualified to this extent: any one claiming to be defamed by the communication must show actual malice or go remediless. This privilege extends to a great variety of subjects, and includes matters of [p282] public concern, public men, and candidates for office.

78 Kan. at 723, 98 P. at 285.

Such a privilege for criticism of official conduct²¹ is appropriately analogous to the protection accorded a public official when he is sued for libel by a private citizen. In *Barr v. Matteo*, 360 U.S. 564 (<http://www.law.cornell.edu/supremecourtfitext/360/564/>), 575, this Court held the utterance of a federal official to be absolutely privileged if made "within the outer perimeter" of his duties. The States accord the same immunity to statements of their highest officers, although some differentiate their lesser officials and

²¹ The privilege immunizing honest misstatements of fact is often referred to as a "conditional" privilege, to distinguish it from the "absolute" privilege recognized in judicial, legislative, administrative and executive proceedings. See, e.g., *Prosser, Torts* (2d ed., 1955), § 95.

qualify the privilege they enjoy.²² But all hold that all officials are protected unless actual malice can be proved. The reason for the official privilege is said to be that the threat of damage suits would otherwise “inhibit the fearless, vigorous, and effective administration of policies of government” and “dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.” *Barr v. Matteo*, supra, 360 U.S. at 571. Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official’s duty to administer. See *Whitney v. California*, 274 U.S. 357 (<http://www.law.cornell.edu/supremecourt/text/274/357/>), 375 (concurring opinion of Mr. Justice Brandeis), quoted supra, p. 270. As Madison said, see supra p. 275, “the censorial power is in the people over the Government, and not in the Government over the people.” It would give public servants an unjustified preference over the public they serve, if critics of official conduct [p283] did not have a fair equivalent of the immunity granted to the officials themselves.

We conclude that such a privilege is required by the First and Fourteenth Amendments.

III

We hold today that the Constitution delimits a State’s power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action,²³ the rule requiring proof of actual malice is applicable. While Alabama law apparently requires proof of actual malice for an award of punitive damages,²⁴ where general damages are concerned malice is “presumed.” Such a

²² See 1 Harper and James, *Torts*, § 5.23, at 429-430 (1956); Prosser, *Torts* (2d ed., 1955), at 612-613; American Law Institute, *Restatement of Torts* (1938), § 591.

²³ We have no occasion here to determine how far down into the lower ranks of government employees the “public official” designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. Cf. *Barr v. Matteo*, 360 U.S. 564 (<http://www.law.cornell.edu/supremecourt/text/360/564/>), 573-575. Nor need we here determine the boundaries of the “official conduct” concept. It is enough for the present case that respondent’s position as an elected city commissioner clearly made him a public official, and that the allegations in the advertisement concerned what was allegedly his official conduct as Commissioner in charge of the Police Department. As to the statements alleging the assaulting of Dr. King and the bombing of his home, it is immaterial that they might not be considered to involve respondent’s official conduct if he himself had been accused of perpetrating the assault and the bombing. Respondent does not claim that the statements charged him personally with these acts; his contention is that the advertisement connects him with them only in his official capacity as the Commissioner supervising the police, on the theory that the police might be equated with the “They” who did the bombing and assaulting. Thus, if these allegations can be read as referring to respondent at all, they must be read as describing his performance of his official duties.

²⁴ *Johnson Publishing Co. v. Davis*, 271 Ala. 474, 487, 124 So.2d 441, 450 (1960). Thus, the trial judge here instructed the jury that mere negligence or carelessness is not evidence of actual malice or malice, in fact, and does not justify an award of exemplary or punitive damages in an action for libel.

The court refused, however, to give the following instruction which had been requested by the Times:

presumption is inconsistent [p284] with the federal rule. “The power to create presumptions is not a means of escape from constitutional restrictions,” *Bailey v. Alabama*, 219 U.S. 219 (<http://www.law.cornell.edu/supremecourt/text/219/2191>), 239, “the showing of malice required for the forfeiture of the privilege is not presumed but is a matter for proof by the plaintiff. . . .” *Lawrence v. Fox*, 357 Mich. 134, 146, 97 N.W.2d 719, 725 (1959).²⁵ Since the trial judge did not instruct the jury to differentiate between general and punitive damages, it may be that the verdict was wholly an award of one or the other. But it is impossible to know, in view of the general verdict returned. Because of this uncertainty, the judgment must be reversed and the case remanded. *Stromberg v. California*, 283 U.S. 359 (<http://www.law.cornell.edu/supremecourt/text/283/359/>), 367-368; *Williams v. North Carolina*, 317 U.S. 287 (<http://www.law.cornell.edu/supremecourt/text/317/287/>), 291-292; see *Yates v. United States*, 354 U.S. 298 (<http://www.law.cornell.edu/supremecourt/text/354/298/>), 311-312; *Cramer v. United States*, 325 U.S. 1 (<http://www.law.cornell.edu/supremecourt/text/325/1/>), 36, n. 45.

Since respondent may seek a new trial, we deem that considerations of effective judicial administration require us to review the evidence in the present record to determine [p285] whether it could constitutionally support a judgment for respondent. This Court’s duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across “the line between speech unconditionally guaranteed and speech which may legitimately be regulated.” *Speiser v. Randall*, 357 U.S. 513 (<http://www.law.cornell.edu/supremecourt/text/357/513/>), 525. In cases where that line must be drawn, the rule is that we examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect. *Pennekamp v. Florida*, 328 U.S. 331 (<http://www.law.cornell.edu/supremecourt/text/328/331/>), 335; see also *One, Inc., v. Olesen*, 355 U.S. 371 (<http://www.law.cornell.edu/supremecourt/text/355/371/>); *Sunshine Book Co. v. Summerfield*, 355 U.S. 372

I charge you . . . that punitive damages, as the name indicates, are designed to punish the defendant, the New York Times Company, a corporation, and the other defendants in this case, . . . and I further charge you that such punitive damages may be awarded only in the event that you, the jury, are convinced by a fair preponderance of the evidence that the defendant . . . was motivated by personal ill will, that is actual intent to do the plaintiff harm, or that the defendant . . . was guilty of gross negligence and recklessness, and not of just ordinary negligence or carelessness in publishing the matter complained of so as to indicate a wanton disregard of plaintiff’s rights.

The trial court’s error in failing to require any finding of actual malice for an award of general damages makes it unnecessary for us to consider the sufficiency under the federal standard of the instructions regarding actual malice that were given as to punitive damages.

²⁵ Accord, *Coleman v. MacLennan*, supra, 78 Kan., at 741, 98 P. at 292; *Gough v. Tribune-Journal Co.*, 75 Idaho 502, 510, 275 P.2d 663, 668 (1954).

(<http://www.law.cornell.edu/supremecourt/text/355/372/>). We must “make an independent examination of the whole record,” *Edwards v. South Carolina*, 372 U.S. 229 (<http://www.law.cornell.edu/supremecourt/text/372/229/>), 235, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.²⁶

Applying these standards, we consider that the proof presented to show actual malice lacks the convincing [p286] clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law. The case of the individual petitioners requires little discussion. Even assuming that they could constitutionally be found to have authorized the use of their names on the advertisement, there was no evidence whatever that they were aware of any erroneous statements or were in any way reckless in that regard. The judgment against them is thus without constitutional support.

As to the Times, we similarly conclude that the facts do not support a finding of actual malice. The statement by the Times’ Secretary that, apart from the padlocking allegation, he thought the advertisement was “substantially correct,” affords no constitutional warrant for the Alabama Supreme Court’s conclusion that it was a cavalier ignoring of the falsity of the advertisement [from which] the jury could not have but been impressed with the bad faith of The Times, and its maliciousness inferable therefrom.

The statement does not indicate malice at the time of the publication; even if the advertisement was not “substantially correct” -- although respondent’s own proofs tend to show that it was -- that opinion was at least a reasonable one, and there was no evidence to impeach the witness’ good faith in holding it. The Times’ failure to retract upon respondent’s demand, although it later retracted upon the demand of Governor Patterson, is likewise not adequate evidence of malice for constitutional purposes. Whether or not a failure to retract may ever constitute such evidence, there are two reasons why it does not here. First, the letter written by the Times reflected a reasonable doubt on its part as to

²⁶ The Seventh Amendment does not, as respondent contends, preclude such an examination by this Court. That Amendment, providing that “no fact tried by a jury shall be otherwise reexamined in any Court of the United States than according to the rules of the common law,” is applicable to state cases coming here. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (<http://www.law.cornell.edu/supremecourt/text/166/226/>), 242-243; cf. *The Justices v. Murray*, 9 Wall. 274. But its ban on reexamination of facts does not preclude us from determining whether governing rules of federal law have been properly applied to the facts.

[T]his Court will review the finding of facts by a State court . . . where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.

Fiske v. Kansas, 274 U.S. 380 (<http://www.law.cornell.edu/supremecourt/text/274/380/>), 385-386. See also *Haynes v. Washington*, 373 U.S. 503 (<http://www.law.cornell.edu/supremecourt/text/373/503/>), 515-516.

whether the advertisement could reasonably be taken to refer to respondent at all. Second, it was not a final refusal, since it asked for an explanation on this point -- a request that respondent chose to ignore. Nor does the retraction upon the demand of the Governor supply the [p287] necessary proof. It may be doubted that a failure to retract, which is not itself evidence of malice, can retroactively become such by virtue of a retraction subsequently made to another party. But, in any event, that did not happen here, since the explanation given by the Times' Secretary for the distinction drawn between respondent and the Governor was a reasonable one, the good faith of which was not impeached.

Finally, there is evidence that the Times published the advertisement without checking its accuracy against the news stories in the Times' own files. The mere presence of the stories in the files does not, of course, establish that the Times "knew" the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement. With respect to the failure of those persons to make the check, the record shows that they relied upon their knowledge of the good reputation of many of those whose names were listed as sponsors of the advertisement, and upon the letter from A. Philip Randolph, known to them as a responsible individual, certifying that the use of the names was authorized. There was testimony that the persons handling the advertisement saw nothing in it that would render it unacceptable under the Times' policy of rejecting advertisements containing "attacks of a personal character";²⁷ their failure to reject it on this ground was not unreasonable. We think [p288] the evidence against the Times supports, at most, a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice. Cf. *Charles Parker Co. v. Silver City Crystal Co.*, 142 Conn. 605, 618, 116 A.2d 440, 446 (1955); *Phoenix Newspapers, Inc., v. Choisser*, 82 Ariz. 271, 277-278, 312 P.2d 150, 154-155 (1957).

We also think the evidence was constitutionally defective in another respect: it was incapable of supporting the jury's finding that the allegedly libelous statements were made "of and concerning" respondent. Respondent relies on the words of the advertisement and the testimony of six witnesses to establish a connection between it and himself. Thus, in his brief to this Court, he states:

The reference to respondent as police commissioner is clear from the ad. In addition, the jury heard the testimony of a newspaper editor . . . ; a real estate and

²⁷ The Times has set forth in a booklet its "Advertising Acceptability Standards." Listed among the classes of advertising that the newspaper does not accept are advertisements that are "fraudulent or deceptive," that are "ambiguous in wording and . . . may mislead," and that contain "attacks of a personal character." In replying to respondent's interrogatories before the trial, the Secretary of the Times stated that, as the advertisement made no attacks of a personal character upon any individual and otherwise met the advertising acceptability standards promulgated, it had been approved for publication.

insurance man . . . ; the sales manager of a men's clothing store . . . ; a food equipment man . . . ; a service station operator . . . , and the operator of a truck line for whom respondent had formerly worked. . . . Each of these witnesses stated that he associated the statements with respondent. . . .

(Citations to record omitted.) There was no reference to respondent in the advertisement, either by name or official position. A number of the allegedly libelous statements -- the charges that the dining hall was padlocked and that Dr. King's home was bombed, his person assaulted, and a perjury prosecution instituted against him -- did not even concern the police; despite the ingenuity of the arguments which would attach this significance to the word "They," it is plain that these statements could not reasonably be read as accusing respondent of personal involvement in the acts [p289] in question. The statements upon which respondent principally relies as referring to him are the two allegations that did concern the police or police functions: that "truckloads of police . . . ringed the Alabama State College Campus" after the demonstration on the State Capitol steps, and that Dr. King had been "arrested . . . seven times." These statements were false only in that the police had been "deployed near" the campus, but had not actually "ringed" it, and had not gone there in connection with the State Capitol demonstration, and in that Dr. King had been arrested only four times. The ruling that these discrepancies between what was true and what was asserted were sufficient to injure respondent's reputation may itself raise constitutional problems, but we need not consider them here. Although the statements may be taken as referring to the police, they did not, on their face, make even an oblique reference to respondent as an individual. Support for the asserted reference must, therefore, be sought in the testimony of respondent's witnesses. But none of them suggested any basis for the belief that respondent himself was attacked in the advertisement beyond the bare fact that he was in overall charge of the Police Department and thus bore official responsibility for police conduct; to the extent that some of the witnesses thought respondent to have been charged with ordering or approving the conduct or otherwise being personally involved in it, they based this notion not on any statements in the advertisement, and not on any evidence that he had, in fact, been so involved, but solely on the unsupported assumption that, because of his official position, he must have been.²⁸ This reliance on the bare [p290] fact of

²⁸ Respondent's own testimony was that, as Commissioner of Public Affairs, it is part of my duty to supervise the Police Department, and I certainly feel like it [a statement] is associated with me when it describes police activities. He thought that, "by virtue of being Police Commissioner and Commissioner of Public Affairs," he was charged with "any activity on the part of the Police Department." "When it describes police action, certainly I feel it reflects on me as an individual." He added that "[i]t is my feeling that it reflects not only on me, but on the other Commissioners and the community." Grover C. Hall testified that, to him, the third paragraph of the advertisement called to mind "the City government -- the Commissioners," and that, now that you ask it, I would naturally think a little more about the police Commissioner, because his responsibility is exclusively with the constabulary. It was "the phrase about starvation" that led to the association; "the other didn't hit me with any particular force."

respondent's official position²⁹ was made explicit by the Supreme Court of Alabama. That court, in holding that the trial court "did not err in overruling the demurrer [of the Times] in the aspect that the libelous [p291] matter was not of and concerning the [plaintiff,]" based its ruling on the proposition that:

We think it common knowledge that the average person knows that municipal agents, such as police and firemen, and others, are under the control and direction of the city governing body, and more particularly under the direction and control of a single commissioner. In measuring the performance or deficiencies of such groups, praise or criticism is usually attached to the official in complete control of the body. 273 Ala., at 674-675, 144 So.2d at 39.

This proposition has disquieting implications for criticism of governmental conduct. For good reason, no court of last resort in this country has ever held, or even

Arnold D. Blackwell testified that the third paragraph was associated in his mind with "the Police Commissioner and the police force. The people on the police force." If he had believed the statement about the padlocking of the dining hall, he would have thought that the people on our police force or the heads of our police force were acting without their jurisdiction, and would not be competent for the position. "I would assume that the Commissioner had ordered the police force to do that, and therefore it would be his responsibility."

Harry W. Kaminsky associated the statement about "truckloads of police" with respondent, "because he is the Police Commissioner." He thought that the reference to arrests in the sixth paragraph implicates the Police Department, I think, or the authorities that would do that -- arrest folks for speeding and loitering and such as that.

Asked whether he would associate with respondent a newspaper report that the police had "beat somebody up or assaulted them on the streets of Montgomery," he replied: I still say he is the Police Commissioner and those men are working directly under him, and therefore I would think that he would have something to do with it. In general, he said, "I look at Mr. Sullivan when I see the Police Department."

H. M. Price, Sr., testified that he associated the first sentence of the third paragraph with respondent because: I would just automatically consider that the Police Commissioner in Montgomery would have to put his approval on those kind of things as an individual.

William M. Parker, Jr., testified that he associated the statements in the two paragraphs with "the Commissioners of the City of Montgomery," and, since respondent "was the Police Commissioner," he "thought of him first." He told the examining counsel: "I think, if you were the Police Commissioner, I would have thought it was speaking of you."

Horace W. White, respondent's former employer, testified that the statement about "truckloads of police" made him think of respondent "as being the head of the Police Department." Asked whether he read the statement as charging respondent himself with ringing the campus or having shotguns and tear gas, he replied: "Well, I thought of his department being charged with it, yes, sir. He is the head of the Police Department, as I understand it." He further said that the reason he would have been unwilling to reemploy respondent if he had believed the advertisement was "the fact that he allowed the Police Department to do the things that the paper say he did."

²⁹ Compare *Ponder v. Cobb*, 257 N.C. 281, 126 S.E.2d 67 (1962).

suggested, that prosecutions for libel on government have any place in the American system of jurisprudence. *City of Chicago v. Tribune Co.*, 307 Ill. 595, 601, 139 N.E. [p292] 86, 88 (1923). The present proposition would sidestep this obstacle by transmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed. There is no legal alchemy by which a State may thus create the cause of action that would otherwise be denied for a publication which, as respondent himself said of the advertisement, “reflects not only on me but on the other Commissioners and the community.” Raising as it does the possibility that a good faith critic of government will be penalized for his criticism, the proposition relied on by the Alabama courts strikes at the very center of the constitutionally protected area of free expression.³⁰ We hold that such a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations. Since it was relied on exclusively here, and there was no other evidence to connect the statements with respondent, the evidence was constitutionally insufficient to support a finding that the statements referred to respondent.

The judgment of the Supreme Court of Alabama is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Reversed and remanded. [p293]

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Together with No. 40, *Abernathy et al. v. Sullivan*, also on certiorari to the same court, argued January 7, 1964.

TOP

³⁰ Insofar as the proposition means only that the statements about police conduct libeled respondent by implicitly criticizing his ability to run the Police Department, recovery is also precluded in this case by the doctrine of fair comment. See American Law Institute, *Restatement of Torts* (1938), § 607. Since the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact. Both defenses are, of course, defeasible if the public official proves actual malice, as was not done here.

Concurrence

BLACK, J., Concurring Opinion

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring.

I concur in reversing this half-million-dollar judgment against the New York Times Company and the four individual defendants. In reversing, the Court holds that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct.

Ante, p. 283. I base my vote to reverse on the belief that the First and Fourteenth Amendments not merely "delimit" a State's power to award damages to "public officials against critics of their official conduct," but completely prohibit a State from exercising such a power. The Court goes on to hold that a State can subject such critics to damages if "actual malice" can be proved against them. "Malice," even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides, at best, an evanescent protection for the right critically to discuss public affairs, and certainly does not measure up to the sturdy safeguard embodied in the First Amendment. Unlike the Court, therefore, I vote to reverse exclusively on the ground that the Times and the individual defendants had an absolute, unconditional constitutional right to publish in the Times advertisement their criticisms of the Montgomery agencies and officials. I do not base my vote to reverse on any failure to prove that these individual defendants signed the advertisement or that their criticism of the Police Department was aimed at the plaintiff Sullivan, who was then the Montgomery City Commissioner having supervision of the city's police; for present purposes, I assume these things were proved. Nor is my reason for reversal the size of the half-million-dollar judgment, large as it is. If Alabama has constitutional power to use its civil libel law to impose damages on the press for criticizing the way public officials perform or fail [p294] to perform their duties, I know of no provision in the Federal Constitution which either expressly or impliedly bars the State from fixing the amount of damages.

The half-million-dollar verdict does give dramatic proof, however, that state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials. The factual background of this case emphasizes the imminence and enormity of that threat. One of the acute and highly emotional issues in this country arises out of efforts of many people, even including some public officials, to continue state-commanded segregation of races in the public schools and other public places despite our several holdings that such a state practice is forbidden by the Fourteenth Amendment. Montgomery is one of the localities in which widespread hostility to desegregation has been manifested. This hostility has sometimes extended itself to persons who favor desegregation, particularly to so-called "outside agitators," a term which can be made to fit papers like the Times,

which is published in New York. The scarcity of testimony to show that Commissioner Sullivan suffered any actual damages at all suggests that these feelings of hostility had at least as much to do with rendition of this half-million-dollar verdict as did an appraisal of damages. Viewed realistically, this record lends support to an inference that, instead of being damaged, Commissioner Sullivan's political, social, and financial prestige has likely been enhanced by the Times' publication. Moreover, a second half-million-dollar libel verdict against the Times based on the same advertisement has already been awarded to another Commissioner. There, a jury again gave the full amount claimed. There is no reason to believe that there are not more such huge verdicts lurking just around the corner for the Times or any other newspaper or broadcaster which [p295] might dare to criticize public officials. In fact, briefs before us show that, in Alabama, there are now pending eleven libel suits by local and state officials against the Times seeking \$5,600,000, and five such suits against the Columbia Broadcasting System seeking \$1,700,000. Moreover, this technique for harassing and punishing a free press -- now that it has been shown to be possible -- is by no means limited to cases with racial overtones; it can be used in other fields where public feelings may make, local as well as out-of-state, newspapers easy prey for libel verdict seekers.

In my opinion, the Federal Constitution has dealt with this deadly danger to the press in the only way possible without leaving the free press open to destruction -- by granting the press an absolute immunity for criticism of the way public officials do their public duty. Compare *Barr v. Matteo*, 360 U.S. 564 (<http://www.law.cornell.edu/supremecourt/text/360/564/>). Stopgap measures like those the Court adopts are, in my judgment, not enough. This record certainly does not indicate that any different verdict would have been rendered here whatever the Court had charged the jury about "malice," "truth," "good motives," "justifiable ends," or any other legal formulas which, in theory, would protect the press. Nor does the record indicate that any of these legalistic words would have caused the courts below to set aside or to reduce the half-million-dollar verdict in any amount.

