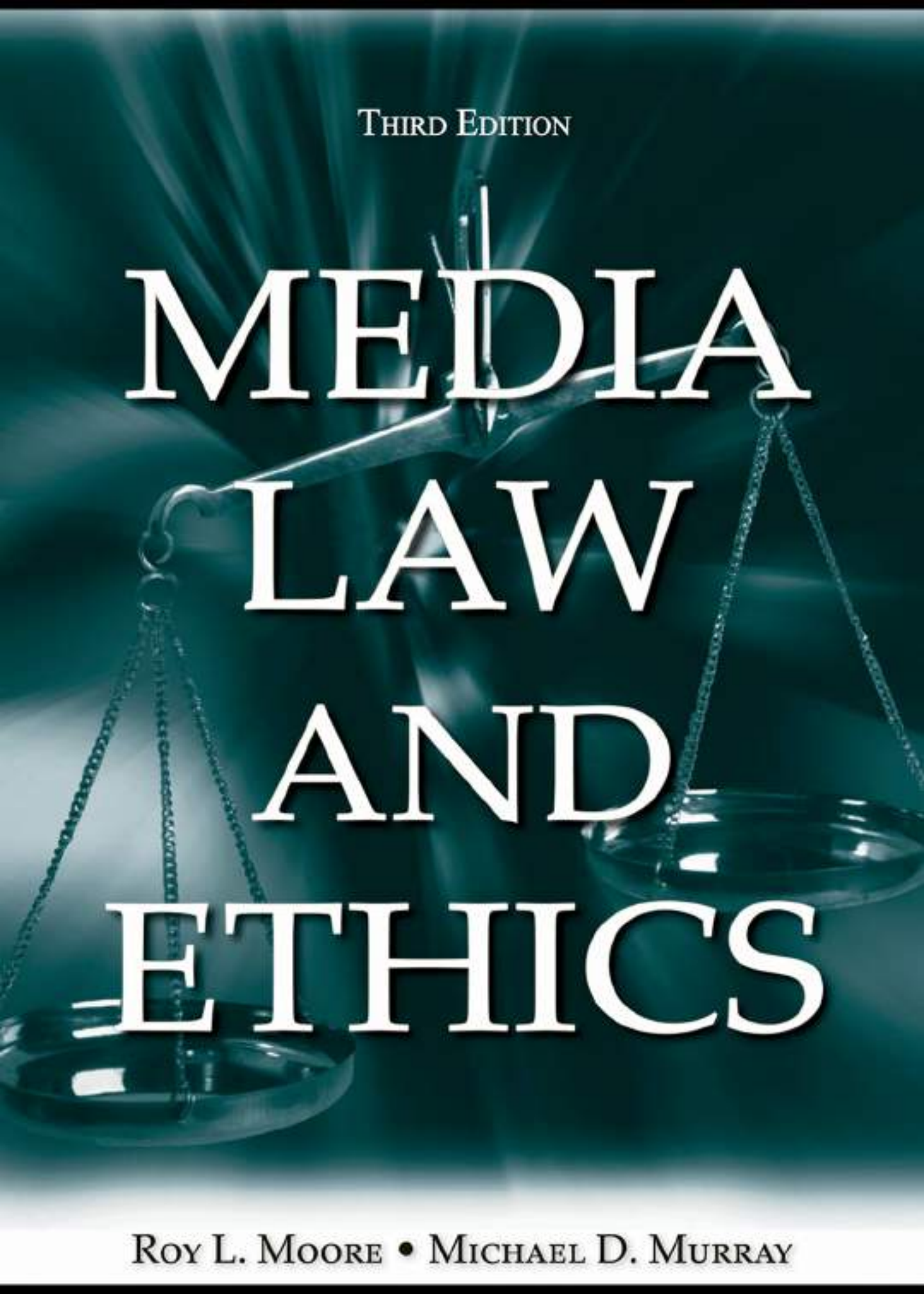
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CHAPTER

8

Libel

Good name in man or woman, dear my lord,
Is the immediate jewel of their souls;
Who steals my purse steals trash; 'tis something nothing;
'Twas mine, 'tis his, and has been slave to thousands;
But he that filches from me my good name
Robs me of that which not enriches him,
And Makes me poor indeed.

—Iago in William Shakespeare's *Othello*

The most basic tenets of newsgathering come under fire and sometimes appear to be "up for grabs" in defamation cases, especially when key elements of reporting—as in who said what to whom—come under critical scrutiny. In addition, frequently it is the most prominent members of society—public officials and public figures—who sue media defendants for libel. Complicating things is the new technology that has expanded the context—the platform, the scope, and the prospects for such charges.

In March 2005, a BBC-TV presenter (a role roughly equivalent to anchor in the United States), Anna Richardson, sued California Governor Arnold Schwarzenegger and two of his aides for comments they made regarding her charge that the former movie actor groped her in late 2000. Richardson claimed the three tried to ruin her reputation by dismissing her assertions that Schwarzenegger had touched her inappropriately at a press event and alleging that she had encouraged this behavior. Making the claim even more compelling as a contemporary libel case was the fact that the story was reported on the Internet, placing it in an international context. Jurisdictional questions arose over whether Schwarzenegger could be a defendant in a British court case, because Richardson also made the claim that she was libeled in an on-line article in the *Los Angeles Times*. A British appeal court ruled the governor's spokesperson could be served with libel proceedings abroad, so the case raised the specter of at least two well-known figures embroiled in an international

dispute involving their good names, brought about in large part through still evolving on-line venues.[1]

The next month MSNBC's Joe Scarborough lambasted Schwarzenegger on his program, saying: "You know, this guy has been in so much trouble. He's got sagging poll numbers. He's got political groups criticizing his every move. And now the governator is making all his enemies' job easier. According to the *London Evening Standard*, Arnold recently went on Howard Stern's radio show and offered his theory on how to end premenstrual syndrome, saying—quote—'If we get rid of the moon, womens [sic], whose menstrual cycles are governed by the moon, will not get PMS. They will stop bitching and whining." The problem from a reporting and ethical point of view was that Schwarzenegger made no such statements. *Washington Post* columnist Anne Schroeder followed up by noting an impersonator on the Stern radio program apparently said those things. She encouraged Scarborough to clarify the mistake. The governor's spokesperson, Margita Thompson, called on news outlets to perform due diligence in the sourcing of information.[2]

A month later, former New York Governor Mario Cuomo settled a $15 million libel suit he initiated against the author and publisher of a book, *The Best Democracy Money Can Buy*. The book's author, Greg Palast, and the publisher, Plume, a unit of Penguin Putnam Inc., were named in the suit. The book alleged that Cuomo had improperly influenced a federal judge, convincing the judge to toss out a verdict against a utility company that allegedly lied about the cost of a nuclear power plant it wanted to build. In the end, the author wrote a letter to Cuomo clarifying his meaning.[3]

In another instance involving celebrity status that began as a California state law defamation action, famed O.J. Simpson attorney Johnnie L. Cochran, Jr. sued a former client and others who, according to the state trial court, falsely claimed that Cochran owed the client money. The defendants also picketed Cochran's office with signs that Cochran claimed included insulting and defamatory statements. Before he died, Cochran also alleged that picketers chased him while chanting threats and insults, all aimed at forcing him to pay the former client money to stop the activities. Without a court order, every indication was that this behavior would continue.

The trial court granted Cochran's request for a permanent injunction against former clients Ulysses Tory and Ruth Craft, banning such picketing as well ordering the defendants to stop making oral statements about the lawyer and his law firm in any public setting. The California Court of Appeal affirmed the trial court decision. The U.S. Supreme Court granted certiorari and heard oral arguments in March 2005. One week later, Cochran died. At Cochran's attorney's request, Cochran's widow was then substituted as the respondent in the case. In *Tory v. Cochran* (2005),[4] the U.S. Supreme Court ruled 7 to 2 that Cochran's death did not make the case moot because the injunction remained in effect under state law until a court overturned it. The Court went on to note that Cochran's death negated any need to rule on any basic First Amendment issues in the case. The Court said:

> 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.[5]

Some First Amendment supporters hoped that the Supreme Court would rule against Cochran on the ground that prior restraint could not be imposed on potentially defamatory statements and that such statements can be punished only after the fact. However, the Court found a way around such a ruling due to Cochran's death.[6]

Another area in which professional journalists provide the most unique and potentially important service to readers, viewers, and listeners is in conducting investigations. However, the results of their investigative work have come under increased scrutiny in cases in which their sources have sought to remain anonymous. In 2005, Ohio's largest daily newspaper, the *Cleveland Plain Dealer*, withheld publication of two major investigative articles because they were based on illegally leaked documents. The paper's lawyers advised against publication for fear of culpability in the event that reporters were forced to divulge their sources. This legal advisory occurred against the backdrop of the jailing of *New York Times* reporter Judith Miller for refusing to divulge the identity of a confidential source. The source, Vice President Cheney's Chief of Staff, Lewis "Scooter" Libby, later gave permission to be identified and Miller was released from jail. Previous to that, a *Times* magazine reporter, Mathew Cooper, was released by a source from the promise of confidentiality in another case in which this reporter was spared from doing time in jail.[7]

These kinds of complex issues are no longer unique. The modern media age with its new information technology has led to concerns about around-the-clock reporting. These concerns include the selection and placement of stories and photos for on-line news sources and the difficulty of handling personal tragedies that are televised and then endlessly repeated. An example of how such deadline pressures can come into play involved prominent Detroit journalist Mitch Albom, who authored popular books including *Tuesdays with Morrie*. Albom was accused of fabricating the attendance of two athletes at an event that they had promised to attend, but were unable to do so. One of the oddest aspects was that so many people came to Albom's defense even though he admitted making up the story to meet his deadline.[8] In other instances, the issue of what constitutes news is also open to interpretation.