I agree with the Court that the Fourteenth Amendment made the First applicable to the States.¹ This means to me that, since the adoption of the Fourteenth Amendment, a State has no more power than the Federal Government to use a civil libel law or any other law to impose damages for merely discussing public affairs and criticizing public officials. The power of the United [p296] States to do that is, in my judgment, precisely nil. Such was the general view held when the First Amendment was adopted, and ever since.² Congress never has sought to challenge this viewpoint by passing any civil libel

¹ See cases collected in *Speiser v. Randall*, 357 U.S. 513 (<http://www.law.cornell.edu/supremecourt/text/357/513/>), 530 (concurring opinion).

² See, e.g., 1 Tucker, *Blackstone's Commentaries* (1803), 297-299 (editor's appendix). St. George Tucker, a distinguished Virginia jurist, took part in the Annapolis Convention of 1786, sat on both state and federal courts, and was widely known for his writings on judicial and constitutional subjects.

law. It did pass the Sedition Act in 1798,³ which made it a crime -- “seditious libel” -- to criticize federal officials or the Federal Government. As the Court’s opinion correctly points out, however, ante, pp. 273-276, that Act came to an ignominious end and, by common consent, has generally been treated as having been a wholly unjustifiable and much to be regretted violation of the First Amendment. Since the First Amendment is now made applicable to the States by the Fourteenth, it no more permits the States to impose damages for libel than it does the Federal Government.

We would, I think, more faithfully interpret the First Amendment by holding that, at the very least, it leaves the people and the press free to criticize officials and discuss public affairs with impunity. This Nation of ours elects many of its important officials; so do the States, the municipalities, the counties, and even many precincts. These officials are responsible to the people for the way they perform their duties. While our Court has held that some kinds of speech and writings, such as “obscenity,” *Roth v. United States*, 354 U.S. 476 (<http://www.law.cornell.edu/supremecourt/text/354/476/>), and “fighting words,” *Chaplinsky v. New Hampshire*, 315 U.S. 568 (<http://www.law.cornell.edu/supremecourt/text/315/568/>), are not expression within the protection of the First Amendment,⁴ freedom to discuss public affairs and public officials [p297] is unquestionably, as the Court today holds, the kind of speech the First Amendment was primarily designed to keep within the area of free discussion. To punish the exercise of this right to discuss public affairs or to penalize it through libel judgments is to abridge or shut off discussion of the very kind most needed. This Nation, I suspect, can live in peace without libel suits based on public discussions of public affairs and public officials. But I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials.

For a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents, and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it.⁵

An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment.^{6]}

³ Act of July 14, 1798, 1 Stat. 596.

⁴ But see *Smith v. California*, 361 U.S. 147 (<http://www.law.cornell.edu/supremecourt/text/361/147/>), 155 (concurring opinion); *Roth v. United States*, 354 U.S. 476 (<http://www.law.cornell.edu/supremecourt/text/354/476/>), 508 (dissenting opinion).

⁵ 1 Tucker, *Blackstone’s Commentaries* (1803), 297 (editor’s appendix); cf. Brant, *Seditious Libel: Myth and Reality*, 39 N.Y.U.L.Rev. 1.

⁶ Cf. Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948).

I regret that the Court has stopped short of this holding indispensable to preserve our free press from destruction.

TOP

Concurrence

GOLDBERG, J., Concurring in the Result

MR. JUSTICE GOLDBERG, with whom MR. JUSTICE DOUGLAS joins, concurring in the result.

The Court today announces a constitutional standard which prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with [p298] “actual malice” -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Ante at 279-280. The Court thus rules that the Constitution gives citizens and newspapers a “conditional privilege” immunizing nonmalicious misstatements of fact regarding the official conduct of a government officer. The impressive array of history⁷ and precedent marshaled by the Court, however, confirms my belief that the Constitution affords greater protection than that provided by the Court’s standard to citizen and press in exercising the right of public criticism.

In my view, the First and Fourteenth Amendments to the Constitution afford to the citizen and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses. The prized American right “to speak one’s mind,” cf. *Bridges v. California*, 314 U.S. 252 (<http://www.law.cornell.edu/supremecourt/text/314/252/>), 270, about public officials and affairs needs “breathing space to survive,” *NAACP v. Button*, 371 U.S. 415 (<http://www.law.cornell.edu/supremecourt/text/371/415/>), 433. The right should not depend upon a probing by the jury of the motivation⁸ of the citizen or press. The theory

⁷ I fully agree with the Court that the attack upon the validity of the Sedition Act of 1798, 1 Stat. 596, “has carried the day in the court of history,” ante at 276, and that the Act would today be declared unconstitutional. It should be pointed out, however, that the Sedition Act proscribed writings which were “false, scandalous and malicious.” (Emphasis added.) For prosecutions under the Sedition Act charging malice, see, e.g., *Trial of Matthew Lyon* (1798), in *Wharton, State Trials of the United States* (1849), p. 333; *Trial of Thomas Cooper* (1800), in *id.* at 659; *Trial of Anthony Haswell* (1800), in *id.* at 684; *Trial of James Thompson Callender* (1800), in *id.* at 688.

⁸ The requirement of proving actual malice or reckless disregard may, in the mind of the jury, add little to the requirement of proving falsity, a requirement which the Court recognizes not to be an adequate safeguard. The thought suggested by Mr. Justice Jackson in *United States v. Ballard*, 322 U.S. 78 (<http://www.law.cornell.edu/supremecourt/text/322/78/>), 92-93, is relevant here:

[p299] of our Constitution is that every citizen may speak his mind and every newspaper express its view on matters of public concern, and may not be barred from speaking or publishing because those in control of government think that what is said or written is unwise, unfair, false, or malicious. In a democratic society, one who assumes to act for the citizens in an executive, legislative, or judicial capacity must expect that his official acts will be commented upon and criticized. Such criticism cannot, in my opinion, be muzzled or deterred by the courts at the instance of public officials under the label of libel.

It has been recognized that “prosecutions for libel on government have [no] place in the American system of jurisprudence.” *City of Chicago v. Tribune Co.*, 307 Ill. 595, 601, 139 N.E. 86, 88. I fully agree. Government, however, is not an abstraction; it is made up of individuals -- of governors responsible to the governed. In a democratic society, where men are free by ballots to remove those in power, any statement critical of governmental action is necessarily “of and concerning” the governors, and any statement critical of the governors’ official conduct is necessarily “of and concerning” the government. If the rule that libel on government has no place in our Constitution is to have real meaning, then libel on the official conduct of the governors likewise can have no place in our Constitution.

We must recognize that we are writing upon a clean slate.⁹ As the Court notes, although there have been [p300] statements of this Court to the effect that the Constitution does not protect libelous publications . . . , [n]one of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials.

[A]s a matter of either practice or philosophy, I do not see how we can separate an issue as to what is believed from considerations as to what is believable. The most convincing proof that one believes his statements is to show that they have been true in his experience. Likewise, that one knowingly falsified is best proved by showing that what he said happened never did happen.

See note 4, *infra*.

⁹ It was not until *Gitlow v. New York*, 268 U.S. 652 (<http://www.law.cornell.edu/supremecourt/text/268/652/>), decided in 1925, that it was intimated that the freedom of speech guaranteed by the First Amendment was applicable to the States by reason of the Fourteenth Amendment. Other intimations followed. See *Whitney v. California*, 274 U.S. 357 (<http://www.law.cornell.edu/supremecourt/text/274/357/>); *Fiske v. Kansas*, 274 U.S. 380 (<http://www.law.cornell.edu/supremecourt/text/274/380/>). In 1931, Chief Justice Hughes, speaking for the Court in *Stromberg v. California*, 283 U.S. 359 (<http://www.law.cornell.edu/supremecourt/text/283/359/>), 368, declared:

It has been determined that the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech.

Thus, we deal with a constitutional principle enunciated less than four decades ago, and consider for the first time the application of that principle to issues arising in libel cases brought by state officials.

Ante at 268. We should be particularly careful, therefore, adequately to protect the liberties which are embodied in the First and Fourteenth Amendments. It may be urged that deliberately and maliciously false statements have no conceivable value as free speech. That argument, however, is not responsive to the real issue presented by this case, which is whether that freedom of speech which all agree is constitutionally protected can be effectively safeguarded by a rule allowing the imposition of liability upon a jury's evaluation of the speaker's state of mind. If individual citizens may be held liable in damages for strong words, which a jury finds false and maliciously motivated, there can be little doubt that public debate and advocacy will be constrained. And if newspapers, publishing advertisements dealing with public issues, thereby risk liability, there can also be little doubt that the ability of minority groups to secure publication of their views on public affairs and to seek support for their causes will be greatly diminished. Cf. *Farmers Educational & Coop. Union v. WDAY, Inc.*, 360 U.S. 525 (<http://www.law.cornell.edu/supremecourt/text/360/525/>), 530. The opinion of the Court conclusively demonstrates the chilling effect of the Alabama libel laws on First Amendment freedoms [p301] in the area of race relations. The American Colonists were not willing, nor should we be, to take the risk that "[m]en who injure and oppress the people under their administration [and] provoke them to cry out and complain" will also be empowered to "make that very complaint the foundation for new oppressions and prosecutions." *The Trial of John Peter Zenger*, 17 Howell's St. Tr. 675, 721-722 (1735) (argument of counsel to the jury). To impose liability for critical, albeit erroneous or even malicious, comments on official conduct would effectively resurrect "the obsolete doctrine that the governed must not criticize their governors." Cf. *Sweeney v. Patterson*, 76 U.S.App.D.C. 23, 24, 128 F.2d 457, 458.

Our national experience teaches that repressions breed hate, and "that hate menaces stable government." *Whitney v. California*, 274 U.S. 357 (<http://www.law.cornell.edu/supremecourt/text/274/357/>), 375 (Brandeis, J., concurring). We should be ever mindful of the wise counsel of Chief Justice Hughes:

[I]mperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

De Jonge v. Oregon, 299 U.S. 353 (<http://www.law.cornell.edu/supremecourt/text/299/353/>), 365.

This is not to say that the Constitution protects defamatory statements directed against the private conduct of a public official or private citizen. Freedom of press and of speech insures that government will respond to the will of the people, and that changes may be obtained by peaceful means. Purely private defamation has little to do with the

political ends of a self-governing society. The imposition of liability for private defamation does not [p302] abridge the freedom of public speech or any other freedom protected by the First Amendment.¹⁰ This, of course, cannot be said where public officials are concerned, or where public matters are involved. . . . [O]ne main function of the First Amendment is to ensure ample opportunity for the people to determine and resolve public issues. Where public matters are involved, the doubts should be resolved in favor of freedom of expression, rather than against it. Douglas, *The Right of the People* (1958), p. 41.

In many jurisdictions, legislators, judges and executive officers are clothed with absolute immunity against liability for defamatory words uttered in the discharge of their public duties. See, e.g., *Barr v. Matteo*, 360 U.S. 564 (<http://www.law.cornell.edu/supremecourt/text/360/564/>); *City of Chicago v. Tribune Co.*, 307 Ill., at 610, 139 N.E. at 91. Judge Learned Hand ably summarized the policies underlying the rule:

It does indeed go without saying that an official who is, in fact, guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the [p303] case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again, the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance, it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. . . .

¹⁰ In most cases, as in the case at bar, there will be little difficulty in distinguishing defamatory speech relating to private conduct from that relating to official conduct. I recognize, of course, that there will be a gray area. The difficulties of applying a public-private standard are, however, certainly of a different genre from those attending the differentiation between a malicious and nonmalicious state of mind. If the constitutional standard is to be shaped by a concept of malice, the speaker takes the risk not only that the jury will inaccurately determine his state of mind, but also that the jury will fail properly to apply the constitutional standard set by the elusive concept of malice. See note 2, *supra*.

The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers, and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. . . .

Gregoire v. Biddle, 177 F.2d 579, 581. [p304]

If the government official should be immune from libel actions, so that his ardor to serve the public will not be dampened and "fearless, vigorous, and effective administration of policies of government" not be inhibited, *Barr v. Matteo*, supra, at 571, then the citizen and the press should likewise be immune from libel actions for their criticism of official conduct. Their ardor as citizens will thus not be dampened, and they will be free "to applaud or to criticize the way public employees do their jobs, from the least to the most important."¹¹ If liability can attach to political criticism because it damages the reputation of a public official as a public official, then no critical citizen can safely utter anything but faint praise about the government or its officials. The vigorous criticism by press and citizen of the conduct of the government of the day by the officials of the day will soon yield to silence if officials in control of government agencies, instead of answering criticisms, can resort to friendly juries to forestall criticism of their official conduct.¹²

The conclusion that the Constitution affords the citizen and the press an absolute privilege for criticism of official conduct does not leave the public official without defenses against unsubstantiated opinions or deliberate misstatements.

Under our system of government, counterargument and education are the weapons available to expose these matters, not abridgment . . . of free speech. . . . *Wood v. Georgia*, 370 U.S. 375 (<http://www.law.cornell.edu/supremecourt/text/370/375/>), 389. The public [p305] official certainly has equal, if not greater, access than most private

¹¹ MR. JUSTICE BLACK, concurring in *Barr v. Matteo*, 360 U.S. 564 (<http://www.law.cornell.edu/supremecourt/text/360/564/>), 577, observed that:

The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees. Such an informed understanding depends, of course, on the freedom people have to applaud or to criticize the way public employees do their jobs, from the least to the most important.

¹² See notes 2, 4, supra.

citizens to media of communication. In any event, despite the possibility that some excesses and abuses may go unremedied, we must recognize that the people of this nation have ordained, in the light of history, that, in spite of the probability of excesses and abuses, [certain] liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy. *Cantwell v. Connecticut*, 310 U.S. 296 (<http://www.law.cornell.edu/supremecourt/text/310/296/>), 310. As Mr. Justice Brandeis correctly observed, “sunlight is the most powerful of all disinfectants.”¹³

For these reasons, I strongly believe that the Constitution accords citizens and press an unconditional freedom to criticize official conduct. It necessarily follows that, in a case such as this, where all agree that the allegedly defamatory statements related to official conduct, the judgments for libel cannot constitutionally be sustained.

¹³ See Freund, *The Supreme Court of the United States* (1949), p. 61.

XXII. WHO IS JUSTICE STEVENS?

U.S. Supreme Court

Texas v. Johnson, 491 U.S. 397 (1989)

Texas v. Johnson

No. 88-155

Argued March 21, 1989

Decided June 21, 1989

491 U.S. 397

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Syllabus

During the 1984 Republican National Convention, respondent Johnson participated in a political demonstration to protest the policies of the Reagan administration and some Dallas-based corporations. After a march through the city streets, Johnson burned an American flag while protesters chanted. No one was physically injured or threatened with injury, although several witnesses were seriously offended by the flag burning. Johnson was convicted of desecration of a venerated object in violation of a Texas statute, and a state court of appeals affirmed. However, the Texas Court of Criminal Appeals reversed, holding that the State, consistent with the First Amendment, could not punish Johnson for burning the flag in these circumstances. The court first found that Johnson's burning of the flag was expressive conduct protected by the First Amendment. The court concluded that the State could not criminally sanction flag desecration in order to preserve the flag as a symbol of national unity. It also held that the statute did not meet the State's goal of preventing breaches of the peace, since it was not drawn narrowly enough to encompass only those flag burnings that would likely result in a serious disturbance, and since the flag burning in this case did not threaten such a reaction. Further, it stressed that another Texas statute prohibited breaches of the peace and could be used to prevent disturbances without punishing this flag desecration.

Held: Johnson's conviction for flag desecration is inconsistent with the First Amendment. Pp. 491 U.S. 402-420.

(a) Under the circumstances, Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment. The State conceded that the conduct was expressive. Occurring as it did at the end of a demonstration coinciding with the Republican National Convention, the expressive, overtly political nature of the conduct was both intentional and overwhelmingly apparent. Pp. 491 U.S. 402-406.

(b) Texas has not asserted an interest in support of Johnson's conviction that is unrelated to the suppression of expression and would therefore permit application of the test set forth in *United States v. O'Brien*, 391 U.S. 367, whereby an important

governmental interest in regulating nonspeech can justify incidental limitations on First Amendment freedoms when speech and nonspeech elements are combined in the same course of conduct. An interest in preventing breaches of the peace is not implicated on this record. Expression may not be prohibited on the basis that an audience that takes serious offense to the expression may disturb the peace, since the Government cannot assume that every expression of a provocative idea will incite a riot, but must look to the actual circumstances surrounding the expression. Johnson's expression of dissatisfaction with the Federal Government's policies also does not fall within the class of "fighting words" likely to be seen as a direct personal insult or an invitation to exchange fisticuffs. This Court's holding does not forbid a State to prevent "imminent lawless action" and, in fact, Texas has a law specifically prohibiting breaches of the peace. Texas' interest in preserving the flag as a symbol of nationhood and national unity is related to expression in this case and, thus, falls outside the O'Brien test. Pp. 491 U.S. 406-410.

(c) The latter interest does not justify Johnson's conviction. The restriction on Johnson's political expression is content based, since the Texas statute is not aimed at protecting the physical integrity of the flag in all circumstances, but is designed to protect it from intentional and knowing abuse that causes serious offense to others. It is therefore subject to "the most exacting scrutiny." *Boos v. Barry*, 485 U.S. 312. The Government may not prohibit the verbal or nonverbal expression of an idea merely because society finds the idea offensive or disagreeable, even where our flag is involved. Nor may a State foster its own view of the flag by prohibiting expressive conduct relating to it, since the Government may not permit designated symbols to be used to communicate a limited set of messages. Moreover, this Court will not create an exception to these principles protected by the First Amendment for the American flag alone. Pp. 491 U.S. 410-422.

755 S.W.2d 92, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, SCALIA, and KENNEDY, JJ., joined. KENNEDY, J., filed a concurring opinion, post, p. 491 U.S. 420. REHNQUIST, C.J., filed a dissenting opinion, in which WHITE and O'CONNOR, JJ., joined, post, p. 491 U.S. 421. STEVENS, J., filed a dissenting opinion, post, p. 491 U.S. 436.

JUSTICE BRENNAN delivered the opinion of the Court.

After publicly burning an American flag as a means of political protest, Gregory Lee Johnson was convicted of desecrating a flag in violation of Texas law. This case presents the question whether his conviction is consistent with the First Amendment. We hold that it is not.

I

While the Republican National Convention was taking place in Dallas in 1984, respondent Johnson participated in a political demonstration dubbed the “Republican War Chest Tour.” As explained in literature distributed by the demonstrators and in speeches made by them, the purpose of this event was to protest the policies of the Reagan administration and of certain Dallas-based corporations. The demonstrators marched through the Dallas streets, chanting political slogans and stopping at several corporate locations to stage “die-ins” intended to dramatize the consequences of nuclear war. On several occasions they spray-painted the walls of buildings and overturned potted plants, but Johnson himself took no part in such activities. He did, however, accept an American flag handed to him by a fellow protestor who had taken it from a flagpole outside one of the targeted buildings.

The demonstration ended in front of Dallas City Hall, where Johnson unfurled the American flag, doused it with kerosene, and set it on fire. While the flag burned, the protestors chanted, “America, the red, white, and blue, we spit on you.” After the demonstrators dispersed, a witness to the flag burning collected the flag’s remains and buried them in his backyard. No one was physically injured or threatened with injury, though several witnesses testified that they had been seriously offended by the flag burning.

Of the approximately 100 demonstrators, Johnson alone was charged with a crime. The only criminal offense with which he was charged was the desecration of a venerated object in violation of Tex.Penal Code Ann. § 42.09(a)(3) (1989).¹ After a trial, he was convicted, sentenced to one year in prison, and fined \$2,000. The Court of Appeals for the Fifth District of Texas at Dallas affirmed Johnson’s conviction, 706 S.W.2d 120 (1986), but the Texas Court of Criminal Appeals reversed, 755 S.W.2d 92 (1988), holding that the State could not, consistent with the First Amendment, punish Johnson for burning the flag in these circumstances.

¹ Tex.Penal Code Ann. § 42.09 (1989) provides in full:

“§ 42.09. Desecration of Venerated Object”

“(a) A person commits an offense if he intentionally or knowingly desecrates:”

“(1) a public monument;”

“(2) a place of worship or burial; or”

“(3) a state or national flag.”

“(b) For purposes of this section, ‘desecrate’ means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.”

“(c) An offense under this section is a Class A misdemeanor.”

The Court of Criminal Appeals began by recognizing that Johnson's conduct was symbolic speech protected by the First Amendment:

"Given the context of an organized demonstration, speeches, slogans, and the distribution of literature, anyone who observed appellant's act would have understood the message that appellant intended to convey. The act for which appellant was convicted was clearly 'speech' contemplated by the First Amendment."

Id. at 95. To justify Johnson's conviction for engaging in symbolic speech, the State asserted two interests: preserving the flag as a symbol of national unity and preventing breaches of the peace. The Court of Criminal Appeals held that neither interest supported his conviction.

Acknowledging that this Court had not yet decided whether the Government may criminally sanction flag desecration in order to preserve the flag's symbolic value, the Texas court nevertheless concluded that our decision in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), suggested that furthering this interest by curtailing speech was impermissible. "Recognizing that the right to differ is the centerpiece of our First Amendment freedoms," the court explained, "a government cannot mandate by fiat a feeling of unity in its citizens. Therefore, that very same government cannot carve out a symbol of unity and prescribe a set of approved messages to be associated with that symbol when it cannot mandate the status or feeling the symbol purports to represent." 755 S.W.2d at 97. Noting that the State had not shown that the flag was in "grave and immediate danger," *Barnette*, supra, at 639, of being stripped of its symbolic value, the Texas court also decided that the flag's special status was not endangered by Johnson's conduct. 755 S.W.2d at 97.

As to the State's goal of preventing breaches of the peace, the court concluded that the flag desecration statute was not drawn narrowly enough to encompass only those flag burnings that were likely to result in a serious disturbance of the peace. And in fact, the court emphasized, the flag burning in this particular case did not threaten such a reaction. "Serious offense" occurred," the court admitted, "but there was no breach of peace, nor does the record reflect that the situation was potentially explosive. One cannot equate 'serious offense' with incitement to breach the peace." Id. at 96. The court also stressed that another Texas statute, Tex. Penal Code Ann. § 42.01 (1989), prohibited breaches of the peace. Citing *Boos v. Barry*, 485 U.S. 312 (1988), the court decided that § 42.01 demonstrated Texas' ability to prevent disturbances of the peace without punishing this flag desecration. 755 S.W.2d at 96.

Because it reversed Johnson's conviction on the ground that § 42.09 was unconstitutional as applied to him, the state court did not address Johnson's argument that the statute was, on its face, unconstitutionally vague and overbroad. We granted certiorari, 488 U.S. 907 (1988), and now affirm.

II

Johnson was convicted of flag desecration for burning the flag, rather than for uttering insulting words.² This fact somewhat complicates our consideration of his conviction under the First Amendment. We must first determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction. See, e.g., *Spence v. Washington*, 418 U.S. 405, 418 U.S. 409-411 (1974). If his conduct was expressive, we next decide whether the State's regulation is related to the suppression of free expression. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 391 U.S. 377 (1968); *Spence*, supra, at 418 U.S. 414, n. 8. If the State's regulation is not related to expression, then the less stringent standard we announced in *United States v. O'Brien* for regulations of noncommunicative conduct controls. See *O'Brien*, supra, at 391 U.S. 377. If it is, then we are outside of *O'Brien's* test, and we must ask whether this interest justifies Johnson's conviction under a more demanding standard.³ See *Spence*, supra, at 418 U.S. 411. A third possibility is that the

² Because the prosecutor's closing argument observed that Johnson had led the protestors in chants denouncing the flag while it burned, Johnson suggests that he may have been convicted for uttering critical words, rather than for burning the flag. Brief for Respondent 33-34. He relies on *Street v. New York*, 394 U.S. 576, 394 U.S. 578 (1969), in which we reversed a conviction obtained under a New York statute that prohibited publicly defying or casting contempt on the flag "either by words or act" because we were persuaded that the defendant may have been convicted for his words alone. Unlike the law we faced in *Street*, however, the Texas flag desecration statute does not on its face permit conviction for remarks critical of the flag, as Johnson himself admits. See Brief for Respondent 34. Nor was the jury in this case told that it could convict Johnson of flag desecration if it found only that he had uttered words critical of the flag and its referents.

Johnson emphasizes, though, that the jury was instructed -- according to Texas' law of parties -- that

"a person is criminally responsible for an offense committed by the conduct of another if acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense."

Brief for Respondent 2, n. 2, quoting 1 Record 49. The State offered this instruction because Johnson's defense was that he was not the person who had burned the flag. Johnson did not object to this instruction at trial, and although he challenged it on direct appeal, he did so only on the ground that there was insufficient evidence to support it. 706 S.W.2d 120, 124 (Tex.App.1986). It is only in this Court that Johnson has argued that the law-of-parties instruction might have led the jury to convict him for his words alone. Even if we were to find that this argument is properly raised here, however, we would conclude that it has no merit in these circumstances. The instruction would not have permitted a conviction merely for the pejorative nature of Johnson's words, and those words themselves did not encourage the burning of the flag, as the instruction seems to require. Given the additional fact that "the bulk of the State's argument was premised on Johnson's culpability as a sole actor," *ibid.*, we find it too unlikely that the jury convicted Johnson on the basis of this alternative theory to consider reversing his conviction on this ground.

³ Although Johnson has raised a facial challenge to Texas' flag desecration statute, we choose to resolve this case on the basis of his claim that the statute, as applied to him, violates the First Amendment. Section 42.09 regulates only physical conduct with respect to the flag, not the written or spoken word, and although one violates the statute only if one "knows" that one's physical treatment of the flag "will seriously offend one or more persons likely to observe or discover his action,"

State's asserted interest is simply not implicated on these facts, and, in that event, the interest drops out of the picture. See 418 U.S. at 418 U.S. 414, n. 8.

The First Amendment literally forbids the abridgment only of "speech," but we have long recognized that its protection does not end at the spoken or written word. While we have rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," *United States v. O'Brien*, supra, at 391 U.S. 376, we have acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments," *Spence*, supra, at 418 U.S. 409.

In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." 418 U.S. at 418 U.S. 410-411. Hence, we have recognized the expressive nature of students' wearing of black armbands to protest American military involvement in Vietnam, *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 393 U.S. 505 (1969); of a sit-in by blacks in a "whites only" area to protest segregation, *Brown v. Louisiana*, 383 U.S. 131, 383 U.S. 141-142 (1966); of the wearing of American military uniforms in a dramatic presentation criticizing American involvement in Vietnam, *Schacht v. United States*, 398 U.S. 58 (1970); and of picketing about a wide variety of causes, see, e.g., *Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 391 U.S. 313-314 (1968); *United States v. Grace*, 461 U.S. 171, 461 U.S. 176 (1983).

Especially pertinent to this case are our decisions recognizing the communicative nature of conduct relating to flags. Attaching a peace sign to the flag, *Spence*, supra, at 418 U.S. 409-410; refusing to salute the flag, *Barnette*, 319 U.S. at 319 U.S. 632; and displaying a red flag, *Stromberg v. California*, 283 U.S. 359, 283 U.S. 368-369 (1931), we have held, all may find shelter under the First Amendment. See also *Smith v. Goguen*, 415 U.S. 566, 415 U.S. 588 (1974) (WHITE, J., concurring in judgment) (treating flag "contemptuously" by wearing pants with small flag sewn into their seat is expressive conduct). That we have had little difficulty identifying an expressive element in conduct relating to flags should not be surprising. The very purpose of a national flag is to serve

Tex. Penal Code Ann. § 42.09(b) (1989), this fact does not necessarily mean that the statute applies only to expressive conduct protected by the First Amendment. Cf. *Smith v. Goguen*, 415 U.S. 566, 415 U.S. 588 (1974) (WHITE, J., concurring in judgment) (statute prohibiting "contemptuous" treatment of flag encompasses only expressive conduct). A tired person might, for example, drag a flag through the mud, knowing that this conduct is likely to offend others, and yet have no thought of expressing any idea; neither the language nor the Texas courts' interpretations of the statute precludes the possibility that such a person would be prosecuted for flag desecration. Because the prosecution of a person who had not engaged in expressive conduct would pose a different case, and because this case may be disposed of on narrower grounds, we address only Johnson's claim that § 42.09, as applied to political expression like his, violates the First Amendment.

as a symbol of our country; it is, one might say, “the one visible manifestation of two hundred years of nationhood.” *Id.* at 415 U.S. 603 (REHNQUIST, J., dissenting). Thus, we have observed: “[T]he flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a shortcut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design.” *Barnette*, *supra*, at 319 U.S. 632. Pregnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in “America.”

We have not automatically concluded, however, that any action taken with respect to our flag is expressive. Instead, in characterizing such action for First Amendment purposes, we have considered the context in which it occurred. In *Spence*, for example, we emphasized that Spence’s taping of a peace sign to his flag was “roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy.” 418 U.S. at 418 U.S. 410. The State of Washington had conceded, in fact, that Spence’s conduct was a form of communication, and we stated that “the State’s concession is inevitable on this record.” *Id.* at 418 U.S. 409.

The State of Texas conceded for purposes of its oral argument in this case that Johnson’s conduct was expressive conduct, *Tr. of Oral Arg.* 4, and this concession seems to us as prudent as was Washington’s in *Spence*. Johnson burned an American flag as part -- indeed, as the culmination -- of a political demonstration that coincided with the convening of the Republican Party and its renomination of Ronald Reagan for President. The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent. At his trial, Johnson explained his reasons for burning the flag as follows:

“The American Flag was burned as Ronald Reagan was being renominated as President. And a more powerful statement of symbolic speech, whether you agree with it or not, couldn’t have been made at that time. It’s quite a just position [juxtaposition]. We had new patriotism and no patriotism.”

5 Record 656. In these circumstances, Johnson’s burning of the flag was conduct “sufficiently imbued with elements of communication,” *Spence*, 418 U.S. at 418 U.S. 409, to implicate the First Amendment.

III

The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. See *O’Brien*, 391 U.S. at 391 U.S. 376-377; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 468 U.S. 293 (1984); *Dallas v. Stanglin*, 490 U.S. 19, 490 U.S. 25 (1989). It may not, however, proscribe particular conduct because it has expressive elements.

“[W]hat might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate basis for singling out that conduct for proscription. A law directed at the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires.”

Community for Creative Non-Violence v. Watt, 227 U.S.App.D.C. 19, 55-56, 703 F.2d 586, 622-623 (1983) (Scalia, J., dissenting) (emphasis in original), rev’d sub nom. *Clark v. Community for Creative Non-Violence*, supra. It is, in short, not simply the verbal or nonverbal nature of the expression, but the governmental interest at stake, that helps to determine whether a restriction on that expression is valid.

Thus, although we have recognized that, where

“‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms,”

O’Brien, supra, at 391 U.S. 376, we have limited the applicability of *O’Brien*’s relatively lenient standard to those cases in which “the governmental interest is unrelated to the suppression of free expression.” *Id.* at 391 U.S. 377; see also *Spence*, 418 U.S. at 418 U.S. 414, n. 8. In stating, moreover, that *O’Brien*’s test “in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions,” *Clark*, supra, at 468 U.S. 298, we have highlighted the requirement that the governmental interest in question be unconnected to expression in order to come under *O’Brien*’s less demanding rule.

In order to decide whether *O’Brien*’s test applies here, therefore, we must decide whether Texas has asserted an interest in support of Johnson’s conviction that is unrelated to the suppression of expression. If we find that an interest asserted by the State is simply not implicated on the facts before us, we need not ask whether *O’Brien*’s test applies. See *Spence*, supra, at 418 U.S. 414, n. 8. The State offers two separate interests to justify this conviction: preventing breaches of the peace and preserving the flag as a symbol of nationhood and national unity. We hold that the first interest is not implicated on this record, and that the second is related to the suppression of expression.

A

Texas claims that its interest in preventing breaches of the peace justifies Johnson’s conviction for flag desecration.⁴

⁴ Relying on our decision in *Boos v. Barry*, 485 U.S. 312 (1988), Johnson argues that this state interest is related to the suppression of free expression within the meaning of *United States v. O’Brien*, 391 U.S. 367 (1968). He reasons that the violent reaction to flag burnings feared by Texas would be the

However, no disturbance of the peace actually occurred or threatened to occur because of Johnson's burning of the flag. Although the State stresses the disruptive behavior of the protestors during their march toward City Hall, Brief for Petitioner 34-36, it admits that "no actual breach of the peace occurred at the time of the flagburning or in response to the flagburning." *Id.* at 34. The State's emphasis on the protestors' disorderly actions prior to arriving at City Hall is not only somewhat surprising, given that no charges were brought on the basis of this conduct, but it also fails to show that a disturbance of the peace was a likely reaction to Johnson's conduct. The only evidence offered by the State at trial to show the reaction to Johnson's actions was the testimony of several persons who had been seriously offended by the flag burning. *Id.* at 6-7.

The State's position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace, and that the expression may be prohibited on this basis.⁵ Our precedents do not countenance such a presumption. On the contrary, they recognize that a principal

"function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."

Terminiello v. Chicago, 337 U.S. 1, 337 U.S. 4 (1949). See also *Cox v. Louisiana*, 379 U.S. 536, 379 U.S. 551 (1965); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. at 393 U.S. 508-509; *Coates v. Cincinnati*, 402 U.S. 611, 402 U.S. 615 (1971); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 485 U.S. 55-56 (1988). It would be odd indeed to conclude both that "if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection," *FCC v. Pacifica Foundation*, 438 U.S. 726, 438 U.S. 745 (1978) (opinion of STEVENS, J.), and that the Government may ban the expression of certain disagreeable ideas on the unsupported presumption that their very disagreeableness will provoke violence.

Thus, we have not permitted the government to assume that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression, asking whether the expression "is directed to inciting or producing imminent lawless action and is likely to incite or

result of the message conveyed by them, and that this fact connects the State's interest to the suppression of expression. Brief for Respondent 12, n. 11. This view has found some favor in the lower courts. See *Monroe v. State Court of Fulton County*, 739 F.2d 568 574-575 (CA11 1984). Johnson's theory may overread *Boos* insofar as it suggests that a desire to prevent a violent audience reaction is "related to expression" in the same way that a desire to prevent an audience from being offended is "related to expression." Because we find that the State's interest in preventing breaches of the peace is not implicated on these facts, however, we need not venture further into this area.

⁵ There is, of course, a tension between this argument and the State's claim that one need not actually cause serious offense in order to violate § 42.09. See Brief for Petitioner 44.

produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 395 U.S. 447 (1969) (reviewing circumstances surrounding rally and speeches by Ku Klux Klan). To accept Texas’ arguments that it need only demonstrate “the potential for a breach of the peace,” Brief for Petitioner 37, and that every flag burning necessarily possesses that potential, would be to eviscerate our holding in *Brandenburg*. This we decline to do.

Nor does Johnson’s expressive conduct fall within that small class of “fighting words” that are “likely to provoke the average person to retaliation, and thereby cause a breach of the peace.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 315 U.S. 574 (1942). No reasonable onlooker would have regarded Johnson’s generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs. See *id.* at 315 U.S. 572-573; *Cantwell v. Connecticut*, 310 U.S. 296, 310 U.S. 309 (1940); *FCC v. Pacifica Foundation*, *supra*, at 438 U.S. 745 (opinion of STEVENS, J.).

We thus conclude that the State’s interest in maintaining order is not implicated on these facts. The State need not worry that our holding will disable it from preserving the peace. We do not suggest that the First Amendment forbids a State to prevent “imminent lawless action.” *Brandenburg*, *supra*, at 395 U.S. 447. And, in fact, Texas already has a statute specifically prohibiting breaches of the peace, Tex. Penal Code Ann. § 42.01 (1989), which tends to confirm that Texas need not punish this flag desecration in order to keep the peace. See *Boos v. Barry*, 485 U.S. at 485 U.S. 327-329.

B

The State also asserts an interest in preserving the flag as a symbol of nationhood and national unity. In *Spence*, we acknowledged that the government’s interest in preserving the flag’s special symbolic value “is directly related to expression in the context of activity” such as affixing a peace symbol to a flag. 418 U.S. at 418 U.S. 414, n. 8. We are equally persuaded that this interest is related to expression in the case of Johnson’s burning of the flag. The State, apparently, is concerned that such conduct will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not in fact exist, that is, that we do not enjoy unity as a Nation. These concerns blossom only when a person’s treatment of the flag communicates some message, and thus are related “to the suppression of free expression” within the meaning of *O’Brien*. We are thus outside of *O’Brien*’s test altogether.

IV

It remains to consider whether the State’s interest in preserving the flag as a symbol of nationhood and national unity justifies Johnson’s conviction.

As in *Spence*, “[w]e are confronted with a case of prosecution for the expression of an idea through activity,” and “[a]ccordingly, we must examine with particular care the interests advanced by [petitioner] to support its prosecution.” 418 U.S. at 418 U.S. 411. Johnson was not, we add, prosecuted for the expression of just any idea; he was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values. See, e.g., *Boos v. Barry*, supra, at 485 U.S. 318; *Frisby v. Schultz*, 487 U.S. 474, 487 U.S. 479 (1988).

Moreover, Johnson was prosecuted because he knew that his politically charged expression would cause “serious offense.” If he had burned the flag as a means of disposing of it because it was dirty or torn, he would not have been convicted of flag desecration under this Texas law: federal law designates burning as the preferred means of disposing of a flag “when it is in such condition that it is no longer a fitting emblem for display,” 36 U.S.C. § 176(k), and Texas has no quarrel with this means of disposal. Brief for Petitioner 45. The Texas law is thus not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others.⁶ Texas concedes as much:

“Section 42.09(b) reaches only those severe acts of physical abuse of the flag carried out in a way likely to be offensive. The statute mandates intentional or knowing abuse, that is, the kind of mistreatment that is not innocent, but rather is intentionally designed to seriously offend other individuals.”

Id. at 44.

Whether Johnson’s treatment of the flag violated Texas law thus depended on the likely communicative impact of his expressive conduct.⁷ Our decision in *Boos v. Barry*,

⁶ Cf. *Smith v. Goguen*, 415 U.S. at 415 U.S. 590-591 (BLACKMUN, J., dissenting) (emphasizing that lower court appeared to have construed state statute so as to protect physical integrity of the flag in all circumstances); id. at 415 U.S. 597-598 (REHNQUIST, J., dissenting) (same).

⁷ Texas suggests that Johnson’s conviction did not depend on the onlookers’ reaction to the flag burning, because § 42.09 is violated only when a person physically mistreats the flag in a way that he “knows will seriously offend one or more persons likely to observe or discover his action.” Tex. Penal Code Ann. § 42.09(b) (1969) (emphasis added). “The serious offense” language of the statute,” Texas argues, “refers to an individual’s intent and to the manner in which the conduct is effectuated, not to the reaction of the crowd.” Brief for Petitioner 44. If the statute were aimed only at the actor’s intent, and not at the communicative impact of his actions, however, there would be little reason for the law to be triggered only when an audience is “likely” to be present. At Johnson’s trial, indeed, the State itself seems not to have seen the distinction between knowledge and actual communicative impact that it now stresses: it proved the element of knowledge by offering the testimony of persons who had in fact been seriously offended by Johnson’s conduct. Id. at 6-7. In any event, we find the distinction between Texas’ statute and one dependent on actual audience reaction too precious to be of constitutional significance. Both kinds of statutes clearly are aimed at protecting onlookers from being offended by the ideas expressed by the prohibited activity.

supra, tells us that this restriction on Johnson's expression is content-based. In *Boos*, we considered the constitutionality of a law prohibiting

“the display of any sign within 500 feet of a foreign embassy if that sign tends to bring that foreign government into ‘public odium’ or ‘public disrepute.’”

Id. at 485 U.S. 315. Rejecting the argument that the law was content-neutral because it was justified by “our international law obligation to shield diplomats from speech that offends their dignity,” *id.* at 485 U.S. 320, we held that “[t]he emotive impact of speech on its audience is not a secondary effect” unrelated to the content of the expression itself. *Id.* at 485 U.S. 321 (plurality opinion); see also *id.* at 485 U.S. 334 (BRENNAN, J., concurring in part and concurring in judgment).

According to the principles announced in *Boos*, Johnson's political expression was restricted because of the content of the message he conveyed. We must therefore subject the State's asserted interest in preserving the special symbolic character of the flag to “the most exacting scrutiny.” *Boos v. Barry*, 485 U.S. at 485 U.S. 321.⁸

Texas argues that its interest in preserving the flag as a symbol of nationhood and national unity survives this close analysis. Quoting extensively from the writings of this Court chronicling the flag's historic and symbolic role in our society, the State emphasizes the “special place” reserved for the flag in our Nation. Brief for Petitioner 22, quoting *Smith v. Goguen*, 415 U.S. at 415 U.S. 601 (REHNQUIST, J., dissenting). The State's argument is not that it has an interest simply in maintaining the flag as a symbol of something, no matter what it symbolizes; indeed, if that were the State's position, it would be difficult to see how that interest is endangered by highly symbolic conduct such as Johnson's. Rather, the State's claim is that it has an interest in preserving the flag as a symbol of nationhood and national unity, a symbol with a determinate range of meanings. Brief for Petitioner 20-24. According to Texas, if one physically treats the flag in a way that would tend to cast doubt on either the idea that nationhood and national unity are the flag's referents or that national unity actually exists, the message conveyed thereby is a harmful one, and therefore may be prohibited.⁹

⁸ Our inquiry is, of course, bounded by the particular facts of this case and by the statute under which Johnson was convicted. There was no evidence that Johnson himself stole the flag he burned, Tr. of Oral Arg. 17, nor did the prosecution or the arguments urged in support of it depend on the theory that the flag was stolen. *Ibid.* Thus, our analysis does not rely on the way in which the flag was acquired, and nothing in our opinion should be taken to suggest that one is free to steal a flag so long as one later uses it to communicate an idea. We also emphasize that Johnson was prosecuted only for flag desecration -- not for trespass, disorderly conduct, or arson.