In recent years there has been an increased effort to force bloggers to identify themselves and their sources. Some experts argue that independent on-line news providers, while maintaining status as journalists, do not gather information in the traditional news gathering sense. Media law experts have insisted that bloggers, while unorthodox and inventive in their methodology, should be held accountable for libelous content they create. Experts also argue that any fictional material must be clearly labeled as fiction.

Actors and film celebrities are often involved in the most prominent libel cases in the news. A now historic case involving television comedian Carol Burnett revolved around a story published in the tabloid *National Enquirer* alleging that she had gotten into an argument in a Washington, D.C., restaurant with former U.S. Secretary of State Henry Kissinger. The allegations were found to be false and a Los Angeles jury awarded Burnett $1.6 million. An appellate court later reduced the award to $200,000, which Burnett used to create a scholarship for journalism students.[9]

In 2005, controversial film director Roman Polanski won a libel case in a British court against the magazine *Vanity Fair*. The magazine published an article in 2002 that said that Polanski had propositioned a woman in a New York City restaurant. The article claimed this event happened soon after his wife, actress Sharon Tate, was murdered by Charles Manson's cult followers in the highly sensational case, later the subject of the popular book *Helter Skelter*. Polanski testified from Paris that he had been libeled "for the sake of a lurid anecdote." After the trial, *Vanity Fair* editor Graydon Carter reflected on some international aspects of the case, saying that he found it amazing that someone who lived in France could sue a magazine published in America in a British courtroom. There was also speculation by Carter that Polanski testified from Paris because of fear that if he entered Britain he could be extradited to the U.S. to face child sex charges made years earlier. *Vanity Fair* was ordered to pay Polanski 175,000 pounds sterling.[10]

Athletes are also involved in many lawsuits and claims about their bad behavior off the field or basketball court. They often dominate news coverage. Pick up a sports review list of top performers in any area of competition and note the large number of lawsuits that some of these individuals attract. Interestingly, that aspect of their celebrity status is often brought up in their defense. Baseball's Bo Jackson, a stellar Chicago athlete—and former player for the White Sox, filed suit in 2005 over a story challenging statements by a "dietary expert" that he had lost his hip due to anabolic steroid use. Jackson called the statement appearing in two California newspapers "hitting below the belt," and added: "If you can call Southern cooking—corn bread, collard greens, stew, fried chicken—if you call that steroids, I'm guilty. Anything else, I don't need it."[11]

In the same year, the Seventh Circuit U.S. Court of Appeals in Chicago dismissed a libel lawsuit revolving around a *Chicago Sun-Times* columnist's statements concerning basketball star Michael Jordan's former mistress. The column said that his mistress was working in an "old profession." The court said that could be construed to have innocent meaning, not prostitution, but simply demeaning oneself for money. Los Angeles Lakers basketball player Kobe Bryant was also the subject of a protracted public and widely reported legal battle in which he was charged with rape. The result was much second guessing about the nature and extent of the coverage. There is a long history of defining, addressing and documenting legal issues involved in such cases.[12]

In 1971 William L. Prosser, who until his death was considered the country's foremost authority on the law of torts, published the last edition of his hornbook.

A *hornbook* explains fundamental principles in a given field of law, and is useful for anyone who wants an overview of an area such as torts. Both appellate and trial courts occasionally refer to "hornbook law" to show that a legal principle has been generally accepted. In *Law of Torts*, Prosser noted:

> It must be confessed . . . there is a great deal of the law of defamation that makes no sense. It contains anomalies and absurdities for which no legal writer ever has a kind word, and it is a curious compound of a strict liability imposed upon innocent defendants, as rigid and extreme as anything found in the law. . . .[13]

Little has changed in the decades since Prosser published these statements even though the U.S. Supreme Court alone has issued dozens of opinions on defamation and thousands of libel trials and lower appellate court decisions have been published. The law of defamation continues to defy logic even with the libel treatment that arrived with the *New York Times v. Sullivan* decision by the Supreme Court in 1964.[14] Some rules have been established—enough for hornbooks. However, defamation law is complicated, confusing, cumbersome, and often unsettling for journalists.

Research has found a potential "chilling effect" of libel suits on the media. Studies consistently show that even the best newspapers, broadcast stations, and networks have lost major libel suits, some to the tune of millions of dollars. They also show that threatened and actual libel suits can "chill" large and small media outlets into being less aggressive and overly cautious in their reporting and editing and also that public perception of libel is inaccurate, in terms of understanding concepts including actual malice and pleading truth as a defense.[15]

Libel seminars are common at meetings of trade associations such as the Newspaper Association of American, American Society of Newspaper Editors, Investigative Reporters, and Editors, Inc., National Association of Broadcasters, Society of Professional Journalists and Women in Communications, Inc. These seminars are widely attended because journalists and publishers see the writing on the wall as plaintiffs win libel trials and the stakes get higher for corporate owners.

According to figures compiled by the Media Law Resource Center (MLRC), a nonprofit organization that monitors libel cases throughout the country, news organizations are sued less frequently for libel than in the past. In addition, they are often winning the cases. The success rate of media defendants in libel cases reached record highs a decade ago. At one point, 82.3 percent of libel cases were dismissed with summary judgments, and 83.6 percent of those that did go to trial were decided in favor of the defendants. Current studies show declines in the number of libel trials and the chance of a defendant having a libel verdict in favor of the plaintiff overturned on appeal or having a verdict in the defendant's favor (about 81.6 percent, a drop from recent years).[16]

According to MLRC's 2005 Report on Trials and Damages, the percentage of "wins" by media defendants continues to rise while the total number of such trials per year is on the decline. There were a dozen trials against media defendants in 2004 and the defendants won seven trials. In trials won by plaintiffs, the average award

was $3.4 million. In the two decades since the MLRC started to keep statistics, the number of trials has declined. Media defendants have fared best against plaintiffs classified as public figures, winning more than 40 percent of those cases.[17]

With media victories in libel cases likely, why aren't First Amendment attorneys uncorking bottles of champagne? One major reason is that megabuck awards can still hit a media company hard and awards by juries against the media can extend over many years, thus tying up company resources. In one of the all-time leading awards in media libel, a jury awarded $58 million in damages to Vic Feazell, the former district attorney for McLennan County, Texas, against Dallas television station WFAA and reporter Charles Duncan in 1991. Feazell claimed he had been libeled in an earlier investigative series that accused him of taking bribes to settle drunk-driving charges. Feazell was later indicted on bribery and racketeering charges but was subsequently acquitted on all counts.[18]

That award broke a previous record of $34 million awarded by a jury against *The Philadelphia Inquirer* to Richard A. Sprague, a former first assistant district attorney in Philadelphia.[19] The $34 million award included $2.5 million in compensatory damages and $31.5 million in punitive damages based upon a series of editorials and articles written by a reporter who had been successfully prosecuted by the attorney for illegal wiretapping a year earlier and had promised to "get" the prosecutor.[20] Twenty-three years after the articles and editorials appeared, the *Inquirer* settled out of court. Two months after a $58 million jury award against the WFAA-TV station owner, the A. H. Belo Corporation announced it had reached an out-of-court settlement.

A seven-person federal jury also sent shock waves throughout the media in 1997 when it awarded a defunct bond brokerage firm, Money Management Analytical Research (MMAR) of Houston, a record $222.7 in a libel suit against the *Wall Street Journal*.[21] The award included $22.7 million in actual damages and $200 million in punitive damages. The jury also awarded $20,000 in punitive damages against the reporter, Laura Jereski. The story, "Regulators Study Texas Securities Firm and Its Louisiana Pension Fund Trades," implied that MMAR may have defrauded the Louisiana State Employees Pension Fund and that the company's founders had earned tens of millions of dollars in profits.[22] The jury determined that five of eight statements at issue were false, including that the firm spent $2 million in one year for limousines, that it kept losses secret and used deceptive or fraudulent information to get the state pension fund to buy securities.[23] The company went bankrupt less than a month after the story appeared. Jereski had interviewed more than thirty sources for the story, on which she had worked for four months.[24] The judge in the case threw out the $200 million award for punitive damages because he said the plaintiffs had not demonstrated the article was printed with actual malice. However, he allowed the $22.7 million in compensatory damages, along with interest and court costs, to stand.[25]

The other fear is that million dollar awards are not limited to "big" media. In 2003, juries in two different states awarded six-figure sums—$1.5 million combined in libel cases against small newspapers in Massachusetts and Minnesota.[26] The *Boston*

Phoenix published allegations of child abuse against a county prosecutor and lost the case to the tune of $950,000. A small Carver County, Minnesota newspaper, the *Chanhassen Villager*, implied a plot against a former administrator existed due to a grudge, the result of editorials that ended up costing $625,000 in damages in state court. An attorney for the Minnesota Newspaper Association maintained that the size of the award could have bankrupted two-thirds of the newspapers in that state.[27]

A jury awarded a former county judge executive $1 million against a small weekly paper in Kentucky. The *Russell Springs Times Journal* printed three editorials criticizing the official's handling of finances in office. He lost re-election by one vote. Damages were $160,000 for lost wages (four years of salary), $340,000 for personal hardship, and $500,000 in punitive damages. The plaintiff had to demonstrate actual malice on the part of the newspaper since he was a public figure. It focused on his contention that the editorials were part of a plan to remove him. The decision was appealed to the Kentucky Court of Appeals which overturned the verdict. On further appeal the Kentucky Supreme Court upheld the Court of Appeals' decision. The plaintiff filed a second libel suit against the paper, its editor, and publisher which was held in abeyance by the trial court judge.[28]