⁹ Texas claims that “Texas is not endorsing, protecting, avowing or prohibiting any particular philosophy.” Brief for Petitioner 29. If Texas means to suggest that its asserted interest does not prefer Democrats over Socialists, or Republicans over Democrats, for example, then it is beside the point, for Johnson does not rely on such an argument. He argues instead that the State's desire to maintain

If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. at 485 U.S. 55-56; *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 466 U.S. 804 (1984); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 463 U.S. 65, 463 U.S. 72 (1983); *Carey v. Brown*, 447 U.S. 455, 447 U.S. 462-463 (1980); *FCC v. Pacifica Foundation*, 438 U.S. at 438 U.S. 745-746; *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 427 U.S. 63-65, 427 U.S. 67-68 (1976) (plurality opinion); *Buckley v. Valeo*, 424 U.S. 1, 424 U.S. 16-17 (1976); *Grayned v. Rockford*, 408 U.S. 104, 408 U.S. 115 (1972); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 408 U.S. 95 (1972); *Bachellar v. Maryland*, 397 U.S. 564, 397 U.S. 567 (1970); *O'Brien*, 391 U.S. at 391 U.S. 382; *Brown v. Louisiana*, 383 U.S. at 383 U.S. 142-143; *Stromberg v. California*, 283 U.S. at 283 U.S. 368-369.

We have not recognized an exception to this principle even where our flag has been involved. In *Street v. New York*, 394 U.S. 576 (1969), we held that a State may not criminally punish a person for uttering words critical of the flag. Rejecting the argument that the conviction could be sustained on the ground that Street had “failed to show the respect for our national symbol which may properly be demanded of every citizen,” we concluded that

“the constitutionally guaranteed ‘freedom to be intellectually . . . diverse or even contrary,’ and the ‘right to differ as to things that touch the heart of the existing order,’ encompass the freedom to express publicly one’s opinions about our flag, including those opinions which are defiant or contemptuous.”

Id. at 394 U.S. 593, quoting *Barnette*, 319 U.S. at 319 U.S. 642. Nor may the government, we have held, compel conduct that would evince respect for the flag.

“To sustain the compulsory flag salute, we are required to say that a Bill of Rights which guards the individual’s right to speak his own mind left it open to public authorities to compel him to utter what is not in his mind.”

Id. at 319 U.S. 634.

In holding in *Barnette* that the Constitution did not leave this course open to the government, Justice Jackson described one of our society’s defining principles in words deserving of their frequent repetition:

the flag as a symbol of nationhood and national unity assumes that there is only one proper view of the flag. Thus, if Texas means to argue that its interest does not prefer any viewpoint over another, it is mistaken; surely one’s attitude toward the flag and its referents is a viewpoint.

“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”

Id. at 319 U.S. 642. In *Spence*, we held that the same interest asserted by Texas here was insufficient to support a criminal conviction under a flag-misuse statute for the taping of a peace sign to an American flag.

“Given the protected character of [Spence’s] expression and in light of the fact that no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts,”

we held, “the conviction must be invalidated.” 418 U.S. at 418 U.S. 415. See also *Goguen*, 415 U.S. at 415 U.S. 588 (WHITE, J., concurring in judgment) (to convict person who had sewn a flag onto the seat of his pants for “contemptuous” treatment of the flag would be “[t]o convict not to protect the physical integrity or to protect against acts interfering with the proper use of the flag, but to punish for communicating ideas unacceptable to the controlling majority in the legislature”).

In short, nothing in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct relating to it.¹⁰ To bring its argument outside our precedents, Texas attempts to convince us that, even if its interest in preserving the flag’s symbolic role does not allow it to prohibit words or some expressive conduct critical of the flag, it does permit it to forbid the outright destruction of the flag. The State’s argument cannot depend here on the distinction between written or spoken words and nonverbal conduct. That distinction, we have shown, is of no moment where the nonverbal conduct is expressive, as it is here, and where the regulation of that conduct is related to expression, as it is here. See *supra* at 491 U.S. 402-403. In addition, both *Barnette* and *Spence* involved expressive conduct, not only verbal communication, and both found that conduct protected.

¹⁰ Our decision in *Halter v. Nebraska*, 205 U.S. 34 (1907), addressing the validity of a state law prohibiting certain commercial uses of the flag, is not to the contrary. That case was decided “nearly 20 years before the Court concluded that the First Amendment applies to the States by virtue of the Fourteenth Amendment.” *Spence v. Washington*, 418 U.S. 405, 418 U.S. 413, n. 7 (1974). More important, as we continually emphasized in *Halter* itself, that case involved purely commercial, rather than political, speech. 205 U.S. at 205 U.S. 38, 205 U.S. 41, 205 U.S. 42, 205 U.S. 45.

Nor does *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 483 U.S. 524 (1987), addressing the validity of Congress’ decision to “authoriz[e] the United States Olympic Committee to prohibit certain commercial and promotional uses of the word Olympic,” relied upon by THE CHIEF JUSTICE’s dissent, *post* at 491 U.S. 429, even begin to tell us whether the government may criminally punish physical conduct towards the flag engaged in as a means of political protest.

Texas' focus on the precise nature of Johnson's expression, moreover, misses the point of our prior decisions: their enduring lesson, that the government may not prohibit expression simply because it disagrees with its message, is not dependent on the particular mode in which one chooses to express an idea.¹¹ If we were to hold that a State may forbid flag burning wherever it is likely to endanger the flag's symbolic role, but allow it wherever burning a flag promotes that role -- as where, for example, a person ceremoniously burns a dirty flag -- we would be saying that when it comes to impairing the flag's physical integrity, the flag itself may be used as a symbol -- as a substitute for the written or spoken word or a "short cut from mind to mind" -- only in one direction. We would be permitting a State to "prescribe what shall be orthodox" by saying that one may burn the flag to convey one's attitude toward it and its referents only if one does not endanger the flag's representation of nationhood and national unity.

We never before have held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents. Indeed, in *Schacht v. United States*, we invalidated a federal statute permitting an actor portraying a member of one of our armed forces to "wear the uniform of that armed force if the portrayal does not tend to discredit that armed force." 398 U.S. at 398 U.S. 60, quoting 10 U.S.C. § 772(f). This proviso, we held,

"which leaves Americans free to praise the war in Vietnam but can send persons like Schacht to prison for opposing it, cannot survive in a country which has the First Amendment."

Id. at 398 U.S. 63.

We perceive no basis on which to hold that the principle underlying our decision in *Schacht* does not apply to this case. To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries. Could the government, on this theory, prohibit the burning of state flags? Of copies of the Presidential seal? Of the Constitution? In evaluating these choices under the First Amendment, how would we decide which symbols were sufficiently special to warrant this unique status? To do so, we would be forced to consult our own political preferences, and impose them on the citizenry, in the very way that the First Amendment forbids us to do. See *Carey v. Brown*, 447 U.S. at 447 U.S. 466-467.

¹¹ THE CHIEF JUSTICE's dissent appears to believe that Johnson's conduct may be prohibited and, indeed, criminally sanctioned, because "his act . . . conveyed nothing that could not have been conveyed and was not conveyed just as forcefully in a dozen different ways." *Post* at 491 U.S. 431. Not only does this assertion sit uneasily next to the dissent's quite correct reminder that the flag occupies a unique position in our society -- which demonstrates that messages conveyed without use of the flag are not "just as forcefu[l]" as those conveyed with it -- but it also ignores the fact that, in *Spence*, *supra*, we "rejected summarily" this very claim. See 418 U.S. at 418 U.S. 411, n. 4.

There is, moreover, no indication -- either in the text of the Constitution or in our cases interpreting it -- that a separate juridical category exists for the American flag alone. Indeed, we would not be surprised to learn that the persons who framed our Constitution and wrote the Amendment that we now construe were not known for their reverence for the Union Jack. The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole -- such as the principle that discrimination on the basis of race is odious and destructive -- will go unquestioned in the marketplace of ideas. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969). We decline, therefore, to create for the flag an exception to the joust of principles protected by the First Amendment.

It is not the State's ends, but its means, to which we object. It cannot be gainsaid that there is a special place reserved for the flag in this Nation, and thus we do not doubt that the government has a legitimate interest in making efforts to "preserv[e] the national flag as an unalloyed symbol of our country." Spence, 418 U.S. at 418 U.S. 412. We reject the suggestion, urged at oral argument by counsel for Johnson, that the government lacks "any state interest whatsoever" in regulating the manner in which the flag may be displayed. Tr. of Oral Arg. 38. Congress has, for example, enacted precatory regulations describing the proper treatment of the flag, see 36 U.S.C. §§ 173-177, and we cast no doubt on the legitimacy of its interest in making such recommendations. To say that the government has an interest in encouraging proper treatment of the flag, however, is not to say that it may criminally punish a person for burning a flag as a means of political protest.

"National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether, under our Constitution, compulsion as here employed is a permissible means for its achievement."

Barnette, 319 U.S. at 319 U.S. 640.

We are fortified in today's conclusion by our conviction that forbidding criminal punishment for conduct such as Johnson's will not endanger the special role played by our flag or the feelings it inspires. To paraphrase Justice Holmes, we submit that nobody can suppose that this one gesture of an unknown man will change our Nation's attitude towards its flag. See *Abrams v. United States*, 250 U.S. 616, 250 U.S. 628 (1919) (Holmes, J., dissenting). Indeed, Texas' argument that the burning of an American flag "is an act having a high likelihood to cause a breach of the peace," Brief for Petitioner 31, quoting *Sutherland v. DeWulf*, 323 F.Supp. 740, 745 (SD Ill.1971) (citation omitted), and its statute's implicit assumption that physical mistreatment of the flag will lead to "serious offense," tend to confirm that the flag's special role is not in danger; if it were, no one would riot or take offense because a flag had been burned.

We are tempted to say, in fact, that the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our decision is a

reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength. Indeed, one of the proudest images of our flag, the one immortalized in our own national anthem, is of the bombardment it survived at Fort McHenry. It is the Nation's resilience, not its rigidity, that Texas sees reflected in the flag -- and it is that resilience that we reassert today.

The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong.

"To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."

Whitney v. California, 274 U.S. 357, 274 U.S. 377 (1927) (Brandeis, J., concurring). And, precisely because it is our flag that is involved, one's response to the flag-burner may exploit the uniquely persuasive power of the flag itself. We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by -- as one witness here did -- according it remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.

V

Johnson was convicted for engaging in expressive conduct. The State's interest in preventing breaches of the peace does not support his conviction, because Johnson's conduct did not threaten to disturb the peace. Nor does the State's interest in preserving the flag as a symbol of nationhood and national unity justify his criminal conviction for engaging in political expression. The judgment of the Texas Court of Criminal Appeals is therefore

Affirmed.

JUSTICE KENNEDY, concurring.

I write not to qualify the words JUSTICE BRENNAN chooses so well, for he says with power all that is necessary to explain our ruling. I join his opinion without reservation, but with a keen sense that this case, like others before us from time to time, exacts its personal toll. This prompts me to add to our pages these few remarks.

The case before us illustrates better than most that the judicial power is often difficult in its exercise. We cannot here ask another Branch to share responsibility, as when the argument is made that a statute is flawed or incomplete. For we are presented with a clear and simple statute to be judged against a pure command of the Constitution. The outcome can be laid at no door but ours.

The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases.

Our colleagues in dissent advance powerful arguments why respondent may be convicted for his expression, reminding us that among those who will be dismayed by our holding will be some who have had the singular honor of carrying the flag in battle. And I agree that the flag holds a lonely place of honor in an age when absolutes are distrusted and simple truths are burdened by unneeded apologetics.

With all respect to those views, I do not believe the Constitution gives us the right to rule as the dissenting Members of the Court urge, however painful this judgment is to announce. Though symbols often are what we ourselves make of them, the flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit. The case here today forces recognition of the costs to which those beliefs commit us. It is poignant but fundamental that the flag protects those who hold it in contempt.

For all the record shows, this respondent was not a philosopher and perhaps did not even possess the ability to comprehend how repellent his statements must be to the Republic itself. But whether or not he could appreciate the enormity of the offense he gave, the fact remains that his acts were speech, in both the technical and the fundamental meaning of the Constitution. So I agree with the Court that he must go free.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE and JUSTICE O'CONNOR join, dissenting.

In holding this Texas statute unconstitutional, the Court ignores Justice Holmes' familiar aphorism that "a page of history is worth a volume of logic." New York Trust

Co. v. Eisner, 256 U.S. 345, 256 U.S. 349 (1921). For more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here.

At the time of the American Revolution, the flag served to unify the Thirteen Colonies at home while obtaining recognition of national sovereignty abroad. Ralph Waldo Emerson's Concord Hymn describes the first skirmishes of the Revolutionary War in these lines:

"By the rude bridge that arched the flood"
"Their flag to April's breeze unfurled,"
"Here once the embattled farmers stood"
"And fired the shot heard round the world."

During that time, there were many colonial and regimental flags, adorned with such symbols as pine trees, beavers, anchors, and rattlesnakes, bearing slogans such as "Liberty or Death," "Hope," "An Appeal to Heaven," and "Don't Tread on Me." The first distinctive flag of the Colonies was the "Grand Union Flag" -- with 13 stripes and a British flag in the left corner -- which was flown for the first time on January 2, 1776, by troops of the Continental Army around Boston. By June 14, 1777, after we declared our independence from England, the Continental Congress resolved:

"That the flag of the thirteen United States be thirteen stripes, alternate red and white: that the union be thirteen stars, white in a blue field, representing a new constellation."

8 Journal of the Continental Congress 1774-1789, p. 464 (W. Ford ed.1907). One immediate result of the flag's adoption was that American vessels harassing British shipping sailed under an authorized national flag. Without such a flag, the British could treat captured seamen as pirates and hang them summarily; with a national flag, such seamen were treated as prisoners of war.

During the War of 1812, British naval forces sailed up Chesapeake Bay and marched overland to sack and burn the city of Washington. They then sailed up the Patapsco River to invest the city of Baltimore, but to do so it was first necessary to reduce Fort McHenry in Baltimore Harbor. Francis Scott Key, a Washington lawyer, had been granted permission by the British to board one of their warships to negotiate the release of an American who had been taken prisoner. That night, waiting anxiously on the British ship, Key watched the British fleet firing on Fort McHenry. Finally, at daybreak, he saw the fort's American flag still flying; the British attack had failed. Intensely moved, he began to scribble on the back of an envelope the poem that became our national anthem:

“O say can you see by the dawn’s early light”
 “What so proudly we hail’d at the twilight’s last gleaming,”
 “Whose broad stripes & bright stars through the perilous fight”
 “O’er the ramparts we watch’d, were so gallantly streaming?”
 “And the rocket’s red glare, the bomb bursting in air,”
 “Gave proof through the night that our flag was still there,”
 “O say does that star-spangled banner yet wave”
 “O’er the land of the free & the home of the brave?”

The American flag played a central role in our Nation’s most tragic conflict, when the North fought against the South. The lowering of the American flag at Fort Sumter was viewed as the start of the war. G. Preble, *History of the Flag of the United States of America* 453 (1880). The Southern States, to formalize their separation from the Union, adopted the “Stars and Bars” of the Confederacy. The Union troops marched to the sound of “Yes We’ll Rally Round The Flag Boys, We’ll Rally Once Again.” President Abraham Lincoln refused proposals to remove from the American flag the stars representing the rebel States, because he considered the conflict not a war between two nations, but an attack by 11 States against the National Government. *Id.* at 411. By war’s end, the American flag again flew over “an indestructible union, composed of indestructible states.” *TeXas v. White*, 7 Wall. 700, 74 U.S. 725 (1869).

One of the great stories of the Civil War is told in John Greenleaf Whittier’s poem, “Barbara Frietchie”:

Up from the meadows rich with corn,
 Clear in the cool September morn,
 The clustered spires of Frederick stand
 Green-walled by the hills of Maryland.
 Round about them orchards sweep,
 Apple- and peach-tree fruited deep,
 Fair as a garden of the Lord
 To the eyes of the famished rebel horde,
 On that pleasant morn of the early fall
 When Lee marched over the mountain wall, --
 Over the mountains winding down,
 Horse and foot, into Frederick town.
 Forty flags with their silver stars,
 Forty flags with their crimson bars,
 Flapped in the morning wind: the sun
 Of noon looked down, and saw not one.
 Up rose old Barbara Frietchie then,
 Bowed with her four-score years and ten;
 Bravest of all in Frederick town,

She took up the flag the men hauled down;
In her attic-window the staff she set,
To show that one heart was loyal yet.
Up the street came the rebel tread,
Stonewall Jackson riding ahead.
Under his slouched hat left and right
He glanced: the old flag met his sight.
“Halt!” -- the dust-brown ranks stood fast.
“Fire!” -- out blazed the rifle-blast
It shivered the window, pane and sash;
It rent the banner with seam and gash.
Quick, as it fell, from the broken staff
Dame Barbara snatched the silken scarf;
She leaned far out on the window-sill,
And shook it forth with a royal will.
“Shoot, if you must, this old gray head,
But spare your country’s flag,” she said.
A shade of sadness, a blush of shame,
Over the face of the leader came;
The nobler nature within him stirred
To life at that woman’s deed and word:
“Who touches a hair of yon gray head
Dies like a dog! March on!” he said.
All day long through Frederick street
Sounded the tread of marching feet:
All day long that free flag tost
Over the heads of the rebel host.
Ever its torn folds rose and fell
On the loyal winds that loved it well;
And through the hill-gaps sunset light
Shone over it with a warm good-night.
Barbara Frietchie’s work is o’er,
And the Rebel rides on his raids no more.
Honor to her! and let a tear
Fall, for her sake, on Stonewall’s bier.
Over Barbara Frietchie’s grave,
Flag of Freedom and Union, wave!
Peace and order and beauty draw
Round thy symbol of light and law;
And ever the stars above look down
On thy stars below in Frederick town!

In the First and Second World Wars, thousands of our countrymen died on foreign soil fighting for the American cause. At Iwo Jima in the Second World War, United States Marines fought hand to hand against thousands of Japanese. By the time the Marines reached the top of Mount Suribachi, they raised a piece of pipe upright and from one end fluttered a flag. That ascent had cost nearly 6,000 American lives. The Iwo Jima Memorial in Arlington National Cemetery memorializes that event. President Franklin Roosevelt authorized the use of the flag on labels, packages, cartons, and containers intended for export as lend-lease aid, in order to inform people in other countries of the United States' assistance. Presidential Proclamation No. 2605, 58 Stat. 1126.

During the Korean War, the successful amphibious landing of American troops at Inchon was marked by the raising of an American flag within an hour of the event. Impetus for the enactment of the Federal Flag Desecration Statute in 1967 came from the impact of flag burnings in the United States on troop morale in Vietnam. Representative L. Mendel Rivers, then Chairman of the House Armed Services Committee, testified that

“The burning of the flag . . . has caused my mail to increase 100 percent from the boys in Vietnam, writing me and asking me what is going on in America.”

Desecration of the Flag, Hearings on H.R. 271 before Subcommittee No. 4 of the House Committee on the Judiciary, 90th Cong., 1st Sess., 189 (1967). Representative Charles Wiggins stated:

“The public act of desecration of our flag tends to undermine the morale of American troops. That this finding is true can be attested by many Members who have received correspondence from servicemen expressing their shock and disgust of such conduct.”

113 Cong.Rec. 16459 (1967).

The flag symbolizes the Nation in peace as well as in war. It signifies our national presence on battleships, airplanes, military installations, and public buildings from the United States Capitol to the thousands of county courthouses and city halls throughout the country. Two flags are prominently placed in our courtroom. Countless flags are placed by the graves of loved ones each year on what was first called Decoration Day, and is now called Memorial Day. The flag is traditionally placed on the casket of deceased members of the Armed Forces, and it is later given to the deceased's family. 10 U.S.C. §§ 1481, 1482. Congress has provided that the flag be flown at half-staff upon the death of the President, Vice President, and other government officials “as a mark of respect to their memory.” 36 U.S.C. § 175(m). The flag identifies United States merchant ships, 22 U.S.C. § 454, and “[t]he laws of the Union protect our commerce wherever the flag of the country may float.” *United States v. Guthrie*, 17 How. 284, 309 (1855).

No other American symbol has been as universally honored as the flag. In 1931, Congress declared “The Star-Spangled Banner” to be our national anthem. 36 U.S.C. § 170. In 1949, Congress declared June 14th to be Flag Day. § 157. In 1987, John Philip Sousa’s “The Stars and Stripes Forever” was designated as the national march. Pub.L. 101-186, 101 Stat. 1286. Congress has also established “The Pledge of Allegiance to the Flag” and the manner of its deliverance. 36 U.S.C. § 172. The flag has appeared as the principal symbol on approximately 33 United States postal stamps and in the design of at least 43 more, more times than any other symbol. United States Postal Service, Definitive Mint Set 15 (1988).

Both Congress and the States have enacted numerous laws regulating misuse of the American flag. Until 1967, Congress left the regulation of misuse of the flag up to the States. Now, however, Title 18 U.S.C. § 700(a) provides that:

“Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than \$1,000 or imprisoned for not more than one year, or both.”