In *Robert R. Thomas v. Bill Page, et al.*, a sitting justice of the Illinois Supreme Court (also a former Chicago Bears football player) sued the *Kane County (Ill) Chronicle*. Kane County is outside Chicago in the western suburb of Geneva. Thomas sued a columnist, an editor, and the paper's parent division because of two columns he alleged had defamed and placed him in a false light. The columns questioned the judge's ethics in decisions he had made, implying that he acted more like a politician than a judge. This was of special concern because Illinois Supreme Court justices are elected to office.[29] As a result, six Illinois Supreme Court justices later requested to quash subpoenas for documents related to this libel suit. The justices also asserted their belief that they were exempt from a standard procedure of listing documents they believed to be privileged.[30]

In a case involving investigative reporting about office holders in Seattle, Washington, the plaintiffs alleged that KING-TV aired two broadcasts that were defamatory, invaded their privacy, and placed one plaintiff in a false light. The first story repeated allegations about one plaintiff making personal use of city equipment and rental cars as well as unnecessarily scheduling overtime. The story concluded with an attempt to interview her on a public street, asking her whether she owed the city money. The news broadcasts centered on the charges specified and a trip to Las Vegas by one plaintiff. The station's report claimed that the plaintiff attended very little of a professional meeting that was the supposed purpose of the trip, but instead spent time gambling and shopping.[31]

The defendants were subject to a variety of claims in this case including alleged violations of the federal Racketeer Influenced and Corrupt Organizations (RICO) Act, as well as civil rights violations. The plaintiff's defamation claims were dismissed by the trial court judge. The court cited lack of specificity. The RICO claims were dismissed as were also false light and emotional distress claims against one

plaintiff. The court denied KING's motion to dismiss other claims. The defendant's motion to dismiss a request for damages was granted.[32]

The *Boston Globe* appealed a $2.1 million verdict that the paper and one of its reporters were ordered to pay to a medical doctor who maintained that she was libeled by a story about a *Globe* columnist who was killed by an accidental chemotherapy overdose. The doctor sued the *Globe* in 1996, arguing that she was erroneously identified in the article. In *Ayash v. Dana-Farber Cancer Institute and Others*, a trial judge found the *Globe* and its reporter liable in 2001, entering a judgment to punish them for refusing to comply with a court order to disclose confidential sources. The jury decided only on the amount of damages, holding the newspaper liable for $1.6 million and the reporter for $420,000. The doctor wanted the identities of the confidential sources to demonstrate that privacy had been invaded.[33]

In cases involving health matters, the financial stakes can be especially high. Philip Morris Companies, Inc. once filed a $10 billion libel suit against the American Broadcasting Company for a story on ABC-TV claiming the tobacco industry spiked cigarettes with extra nicotine so smokers would get addicted, thus increasing tobacco sales. Afterward, R.J. Reynolds Tobacco Co. filed a similar suit for the same segment. Philip Morris filed its suit in state circuit court in Virginia, and subpoenaed material from telephone companies, a rental car firm, and two credit card issuers, trying to track the identity of ABC's source of information, code-named "Deep Cough."[34]

ABC, in turn, filed a motion for a protective order to quash the subpoenas, but the trial court judge in the case turned down the network's request. He ruled that the subpoenas were not protected by qualified privilege, as ABC argued, and thus the subpoenas were valid. Both suits were settled out of court. The network made an apology and agreed to settle to avoid further litigation. ABC paid the plaintiffs' legal fees and expenses, believed to be more than $2.5 million. At the same time three TV stations quit carrying anti-tobacco commercials placed by a state health services department after being told by the R.J. Reynolds Tobacco Co. they might be sued for libel.[35]

Other defamation suits of note have included an early $100 million suit filed by Michael Jackson against a syndicated TV show, "Hard Copy," and Los Angeles radio station KABC-AM for broadcasting a story about a 27-minute videotape allegedly showing Jackson engaging in sexual romps with a 13-year-old boy. This occurred long before Jackson was accused and acquitted of similar allegations in 2005. Another was a $100 million libel suit filed by the Boston Celtics against the *Wall Street Journal* for a front page story in which several physicians averred that star Reggie Lewis could have died from cocaine abuse rather than a heart condition. In the wake of the O.J. Simpson trial and charges against Michael Jackson much later that resulted in acquittals, professional athletes and entertainers became regular targets for special press coverage.[35]

Documentary filmmaker Michael Moore was hit with a libel suit filed by the brother of Oklahoma City bombing conspirator Terry Nichols (currently serving

two life sentences without parole in the bombing that killed 168 people). Nichols' brother James maintained that Michael Moore's 2002 film, *Bowling for Columbine,* accused him of being an accomplice in the bombing through statements that were "half-truths or total untruths." Among items in question was one phrase in the film alleging federal agents couldn't "get the goods" on James Nichols.[36] The implication was that the terrorist's brother was involved, but somehow able to evade prosecution. Moore and his attorneys took the position that filmgoers understood that statements in his films are opinions—not facts, and therefore should be fully protected by the First Amendment.

Many libel cases involve the First Amendment defense. One case involved a media figure operating behind the scenes. Lou DiBella, a former executive with Home Box Office (HBO) sued Bernard Hopkins, who became middleweight boxing champion of the world. DiBella had left HBO but retained several dates for fights that he had arranged. Before leaving, DiBella had discussions with Hopkins about representing and marketing him in the future. They agreed by way of a handshake and Hopkins agreed to pay DiBella $50,000 as an advance fee for future services, which he later paid. Once DiBella left HBO, he began to advise Hopkins. The previously agreed-upon fight dates were filled by Hopkins. These were all fights he later won.[37] In the aftermath, Hopkins stopped communicating with DiBella and was interviewed by Steve Kim for the online boxing publication, MaxBoxing.com, in which Hopkins said:

> Understand, every time I fought (the past couple of years), Lou DiBella got paid, even when he was with HBO, which is f**king wrong. What I'm saying is that the bottom line is, the Syd Vanderpool fight, should an HBO employee accept $50,000 while he's still working for HBO? . . . So if they want the cat out [of] the bag, then let's let the f**king cat out of the bag. . . .[38]

Hopkins made these and other allegations of a relationship between the fight dates and business dealings. He repeated them in an article by Ron Borges in the *Boston Globe* ("Hopkins Hops Around") on December 24, 2001, in another article by Bernard Fernandez, published January 10, 2002 in the *Philadelphia Daily News,* and later on ESPN Radio. DiBella sued Hopkins for libel. A jury returned a verdict in DiBella's favor based on Hopkins' original online interview with Steve Kim. On appeal, DiBella challenged the trial court judges' jury instructions with respect to the burden of proof necessary to show libel.[39]

In his cross appeal, Hopkins claimed the libel judgment violated his freedom of speech, that DiBella failed to prove falsity and actual malice, and that there was inconsistency based on the fact that the assertions appeared three times in the media but only one was shown to be libelous. Libel claims in this case arose under New York law. The jury did not find other dissemination of allegations from other sources libelous, though Hopkins undoubtedly made them. The judgment in *Lou DiBella and DiBella Entertainment v. Bernard Hopkins* was upheld by the second Circuit U.S. Court of Appeals. This dispute arose between individuals—with the mass media caught in the middle.[40]

When it comes to the status of individuals in libel and defamation cases, the attention has by no means been limited to professional sports. In 2005, a judge in Alabama threw out claims in a defamation suit based on the public figure status of two University of Alabama assistant football coaches. A $60 million lawsuit had been filed initially against the NCAA in December 2002, claiming the association had defamed the coaches when it implicated them in a recruitment scandal that led to the loss of 21 student scholarships and 5 year's probation for the program. The state trial court judge in two separate rulings held that both men were public figures.[41] The message in the rulings was clear—coaches who attract media attention and then are subsequently associated with scandals at former institutions will be considered public figures for purposes of a libel suit and thus required to demonstrate actual malice. A libel suit filed by one of the coaches against *Time, Inc.* was later settled out of court.[42]

High-profile cases sometimes involve individuals who initially welcomed publicity, but the attention resulted in disclosure of unsavory personal matters for public consumption. In one case in Louisville, Kentucky, a former TV morning show host sought $2.7 million in damages, claiming that she had been defamed by her former boyfriend, a former radio host, by malicious on-air comments he made in 2003 after they stopped dating. The radio host, John Ziegler, called former WDRB television morning show host Darcie Divita "the devil" and made additional comments regarding breast implants, personal hygiene, and undergarments. Divita's attorney called Ziegler "a spurned suitor." The radio host was subsequently fired from WHAS Radio, and he relocated to Los Angeles. The plaintiff relocated as well. The verdict in the case, which took the jury only two hours to decide, cleared Ziegler on all claims. Although members of the jury expressed concern about the nature of the expressions that had been made on the air, they were reluctant to find that the defendant in the case acted with actual malice.[43]

The fact remains that libel suits make up a disproportionate share of litigation against the mass media, although invasion of privacy and other torts appear to be growing. Until recent years, the number of megabuck verdicts appeared to be increasing, with juries determined to punish the press for perceived transgressions. Every journalist must be familiar with the basic principles of libel, and know how to avoid libel suits and to successfully defend those that still occur despite the best intentions.