Congress has also prescribed, inter alia, detailed rules for the design of the flag, 4 U.S.C. § 1, the time and occasion of flag’s display, 36 U.S.C. § 174, the position and manner of its display, § 175, respect for the flag, § 176, and conduct during hoisting, lowering, and passing of the flag, § 177. With the exception of Alaska and Wyoming, all of the States now have statutes prohibiting the burning of the flag.¹² Most of the state statutes are patterned after the Uniform Flag Act of 1917, which in § 3 provides:

¹² See Ala.Code § 13A-11-12 (1982); Ariz.Rev.Stat. Ann. § 13-3703 (1978); Ark.Code Ann. § 5-51-207 (1987); Cal.Mil. & Vet.Code Ann. § 614 (West 1988); Colo.Rev.Stat. § 18-11-204 (1986); Conn.Gen.Stat. § 53-258a (1985); Del.Code Ann., Tit. 11, § 1331 (1987); Fla.Stat. §§ 256.05-256.051 (1987); Fla.Stat. § 876.52 (1987); Ga.Code Ann. § 50-3-9 (1986); Haw. Rev.Stat. § 711-1107 (1988); Idaho Code § 18-3401 (1987); Ill.Rev.Stat., ch. 1, §§ 3307, 3351 (1980); Ind.Code § 35-45-1-4 (1986); Iowa Code § 32.1 (1978 and Supp.1989); Kan.Stat. Ann. § 21-4114 (1988); Ky.Rev.Stat. Ann. § 525.110 (Michie Supp.1988); La.Rev.Stat. Ann. § 14:116 (West 1986); Me.Rev.Stat. Ann., Tit. 1, § 254 (1979); Md. Ann. Code, Art. 27, § 83 (1988); Mass.Gen.Laws §§ 264, 265 (1987); Mich.Comp.Laws § 750.246 (1968); Minn.Stat. § 609.40 (1987); Miss.Code Ann. § 97-7-39 (1973); Mo.Rev.Stat. § 578.095 (Supp.1989); Mont.Code Ann. § 45-8-215 (1987); Neb.Rev.Stat. § 28-928 (1985); Nev.Rev.Stat. § 201.290 (1986); N.H.Rev.Stat. Ann. § 646.1 (1986); N.J.Stat. Ann. § 2C:33-9 (West 1982); N.M.Stat. Ann. § 30-21-4 (1984); N.Y.Gen.Bus.Law § 136 (McKinney 1988); N.C.Gen.Stat. § 14-381 (1986); N.D.Cent.Code § 12.1-07-02 (1985); Ohio Rev.Code Ann. § 2927.11 (1987); Okla.Stat., Tit. 21, § 372 (1983); Ore.Rev.Stat. § 166.075 (1987); 18 Pa.Cons.Stat. § 2102 (1983); R.I.Gen.Laws § 11-15-2 (1981); S.C.Code §§ 16-17-220, 16-17-230 (1985 and Supp.1988); S.D.Codified Laws § 22-9-1 (1988); Tenn.Code Ann. §§ 39-5-843, 39-5-847 (1982); Tex.Penal Code Ann. § 42.09 (1974); Utah Code Ann. § 76-9-601 (1978); Vt.Stat. Ann., Tit. 13, § 1903 (1974); Va.Code § 18.2-488 (1988); Wash.Rev.Code § 9.86.030 (1988); W.Va. Code § 61-1-8 (1989); Wis.Stat. § 946.05 (1985-1986).

“No person shall publicly mutilate, deface, defile, defy, trample upon, or by word or act cast contempt upon any such flag, standard, color, ensign or shield.”

Proceedings of National Conference of Commissioners on Uniform State Laws 323-324 (1917). Most were passed by the States at about the time of World War I. Rosenblatt, *Flag Desecration Statutes: History and Analysis*, 1972 Wash.U.L.Q.193, 197.

The American flag, then, throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. It does not represent the views of any particular political party, and it does not represent any particular political philosophy. The flag is not simply another “idea” or “point of view” competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with an almost mystical reverence, regardless of what sort of social, political, or philosophical beliefs they may have. I cannot agree that the First Amendment invalidates the Act of Congress, and the laws of 48 of the 50 States, which make criminal the public burning of the flag.

More than 80 years ago, in *Halter v. Nebraska*, 205 U.S. 34 (1907), this Court upheld the constitutionality of a Nebraska statute that forbade the use of representations of the American flag for advertising purposes upon articles of merchandise. The Court there said:

“For that flag every true American has not simply an appreciation, but a deep affection. . . . Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot.”

Id. at 41.

Only two Terms ago, in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987), the Court held that Congress could grant exclusive use of the word “Olympic” to the United States Olympic Committee. The Court thought that this “restrictio[n] on expressive speech properly [was] characterized as incidental to the primary congressional purpose of encouraging and rewarding the USOC’s activities.” *Id.* at 483 U.S. 536. As the Court stated, “when a word [or symbol] acquires value ‘as the result of organization and the expenditure of labor, skill, and money’ by an entity, that entity constitutionally may obtain a limited property right in the word [or symbol].” *Id.* at 483 U.S. 532, quoting *International News Service v. Associated Press*, 248 U.S. 215, 248 U.S. 239 (1918). Surely Congress or the States may recognize a similar interest in the flag.

But the Court insists that the Texas statute prohibiting the public burning of the American flag infringes on respondent Johnson’s freedom of expression. Such freedom, of course, is not absolute. See *Schenck v. United States*, 249 U.S. 47 (1919). In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), a unanimous Court said:

“Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words -- those which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”

Id. at 315 U.S. 571-572 (footnotes omitted). The Court upheld Chaplinsky’s conviction under a state statute that made it unlawful to “address any offensive, derisive or annoying word to any person who is lawfully in any street or other public place.” *Id.* at 315 U.S. 569. Chaplinsky had told a local marshal, “You are a God damned racketeer” and a “damned Fascist and the whole government of Rochester are Fascists or agents of Fascists.” *Ibid.*

Here it may equally well be said that the public burning of the American flag by Johnson was no essential part of any exposition of ideas, and at the same time it had a tendency to incite a breach of the peace. Johnson was free to make any verbal denunciation of the flag that he wished; indeed, he was free to burn the flag in private. He could publicly burn other symbols of the Government or effigies of political leaders. He did lead a march through the streets of Dallas, and conducted a rally in front of the Dallas City Hall. He engaged in a “die-in” to protest nuclear weapons. He shouted out various slogans during the march, including: “Reagan, Mondale which will it be? Either one means World War III”; “Ronald Reagan, killer of the hour, Perfect example of U.S. power”; and “red, white and blue, we spit on you, you stand for plunder, you will go under.” Brief for Respondent 3. For none of these acts was he arrested or prosecuted; it was only when he proceeded to burn publicly an American flag stolen from its rightful owner that he violated the Texas statute.

The Court could not, and did not, say that Chaplinsky’s utterances were not expressive phrases -- they clearly and succinctly conveyed an extremely low opinion of the addressee. The same may be said of Johnson’s public burning of the flag in this case; it obviously did convey Johnson’s bitter dislike of his country. But his act, like Chaplinsky’s provocative words, conveyed nothing that could not have been conveyed and was not conveyed just as forcefully in a dozen different ways. As with “fighting words,” so with flag burning, for purposes of the First Amendment: It is “no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed” by the public interest in avoiding a probable breach of the peace. The highest courts of several States have upheld

state statutes prohibiting the public burning of the flag on the grounds that it is so inherently inflammatory that it may cause a breach of public order. See, e.g., *State v. Royal*, 113 N. H. 224, 229, 305 A.2d 676, 680 (1973); *State v. Waterman*, 190 N.W.2d 809, 811-812 (Iowa 1971); see also *State v. Mitchell*, 32 Ohio App.2d 16, 30, 288 N.E.2d 216, 226 (1972).

The result of the Texas statute is obviously to deny one in Johnson's frame of mind one of many means of "symbolic speech." Far from being a case of "one picture being worth a thousand words," flag burning is the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others. Only five years ago we said in *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 466 U.S. 812 (1984), that "the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places." The Texas statute deprived Johnson of only one rather inarticulate symbolic form of protest -- a form of protest that was profoundly offensive to many -- and left him with a full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy. Thus, in no way can it be said that Texas is punishing him because his hearers -- or any other group of people -- were profoundly opposed to the message that he sought to convey. Such opposition is no proper basis for restricting speech or expression under the First Amendment. It was Johnson's use of this particular symbol, and not the idea that he sought to convey by it or by his many other expressions, for which he was punished.

Our prior cases dealing with flag desecration statutes have left open the question that the Court resolves today. In *Street v. New York*, 394 U.S. 576, 394 U.S. 579 (1969), the defendant burned a flag in the street, shouting "We don't need no damned flag" and, "[i]f they let that happen to Meredith, we don't need an American flag." The Court ruled that since the defendant might have been convicted solely on the basis of his words, the conviction could not stand, but it expressly reserved the question whether a defendant could constitutionally be convicted for burning the flag. *Id.* at 394 U.S. 581.

Chief Justice Warren, in dissent, stated:

"I believe that the States and Federal Government do have the power to protect the flag from acts of desecration and disgrace. . . . [I]t is difficult for me to imagine that, had the Court faced this issue, it would have concluded otherwise."

Id. at 394 U.S. 605. Justices Black and Fortas also expressed their personal view that a prohibition on flag burning did not violate the Constitution. See *id.* at 394 U.S. 610 (Black, J., dissenting) ("It passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American Flag an offense"); *id.* at 394 U.S. 615-617 (Fortas, J., dissenting) ("[T]he States and the Federal Government have the power to protect the flag from acts of desecration committed in public. . . . [T]he flag is a special kind of personality. Its use is traditionally and universally subject to special rules

and regulation. . . . A person may own' a flag, but ownership is subject to special burdens and responsibilities. A flag may be property, in a sense; but it is property burdened with peculiar obligations and restrictions. Certainly . . . these special conditions are not per se arbitrary or beyond governmental power under our Constitution").

In *Spence v. Washington*, 418 U.S. 405 (1974), the Court reversed the conviction of a college student who displayed the flag with a peace symbol affixed to it by means of removable black tape from the window of his apartment. Unlike the instant case, there was no risk of a breach of the peace, no one other than the arresting officers saw the flag, and the defendant owned the flag in question. The Court concluded that the student's conduct was protected under the First Amendment, because "no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts."

Id. at 418 U.S. 415. The Court was careful to note, however, that the defendant "was not charged under the desecration statute, nor did he permanently disfigure the flag or destroy it." *Ibid.*

In another related case, *Smith v. Goguen*, 415 U.S. 566 (1974), the appellee, who wore a small flag on the seat of his trousers, was convicted under a Massachusetts flag misuse statute that subjected to criminal liability anyone who publicly . . . treats contemptuously the flag of the United States." *Id.* at 415 U.S. 568-569. The Court affirmed the lower court's reversal of appellee's conviction, because the phrase "treats contemptuously" was unconstitutionally broad and vague. *Id.* at 415 U.S. 576. The Court was again careful to point out that "[c]ertainly nothing prevents a legislature from defining with substantial specificity what constitutes forbidden treatment of United States flags." *Id.* at 415 U.S. 581-582. See also *id.* at 415 U.S. 587 (WHITE, J., concurring in judgment) ("The flag is a national property, and the Nation may regulate those who would make, imitate, sell, possess, or use it. I would not question those statutes which proscribe mutilation, defacement, or burning of the flag or which otherwise protect its physical integrity, without regard to whether such conduct might provoke violence. . . . There would seem to be little question about the power of Congress to forbid the mutilation of the Lincoln Memorial. . . . The flag is itself a monument, subject to similar protection"); *id.* at 415 U.S. 591 (BLACKMUN, J., dissenting) ("Goguen's punishment was constitutionally permissible for harming the physical integrity of the flag by wearing it affixed to the seat of his pants").

But the Court today will have none of this. The uniquely deep awe and respect for our flag felt by virtually all of us are bundled off under the rubric of "designated symbols," ante at 491 U.S. 417, that the First Amendment prohibits the government from "establishing." But the government has not "established" this feeling; 200 years of history have done that. The government is simply recognizing as a fact the profound regard for the American flag created by that history when it enacts statutes prohibiting the disrespectful public burning of the flag.

The Court concludes its opinion with a regrettably patronizing civics lecture, presumably addressed to the Members of both Houses of Congress, the members of the 48 state legislatures that enacted prohibitions against flag burning, and the troops fighting under that flag in Vietnam who objected to its being burned:

“The way to preserve the flag’s special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong.”

Ante at 491 U.S. 419. The Court’s role as the final expositor of the Constitution is well established, but its role as a platonic guardian admonishing those responsible to public opinion as if they were truant schoolchildren has no similar place in our system of government. The cry of “no taxation without representation” animated those who revolted against the English Crown to found our Nation -- the idea that those who submitted to government should have some say as to what kind of laws would be passed. Surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people -- whether it be murder, embezzlement, pollution, or flagburning.

Our Constitution wisely places limits on powers of legislative majorities to act, but the declaration of such limits by this Court “is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case.” *Fletcher v. Peck*, 6 Cranch 87, 10 U.S. 128 (1810) (Marshall, C.J.). Uncritical extension of constitutional protection to the burning of the flag risks the frustration of the very purpose for which organized governments are instituted. The Court decides that the American flag is just another symbol, about which not only must opinions pro and con be tolerated, but for which the most minimal public respect may not be enjoined. The government may conscript men into the Armed Forces where they must fight and perhaps die for the flag, but the government may not prohibit the public burning of the banner under which they fight. I would uphold the Texas statute as applied in this case.¹³

¹³ In holding that the Texas statute as applied to Johnson violates the First Amendment, the Court does not consider Johnson’s claims that the statute is unconstitutionally vague or overbroad. Brief for Respondent 24-30. I think those claims are without merit. In *New York State Club Assn. v. City of New York*, 487 U.S. 1, 487 U.S. 11 (1988), we stated that a facial challenge is only proper under the First Amendment when a statute can never be applied in a permissible manner or when, even if it may be validly applied to a particular defendant, it is so broad as to reach the protected speech of third parties. While Tex. Penal Code Ann. § 42.09 (1989) “may not satisfy those intent on finding fault at any cost, [it is] set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with.” *CSC Letter Carriers*, 413 U.S. 548 413 U.S. 579 (1973). By defining “desecrate” as “deface,” “damage” or otherwise “physically mistreat” in a manner that the actor knows will “seriously offend” others, § 42.09 only prohibits flagrant acts of physical abuse and destruction of the flag of the sort at issue here -- soaking a flag with lighter fluid and igniting it in public -- and not any of the examples of improper flag etiquette cited in respondent’s brief.

JUSTICE STEVENS, dissenting.

As the Court analyzes this case, it presents the question whether the State of Texas, or indeed the Federal Government, has the power to prohibit the public desecration of the American flag. The question is unique. In my judgment, rules that apply to a host of other symbols, such as state flags, armbands, or various privately promoted emblems of political or commercial identity, are not necessarily controlling. Even if flagburning could be considered just another species of symbolic speech under the logical application of the rules that the Court has developed in its interpretation of the First Amendment in other contexts, this case has an intangible dimension that makes those rules inapplicable.

A country's flag is a symbol of more than "nationhood and national unity." Ante at 491 U.S. 407, 491 U.S. 410, 491 U.S. 413, and n. 9, 491 U.S. 417, 491 U.S. 420. It also signifies the ideas that characterize the society that has chosen that emblem as well as the special history that has animated the growth and power of those ideas. The fleurs-de-lis and the tricolor both symbolized "nationhood and national unity," but they had vastly different meanings. The message conveyed by some flags -- the swastika, for example -- may survive long after it has outlived its usefulness as a symbol of regimented unity in a particular nation.

So it is with the American flag. It is more than a proud symbol of the courage, the determination, and the gifts of nature that transformed 13 fledgling Colonies into a world power. It is a symbol of freedom, of equal opportunity, of religious tolerance, and of goodwill for other peoples who share our aspirations. The symbol carries its message to dissidents both at home and abroad who may have no interest at all in our national unity or survival.

The value of the flag as a symbol cannot be measured. Even so, I have no doubt that the interest in preserving that value for the future is both significant and legitimate. Conceivably, that value will be enhanced by the Court's conclusion that our national commitment to free expression is so strong that even the United States, as ultimate guarantor of that freedom, is without power to prohibit the desecration of its unique symbol. But I am unpersuaded. The creation of a federal right to post bulletin boards and graffiti on the Washington Monument might enlarge the market for free expression, but at a cost I would not pay. Similarly, in my considered judgment, sanctioning the public desecration of the flag will tarnish its value -- both for those who cherish the ideas for which it waves and for those who desire to don the robes of martyrdom by burning it. That tarnish is not justified by the trivial burden on free expression occasioned by requiring that an available, alternative mode of expression -- including uttering words critical of the flag, see *Street v. New York*, 394 U.S. 576 (1969) -- be employed.

It is appropriate to emphasize certain propositions that are not implicated by this case. The statutory prohibition of flag desecration does not "prescribe what shall be

orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 319 U.S. 642 (1943). The statute does not compel any conduct or any profession of respect for any idea or any symbol.

Nor does the statute violate “the government’s paramount obligation of neutrality in its regulation of protected communication.” *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 427 U.S. 70 (1976) (plurality opinion). The content of respondent’s message has no relevance whatsoever to the case. The concept of “desecration” does not turn on the substance of the message the actor intends to convey, but rather on whether those who view the act will take serious offense. Accordingly, one intending to convey a message of respect for the flag by burning it in a public square might nonetheless be guilty of desecration if he knows that others -- perhaps simply because they misperceive the intended message -- will be seriously offended. Indeed, even if the actor knows that all possible witnesses will understand that he intends to send a message of respect, he might still be guilty of desecration if he also knows that this understanding does not lessen the offense taken by some of those witnesses. Thus, this is not a case in which the fact that “it is the speaker’s opinion that gives offense” provides a special “reason for according it constitutional protection,” *FCC v. Pacifica Foundation*, 438 U.S. 726, 438 U.S. 745 (1978) (plurality opinion). The case has nothing to do with “disagreeable ideas,” see ante at 491 U.S. 409. It involves disagreeable conduct that, in my opinion, diminishes the value of an important national asset.

The Court is therefore quite wrong in blandly asserting that respondent “was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values.”

Ante at 491 U.S. 411. Respondent was prosecuted because of the method he chose to express his dissatisfaction with those policies. Had he chosen to spraypaint -- or perhaps convey with a motion picture projector -- his message of dissatisfaction on the facade of the Lincoln Memorial, there would be no question about the power of the Government to prohibit his means of expression. The prohibition would be supported by the legitimate interest in preserving the quality of an important national asset. Though the asset at stake in this case is intangible, given its unique value, the same interest supports a prohibition on the desecration of the American flag.*

* The Court suggests that a prohibition against flag desecration is not content-neutral, because this form of symbolic speech is only used by persons who are critical of the flag or the ideas it represents. In making this suggestion, the Court does not pause to consider the far-reaching consequences of its introduction of disparate-impact analysis into our First Amendment jurisprudence. It seems obvious that a prohibition against the desecration of a gravesite is content-neutral even if it denies some protesters the right to make a symbolic statement by extinguishing the flame in Arlington Cemetery where John F. Kennedy is buried while permitting others to salute the flame by bowing their heads. Few would doubt that a protester who extinguishes the flame has desecrated the gravesite, regardless

The ideas of liberty and equality have been an irresistible force in motivating leaders like Patrick Henry, Susan B. Anthony, and Abraham Lincoln, schoolteachers like Nathan Hale and Booker T. Washington, the Philippine Scouts who fought at Bataan, and the soldiers who scaled the bluff at Omaha Beach. If those ideas are worth fighting for -- and our history demonstrates that they are -- it cannot be true that the flag that uniquely symbolizes their power is not itself worthy of protection from unnecessary desecration.

I respectfully dissent.

of whether he prefaces that act with a speech explaining that his purpose is to express deep admiration or unmitigated scorn for the late President. Likewise, few would claim that the protester who bows his head has desecrated the gravesite, even if he makes clear that his purpose is to show disrespect. In such a case, as in a flag burning case, the prohibition against desecration has absolutely nothing to do with the content of the message that the symbolic speech is intended to convey.

XXIII. WHO IS JUSTICE STEVENS?

SYLLABUS

OCTOBER TERM, 2009

CITIZENS UNITED V. FEDERAL ELECTION COMM’N

SUPREME COURT OF THE UNITED STATES

CITIZENS UNITED v. FEDERAL ELECTION COMMISSION

appeal from the united states district court for the district of columbia

No. 08–205. Argued March 24, 2009—Reargued September 9, 2009—Decided January 21, 2010

As amended by §203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), federal law prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech that is an “electioneering communication” or for speech that expressly advocates the election or defeat of a candidate. 2 U.S.C. §441b. An electioneering communication is “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office” and is made within 30 days of a primary election, §434(f)(3)(A), and that is “publicly distributed,” 11 CFR §100.29(a)(2), which in “the case of a candidate for nomination for President ... means” that the communication “[c]an be received by 50,000 or more persons in a State where a primary election ... is being held within 30 days,” §100.29(b)(3)(ii). Corporations and unions may establish a political action committee (PAC) for express advocacy or electioneering communications purposes. 2 U.S.C. §441b(b)(2). In *McConnell v. Federal Election Comm’n*, 540 U.S. 93, 203–209, this Court upheld limits on electioneering communications in a facial challenge, relying on the holding in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, that political speech may be banned based on the speaker’s corporate identity.