Origins of Defamation

Defamation, which includes both libel and slander, is very old. It is difficult to determine exactly how old, as evidenced by the different origins ascribed by experts to each of these two causes of action. Prosser traces modern-day defamation to 16th and 17th century England when the ecclesiastical and common law courts battled over jurisdiction in slander cases.[44] Later, political libel or sedition developed in the notorious Star Chamber cases as printing became prevalent. Columnist Michael Gartner traced *libel* to the Latin *libellus,* meaning "little book" to signify pamphlets that were published

to broadcast rumors about the famous or the not-so-famous during the Elizabethan era.[45] Prominent First Amendment attorney Bruce Sanford notes that Anglo-American libel can be traced to remedies provided to defamed individuals as early as pre-Norman times, with the church becoming the first major arbiter.[46]

Four types of libel developed in England—sedition, defamation, blasphemy, and obscene libel.[47] *Sedition* or *seditious libel*, as discussed *infra*, was and still is criticism of the government and/or government officials. From the mid-15th century until its abolition by Parliament in 1641, the English Star Chamber secretly tried without a jury and imposed torture on individuals who spoke ill of the monarchy. The fate for committing an offense may have been worse than death. In 1636, William Prynn was pilloried in stocks in the public square, had his ears cut off, was fined 10,000 pounds, and then was imprisoned for life for denouncing plays and other activities in a book that was deemed to criticize the queen by inference.[48] John Twyn suffered an even more horrible demise in 1663 for advocating that a ruler should be accountable to the people. He was sentenced by the judge to first be hanged by the neck then, while alive, cut down and castrated, after which his intestines were taken out and burned while he remained alive. Finally, he was to be beheaded and quartered.[49] No mention was apparently made about what was to be done if he died before he had a chance to see his body parts removed!

Defamation, also known as *private libel* and handled at first by the ecclesiastical courts, gradually became a common law offense with requirements somewhat similar to those of libel and slander today. *Blasphemy* or *blasphemous libel* was principally criticism of God, Christ, the church, or church leaders. It is nonexistent today in the U.S. but is still alive and well in some countries and caught many individuals in its vise until the mid-19th century in England. Finally, *obscenity* or *obscene libel* was not a concern until about the early 19th century with the spread of Methodism. However, as *Regina v. Hicklin* (1868) illustrates,[50] obscenity was suppressed by the mid-19th century in both England and the United States, which adopted the *Hicklin* rule until 1957.[51]

Libel versus Slander

With the proliferation of printing, *defamation,* or information that tends to subject an individual or entity such as a corporation to public hatred, contempt, or ridicule, involved a new factor—the multiplying of harm to one's reputation through widespread dissemination via publication. *Slander* (oral defamation) and libel (printed defamation) became separate torts with somewhat different rules. The reasons for this distinction were mired in historic inconsistencies, but the distinction continues. Some states, for example, treat broadcast defamation as slander, although others follow the recommendation of the Restatement (Second) of Torts that print and electronic media be treated the same—that is, that both be considered libel.[52]

The distinction between libel and slander is very important because in most jurisdictions *special damages* must be demonstrated by plaintiffs before they can recover any damages unless the slander falls into one of four categories: (a) imputation of

crime; (b) imputation of a loathsome disease such as leprosy or a venereal disease; (c) imputations affecting one's trade, business, profession or calling; and (d) imputation of unchastity. Special damages are specific pecuniary losses or what are commonly called "out-of-pocket" expenses. They are difficult to prove in slander cases, but they do not have to occur if slander fits into one of the four traditional pegs.

Except for broadcasting in a few jurisdictions, slander is not a major problem. Broadcasters generally do not object to falling into the slander category because they have much greater protection against slander than libel. A few jurisdictions differentiate slander and libel in other ways. Georgia, for example, characterizes broadcast defamation as "defamacast."[53] Kentucky[54] and some other states treat both print and broadcast defamation as slander but have somewhat different rules for defamation in the two types of media.[55] Most distinctions have no real practical effect unless it is a matter of categorizing one as slander and the other as libel.

Libel Per Se versus Libel Per Quod

Some courts have traditionally made a distinction between *libel per se* (statements defamatory on their face) and *libel per quod* (statements not defamatory on their face but defamatory with reference to extrinsic facts or circumstances). These distinctions are less than clear at common law and in state statutes. However, according to the general rule, special harm must be shown for a plaintiff to recover for libel per se but this does not have to be demonstrated for libel per quod. Even this distinction has become blurred over the decades and centuries. Attorney Robert Sack points out, "In New York, the state of case law [on libel per se versus libel per quod] is so confusing and contradictory that it is impossible to be certain what the rule is."[56] New York is not alone. According to Sack, at least nine states[57] appear to have rules that all libelous statements are treated as libel per se, thus not requiring proof of special harm.[58]

There have been thousands of libel per se cases. Some resulted in awards for plaintiffs; others did not. ESPN sports TV network once broadcast a retraction after one of its announcers said that a particular professional baseball pitcher transferred from a private university to a community college because he "failed his grades."[59]

In *Bryson v. News America Publications Inc.* (1996),[60] the Supreme Court of Illinois held that a story entitled "Bryson" in *Seventeen* magazine was libelous per se because it characterized a woman as a "slut." Under Illinois law, one of the categories in which a written or spoken statement is defamatory per se is the false claim that a person has engaged in "fornication or adultery."[61] The article was labeled "fiction" and used only the plaintiff's last name (Bryson), but the Illinois Supreme Court noted that the name "is not so common that we must find, as a matter of law, that no reasonable person would believe that the article was about the plaintiff."[62] The plaintiff's name was Kimberly Bryson, and she and the defendant, Lucy Logsdon, had attended high school together. The article's namesake was a native of southern Illinois, the same area as the plaintiff, who claimed there were 23 other similarities between her and the fictional character.

These examples show how libel on its face can potentially get a publication or an individual into trouble. First Amendment attorney Bruce Sanford compiled a list of what he termed "red flag" words that can lead to a suit if improperly handled: *fascist, booze-hound, fawning sycophant,* and *stool pigeon.*[63] Many of these are prime illustrations of libel per se.

Libel per quod can be troublesome for journalists because words do not automatically throw up a red flag. Publishing the statement that a woman is pregnant is not defamatory on its face. What if she is elderly? Ninety-six-year-old Nellie Mitchell won $650,000 in compensatory damages and $850,000 in punitive damages from the *Sun* after a jury trial in U.S. District Court, Harrison, Arkansas.[64] The supermarket tabloid published her picture with an article in which it said a 101-year-old Australian newspaper carrier quit her route because a millionaire customer had gotten her pregnant. A *Sun* editor admitted during the trial that the story had been fabricated but Mitchell's photo was used because he assumed she was dead. The *Sun's* attorney argued that Mitchell was not libeled because "most reasonable people recognize that the stories [in the *Sun*] are essentially fiction."[65]

What about the discrepancy in age or false assertion that she lived in Australia? The last two facts, while false, are probably not defamatory because they would probably not harm one's reputation unless special circumstances existed—such as falsely indicating that a married man lived in Australia when his friends, acquaintances, and family knew his spouse was living elsewhere. At trial, these extrinsic facts and circumstances are relevant in showing information was false and defamatory even though they were not widely known nor even known by the defendant. If the jurisdiction requires a showing of special damages, as some states do, before recovery by the plaintiff or if the libel per quod does not fall within one of the special categories under slander, a suit would be unsuccessful. In general, such damages need not be demonstrated.

Trade Libel

Most libel suits involve people, companies, or organizations, but a growing number involve product disparagement or *trade libel,* which requires proof of four elements: (1) publication of a false statement that disparages the quality of a product; (2) actual malice (reckless disregard for truth or knowledge of falsity); (3) intent to harm, awareness of the likelihood of harm or a reasonable basis for awareness; and (4) special damages.[66]

A prominent, now historic, case of trade libel is *Engler et al. v. Lyman et al.* (1998).[67] Top-rated talk show host Oprah Winfrey, her production company, and a guest on her April 16, 1996 syndicated program were sued for $6.7 million by Amarillo, Texas, cattle rancher Paul Engler and Cactus Feeders, a Texas cattle producer. The suit was filed after Howard Lyman, a vegetarian and director of the Humane Society's "Eating with a Conscience Campaign," and Winfrey made negative comments about beef. Lyman claimed on "The Oprah Winfrey Show" that 100,000 cows die for no apparent reason and are ground up and fed to other cows. If even one of the dead cows had "mad cow disease,"

thousands of other cows might be infected as a result, according to Lyman. Other guests on the show, appearing before Lyman made his comments, played down the risks of transmittal of the disease to humans through beef.

Mad cow disease, or bovine spongiform encephalopathy, became a major health issue in Great Britain beginning in the 1980s and is still a concern there as well as in the United States. There were reports that the disease, which destroys the brain, might be linked to illness in humans. The disease is thought to be picked up by cows through feed containing ground-up sheep parts.

After Lyman commented, Winfrey exclaimed, "It has just stopped me from eating another burger." After the show, cattle prices fell from 62 cents a pound to 55 cents, and Engler claimed he lost $6.7 million.[68] Engler sued under a Texas statute. At the time, Texas was one of 13 states with what became known as "veggie libel" statutes because they allow a company, individual, or industry harmed as a result of disparaging comments made about a perishable food product to recover damages. Winfrey moved her program to Amarillo, Texas where the case was tried by a jury in federal court. After 5½ hours of deliberation, the jury vindicated Winfrey, finding that no harm occurred because she did not defame cattle producers by providing false information. The Third Circuit U.S. Court of Appeals upheld the decision in 2000 and Winfrey's reputation for fairness was intact although one of the appeals judges wrote that she believed cattle to be covered by the law.[69]

States began considering veggie libel laws after CBS, the National Defense Resource Council, Fenton Communications, Inc., and three CBS network affiliates successfully defended a suit filed by 11 Washington State apple growers who sued after a report by "60 Minutes" that claimed Alar, a chemical growth regulator sprayed on apples, could cause cancer. The report entitled "A is for Apple" called Alar the "most potent cancer-causing agent in our food supply." It did not mention apple growers nor refer to Washington or Washington apples per se. According to growers, it (a) implied "red apples were poisonous, dangerous or harmful for human consumption," (b) did not "distinguish . . . between red apples that were Alar-treated and those red apples that were untreated," and (c) failed to include "advocates for the healthy, safe nature of all red apples." The apple growers contended they lost more than $130 million as a result of the broadcast.

The U.S. District Court judge denied the defendants' motion to dismiss. The defendants argued that the report was not "of and concerning" the plaintiffs—i.e., it did not identify the plaintiffs, but the judge held that the "of and concerning" rule did not apply because the suit was a product disparagement suit, not traditional defamation. The district court held the broadcast "was 'of and concerning' all apples" since it "clearly targeted every apple in the U.S." Thus every apple grower would have standing to sue. After a year of discovery including depositions from experts on both sides, CBS successfully sought a summary judgment. The court ruled that the claims in the program could not be proven false and that the defendants should be able to reasonably rely on government data.

In *Auvil v. CBS "60 Minutes"* (1995),[70] the Ninth Circuit U.S. Court of Appeals affirmed the district court decision, saying plaintiffs in the case "failed to raise a

genuine issue of material fact as to the falsity of the broadcast." In *Communications Lawyer*, the CBS attorneys noted: "For all the cosmic questions posed, the ultimate issue in the Alar case really was whether optimists can recover for product disparagement against those who publicize the views of pessimists."[71]

First Amendment experts generally view such laws as unconstitutional. Ironically, Washington State had no such statute at the time of the CBS broadcast so the plaintiffs had to rely on common law. Professor Robert D. Richards of Pennsylvania State University noted, "If lawmakers are concerned about the reputation of locally grown produce, they should concentrate their efforts on regulating the types of pesticides used rather than the reports about how such chemicals potentially harm consumers."[72]

Another case—this one in Britain—attracted a lot of media attention because McDonald's Corp. spent an estimated $16 million to win a trade libel suit against two vegetarian activists. They handed out pamphlets outside a McDonald's in Britain, claiming the company abused animals, exploited kids in ads, promoted poor diet, and paid low wages. After the longest trial in British history—314 days that included 130 witnesses and 40,000 pages of documents—the fast-food chain was awarded $98,000 in damages in an 800-page ruling.[73]

Other examples of alleged trade libel include two suits filed against Consumers Union (CU), publisher of *Consumer Reports,* for damaging the sales of the Suzuki Samurai after reporting that the sports utility vehicle (SUV) rolled over easily in road tests. In one year sales fell from 77,000 to less than 1,500.[74] Suzuki sued after the magazine republished the report in a 60th anniversary edition. The product disparagement case was later settled.[75]

In a case of David versus Goliath, New York attorney Aaron Lichtman successfully defended a libel suit filed against him by a restaurant after he put a sign in his office window that simply said "Bad Food." His office was directly above the restaurant. The case was dismissed by a trial court judge who ruled the sign had First Amendment protection.[76]

The Typical Libel Case

There is probably no typical libel suit because every case has its own unique aspects, as even big-name suits have demonstrated. However, it may be useful to focus on a fairly typical case before a discussion of libel elements.

E. W. Scripps Co., The Kentucky Post and Al Salvato v. Louis A. Ball

E. W. Scripps Co., The Kentucky Post and Al Salvato v. Louis A. Ball[77] began when a newspaper owned by Scripps Howard and the third largest daily in the state, *The Kentucky Post,* published the first of a two-part series by reporter Al Salvato on the allegedly poor performance of a county attorney.[78] (The second part appeared

two days later.) The articles primarily dealt with the prosecutor's allegedly lenient handling of repeat offenders and strained police relationships. Both stories were lead articles each day and were headed "Portrait of a Prosecutor." The major subhead in the first article was: "Lou Ball's Record Lags Behind Others." The second's was "Serious Gap with the Police." Both were accompanied by large graphs, photos, and other visual elements. An editorial entitled "Our Challenge to Lou Ball" appeared later and called on Ball to improve his record. The paper had also earlier published a critical editorial. Although the series did not claim Ball was corrupt, it implied he was not doing a good job. A team of lawyers checked and rechecked the stories before publication.[79]

Later, the prosecutor filed a libel suit against the *Post*, claiming the series and editorials were false and published with actual malice. The U.S. Supreme Court defined *actual malice* as reckless disregard for the truth or knowledge of falsity in *New York Times v. Sullivan* (1964) and held that public officials must show actual malice before they can recover for libel. Less than a year after the series appeared and after months of discovery and legal maneuvers, including the *Post* filing a motion to dismiss that was rejected by the judge, the trial began in Campbell Circuit Court. It lasted seven days and included testimony that Salvato, the reporter, bore a grudge against Ball because of an incident at a high school football game in which a police officer made the reporter leave. The officer had been called to investigate a report that Salvato was "trying to get some girls to take some dope with him," but he decided not to arrest Salvato after Salvato said he was working on a story on drug use among young people. The grudge against Ball supposedly arose when the prosecutor failed to pursue Salvato's complaint against police. During the trial, Salvato was questioned about how he conducted research for the series. He testified that he spent three months reviewing records of nearly 3,000 cases and interviewed more than 40 people, including Ball and three assistants.[80]

The plaintiff's attorney argued there was considerable evidence of actual malice, including the notation "good case" scribbled by the reporter on certain cases—such as a felony charge reduced to a misdemeanor—and that Salvato had used a statement by a former narcotics officer that criminals "couldn't have a better friend" than Ball even though a judge who knew the officer had told the reporter he was "a very poor police officer, totally unreliable." Ball's attorney claimed this and other allegations—such as that the prosecutor had lost about half the cases taken to trial in the last six years and he failed to assist a county attorney investigating misdemeanor obscenity charges involving an adult theater—were false and defamatory.[81]

The *Post's* attorneys countered that all allegations had been checked and rechecked, the reporter had no grudge against Ball, and most statements were protected by the First Amendment. The stories contained inaccuracies, which the newspaper's attorneys contended were minor and had no impact on the readers' perception of Ball. For example, figures in one graph had been accidentally transposed so that Ball's record appeared worse than was the actual case. The defense noted that Ball did not point out the mistake when he was shown the graph before publication and asked to comment on the story.[82]

After deliberating only a few hours, the jury returned a verdict in favor of Ball and awarded him $175,000 in actual damages but no punitive damages. The *Post* appealed and nearly two years after the jury decision and almost three years after the series appeared, the Kentucky Court of Appeals reversed the trial court. It held "there is no clear and convincing evidence that these articles were published with the requisite knowledge of falsity or reckless disregard for the truth necessary to remove from constitutional protection." Ball appealed and the Kentucky Supreme Court heard oral arguments. The state supreme court delayed its decision until a case it considered to be similar, *Harte-Hanks Communications, Inc. v. Connaughton* (1989),[83] was handed down by the U.S. Supreme Court. *Harte-Hanks* upheld a jury finding of actual malice by the Hamilton (Ohio) *Journal News* in publishing a story and editorial about a political candidate. Connaughton won $5,000 in compensatory damages and $195,000 in punitive damages in the trial court.

One year later, the Kentucky Supreme Court heard re-arguments in the case. Five months later, the state Supreme Court reversed the state court of appeals decision and reinstated the trial court award (with interest) to Ball. In a unanimous opinion (6 to 0), the Kentucky Supreme Court ruled:

> Based on the law of libel in Kentucky, as constrained by the decisions of the United States Supreme Court regarding the First Amendment protection of freedom of the press, including the mandate that appellate judges in such cases "exercise independent judgment and determine whether the record establishes actual malice with convincing clarity" [citing *Bose v. Consumers Union of the United States* (1984)[84]], we reverse the Court of Appeals and reinstate the judgment of the trial court.[85]

The state supreme court felt that the jury could reasonably infer that the *Post* reporter held a grudge against the prosecutor because of the incident at the high school game and from a statement made by Salvato to Ball in a phone conversation, presumably implying a threat that Ball would be "hearing from" him. The court ruled there was substantial evidence presented at trial that statements were false and defamatory, including the "they couldn't have a better friend" comment from the former narcotics officer and the claim that he lost half the cases he took to trial. The court rejected the idea that some statements were opinions enjoying First Amendment protection. It noted that the refusal to publish a retraction could be evidence of actual malice.

The newspaper petitioned the U.S. Supreme Court to grant a writ of certiorari, but the Court turned it down, 6½ years after the series appeared. The newspaper's insurance reportedly covered most legal fees, but the *Post* probably paid $50,000 to $100,000 as a deductible in the award to Ball plus a percentage (typically 20 percent) of the amount above the deductible.[86] Reporter Al Salvato died in 2006 after a long and distinguished career in journalism.

E. W. Scripps et al. v. Ball is typical of libel suits the media face in four ways, although circumstances differ. First, the plaintiff was a public official and had to demonstrate with clear and convincing evidence or "convincing clarity" that the

defendant published the story with actual malice, as required under *New York Times v. Sullivan* (1964). Public figures and public officials have a heavier evidentiary burden to meet in successfully suing for libel than private individuals, but they are more likely to sue. Three factors explain this. First, public officials and public figures get more media attention than private people. They are supposedly more newsworthy. Second, public officials and public figures usually have greater finances and can persevere more than private citizens who may not be able to afford court costs and attorney fees. Because they are in the limelight, public figures typically depend on positive images or reputations for their livelihood. When an image is hurt, damages mount.

A second way in which *E. W. Scripps v. Ball* typifies libel lies in how it meandered through the courts. While the trend appears to have reversed by now, plaintiffs in the past were more likely than defendants to win libel suits. More libel suits are settled out of court than ever reach trial or they are dismissed before trial. Many are settled with payment to plaintiffs. Media defendants cannot count juries among friends, as witnessed by the numerous major megabuck awards.