In January 2008, appellant Citizens United, a nonprofit corporation, released a documentary (hereinafter *Hillary*) critical of then-Senator Hillary Clinton, a candidate for her party’s Presidential nomination. Anticipating that it would make *Hillary* available on cable television through video-on-demand within 30 days of primary elections, Citizens United produced television ads to run on broadcast and cable television. Concerned about possible civil and criminal penalties for violating §441b, it sought declaratory and injunctive relief, arguing that (1) §441b is unconstitutional as applied to *Hillary*; and (2) BCRA’s disclaimer, disclosure, and reporting requirements, BCRA §§201 and 311, were unconstitutional as applied to *Hillary* and the ads. The District Court denied Citizens United a preliminary injunction and granted appellee Federal Election Commission (FEC) summary judgment.

Held:

1. Because the question whether §441b applies to Hillary cannot be resolved on other, narrower grounds without chilling political speech, this Court must consider the continuing effect of the speech suppression upheld in *Austin*. Pp. 5–20.

(a) Citizen United’s narrower arguments—that Hillary is not an “electioneering communication” covered by §441b because it is not “publicly distributed” under 11 CFR §100.29(a)(2); that §441b may not be applied to Hillary under *Federal Election Comm’n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (WRTL), which found §441b unconstitutional as applied to speech that was not “express advocacy or its functional equivalent,” *id.*, at 481 (opinion of Roberts, C. J.), determining that a communication “is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate,” *id.*, at 469–470; that §441b should be invalidated as applied to movies shown through video-on-demand because this delivery system has a lower risk of distorting the political process than do television ads; and that there should be an exception to §441b’s ban for nonprofit corporate political speech funded overwhelming by individuals—are not sustainable under a fair reading of the statute. Pp. 5–12.

(b) Thus, this case cannot be resolved on a narrower ground without chilling political speech, speech that is central to the First Amendment’s meaning and purpose. Citizens United did not waive this challenge to *Austin* when it stipulated to dismissing the facial challenge below, since (1) even if such a challenge could be waived, this Court may reconsider *Austin* and §441b’s facial validity here because the District Court “passed upon” the issue, *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 379; (2) throughout the litigation, Citizens United has asserted a claim that the FEC has violated its right to free speech; and (3) the parties cannot enter into a stipulation that prevents the Court from considering remedies necessary to resolve a claim that has been preserved. Because Citizen United’s narrower arguments are not sustainable, this Court must, in an exercise of its judicial responsibility, consider §441b’s facial validity. Any other course would prolong the substantial, nationwide chilling effect caused by §441b’s corporate expenditure ban. This conclusion is further supported by the following: (1) the uncertainty caused by the Government’s litigating position; (2) substantial time would be required to clarify §441b’s application on the points raised by the Government’s position in order to avoid any chilling effect caused by an improper interpretation; and (3) because speech itself is of primary importance to the integrity of the election process, any speech arguably within the reach of rules created for regulating political speech is chilled. The regulatory scheme at issue may not be a prior restraint in the strict sense. However, given its complexity and the deference courts show to administrative determinations, a speaker wishing to avoid criminal liability threats and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak. The restrictions thus function as the equivalent of a prior restraint, giving the FEC power

analogous to the type of government practices that the First Amendment was drawn to prohibit. The ongoing chill on speech makes it necessary to invoke the earlier precedents that a statute that chills speech can and must be invalidated where its facial invalidity has been demonstrated. Pp. 12–20.

2. Austin is overruled, and thus provides no basis for allowing the Government to limit corporate independent expenditures. Hence, §441b’s restrictions on such expenditures are invalid and cannot be applied to Hillary. Given this conclusion, the part of McConnell that upheld BCRA §203’s extension of §441b’s restrictions on independent corporate expenditures is also overruled. Pp. 20–51.

(a) Although the First Amendment provides that “Congress shall make no law ... abridging the freedom of speech,” §441b’s prohibition on corporate independent expenditures is an outright ban on speech, backed by criminal sanctions. It is a ban notwithstanding the fact that a PAC created by a corporation can still speak, for a PAC is a separate association from the corporation. Because speech is an essential mechanism of democracy—it is the means to hold officials accountable to the people—political speech must prevail against laws that would suppress it by design or inadvertence. Laws burdening such speech are subject to strict scrutiny, which requires the Government to prove that the restriction “furthers a compelling interest and is narrowly tailored to achieve that interest.” *WRTL*, 551 U.S., at 464. This language provides a sufficient framework for protecting the interests in this case. Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints or to distinguish among different speakers, which may be a means to control content. The Government may also commit a constitutional wrong when by law it identifies certain preferred speakers. There is no basis for the proposition that, in the political speech context, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead to this conclusion. Pp. 20–25.

(b) The Court has recognized that the First Amendment applies to corporations, e.g., *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 778, n. 14, and extended this protection to the context of political speech, see, e.g., *NAACP v. Button*, 371 U.S. 415, 428–429. Addressing challenges to the Federal Election Campaign Act of 1971, the Buckley Court upheld limits on direct contributions to candidates, 18 U.S.C. §608(b), recognizing a governmental interest in preventing quid pro quo corruption. 424 U.S., at 25–26. However, the Court invalidated §608(e)’s expenditure ban, which applied to individuals, corporations, and unions, because it “fail[ed] to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process,” *id.*, at 47–48. While Buckley did not consider a separate ban on corporate and union independent expenditures found in §610, had that provision been challenged in Buckley’s wake, it could not have been squared with the precedent’s reasoning and analysis. The Buckley Court did not invoke the overbreadth doctrine to suggest that §608(e)’s expenditure ban would have been constitutional had it applied to corporations

and unions but not individuals. Notwithstanding this precedent, Congress soon recodified §610's corporate and union expenditure ban at 2 U.S.C. §441b, the provision at issue. Less than two years after Buckley, Bellotti reaffirmed the First Amendment principle that the Government lacks the power to restrict political speech based on the speaker's corporate identity. 435 U.S., at 784–785. Thus the law stood until Austin upheld a corporate independent expenditure restriction, bypassing Buckley and Bellotti by recognizing a new governmental interest in preventing “the corrosive and distorting effects of immense aggregations of [corporate] wealth ... that have little or no correlation to the public's support for the corporation's political ideas.” 494 U.S., at 660. Pp. 25–32.

(c) This Court is confronted with conflicting lines of precedent: a pre-Austin line forbidding speech restrictions based on the speaker's corporate identity and a post-Austin line permitting them. Neither Austin's antidistortion rationale nor the Government's other justifications support §441b's restrictions. Pp. 32–47.

(1) The First Amendment prohibits Congress from fining or jailing citizens, or associations of citizens, for engaging in political speech, but Austin's antidistortion rationale would permit the Government to ban political speech because the speaker is an association with a corporate form. Political speech is “indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation.” Bellotti, *supra*, at 777 (footnote omitted). This protection is inconsistent with Austin's rationale, which is meant to prevent corporations from obtaining “ ‘an unfair advantage in the political marketplace’ ” by using “ ‘resources amassed in the economic marketplace.’ ” 494 U.S., at 659. First Amendment protections do not depend on the speaker's “financial ability to engage in public discussion.” Buckley, *supra*, at 49. These conclusions were reaffirmed when the Court invalidated a BCRA provision that increased the cap on contributions to one candidate if the opponent made certain expenditures from personal funds. *Davis v. Federal Election Comm'n*, 554 U.S. ___, ___. Distinguishing wealthy individuals from corporations based on the latter's special advantages of, e.g., limited liability, does not suffice to allow laws prohibiting speech. It is irrelevant for First Amendment purposes that corporate funds may “have little or no correlation to the public's support for the corporation's political ideas.” Austin, *supra*, at 660. All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech, and the First Amendment protects the resulting speech. Under the antidistortion rationale, Congress could also ban political speech of media corporations. Although currently exempt from §441b, they accumulate wealth with the help of their corporate form, may have aggregations of wealth, and may express views “hav[ing] little or no correlation to the public's support” for those views. Differential treatment of media corporations and other corporations cannot be squared with the First Amendment, and there is no support for the view that the Amendment's original meaning would permit suppressing media corporations' political speech. Austin interferes with the “open marketplace” of ideas protected by the First Amendment. *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208. Its censorship is vast in its reach,

suppressing the speech of both for-profit and nonprofit, both small and large, corporations. Pp. 32–40.

(2) This reasoning also shows the invalidity of the Government’s other arguments. It reasons that corporate political speech can be banned to prevent corruption or its appearance. The Buckley Court found this rationale “sufficiently important” to allow contribution limits but refused to extend that reasoning to expenditure limits, 424 U.S., at 25, and the Court does not do so here. While a single Bellotti footnote purported to leave the question open, 435 U.S., at 788, n. 26, this Court now concludes that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption. That speakers may have influence over or access to elected officials does not mean that those officials are corrupt. And the appearance of influence or access will not cause the electorate to lose faith in this democracy. *Caperton v. A. T. Massey Coal Co.*, 556 U.S. ___, distinguished. Pp. 40–45.

(3) The Government’s asserted interest in protecting shareholders from being compelled to fund corporate speech, like the antidistortion rationale, would allow the Government to ban political speech even of media corporations. The statute is underinclusive; it only protects a dissenting shareholder’s interests in certain media for 30 or 60 days before an election when such interests would be implicated in any media at any time. It is also overinclusive because it covers all corporations, including those with one shareholder. P. 46.

(4) Because §441b is not limited to corporations or associations created in foreign countries or funded predominately by foreign shareholders, it would be overbroad even if the Court were to recognize a compelling governmental interest in limiting foreign influence over the Nation’s political process. Pp. 46–47.

(d) The relevant factors in deciding whether to adhere to stare decisis, beyond workability—the precedent’s antiquity, the reliance interests at stake, and whether the decision was well reasoned—counsel in favor of abandoning *Austin*, which itself contravened the precedents of *Buckley* and *Bellotti*. As already explained, *Austin* was not well reasoned. It is also undermined by experience since its announcement. Political speech is so ingrained in this country’s culture that speakers find ways around campaign finance laws. Rapid changes in technology—and the creative dynamic inherent in the concept of free expression—counsel against upholding a law that restricts political speech in certain media or by certain speakers. In addition, no serious reliance issues are at stake. Thus, due consideration leads to the conclusion that *Austin* should be overruled. The Court returns to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech based on the speaker’s corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations. Pp. 47–50.

3. BCRA §§201 and 311 are valid as applied to the ads for Hillary and to the movie itself. Pp. 50–57.

(a) Disclaimer and disclosure requirements may burden the ability to speak, but they “impose no ceiling on campaign-related activities,” *Buckley*, 424 U.S., at 64, or “ “prevent anyone from speaking,” ” *McConnell*, *supra*, at 201. The *Buckley* Court explained that disclosure can be justified by a governmental interest in providing “the electorate with information” about election-related spending sources. The *McConnell* Court applied this interest in rejecting facial challenges to §§201 and 311. 540 U.S., at 196. However, the Court acknowledged that as-applied challenges would be available if a group could show a “ ‘reasonable probability’ ” that disclosing its contributors’ names would “ ‘subject them to threats, harassment, or reprisals from either Government officials or private parties.’ ” *Id.*, at 198. Pp. 50–52.

(b) The disclaimer and disclosure requirements are valid as applied to *Citizens United*’s ads. They fall within BCRA’s “electioneering communication” definition: They referred to then-Senator Clinton by name shortly before a primary and contained pejorative references to her candidacy. Section 311 disclaimers provide information to the electorate, *McConnell*, *supra*, at 196, and “insure that the voters are fully informed” about who is speaking, *Buckley*, *supra*, at 76. At the very least, they avoid confusion by making clear that the ads are not funded by a candidate or political party. *Citizens United*’s arguments that §311 is underinclusive because it requires disclaimers for broadcast advertisements but not for print or Internet advertising and that §311 decreases the quantity and effectiveness of the group’s speech were rejected in *McConnell*. This Court also rejects their contention that §201’s disclosure requirements must be confined to speech that is the functional equivalent of express advocacy under *WRTL*’s test for restrictions on independent expenditures, 551 U.S., at 469–476 (opinion of Roberts, C.J.). Disclosure is the less-restrictive alternative to more comprehensive speech regulations. Such requirements have been upheld in *Buckley* and *McConnell*. *Citizens United*’s argument that no informational interest justifies applying §201 to its ads is similar to the argument this Court rejected with regard to disclaimers. *Citizens United* finally claims that disclosure requirements can chill donations by exposing donors to retaliation, but offers no evidence that its members face the type of threats, harassment, or reprisals that might make §201 unconstitutional as applied. Pp. 52–55.

(c) For these same reasons, this Court affirms the application of the §§201 and 311 disclaimer and disclosure requirements to *Hillary*. Pp. 55–56.

Reversed in part, affirmed in part, and remanded.

Kennedy, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia and Alito, JJ., joined, in which Thomas, J., joined as to all but Part IV, and in which Stevens, Ginsburg, Breyer, and Sotomayor, JJ., joined as to Part IV. Roberts, C. J., filed a concurring opinion, in which Alito, J., joined. Scalia, J., filed a concurring

opinion, in which Alito, J., joined, and in which Thomas, J., joined in part. Stevens, J., filed an opinion concurring in part and dissenting in part, in which Ginsburg, Breyer, and Sotomayor, JJ., joined. Thomas, J., filed an opinion concurring in part and dissenting in part.

XXIV. WHO IS JUSTICE HOLMES?

250 U.S. 616

Abrams v. United States (No. 316)

Argued: October 21, 22, 1919

Decided: November 10, 1919

Affirmed.

- Syllabus
- Opinion, Clarke
- Dissent, Holmes

Syllabus

Evidence sufficient to sustain anyone of several counts of an indictment will sustain a verdict and judgment of guilty under all if the sentence does not exceed that which might lawfully have been imposed under any single count. P. 619.

Evidence held sufficient to sustain a conviction of conspiracy to violate the Espionage Act by uttering, etc., circulars intended to provoke and encourage resistance to the United States in the war with Germany, and by inciting and advocating, through such circulars, resort to a general strike of workers in ammunition factories for the purpose of curtailing production of ordnance and munitions essential to the prosecution of the war. Pp. 619 et seq.

When prosecuted under the Espionage Act, persons who sought to effectuate a plan of action which necessarily, before it could be realized, involved the defeat of the plans of the United States for the conduct of the war with Germany must be held to have intended that result notwithstanding their ultimate purpose may have been to prevent interference with the Russian Revolution. P. 621.

The case is stated in the opinion.

TOP

Opinion

CLARKE, J., Opinion of the Court

MR. JUSTICE CLARKE delivered the opinion of the court.

On a single indictment, containing four counts, the five plaintiffs in error, hereinafter designated the defendants, were convicted of conspiring to violate provisions of the [p617] Espionage Act of Congress (§ 3, Title I, of Act approved June 15, 1917, as amended May 16, 1918, 40 Stat. 553).

Each of the first three counts charged the defendants with conspiring, when the United States was at war with the Imperial Government of Germany, to unlawfully utter, print, write and publish: in the first count, “disloyal, scurrilous and abusive language about the form of Government of the United States;” in the second count, language “intended to bring the form of Government of the United States into contempt, scorn, contumely and disrepute;” and in the third count, language “intended to incite, provoke and encourage resistance to the United States in said war.” The charge in the fourth count was that the defendants conspired, when the United States was at war with the Imperial German Government, unlawfully and willfully, by utterance, writing, printing and publication, to urge, incite and advocate curtailment of production of things and products, to-wit, ordnance and ammunition, necessary and essential to the prosecution of the war.

The offenses were charged in the language of the act of Congress.

It was charged in each count of the indictment that it was a part of the conspiracy that the defendants would attempt to accomplish their unlawful purpose by printing, writing and distributing in the City of New York many copies of a leaflet or circular, printed in the English language, and of another printed in the Yiddish language, copies of which, properly identified, were attached to the indictment.

All of the five defendants were born in Russia. They were intelligent, had considerable schooling, and, at the time they were arrested, they had lived in the United States terms varying from five to ten years, but none of them had applied for naturalization. Four of them testified as witnesses in their own behalf, and, of these, three frankly avowed that they were “rebels,” “revolutionists,” [p618] “anarchists,” that they did not believe in government in any form, and they declared that they had no interest whatever in the Government of the United States. The fourth defendant testified that he was a “socialist,” and believed in “a proper kind of government, not capitalistic,” but, in his classification, the Government of the United States was “capitalistic.”

It was admitted on the trial that the defendants had united to print and distribute the described circulars, and that five thousand of them had been printed and distributed about the 22nd day of August, 1918. The group had a meeting place in New York City, in rooms rented by defendant Abrams under an assumed name, and there the subject of printing the circulars was discussed about two weeks before the defendants were arrested. The defendant Abrams, although not a printer, on July 27, 1918, purchased the printing outfit with which the circulars were printed, and installed it in a basement room where the work was done at night. The circulars were distributed, some by throwing them from a window of a building where one of the defendants was employed and others secretly, in New York City.

The defendants pleaded “not guilty,” and the case of the Government consisted in showing the facts we have stated, and in introducing in evidence copies of the two printed circulars attached to the indictment, a sheet entitled “Revolutionists Unite for Action,”

written by the defendant Lipman, and found on him when he was arrested, and another paper, found at the headquarters of the group, and for which Abrams assumed responsibility.

Thus, the conspiracy and the doing of the overt acts charged were largely admitted, and were fully established.

On the record thus described, it is argued, somewhat faintly, that the acts charged against the defendants were not unlawful because within the protection of that freedom [p619] of speech and of the press which is guaranteed by the First Amendment to the Constitution of the United States, and that the entire Espionage Act is unconstitutional because in conflict with that Amendment.

This contention is sufficiently discussed and is definitely negated in *Schenck v. United States* and *Baer v. United States*, 249 U.S. 47 (<http://www.law.cornell.edu/supremecourt/text/249/47/>), and in *Frohwerk v. United States*, 249 U.S. 204 (<http://www.law.cornell.edu/supremecourt/text/249/204/>).

The claim chiefly elaborated upon by the defendants in the oral argument and in their brief is that there is no substantial evidence in this record to support the judgment upon the verdict of guilty, and that the motion of the defendants for an instructed verdict in their favor was erroneously denied. A question of law is thus presented, which calls for an examination of the record not for the purpose of weighing conflicting testimony, but only to determine whether there was some evidence, competent and substantial, before the jury, fairly tending to sustain the verdict. *Troxell v. Delaware, Lackawanna & Western R.R. Co.*, 227 U.S. 434 (<http://www.law.cornell.edu/supremecourt/text/227/434/>), 442; *Lancaster v. Collins*, 115 U.S. 222 (<http://www.law.cornell.edu/supremecourt/text/115/222/>), 225; *Chicago & Northwestern Ry. Co. v. Ohle*, 117 U.S. 123 (<http://www.law.cornell.edu/supremecourt/text/117/123/>), 129. We shall not need to consider the sufficiency, under the rule just stated, of the evidence introduced as to all of the counts of the indictment, for, since the sentence imposed did not exceed that which might lawfully have been imposed under any single count, the judgment upon the verdict of the jury must be affirmed if the evidence is sufficient to sustain anyone of the counts. *Evans v. United States*, 153 U.S. 608 (<http://www.law.cornell.edu/supremecourt/text/153/608/>); *Claassen v. United States*, 142 U.S. 140 (<http://www.law.cornell.edu/supremecourt/text/142/140/>); *Debs v. United States*, 249 U.S. 211 (<http://www.law.cornell.edu/supremecourt/text/249/211/>), 216.

The first of the two articles attached to the indictment is conspicuously headed, "The Hypocrisy of the United States and her Allies." After denouncing President Wilson as a hypocrite and a coward because troops were sent into Russia, it proceeds to assail our Government in general, saying: [p620]

His [the President's] shameful, cowardly silence about the intervention in Russia reveals the hypocrisy of the plutocratic gang in Washington and vicinity.

It continues:

He [the President] is too much of a coward to come out openly and say: "We capitalistic nations cannot afford to have a proletarian republic in Russia."

Among the capitalistic nations, Abrams testified, the United States was included.

Growing more inflammatory as it proceeds, the circular culminates in:

The Russian Revolution cries: Workers of the World! Awake! Rise! Put down your enemy and mine!

Yes! friends, there is only one enemy of the workers of the world and that is CAPITALISM.

This is clearly an appeal to the "workers" of this country to arise and put down by force the Government of the United States which they characterize as their "hypocritical," "cowardly" and "capitalistic" enemy.

It concludes:

Awake! Awake! you Workers of the World!

REVOLUTIONISTS

The second of the articles was printed in the Yiddish language and, in the translation, is headed, "Workers -- Wake up." After referring to "his Majesty, Mr. Wilson, and the rest of the gang; dogs of all colors," it continues:

"Workers, Russian emigrants, you who had the least belief in the honesty of our Government," which defendants admitted referred to the United States Government, must now throw away all confidence, must spit in the face the false, hypocritical, military propaganda which has fooled you so relentlessly, calling forth your sympathy, your help, to the prosecution of the war.

The purpose of this obviously was to persuade the persons to whom it was addressed to turn a deaf ear to patriotic [p621] appeals in behalf of the Government of the United States, and to cease to render it assistance in the prosecution of the war.

It goes on:

With the money which you have loaned, or are going to loan them, they will make bullets not only for the Germans, but also for the Workers Soviets of Russia. Workers in the ammunition factories, you are producing bullets, bayonets, cannon, to murder not only the Germans, but also your dearest, best, who are in Russia and are fighting for freedom.