Third, the treatment accorded the *Post* in the courts reflects the trends in other courts. Whereas a lower appellate court may occasionally reverse a libel award, higher appellate courts, especially state supreme courts, are just as likely to uphold. State and federal appellate courts are following the lead of the U.S. Supreme Court. That is why the Kentucky Supreme Court delayed its decision on the appeal until *Harte-Hanks Communications v. Connaughton* could be decided. Contrary to the Kentucky Supreme Court's conclusions, the facts in *Harte-Hanks* were different from those in *E. W. Scripps*. The evidence of actual malice was substantially stronger in *Harte-Hanks*. The only pieces of evidence of actual malice the Kentucky Supreme Court could point to in *E. W. Scripps* were the "grudge" theory, the "good case" marks on reporter's notes, the contention he "selectively interviewed only a few persons hostile to Ball as background" while "deliberately choosing not to interview those who could contradict their claims," and the "[criminals] couldn't have a better friend" statement by the ex-police officer.

The case points out how attorneys on the opposing side can highlight seemingly innocent mistakes even veteran journalists might commit and sway a jury toward the plaintiff's side. No story, no matter how much time is spent researching, writing, editing, and fact checking, is perfect. There will always be one more source who should have been interviewed, a misspelled name, wrong age, or transposed graph. Juries hold reporters and editors to high standards—so high, in fact, that they are sometimes impossible to meet. Juries are not journalists' peers. They focus on a story in dispute and fail to put the journalistic process into perspective by realizing that a reporter or editor usually cannot concentrate on only one story. To the jury, mistakes are unforgivable, no matter how minor. In the eyes of the jurors, mistakes reflect sloppy reporting.

In addition to the financial toll of libel suits, there is the time of individual reporters or editors spent under fire, as they face hours of depositions by opposing attorneys, briefings, and pretrial preparations conducted by their lawyers. Time

spent in preparing a case and appearing in court is time away from the news. The toll can be enormous even when a media defendant wins.[87]

Elements of Libel

As with any tort, libel requires elements be established before a plaintiff can win a suit and recover damages. This section examines these with examples in case law, especially from the U.S. Supreme Court. While there is agreement on the general nature of each requirement, there are differences among courts and statutes in the role each element plays in the whole libel picture. Inconsistencies and confusion abound.

The Restatement (Second) of Torts[88] enumerates elements for a *prima facie* case of libel. These include: (a) a false and defamatory statement of and concerning another *(identification)*, (b) communication that is not privileged to a third party *(publication)*, (c) negligence or greater *fault* on the part of the plaintiff, and (d) actual injury arising from publication of the statement *(harm)*. The first element can actually be broken down into three requirements—*defamation, falsity, and identification*.

Defamation

To be libelous, a statement must be defamatory. The words in and of themselves may be defamatory *(libel per se)* or they may be defamatory only when extrinsic facts and circumstances are known *(libel per quod)*. Nevertheless, they must be such that they would or could injure the reputation of a person or other entity such as a business. A common definition of *libel* is information that tends to subject a person to public hatred, contempt, or ridicule or tends to demean individuals in their profession or business. Statements that tend to enhance a person's reputation, although they may be false, generally are not actionable. However, there may be instances in which it could trigger an invasion of privacy. Characterizing a person as well educated, intelligent, or kind would not be libelous, even if false, simply because such information does not harm the person's *reputation*, which is usually defined as standing in the community (i.e., what others think about that person).

The question of whether a statement is defamatory is crucial in many libel cases because it is often easy to establish most of the other elements, such as falsity, publication, and identification. Examples of information that the U.S. Supreme Court has upheld as defamatory or sent back to a trial court or a lower appellate court with the presumption that it was defamatory include:

1. A magazine's false accusation that a college football coach had conspired with another coach to "fix" a game [*Curtis Publishing Co. v. Butts* (1967)][89]
2. A magazine's false claim that an attorney for a family in its suit against a police officer for killing their son had been an official of a "Marxist League" advocating "violent seizure of our government" and that the attorney was a "Leninist" and a "communist" [*Gertz v. Welch* (1974)][90]

3. A magazine's statement that a multimillionaire's divorce was granted due to adultery when it had been for "a gross lack of domestication" on both sides [*Time v. Firestone* (1976)][91]
4. A credit reporting agency's circulation of a false statement that a contractor had filed for bankruptcy [*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* (1985)][92]

The following have been held as not defamatory under the particular circumstances:

1. A statement during a pay-per-view World Championship Wrestling (WCW) event by a WCW creative director that the professional wrestler known as "Hulk Hogan" was a "god damn politician . . . who doesn't give a shit about this company." The director, Vince Russo, was playing his scripted role as a member of WCW at the time. The professional wrestler was performing in his Hulk Hogan character. However, Russo strayed from his script and went on to note that the viewers would "never see that piece of shit again," called Hogan a "big bald son of a bitch," and told Hogan to "kiss my ass." A Georgia trial court granted a summary judgment in favor of the defendant on the ground the comments did not constitute factual statements but were merely rhetorical hyperbole made primarily to advance the storyline and role he had assumed [*Bollea v. World Championship Wrestling, Inc.* (2005)].[93]
2. A parody ad in *Hustler* magazine, in which the Rev. Jerry Falwell was depicted as having had sex with his mother in an outhouse [*Hustler Magazine and Larry C. Flynt v. Jerry Falwell* (1988)].[94] The U.S. Supreme Court reversed a jury decision awarding Falwell damages for intentional infliction of emotional distress. (The jurors had found that no libel had occurred.) There was no basis for a libel suit or for an emotional distress suit, according to the Supreme Court, because the parody had not been touted as factual or understood as such by readers.

Falsity

By virtue of its definition, libelous information must be false. Thus *truth* is an absolute defense. Most state statutes make it clear that truth, if demonstrated, is a complete defense to libel. Truth is typically not an issue in libel trials, especially those involving the mass media, because defamation suits that survive a motion to dismiss usually involve false information. Inaccuracies, even those that may initially appear to be minor, traditionally trip up reporters and editors.

Figure 8.1 November 1982 *Hustler* magazine parody. Reprinted with permission of Larry Flynt.

An important issue that sometimes does arise about the element of falsity is whether the plaintiff has the burden of proving information is false or a defendant has the burden of showing the published statements are true. The assumption has been that public officials and public figures in libel suits have the burden of proving falsity. The Supreme Court's decision in *New York Times v. Sullivan* (1964)[95] requires public officials (and public figures, as enunciated later by the Court) to *show actual malice,* but, who has the burden in cases involving private figures?

In *Philadelphia Newspapers v. Hepps* (1986),[96] the Supreme Court answered one-half of the question when it held that a private individual suing a media defendant for libel over a matter of public concern must demonstrate that the information published was false. In other words, the media defendant does not have the burden of proving truth. In its 5 to 4 decision written by Justice Sandra Day O'Connor, the Court ruled unconstitutional the interpretation by some state courts that *Gertz v. Welch* permitted a court to assume the information was false unless proven otherwise by the defendant. Instead, the Court said a plaintiff must prove with clear and convincing evidence that the allegedly defamatory statements are false when they involve a matter of public concern. The Court appeared to leave the door open for state and lower courts to adopt a common law position that the burden is on the defendant to prove truth and apply the rule to situations involving non-media defendants in public controversies. Two justices, Brennan and Blackmun, said the Court's rules were applicable to non-media defendants.

Identification

Before a person or corporation can be libeled, readers must link the defamatory information to that individual or entity. A reputation obviously cannot be harmed if no one understands to whom the defamatory information refers. However, identification does not have to be by name. Instead, the identification can be established with extrinsic facts. This latter process is known as *colloquium*.

Ordinarily, identification is not an issue in a libel case because the plaintiff is actually named or enough information is provided about the person in the story so there is little or no doubt about the individual's identity. There are three typical situations in which colloquium may be an issue: (a) stories in which no specific individual is named but allegations are inferred to a particular person, (b) fictionalized stories and stories employing pseudonyms, and (c) group libel.

A Florida case is a good illustration of the first situation. A Florida automobile mechanic sued ABC-TV for libel after his back was shown in a report on auto repair scams. The segment was an excerpt from a video secretly recorded by police. In the tape, mechanic Steven Berry is shown with his back to the camera while he works under the car's hood. The network filed a motion to dismiss Berry's suit on several grounds, including the fact that Berry was not identifiable, and the U.S. District Court judge granted the motion.[97]

In *Bryson v. News America Publications*, only the last name was included in the article. Given the fact that Bryson is not a common name, a reasonable person

could assume that the term "slut" referred to the plaintiff, according to the court. What if a different last name had been used but the other 24 alleged similarities remained?Would these similarities be enough to satisfy identification? Perhaps. Let us now look at fictionalized stories.

The second category, *fictionalization*, is illustrated in two cases: one involving a fictional Miss Wyoming and the other a fictional psychiatrist. In the first, *Pring v. Penthouse International, Ltd.* (1982),[98] Kimberli Jayne Pring, one-time Miss Wyoming in the Miss America contest, won $25 million in punitive damages and $1.5 million in actual damages from *Penthouse* magazine in a jury trial. The trial court judge later reduced the punitive award to $12.5 million. The jury awarded Pring $10,000 actual and $25,000 punitive damages against the author, Philip Cioffari. The adult magazine had published a fictitious story about "Charlene," a fictional Miss Wyoming who was a champion baton twirler, as Pring had been, and also had another talent, or at least imagined she had another talent in the article—she could make men levitate by performing fellatio on them.