It will not do to say, as is now argued, that the only intent of these defendants was to prevent injury to the Russian cause. Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce. Even if their primary purpose and intent was to aid the cause of the Russian Revolution, the plan of action which they adopted necessarily involved, before it could be realized, defeat of the war program of the United States, for the obvious effect of this appeal, if it should become effective, as they hoped it might, would be to persuade persons of character such as those whom they regarded themselves as addressing, not to aid government loans, and not to work in ammunition factories where their work would produce "bullets, bayonets, cannon" and other munitions of war the use of which would cause the "murder" of Germans and Russians.

Again, the spirit becomes more bitter as it proceed to declare that -- America and her Allies have betrayed (the Workers). Their robberish aims are clear to all men. The destruction of the Russian Revolution, that is the politics of the march to Russia.

Workers, our reply to the barbaric intervention has to be a general strike! An open challenge only will let the Government know that not only the Russian Worker fights for [p622] freedom, but also here in America lives the spirit of Revolution.

This is not an attempt to bring about a change of administration by candid discussion, for, no matter what may have incited the outbreak on the part of the defendant anarchists, the manifest purpose of such a publication was to create an attempt to defeat the war plans of the Government of the United States by bringing upon the country the paralysis of a general strike, thereby arresting the production of all munitions and other things essential to the conduct of the war.

This purpose is emphasized in the next paragraph, which reads:

Do not let the Government scare you with their wild punishment in prisons, hanging and shooting. We must not and will not betray the splendid fighters of Russia. Workers, up to fight.

After more of the same kind, the circular concludes:

Woe unto those who will be in the way of progress. Let solidarity live!

It is signed, "The Rebels."

That the interpretation we have put upon these articles, circulated in the greatest port of our land, from which great numbers of soldiers were at the time taking ship daily, and in which great quantities of war supplies of every kind were at the time being manufactured for transportation overseas, is not only the fair interpretation of them, but that it is the meaning which their authors consciously intended should be conveyed by them to others is further shown by the additional writings found in the meeting place of the defendant group and on the person of one of them. One of these circulars is headed: "Revolutionists! Unite for Action!"

After denouncing the President as "Our Kaiser" and the hypocrisy of the United States and her Allies, this article concludes: [p623]

Socialists, Anarchists, Industrial Workers of the World, Socialists, Labor party men and other revolutionary organizations, Unite for action, and let us save the Workers' Republic of Russia,

Know you lovers of freedom that, in order to save the Russian revolution, we must keep the armies of the allied countries busy at home.

Thus was again avowed the purpose to throw the country into a state of revolution if possible, and to thereby frustrate the military program of the Government.

The remaining article, after denouncing the resident for what is characterized as hostility to the Russian revolution, continues:

We, the toilers of America, who believe in real liberty, shall pledge ourselves, in case the United States will participate in that bloody conspiracy against Russia, to create so great a disturbance that the autocrats of America shall be compelled to keep their armies at home, and not be able to spare any for Russia.

It concludes with this definite threat of armed rebellion:

If they will use arms against the Russian people to enforce their standard of order, so will we use arms, and they shall never see the ruin of the Russian Revolution.

These excerpts sufficiently show that, while the immediate occasion for this particular outbreak of lawlessness on the part of the defendant alien anarchists may have been resentment caused by our Government's sending troops into Russia as a strategic operation against the Germans on the eastern battle front, yet the plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country for the purpose of embarrassing, and, if possible, defeating the military plans of the Government in Europe. A technical distinction may perhaps be taken between disloyal and abusive language applied to the form of our government or language intended to bring the form [p624] of our government

into contempt and disrepute, and language of like character and intended to produce like results directed against the President and Congress, the agencies through which that form of government must function in time of war. But it is not necessary to a decision of this case to consider whether such distinction is vital or merely formal, for the language of these circulars was obviously intended to provoke and to encourage resistance to the United States in the war, as the third count runs, and the defendants, in terms, plainly urged and advocated a resort to a general strike of workers in ammunition factories for the purpose of curtailing the production of ordnance and munitions necessary and essential to the prosecution of the war as is charged in the fourth count. Thus, it is clear not only that some evidence, but that much persuasive evidence, was before the jury tending to prove that the defendants were guilty as charged in both the third and fourth counts of the indictment, and, under the long established rule of law hereinbefore stated, the judgment of the District Court must be

Affirmed.

Dissent

HOLMES, J., Dissenting Opinion

MR. JUSTICE HOLMES dissenting.

This indictment is founded wholly upon the publication of two leaflets which I shall describe in a moment. The first count charges a conspiracy pending the war with Germany to publish abusive language about the form of government of the United States, laying the preparation and publishing of the first leaflet as overt acts. The second count charges a conspiracy pending the war to publish language intended to bring the form of government into contempt, laying the preparation and publishing of the two leaflets as overt acts. The third count alleges a conspiracy to encourage resistance to the United States in the same war, and to attempt to effectuate the purpose by publishing the same leaflets. The fourth count lays a conspiracy [p625] to incite curtailment of production of things necessary to the prosecution of the war and to attempt to accomplish it by publishing the second leaflet, to which I have referred.

The first of these leaflets says that the President's cowardly silence about the intervention in Russia reveals the hypocrisy of the plutocratic gang in Washington. It intimates that "German militarism combined with allied capitalism to crush the Russian evolution" -- goes on that the tyrants of the world fight each other until they see a common enemy -- working class enlightenment, when they combine to crush it, and that now militarism and capitalism combined, though not openly, to crush the Russian revolution. It says that there is only one enemy of the workers of the world, and that is capitalism; that it is a crime for workers of America, &c., to fight the workers' republic of Russia, and ends "Awake! Awake, you Workers of the World, Revolutionists!" A note adds

It is absurd to call us pro-German. We hate and despise German militarism more than do you hypocritical tyrants. We have more reasons for denouncing German militarism than has the coward of the White House.

The other leaflet, headed “Workers -- Wake Up,” with abusive language says that America together with the Allies will march for Russia to help the Czecho-Slovaks in their struggle against the Bolsheviki, and that this time the hypocrites shall not fool the Russian emigrants and friends of Russia in America. It tells the Russian emigrants that they now must spit in the face of the false military propaganda by which their sympathy and help to the prosecution of the war have been called forth, and says that, with the money they have lent or are going to lend, “they will make bullets not only for the Germans, but also for the Workers Soviets of Russia,” and further,

Workers in the ammunition factories, you are producing bullets, bayonets, cannon, to murder not only the Germans, [p626] but also your dearest, best, who are in Russia and are fighting for freedom.

It then appeals to the same Russian emigrants at some length not to consent to the “inquisitionary expedition to Russia,” and says that the destruction of the Russian revolution is “the politics of the march to Russia.” The leaflet winds up by saying “Workers, our reply to this barbaric intervention has to be a general strike!” and, after a few words on the spirit of revolution, exhortations not to be afraid, and some usual tall talk ends, “Woe unto those who will be in the way of progress. Let solidarity live! The Rebels.”

No argument seems to me necessary to show that these pronunciamientos in no way attack the form of government of the United States, or that they do not support either of the first two counts. What little I have to say about the third count may be postponed until I have considered the fourth. With regard to that, it seems too plain to be denied that the suggestion to workers in the ammunition factories that they are producing bullets to murder their dearest, and the further advocacy of a general strike, both in the second leaflet, do urge curtailment of production of things necessary to the prosecution of the war within the meaning of the Act of May 16, 1918, c. 75, 40 Stat. 553, amending § 3 of the earlier Act of 1917. But to make the conduct criminal, that statute requires that it should be “with intent by such curtailment to cripple or hinder the United States in the prosecution of the war.” It seems to me that no such intent is proved.

I am aware, of course, that the word intent as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. Even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law might be hanged, if, at the time of his act, [p627] he knew facts from which common experience showed that the consequences would follow, whether he individually could foresee them or not. But, when words are used exactly, a deed is not done with

intent to produce a consequence unless that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence will follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind.

It seems to me that this statute must be taken to use its words in a strict and accurate sense. They would be absurd in any other. A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success, yet, even if it turned out that the curtailment hindered and was thought by other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime. I admit that my illustration does not answer all that might be said, but it is enough to show what I think, and to let me pass to a more important aspect of the case. I refer to the First Amendment to the Constitution, that Congress shall make no law abridging the freedom of speech.

I never have seen any reason to doubt that the questions of law that alone were before this Court in the cases of Schenck, Frohwerk and Debs, 249 U.S. 47 (<http://www.law.cornell.edu/supremecourt/text/249/47/>), 204, 211, were rightly decided. I do not doubt for a moment that, by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is [p628] greater in time of war than in time of peace, because war opens dangers that do not exist at other times.

But, as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so. Publishing those opinions for the very purpose of obstructing, however, might indicate a greater danger, and, at any rate, would have the quality of an attempt. So I assume that the second leaflet, if published for the purposes alleged in the fourth count, might be punishable. But it seems pretty clear to me that nothing less than that would bring these papers within the scope of this law. An actual intent in the sense that I have explained is necessary to constitute an attempt, where a further act of the same individual is required to complete the substantive crime, for reasons given in *Swift & Co. v. United States*, 196 U.S. 375 (<http://www.law.cornell.edu/supremecourt/text/196/375/>), 396. It is necessary where the success of the attempt

depends upon others because, if that intent is not present, the actor's aim may be accomplished without bringing about the evils sought to be checked. An intent to prevent interference with the revolution in Russia might have been satisfied without any hindrance to carrying on the war in which we were engaged.

I do not see how anyone can find the intent required by the statute in any of the defendants' words. The second leaflet is the only one that affords even a foundation for the charge, and there, without invoking the hatred of German militarism expressed in the former one, it is evident [p629] from the beginning to the end that the only object of the paper is to help Russia and stop American intervention there against the popular government -- not to impede the United States in the war that it was carrying on. To say that two phrases, taken literally, might import a suggestion of conduct that would have interference with the war as an indirect and probably undesired effect seems to me by no means enough to show an attempt to produce that effect.

I return for a moment to the third count. That charges an intent to provoke resistance to the United States in its war with Germany. Taking the clause in the statute that deals with that, in connection with the other elaborate provisions of the act, I think that resistance to the United States means some forcible act of opposition to some proceeding of the United States in pursuance of the war. I think the intent must be the specific intent that I have described, and, for the reasons that I have given, I think that no such intent was proved or existed in fact. I also think that there is no hint at resistance to the United States as I construe the phrase.

In this case, sentences of twenty years' imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them. Even if I am technically wrong, and enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper, I will add, even if what I think the necessary intent were shown, the most nominal punishment seems to me all that possibly could be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges, but for the creed that they avow -- a creed that I believe to be the creed of ignorance and immaturity when honestly held, as I see no reason to doubt that it was held here, but which, although made the subject of examination at the [p630] trial, no one has a right even to consider in dealing with the charges before the Court.

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power, and want a certain result with all your heart, you naturally express your wishes in law, and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better

reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States, through many years, had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants [p631] making any exception to the sweeping command, "Congress shall make no law . . . abridging the freedom of speech." Of course, I am speaking only of expressions of opinion and exhortations, which were all that were uttered here, but I regret that I cannot put into more impressive words my belief that, in their conviction upon this indictment, the defendants were deprived of their rights under the Constitution of the United States.

MR. JUSTICE BRANDEIS concurs with the foregoing opinion.

XXV. WHAT IS, THAT HE WAS NOT THE SON OF AN ORANGUTAN?

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10 Attorneys for PLAINTIFF
11 DONALD J. TRUMP

D74 Teresa Sanchez-Gordon

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA

13 COUNTY OF LOS ANGELES

14 CENTRAL DISTRICT

15 BC 499537

16 DONALD J. TRUMP,

17 Plaintiff,

18 v.

19 WILLIAM MAHER,

20 Defendant.

Case No.

PLAINTIFF DONALD J. TRUMP'S
COMPLAINT FOR:

(1) BREACH OF CONTRACT

DEMAND FOR JURY TRIAL

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

FEB 04 2013

JOHN A. CLARKE, JUDICIAL OFFICER/CLERK
BY Gina Grider Deputy

CIT/CASE: BC499537
LEA/DEF#: 310
RECEIPT #: CCH507417021
DATE PAID: 02/04/13 02:08 PM
PAYMENT: \$435.00
RECEIVED:
CHECK: \$435.00
CASH: \$0.00
CHANGE: \$0.00
CARD: \$0.00
Debevoise & Plimpton

1 Plaintiff DONALD J. TRUMP ("Mr. Trump"), an individual, hereby files this Complaint
2 for Damages against Defendant WILLIAM MAHER, A/K/A BILL MAHER ("Maher"), an
3 individual. This is an action by Mr. Trump, a highly successful businessman, investor, and
4 television personality, against Maher, a talk show host and television commentator.

5 INTRODUCTION

6 1. This action arises from Defendant Maher's refusal to honor the terms of a public
7 offer which he made to Mr. Trump. Maher offered to pay Mr. Trump \$5 million, to be donated
8 by Mr. Trump to charitable organizations of Mr. Trump's choosing, if Mr. Trump provided
9 Maher with proof of Mr. Trump's parentage. Mr. Trump accepted Maher's offer in writing, and
10 has provided the documentation demanded by Maher, but Maher has failed and refused to
11 perform his obligation to make payment in accordance with the terms of his offer. Maher's
12 refusal to make payment pursuant to the offer he made has deprived five worthy charities – a
13 Hurricane Sandy relief organization, the Police Athletic League, the American Cancer Society,
14 the March of Dimes, and the Dana-Farber Cancer Institute – of much-needed funds. Mr. Trump
15 brings this action to compel Maher to carry out his promise.

16 THE PARTIES

17 2. Mr. Trump is a citizen of New York and resides in New York City.

18 3. Mr. Trump is a prominent businessman, political commentator, popular television
19 personality, number one best-selling author, and well-known philanthropist. He has been
20 responsible for the development of myriad large-scale real estate projects around the world,
21 including the Trump World Tower, the Trump International Hotel and Tower, various residential
22 apartment towers in cities such as Chicago, Las Vegas, and New York, and numerous luxury
23 resorts and golf courses.

24 4. Plaintiff is informed and believes and based thereon alleges that Maher is a citizen
25 of California and resides in Beverly Hills, California.

26 5. Plaintiff is informed and believes and based thereon alleges that Maher is a highly-
27 compensated television personality, reputed to have a net worth in the tens of millions of dollars.

28 6. Between 1993 and 2002, Maher was the host of *Politically Incorrect with Bill*

1 *Mahe*r, a political talk show. The show featured a panel of guests, including, *inter alia*, political
2 consultants, political commentators, prominent authors, United States Senators, Congressmen and
3 other public officials, and candidates for public office.

4 7. In 2003, Maher became the host of *Real Time with Bill Maher*, a political talk
5 show on the HBO cable network. *Real Time with Bill Maher* has featured as guests prominent
6 journalists, United States Senators, government officials, and other figures, who engage in
7 discussion of political, social and policy issues. The show is not considered a "comedy"
8 broadcast.

9 8. Maher has regularly appeared as a commentator in news broadcasts on networks
10 such as CNN and MSNBC.

11 JURISDICTION AND VENUE

12 9. Jurisdiction is based upon the California Constitution Article 6, Section 10.

13 10. Venue is proper in this Court pursuant to Section 395(A) of the California Code of
14 Civil Procedure because Plaintiff is informed and believes, and based thereon alleges, that the
15 Defendant resides in Los Angeles County.

16 SUBSTANTIVE ALLEGATIONS

17 **Trump offered to donate \$5 million to a number of charities as consideration for President** 18 **Obama to release his college transcripts**

19 11. In 2010, Mr. Trump indicated his potential interest in becoming a candidate for the
20 Presidency of the United States in the 2012 elections. A Wall Street Journal/NBC news poll
21 conducted in March 2011 found that Mr. Trump enjoyed a higher public approval rating than any
22 other potential candidate for the Republican Presidential nomination. A Newsweek poll
23 conducted in February of 2011 showed Mr. Trump would enjoy the support of 41% of voters in a
24 hypothetical race against President Obama, as against 43% support for the President.

25 12. While Mr. Trump ultimately decided not to become a Presidential candidate, he
26 continued to play a prominent role in the 2012 Presidential election, ultimately endorsing
27 Republican candidate Mitt Romney and making numerous public and media appearances in
28 support of Mr. Romney's candidacy.

1 13. On October 24, 2012, Mr. Trump released a web video that was broadcast by
2 multiple media outlets.

3 14. The video followed Mr. Trump's successful request that President Obama make
4 public his long-form birth certificate.

5 15. In the video, Mr. Trump made an offer to pay \$5 million to a charity of the
6 President's choice as consideration for the President's publication of his college and passport
7 applications and records. Mr. Trump reinforced the seriousness of his offer by listing the
8 potential recipients of the funds, including "inner city children in Chicago, AIDS research, or the
9 American Cancer Society."

10 16. Mr. Trump's goal in making the offer was to secure the release of the President's
11 college and passport records in the public interest.

12 17. Mr. Trump explained that he would transmit the \$5 million check within one hour
13 of President Obama releasing the records.

14 18. Mr. Trump's offer, which was of limited duration, terminated at 5:00 p.m. on
15 October 31, 2012. Because President Obama did not release the requested records, Mr. Trump's
16 offer expired and was not accepted.

17 19. Mr. Trump made his offer with the full intention of performing and making the
18 promised payment immediately upon acceptance of his offer by President Obama and the release
19 of the records in question.

20 20. Plaintiff is informed and believes and based thereon alleges that Mr. Trump's offer
21 was understood by the public as a genuine offer of payment.
22

23 **In response to Trump's \$5 million offer to President Obama, Maher made an offer to pay
24 Trump \$5 million to offer proof of his parentage**

25 21. On January 7, 2013, Maher appeared on the Tonight Show with Jay Leno. Maher
26 was asked by Mr. Leno to explain his "beef" with Mr. Trump.

27 22. In response, Maher accused Mr. Trump of having "lied" regarding a potential
28 appearance on Maher's television talk show, and falsely stated that Mr. Trump was "first of all, a

1 terrible racist, so I don't feel bad about anything I say about him."

2 23. Having recklessly and baselessly accused Mr. Trump of racism, Maher then
3 engaged in base insults, stating that Mr. Trump's postings on the Twitter social networking
4 service are the work of a "syphilitic monkey."

5 24. Maher then stated that "suppose that perhaps Donald Trump had been the spawn of
6 his mother having sex with an orangutan . . . I hope it's not true . . . but, *unless, he comes up with*
7 *proof, I'm willing to offer 5 million dollars to Donald Trump* . . . that he can donate to a charity
8 of his choice . . . whatever charity!" (Emphasis added.) A transcription of the relevant portion of
9 Maher's appearance on the *Tonight Show with Jay Leno* is attached as Exhibit A hereto and
10 incorporated by reference herein as though set forth in full.

11 25. Demonstrating that he understood Maher's offer to be genuine, Mr. Leno
12 responded to Maher's statement by commenting on the substantial sum at issue, stating "wow,
13 wow, 5 million dollars!"

14 26. While perhaps motivated by his evident malice towards Mr. Trump, Maher's offer,
15 much like Mr. Trump's offer to President Obama, was, and would have been understood by an
16 objective observer to be, a genuine offer to make the promised payment if Mr. Trump provided
17 proof of his birth and parentage.

18 27. The next day, on January 8, 2013, Mr. Trump's counsel wrote to Maher, formally
19 accepting Maher's offer and attaching a copy of Mr. Trump's birth certificate, demonstrating that
20 "he is the son of Fred Trump" The letter demanded that the promised \$5 million be paid to
21 Mr. Trump immediately, and specified the five charities to whom Mr. Trump would distribute the
22 money: a charity assisting the Hurricane Sandy victims, the Police Athletic League, the American
23 Cancer Society, the March of Dimes, and the Dana-Farber Cancer Institute. A copy of the
24 January 8, 2013 letter from Mr. Trump's counsel to Maher (the "Acceptance Letter") is attached
25 as Exhibit B hereto and incorporated by reference herein as though set forth in full.

26 28. A contract was formed between Maher and Mr. Trump as of the moment the
27 Acceptance Letter was sent. Mr. Trump accepted Maher's offer in writing, the offer had not
28 previously been revoked, and Mr. Trump fully performed his contractual obligations pursuant to

1 the terms of Maher's offer.

2 29. Maher provided no response to the Acceptance Letter. Consequently, on
3 January 16, 2013, Mr. Trump's counsel wrote again to Maher, noting that Mr. Trump had
4 accepted Maher's offer, that Mr. Trump had performed his contractual obligations, and that
5 Maher had not honored his contractual obligation to make payment. The letter demanded
6 payment of \$5 million within five business days, and stated that Mr. Trump would provide
7 appropriate wire transfer details in the event that Maher wished to make payment by wire
8 transfer. A copy of the January 16, 2013 letter from Mr. Trump's counsel to Maher (the
9 "Demand Letter") is attached as Exhibit C hereto and incorporated by reference herein as though
10 set forth in full.

11 30. Maher has not responded to the Acceptance Letter or to the Demand Letter, and
12 has never denied the legitimacy of his offer, but has made no payments pursuant to his contract
13 with Mr. Trump. It should be noted that Maher did not mention this very public event on his next
14 live episode of *Real Time with Bill Maher*, which aired on January 18, 2013.

15 31. As a consequence of Maher's disregard of his obligations, Mr. Trump has been
16 injured by not receiving payment of the promised sum. In addition, the five worthy charities
17 identified by Mr. Trump have been deprived of millions of dollars in donations, which they have
18 not been able to utilize for the benefit of their constituents.