The article described three incidents during which Charlene (a) levitates a football player from her school by performing oral sex; (b) performs the same act on the football coach, while the audience applauds; and (c) performs a fellatio-like act on her baton, which stops the orchestra. The trial court jury and judge had no problem associating the alleged libel with the real former Miss Wyoming, and, on appeal, the 10th Circuit U.S. Court of Appeals accepted that determination (i.e., that the article identified the plaintiff). However, the appeals court reversed the mega-award, ruling the story was "complete fantasy." The court said, "It is impossible to believe that anyone could understand that levitation could be accomplished by oral sex before a national audience or anywhere else. The incidents charged were impossible. The setting was impossible." Thus, the descriptions were "obviously a complete fantasy."[99] The appellate court reversed the verdict on grounds the story was too unbelievable to be libelous, rather than for lack of identification. The judges said labeling a story as fiction is not enough, with the test being whether the charged portions in context could be reasonably understood as describing facts about the plaintiff or real events in which she participated. If it could not be understood as such, portions could not be taken literally.[100]

The Court of Appeals characterized the story as "gross, unpleasant, crude, distorted" and an attempt to ridicule the Miss America contest and contestants, without redeeming features. However, the court felt the story had First Amendment protection because the Constitution was intended to cover a "vast divergence in views and ideas." Would the appellate court have decided differently if the story had concerned acts that were not impossible? What if the nonsexual talent for both beauty contestants had been unusual: playing the piano while seated backward or speaking simultaneously in five languages?

The second example of fictionalization, *Bindrim v. Mitchell* (1979),[101] sheds light on these questions. Best-seller author Gwen Davis Mitchell decided to write a novel about leisure-class women. In an effort to gather background information for the book, she attended a nude therapy session offered by Paul Bindrim, a licensed clinical

psychologist and author. Bindrim used a technique known as nude marathon in group therapy to get clients to shed inhibitions. Mitchell was allowed to attend only if she would agree in writing not to take photos, write articles, or in any way to disclose what happened at the workshop. Mitchell told the psychologist she had no intentions of writing about the marathon and that she was attending solely for therapy.

Two months later, Mitchell contracted with Doubleday to write her novel and received $150,000 in advance royalties. The completed novel, *Touching,* included an account of a nude encounter session in southern California led by a fictional "Dr. Simon Herford." Bindrim sued for libel and breach of contract. He cited passages in the book as libelous, including the false implication that he used obscenities in therapy sessions and other inaccurate portrayals of what occurred at the nude marathon sessions. A jury awarded the plaintiff $38,000 against the author for libel, $25,000 in punitive damages against the publisher for libel, and $12,000 against the author on the contract claim. The total award was later reduced to $50,000. The Second Appellate District California Court of Appeal modified the amount of damages but affirmed the decision. The California Supreme Court and the U.S. Supreme Court rejected further appeals.

The California Court of Appeals had no problem with the question of whether Bindrim was identified: "There is overwhelming evidence that plaintiff and 'Herford' [the fictional doctor] were one." The trial court and the appellate court reached this conclusion in spite of major differences in characteristics. The book character is described as a "fat Santa Claus type with long white hair, white sideburns, a cherubic rosy face and rosy forearms," but Bindrim had short hair and shaved. The book character was an M.D. and Bindrim held a Ph.D. Their names were different. Common links convincing the court were nude marathon techniques and the similarity between a transcript of the encounter the author attended and one in the book. The court relied on the identification by several witnesses of the fictional Dr. Herford as Bindrim, the real psychologist.

Although *Bindrim v. Mitchell* is binding only in California's Second Appellate District, it has been influential in other cases. It invoked a common rule of identification employed in other jurisdictions—whether a reasonable person exposed to the work would understand the fictional character as referring to the real person. That is the key difference between *Bindrim* and *Pring.* Although the appellate court ruling in *Pring* was handed down in a different jurisdiction three years after *Bindrim,* the basic rule of identification was essentially the same. The *Penthouse* story was hype and fantasy. *Touching* hit close to home with descriptions of therapy sessions fairly close to what could have happened but did not.

What role did the contract Mitchell signed about nondisclosure play? Initially, the jury awarded Bindrim $12,000 in damages on the contract claim, but the trial court judge struck down the award. The appellate court upheld the judge's decision, noting that because Mitchell was a bona fide patient, she could write whatever she wished about what occurred in spite of the contract. Thus, the contract clause was unenforceable. It is clear from the case that even when fictional names are employed, authors must be cautious about how close their descriptions of fictional events are

to the factual situations on which they are based. Changing names does not always protect the innocent.

Group Libel

One situation in which identification is nearly always an issue is *group libel*—defamatory comments directed at a specific group. The general rule is the larger the group, the less likely a member of the group has been defamed. Group libel suits are fairly common but are usually dismissed, unless they involve a small group. The late NBC-TV "Tonight" show host, Johnny Carson, was once sued for $5 million by a dentist for jokes Carson told about dentists.[102] The jokes were directed at dentists in general, not the one whose letter Carson read on the air before a monologue. The suit was dismissed. Dentists compose too large a group for group libel.

Similar suits have been filed against film companies for depictions of ethnic groups in popular films. A U.S. District Court judge dismissed a class action suit he characterized as bordering "on the frivolous" filed against the Public Broadcasting System for airing the controversial documentary, *Death of a Princess*.[103] Plaintiffs sought $20 million in damages on behalf of all Muslims, who the plaintiffs asserted were defamed by the film's depiction of the execution of a Saudi Arabian princess for adultery. The total number of individuals alleged to have been defamed was 600 million. The court indicated that defamation of such a group "would render meaningless the rights guaranteed by the First Amendment to explore issues of public import."[104]

Similarly, a specific chain of businesses would not be permitted to recover for group libel unless its size was small. The founder of Kentucky Fried Chicken, the late Colonel Sanders, was known for commenting on the franchise products after he sold the company but for which he still served as a spokesperson. In a published story he said the gravy on mashed potatoes was "horrible" and the potatoes had "no nutrition," adding "[T]hat new 'crispy' recipe is nothing in the world but a damn fried dough-ball stuck on some chicken." A franchise owner sued on behalf of 5,000 franchised restaurants. The suit was dismissed by the Kentucky Supreme Court because the owner could not demonstrate that the comments referred to him or any of the other franchisees.[105]

A group of 637 net fishermen sued three Orlando, Florida, TV stations for libel after they broadcast paid political ads criticizing opposition to a state constitutional amendment to ban net fishing in coastal waters.[106] (The amendment was approved by voters.) A trial court judge dismissed the suit because the group was considered too large. A state court of appeals upheld the decision.[107] In its *per curiam* opinion, the appellate court aligned with jurisdictions recognizing that for a group defamation to be actionable by a member of the group when there is no specific reference to an individual, the group must be small enough for the defamation to be reasonably understood to refer to that member.[108]

The court cited cases from other jurisdictions to support its decision, including one in which a Nigerian businessman unsuccessfully sued for libel on behalf of 500 other Nigerian businesspeople after a "60 Minutes" segment about Nigerians engaged

in allegedly fraudulent international business.[109] Another summary judgment was granted in a suit brought on behalf of almost 1 million Michigan hunters over a "60 Minutes" broadcast that criticized hunters.[110]

In a case similar to the Orlando suit, a group of 436 fishermen sued four Jacksonville, Florida TV stations for airing the same ads.[111] The state appeals court was critical of the ads, calling them "false and fraudulent and clearly intended to mislead voters in the State of Florida."[112] Even after the stations were told by an outside source the ads were fraudulent, they continued to air them, "[k]nowing the words and images selected were false and fraudulent," according to the court. It said the stations were "actors and participants in the use of false and defamatory material in a negligent manner without reasonable care as to whether the defamatory advertisements were true or false."[113] The opinion suggested legislation.[114] The court concluded the plaintiffs had been unable to demonstrate the defamatory ads were *of and concerning* them because of the group's size.

William Prosser noted in his *Law of Torts* that 25 persons had become a general rule in determining whether a group is small enough for individual members to have been defamed by libelous statements about the group as a whole.[115] Some jurisdictions appear to apply such a rule of thumb, but it is not universal. The U.S. Supreme Court has never dealt directly with the issue of whether group libel is possible. It may some day have the opportunity with concern over "politically correct" speech. Universities have enacted codes of conduct that bar students and faculty from uttering racial, sexual, ethnic, and religious slurs in public on campus, including classes and school functions. Recent examples have emerged involving references to September 11 and the treatment of minority groups. Penalties for violations range from reprimands to expulsion or faculty firing. The purpose of such codes is to prevent libel of certain groups. They could be challenged as unconstitutional prior restraint or as unenforceable because the size of the group makes it impossible to establish *colloquium*—that is, that the libelous statements individually harm the group's members.

One case attracted considerable media attention more than a decade ago. A white male undergraduate student at the time, Eden Jacobowitz, was charged for violating the University of Pennsylvania's racial harassment policy. He faced charges after yelling "Shut up, you water buffalo" from his dormitory to five African American women, who he said were noisy. He contended the term *water buffalo* was not racist. The women filed a complaint but later dropped it. Jacobowitz sued the university for intentional infliction of emotional distress. The two sides settled out of court about five years after the incident, with the university admitting no harm or fault.[116]

There are at least two major points of view on group libel. On the one side are those individuals who believe the press should be held accountable for group libel under certain circumstances—such as racial, ethnic, and religious slurs when they cause substantial harm. The Rutgers women's basketball team in 2007 demanded and received an apology from CBS radio talkshow hot Don Imus after he referred to the players as "nappy-headed hos" on his program. Imus was initially dropped from several stations and then fired several days later by CBS. Racial and ethnic jokes are rife with stereotypes but publications employing them still have First Amendment

protection. Presumably no mainstream publisher would present defamatory information but defamatory on line sources are sometimes brought to public attention. On the other hand, scholars argue that there should be no control over the press in uttering whatever group slurs and defamations it wishes to publish unless the comments would lead directly to violence. One writer characterized the two perspectives as "communitarian" and "liberal," respectively.[117] More recently, special concerns have been expressed regarding the use of the term "person of interest" or "persons of interest." Use of those terms by authorities in controversial, unsolved criminal cases has raised some red flags with civil libertarians. The terms emerge almost in the same sense that the old "usual suspects" phrase was used to describe those who fit a certain profile. There is concern for persons unjustly accused of committing a crime by implication, as was the case in the press coverage of Richard Jewell and the Atlanta Olympics bombing.