19 **CAUSE OF ACTION**

20 **FOR BREACH OF CONTRACT AGAINST MAHER**

21 32. Plaintiff repeats and re-alleges each of the allegations of paragraphs 1 through 31
22 above, as though fully set forth herein.

23 33. Maher's January 7, 2013 offer was a valid offer to enter into a contract, to be
24 accepted either in writing or by performance, pursuant to which Maher was obligated to pay Mr.
25 Trump \$5 million upon proof of Mr. Trump's parentage.

26 34. On January 8, 2013, both by communicating his written acceptance and by fully
27 performing his contractual obligations to Maher, Mr. Trump accepted Maher's offer, which
28 remained outstanding and had not been revoked as of that time.

1 35. A valid contract exists between Maher and Mr. Trump, pursuant to which Maher is
2 obligated to pay Mr. Trump \$5 million, Mr. Trump having provided the proof of his parentage
3 contemplated by his contract with Maher.

4 36. Following written demand, Maher has failed to make any payment pursuant to his
5 contract with Mr. Trump.

6 37. Maher's failure to make payment constitutes a breach of contract.

7 38. Mr. Trump is therefore entitled to damages for breach of contract in the full
8 amount of the \$5 million contemplated by the terms of the contract.

9
10 **PRAYER FOR RELIEF**

11 WHEREFORE, the Plaintiff prays for judgment as follows:

- 12 A. An award of \$5 million in compensatory damages;
13 B. An award of prejudgment interest, costs and attorneys' fees; and
14 C. An award of such other and further relief as may be appropriate.

15
16 **JURY DEMAND**

17 D. Plaintiff hereby demands a trial by jury on all matters so triable.

18
19
20
21 Dated: February 4, 2013

COOLEY LLP

22
23 By Scott S. Balber /w/ permission
24 Scott S. Balber (*pro hac vice* application
 forthcoming)

25 Attorneys for PLAINTIFF
26 DONALD J. TRUMP

EXHIBIT A

02/04/2013

BM: It doesn't and it's not supposed to. And that's not how government works.

JL: Now what's going on with you and Trump? You and Trump have some kind of beef going.

BM: Oh.

JL: What happened? It seems like you two should be good friends. I can't imagine...what happened?

BM: Why should WE be good friends?

JL: I'm just teasing. Have you had him, you ever had him on your show?

BM: Of course not!

JL: No.

BM: I mean, I asked for years. And, they always lied and said: "Oh, I'll be there." And, he never showed up. I'm glad he didn't because, you know, he turned out to be such a, first of all, a terrible racist. So don't feel bad about anything I say about him. He's the one who's been tweeting mean things about me! And, you know, look, I'm not looking for a feud with Donald Trump; and I certainly only wish the best for the syphilitic monkey who does his twitter feed. But...

JL: A syphilitic monkey! Which is even worse!

BM: Well, the monkey thing, that see, I think that's what got him so mad is that we did a new rule one week that...supposed that perhaps Donald Trump had been the spawn of his mother having sex with an orangutan, because, well - I didn't just make this up - the color of his hair...and the color of an orange orangutan is the only two things in nature of the same color. So...

JL: Is that what this picture is for?

BM: Oh, there you go! I mean... Jay...

JL: I wondered what that was for today!

BM: I'm not saying it's true...

JL: Right.

BM: I hope it's not true.

JL: Right.

BM: But, unless he comes up with proof, I'm willing to...I'm willing to offer 5 million dollars to Donald Trump...

JL: Wow, wow, 5 million dollars!...

BM: If he will come...that he can donate to a charity of his choice.

JL: Charity of his choice.

BM: Hair Club for Men; The Institute for Incurable Douche-bag-ery. Whatever charity!

JL: We'll take a break. More with Bill right after this when we come back..

EXHIBIT B

02/04/2013



Scott S. Balber
T: +1 212 479 6550
ssbalber@cooley.com

HAND DELIVERY

January 8, 2013

Mr. Bill Maher
Real Time with Bill Maher
CBS Studios
7800 Beverly Boulevard
Los Angeles, CA 90036

RE: Mr. Donald J. Trump

Dear Mr. Maher:

I represent Mr. Donald J. Trump. I write on his behalf to accept your offer (made during the Jay Leno Show on January 7, 2013) that Mr. Trump prove he is not the "spawn of his mother having sex with an orangutan."

Attached hereto is a copy of Mr. Trump's birth certificate, demonstrating that he is the son of Fred Trump, not an orangutan. Please remit the \$5 million to Mr. Trump immediately and he will ensure that the money be donated to the following five charities in equal amounts: Hurricane Sandy Victims, The Police Athletic League, The American Cancer Society, The March of Dimes, and The Dana-Farber Cancer Institute.

Regards,

Scott S. Balber

Enclosure

02/04/2013

THE CITY OF NEW YORK
VITAL RECORDS CERTIFICATE

CERTIFICATION OF BIRTH

This is a certification of name and birth facts on file in the Office of Vital Records, Department of Health and Mental Hygiene, City of New York.

DATE OF BIRTH: JUNE 14, 1946

CERTIFICATE NO. 07624

BOROUGH: QUEENS

DATE FILED: 06-17-46

DATE ISSUED: 05-22-12

NAME: DONALD JOHN TRUMP ***

SEX: MALE

MOTHER/PARENT'S NAME: MARY MAC LEOD

FATHER/PARENT'S NAME: FRED C. TRUMP

Steven P. Schwartz
Steven P. Schwartz, PhD.
City Registrar

The City of New York

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N 0 0 1 5 3 4 3 1



ANY ALTERATION OR ERASURE VOID THIS CERTIFICATE

02/04/2013

EXHIBIT C

02/04/2013



Scott S. Balber
T: +1 212 479 6550
sbalber@cooley.com

HAND DELIVERY

January 16, 2013

Mr. Bill Maher
Real Time with Bill Maher
CBS Studios
7800 Beverly Boulevard
Los Angeles, CA 90036

RE: Mr. Donald J. Trump

Dear Mr. Maher:

I write to follow up on my letter to you dated January 8, 2013 sent on behalf of Mr. Donald Trump, to which you have not responded.

As you know, on January 7, 2013, you made Mr. Trump a \$5 million offer during an appearance on the Jay Leno Show. Mr. Trump accepted your offer, provided the necessary documentation and demanded payment. You have not honored your obligation.

Please ensure that payment is made within 5 business days. In the event that you wish to make payment by wire transfer, please contact me and we will provide appropriate wire transfer details.

Regards,

Scott S. Balber

01/16/2013

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): COOLEY LLP Joseph B. Woodring, Esq. (SBN 272940) 4401 Eastgate Mall San Diego, CA 92121 TELEPHONE NO.: (858) 550-6000 FAX NO.: (858) 550-6420		FOR COURT USE ONLY FILED SUPERIOR COURT OF CALIFORNIA COUNTY OF LOS ANGELES FEB 04 2013 JUDGE: _____ BY: <u>Gina Grider</u> Deputy Clerk
ATTORNEY FOR (Name): Plaintiff, DONALD J. TRUMP		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES STREET ADDRESS: 111 N. Hill Street MAILING ADDRESS: CITY AND ZIP CODE: Los Angeles, CA BRANCH NAME: Central		
CASE NAME: Donald J. Trump v. William Maher		
CIVIL CASE COVER SHEET ☒ Unlimited (Amount demanded exceeds \$25,000)	☐ Limited (Amount demanded is \$25,000 or less)	Complex Case Designation ☐ Counter ☐ Joinder Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)
		CASE NUMBER: BC 499537 JUDGE: DEPT:

Items 1-6 below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:

Auto Tort ☐ Auto (22) ☐ Uninsured motorist (46) Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort ☐ Asbestos (04) ☐ Product liability (24) ☐ Medical malpractice (45) ☐ Other PI/PD/WD (23) Non-PI/PD/WD (Other) Tort ☐ Business tort/unfair business practice (07) ☐ Civil rights (08) ☐ Defamation (13) ☐ Fraud (16) ☐ Intellectual property (19) ☐ Professional negligence (25) ☐ Other non-PI/PD/WD tort (35) Employment ☐ Wrongful termination (36) ☐ Other employment (15)	Contract ☒ Breach of contract/warranty (06) ☐ Rule 3.740 collections (09) ☐ Other collections (09) ☐ Insurance coverage (18) ☐ Other contract (37) Real Property ☐ Eminent domain/inverse condemnation (14) ☐ Wrongful eviction (33) ☐ Other real property (26) Unlawful Detainer ☐ Commercial (31) ☐ Residential (32) ☐ Drugs (38) Judicial Review ☐ Asset forfeiture (05) ☐ Petition re: arbitration award (11) ☐ Writ of mandate (02) ☐ Other judicial review (39)	Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400-3.403) ☐ Antitrust/Trade regulation (03) ☐ Construction defect (10) ☐ Mass tort (40) ☐ Securities litigation (28) ☐ Environmental/Toxic tort (30) ☐ Insurance coverage claims arising from the above listed provisionally complex case types (41) Enforcement of Judgment ☐ Enforcement of judgment (20) Miscellaneous Civil Complaint ☐ RICO (27) ☐ Other complaint (not specified above) (42) Miscellaneous Civil Petition ☐ Partnership and corporate governance (21) ☐ Other petition (not specified above) (43)

2. This case ☐ is ☒ is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:
- | | |
|--|--|
| a. ☐ Large number of separately represented parties | d. ☐ Large number of witnesses |
| b. ☐ Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve | e. ☐ Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court |
| c. ☐ Substantial amount of documentary evidence | f. ☐ Substantial postjudgment judicial supervision |
3. Remedies sought (check all that apply): a. ☒ monetary b. ☐ nonmonetary; declaratory or injunctive relief c. ☐ punitive
4. Number of causes of action (specify): One (breach of contract)
5. This case ☐ is ☒ is not a class action suit.
6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)
- Date: 2/4/2013
- Joseph B. Woodring _____

(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

Page 1 of 2

SHORT TITLE:
TRUMP v. MAHER

CASE NUMBER

BC 499537

**CIVIL CASE COVER SHEET ADDENDUM AND
STATEMENT OF LOCATION
(CERTIFICATE OF GROUNDS FOR ASSIGNMENT TO COURTHOUSE LOCATION)**

This form is required pursuant to Local Rule 2.0 in all new civil case filings in the Los Angeles Superior Court.

Item I. Check the types of hearing and fill in the estimated length of hearing expected for this case:

JURY TRIAL? ☒ YES CLASS ACTION? ☐ YES LIMITED CASE? ☐ YES TIME ESTIMATED FOR TRIAL 2 ☐ HOURS/ ☒ DAYS

Item II. Indicate the correct district and courthouse location (4 steps – If you checked "Limited Case", skip to Item III, Pg. 4):

Step 1: After first completing the Civil Case Cover Sheet form, find the main Civil Case Cover Sheet heading for your case in the left margin below, and, to the right in Column **A**, the Civil Case Cover Sheet case type you selected.

Step 2: Check one Superior Court type of action in Column **B** below which best describes the nature of this case.

Step 3: In Column **C**, circle the reason for the court location choice that applies to the type of action you have checked. For any exception to the court location, see Local Rule 2.0.

Applicable Reasons for Choosing Courthouse Location (see Column C below)

1. Class actions must be filed in the Stanley Mosk Courthouse, central district.
2. May be filed in central (other county, or no bodily injury/property damage).
3. Location where cause of action arose.
4. Location where bodily injury, death or damage occurred.
5. Location where performance required or defendant resides.
6. Location of property or permanently garaged vehicle.
7. Location where petitioner resides.
8. Location wherein defendant/respondent functions wholly.
9. Location where one or more of the parties reside.
10. Location of Labor Commissioner Office

Step 4: Fill in the information requested on page 4 in Item III; complete Item IV. Sign the declaration.

	A Civil Case Cover Sheet Category No.	B Type of Action (Check only one)	C Applicable Reasons - See Step 3 Above
Auto Tort	Auto (22)	☐ A7100 Motor Vehicle - Personal Injury/Property Damage/Wrongful Death	1., 2., 4.
	Uninsured Motorist (46)	☐ A7110 Personal Injury/Property Damage/Wrongful Death – Uninsured Motorist	1., 2., 4.
Other Personal Injury/Property Damage/Wrongful Death Tort	Asbestos (04)	☐ A6070 Asbestos Property Damage ☐ A7221 Asbestos - Personal Injury/Wrongful Death	2. 2.
	Product Liability (24)	☐ A7260 Product Liability (not asbestos or toxic/environmental)	1., 2., 3., 4., 8.
	Medical Malpractice (45)	☐ A7210 Medical Malpractice - Physicians & Surgeons ☐ A7240 Other Professional Health Care Malpractice	1., 4. 1., 4.
	Other Personal Injury Property Damage Wrongful Death (23)	☐ A7250 Premises Liability (e.g., slip and fall)	1., 4.
		☐ A7230 Intentional Bodily Injury/Property Damage/Wrongful Death (e.g., assault, vandalism, etc.)	1., 4.
☐ A7270 Intentional Infliction of Emotional Distress		1., 3.	
☐ A7220 Other Personal Injury/Property Damage/Wrongful Death		1., 4.	

SHORT TITLE:
TRUMP v. MAHER

CASE NUMBER

Non-Personal Injury/ Property
Damage/ Wrongful Death Tort

Employment

Contract

Real Property

Unlawful Detainer

A Civil Case Cover Sheet Category No.	B Type of Action (Check only one)	C Applicable Reasons - See Step 3 Above
Business Tort (07)	☐ A6029 Other Commercial/Business Tort (not fraud/breach of contract)	1., 3.
Civil Rights (08)	☐ A6005 Civil Rights/Discrimination	1., 2., 3.
Defamation (13)	☐ A6010 Defamation (slander/libel)	1., 2., 3.
Fraud (16)	☐ A6013 Fraud (no contract)	1., 2., 3.
Professional Negligence (25)	☐ A6017 Legal Malpractice ☐ A6050 Other Professional Malpractice (not medical or legal)	1., 2., 3. 1., 2., 3.
Other (35)	☐ A6025 Other Non-Personal Injury/Property Damage tort	2., 3.
Wrongful Termination (36)	☐ A6037 Wrongful Termination	1., 2., 3.
Other Employment (15)	☐ A6024 Other Employment Complaint Case ☐ A6109 Labor Commissioner Appeals	1., 2., 3. 10.
Breach of Contract/ Warranty (06) (not insurance)	☐ A6004 Breach of Rental/Lease Contract (not unlawful detainer or wrongful eviction) ☐ A6008 Contract/Warranty Breach -Seller Plaintiff (no fraud/negligence) ☐ A6019 Negligent Breach of Contract/Warranty (no fraud) ☒ A6028 Other Breach of Contract/Warranty (not fraud or negligence)	2., 5. 2., 5. 1., 2., 5. 1., 2., 5.
Collections (09)	☐ A6002 Collections Case-Seller Plaintiff ☐ A6012 Other Promissory Note/Collections Case	2., 5., 6. 2., 5.
Insurance Coverage (18)	☐ A6015 Insurance Coverage (not complex)	1., 2., 5., 8.
Other Contract (37)	☐ A6009 Contractual Fraud ☐ A6031 Tortious Interference ☐ A6027 Other Contract Dispute(not breach/insurance/fraud/negligence)	1., 2., 3., 5. 1., 2., 3., 5. 1., 2., 3., 8.
Eminent Domain/Inverse Condemnation (14)	☐ A7300 Eminent Domain/Condemnation Number of parcels _____	2.
Wrongful Eviction (33)	☐ A6023 Wrongful Eviction Case	2., 6.
Other Real Property (26)	☐ A6018 Mortgage Foreclosure ☐ A6032 Quiet Title ☐ A6060 Other Real Property (not eminent domain, landlord/tenant, foreclosure)	2., 6. 2., 6. 2., 6.
Unlawful Detainer-Commercial (31)	☐ A6021 Unlawful Detainer-Commercial (not drugs or wrongful eviction)	2., 6.
Unlawful Detainer-Residential (32)	☐ A6020 Unlawful Detainer-Residential (not drugs or wrongful eviction)	2., 6.
Unlawful Detainer- Post-Foreclosure (34)	☐ A6020F Unlawful Detainer-Post-Foreclosure	2., 6.
Unlawful Detainer-Drugs (38)	☐ A6022 Unlawful Detainer-Drugs	2., 6.

SHORT TITLE:
TRUMP v. MAHER

CASE NUMBER

	A Civil Case Cover Sheet Category No.	B Type of Action (Check only one)	C Applicable Reasons - See Step 3 Above
Judicial Review	Asset Forfeiture (05)	☐ A6108 Asset Forfeiture Case	2., 6.
	Petition re Arbitration (11)	☐ A6115 Petition to Compel/Confirm/Vacate Arbitration	2., 5.
	Writ of Mandate (02)	☐ A6151 Writ - Administrative Mandamus	2., 8.
		☐ A6152 Writ - Mandamus on Limited Court Case Matter	2.
		☐ A6153 Writ - Other Limited Court Case Review	2.
Other Judicial Review (39)	☐ A6150 Other Writ/Judicial Review	2., 8.	
Provisionally Complex Litigation	Antitrust/Trade Regulation (03)	☐ A6003 Antitrust/Trade Regulation	1., 2., 8.
	Construction Defect (10)	☐ A6007 Construction Defect	1., 2., 3.
	Claims Involving Mass Tort (40)	☐ A6006 Claims Involving Mass Tort	1., 2., 8.
	Securities Litigation (28)	☐ A6035 Securities Litigation Case	1., 2., 8.
	Toxic Tort Environmental (30)	☐ A6036 Toxic Tort/Environmental	1., 2., 3., 8.
	Insurance Coverage Claims from Complex Case (41)	☐ A6014 Insurance Coverage/Subrogation (complex case only)	1., 2., 5., 8.
Enforcement of Judgment	Enforcement of Judgment (20)	☐ A6141 Sister State Judgment	2., 9.
		☐ A6160 Abstract of Judgment	2., 6.
		☐ A6107 Confession of Judgment (non-domestic relations)	2., 9.
		☐ A6140 Administrative Agency Award (not unpaid taxes)	2., 8.
		☐ A6114 Petition/Certificate for Entry of Judgment on Unpaid Tax	2., 8.
		☐ A6112 Other Enforcement of Judgment Case	2., 8., 9.
Miscellaneous Civil Complaints	RICO (27)	☐ A6033 Racketeering (RICO) Case	1., 2., 8.
	Other Complaints (Not Specified Above) (42)	☐ A6030 Declaratory Relief Only	1., 2., 8.
		☐ A6040 Injunctive Relief Only (not domestic/harassment)	2., 8.
		☐ A6011 Other Commercial Complaint Case (non-tort/non-complex)	1., 2., 8.
☐ A6000 Other Civil Complaint (non-tort/non-complex)		1., 2., 8.	
Miscellaneous Civil Petitions	Partnership Corporation Governance (21)	☐ A6113 Partnership and Corporate Governance Case	2., 8.
	Other Petitions (Not Specified Above) (43)	☐ A6121 Civil Harassment	2., 3., 9.
☐ A6123 Workplace Harassment		2., 3., 9.	
☐ A6124 Elder/Dependent Adult Abuse Case		2., 3., 9.	
☐ A6190 Election Contest		2.	
☐ A6110 Petition for Change of Name		2., 7.	
☐ A6170 Petition for Relief from Late Claim Law		2., 3., 4., 8.	
☐ A6100 Other Civil Petition		2., 9.	

SHORT TITLE:
TRUMP v. MAHER

CASE NUMBER

Item III. Statement of Location: Enter the address of the accident, party's residence or place of business, performance, or other circumstance indicated in Item II., Step 3 on Page 1, as the proper reason for filing in the court location you selected.

REASON: Check the appropriate boxes for the numbers shown under Column C for the type of action that you have selected for this case. ☐ 1. ☒ 2. ☐ 3. ☐ 4. ☐ 5. ☐ 6. ☐ 7. ☐ 8. ☐ 9. ☐ 10.		ADDRESS:
CITY:	STATE:	ZIP CODE:

Item IV. Declaration of Assignment: I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that the above-entitled matter is properly filed for assignment to the Stanley Mosk County courthouse in the Central District of the Superior Court of California, County of Los Angeles [Code Civ. Proc., § 392 et seq., and Local Rule 2.0, subds. (b), (c) and (d)].

Dated: February 4, 2013

Scott S. Balber /w/ permission
(SIGNATURE OF ATTORNEY/FILING PARTY)
Scott S. Balber

PLEASE HAVE THE FOLLOWING ITEMS COMPLETED AND READY TO BE FILED IN ORDER TO PROPERLY COMMENCE YOUR NEW COURT CASE:

1. Original Complaint or Petition.
2. If filing a Complaint, a completed Summons form for issuance by the Clerk.
3. Civil Case Cover Sheet, Judicial Council form CM-010.
4. Civil Case Cover Sheet Addendum and Statement of Location form, LACIV 109, LASC Approved 03-04 (Rev. 03/11).
5. Payment in full of the filing fee, unless fees have been waived.
6. A signed order appointing the Guardian ad Litem, Judicial Council form CIV-010, if the plaintiff or petitioner is a minor under 18 years of age will be required by Court in order to issue a summons.
7. Additional copies of documents to be conformed by the Clerk. Copies of the cover sheet and this addendum must be served along with the summons and complaint, or other initiating pleading in the case.