Publication

The second element that must be demonstrated in a libel case, *publication*, is typically the easiest for a plaintiff to prove because the allegedly libelous information has appeared in a news story, documentary, book, or similar outlet. All that is required is simply that the information was communicated to a third party. There is usually no dispute about whether publication has occurred. On rare occasions, publication may be in question. For example, suppose a TV news director sends a confidential memo to one of the reporters falsely accusing him of doctoring his expense vouchers (i.e., inflating mileage or meal costs). The director types the memo and sends it in a sealed envelope to the reporter. Has publication occurred? The answer is *absolutely not*. The information has not been transmitted to the necessary third party. What if the reporter then shares the memo with others? Publication failed. An individual cannot communicate a defamatory message and then claim she has been libeled. In other words, self-publication will not work. If the alleged libeler publishes the defamatory remarks and then the person who is the object of the comments passes the information on to others, the libeler is certainly not off the hook. The key is that self-publication does not affect the outcome one way or another.

What if the director has a secretary type the memo, but the director still marks the envelope *confidential* and does not share the information with anyone else? Publication has been committed even if these three individuals are the only ones who actually see the memo. An equivalent situation happened when two reporters at the *Alton* (Illinois) *Telegraph* sent a confidential memorandum to an attorney in the U.S. Department of Justice summarizing information they gathered in an investigation they had conducted about possible organized crime ties with a major local contractor and a local bank. The reporters sent information, much of which was unsubstantiated, to fulfill a promise to share results of their investigations with the Justice Department in exchange for cooperation. Each page of the memo was marked *confidential* and the reporters noted some charges were unsubstantiated.[118]

The attorney to whom the memo was directed left the Justice Department soon after the memo was delivered. The memo eventually fell into the hands of Federal Home Loan Bank Board (FHLBB) officials after Justice Department employees passed it on with a suggestion that the bank board review the files of a savings and loan (S&L) association to determine whether loans to the developer had been proper. The memo from the reporters, which was never acted on by the Justice Department, had intimated possible ties to organized crime, although these links were not substantiated. The review indicated that improper loans had been made. The company lost several construction projects. The lawyer for the S&L vice president who had facilitated the loans discovered the existence of the confidential memo through a federal Freedom of Information Act request. By this time, the S&L was under control of the FHLBB and the construction enterprise had fallen apart. The reporters and the paper were sued for libel even though the allegedly libelous information was never published. The reporters merely sent the memo in an effort to get help in verifying unsubstantiated allegations to which the Justice Department had never responded.

Eleven years after the memo was sent, an Illinois Circuit Court jury awarded $6.7 million in compensatory damages and $2.5 million in punitive damages for a total of $9.2 million, more than the paper was worth.[119] At the time it was the largest U.S. libel award. An Illinois appellate court denied the newspaper's appeal on grounds it lacked jurisdiction because the newspaper failed to post a $13.8 million bond.[120] The newspaper did not have the funds to post bond and filed for bankruptcy. After the dust settled in bankruptcy proceedings, the *Telegraph* and insurers agreed to pay $1.4 million. The defense legal expenses alone were reportedly more than $600,000, which the paper itself had to pay.[121]

Privilege: Absolute, Qualified, and Constitutional

The element of *publication* also involves the concept of privilege. If defamatory information is privileged, the defamed person cannot recover damages even though the statements may have been false and caused harm. Thus, privilege can act as a defense to a libel suit. There are two basic types of privilege—**absolute** (sometimes called "unconditional") and **qualified** (known as "conditional" and "limited"). There is a third type known as **constitutional privilege** arising from the U.S. Constitution but, unlike absolute privilege, it originates indirectly from the First Amendment rather than from a specific provision in the Constitution. This third type of privilege did not exist until *New York Times v. Sullivan* in 1964 when the U.S. Supreme Court announced that press or media defendants could not be held liable for defaming public officials unless plaintiffs could demonstrate actual malice.

Except in one rare situation involving the broadcast media, as elaborated shortly, the press does not enjoy *absolute privilege*. Instead, this is a defense to libel that can generally be claimed only by participants, including officials in official proceedings. The best example of absolute privilege, one typically not connected with the media,

lies in the Speech or Debate clause of the U.S. Constitution. Article I, Section 6 states: "They [Senators and Representatives] shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place."

This clause ensures that any member of Congress cannot be held legally liable for any remarks made as part of an official proceeding in the Senate or the House, regardless of the harm they may cause, unless tantamount to a criminal act. A senator would not be immune from prosecution for plotting a murder or committing criminal fraud even though it occurred during a Senate hearing. A senator could make defamatory remarks about private citizens with impunity as U.S. Senator Joseph McCarthy did during the early 1950s when he launched attacks on alleged communists in a series of Senate hearings. The 2005 George Clooney film, *Good Night and Good Luck*, dramatizes McCarthy's attacks, including his infamous battle with famed CBS journalist Edward R. Murrow, who played a key role in McCarthy's downfall, especially with his famous March 9, 1954 *See It Now* broadcast. The senator's claims—that communists occupied government positions, aided by communist sympathizers—were never substantiated. However, McCarthy remained immune in spite of eventual censure by his fellow senators on December 2, 1954. The junior senator from Wisconsin died three years later.

During the McCarthy era, there was widespread abuse of the absolute privilege, but this defense remains alive, thanks to the U.S. Constitution. Since the 1930s, members of the U.S. House of Representatives have invoked a ritual known as "one-minute speeches." A member can speak for 60 seconds on any issue. The speeches require prior approval of the Speaker of the House, but this is always granted.[122] Sometimes these presentations become heated and controversial, but the tradition continues.

Hutchinson v. Proxmire (1979)

Another Wisconsin senator, William Proxmire, discovered that absolute privilege has limits. In 1975, the senator initiated a satirical "Golden Fleece of the Month Award" to publicize examples of what he considered wasteful government spending. He cited federal agencies, including the National Science Foundation, Office of Naval Research, and National Aeronautics and Space Administration, which funded research by Ronald R. Hutchinson, director of research at the Kalamazoo, Michigan, State Mental Hospital. Hutchinson received more than $500,000 over a seven-year period to conduct a study of emotional behavior in animals to devise an objective measure of aggression. The tests included exposing animals to aggravating stimuli to see how they reacted to stress. Proxmire's legislative assistant, Morton Schwartz, who had alerted the senator to Hutchinson's research, prepared a speech announcing the award to the Senate, along with an advance press release almost identical to the speech that was sent to 275 members of the media. Later, the senator mentioned the research and award in a newsletter sent to about 100,000 constituents and others, and he talked about it on TV. The next year Proxmire listed "Golden

Fleece" awards for the previous year, including Hutchinson's. Proxmire mentioned Hutchinson by name in his speech and press release, but not in other publicity.

Among the comments by the senator in the release and in the Senate speech was: "Dr. Hutchinson's studies should make the taxpayers as well as the monkeys grind their teeth. In fact, the good doctor has made a fortune from his monkeys and in the process made a monkey out of the American taxpayer."[123] Hutchinson filed suit against Proxmire and Schwartz, claiming that as a result of publicity, he "suffered a loss of respect in his profession . . . suffered injury to his feelings . . . [had] been humiliated, held up to public scorn, suffered extreme mental anguish and physical illness and pain." He contended that he lost income and the ability to earn future income.

The defendants in the libel suit made a two-prong attack on the plaintiff's claims. First, they moved for change of venue from Wisconsin to the District of Columbia and for summary judgment on grounds that such criticism enjoyed absolute privilege under the Speech or Debate clause as well as protection under the First Amendment. Second, Proxmire and Schwartz argued that the researcher was both a public figure and a public official and thus had to demonstrate *actual malice* under *New York Times v. Sullivan*. No actual malice existed, according to the defendants.

The federal district court judge did not rule on the change of venue motion but did grant summary judgment in favor of the defendants. The judge said the Speech or Debate clause included investigative activities related to research and afforded Schwartz and Proxmire absolute immunity. The trial court also held that the press release "was no different [from a Constitutional perspective] from a radio or television broadcast of his speech from the Senate floor."[124]

The District Court further held that Hutchinson was a public figure because of his "long involvement with publicly-funded research, his active solicitation of federal and state grants, the local press coverage of his research, and the public interest in the expenditure of public funds on the precise activities in which he voluntarily participated."[125] The Seventh Circuit U.S. Court of Appeals affirmed the District Court ruling.[126] When Hutchinson appealed the decision to the U.S. Supreme Court, Proxmire and Schwartz said that newsletters, press releases, and appearances were protected by the Speech or Debate clause because they were necessary to communicate with Congress. They also argued this was essential for members of Congress to inform constituents.

On appeal, the U.S. Supreme Court, in an 8 to 1 decision written by Chief Justice Burger, reversed and remanded to the U.S. Court of Appeals. The Court noted that a literal reading of the clause would confine its application strictly to speech or debate within the walls of either house, but the Court previously ruled that committee hearings had absolute protection even if held outside chambers and committee reports enjoyed the same status. The majority opinion held that the objective of the clause was to protect legislative activities: "A speech by Proxmire in the Senate would be wholly immune and would be available to other members of Congress and the public in the Congressional record. But neither the newsletters nor the press

release was 'essential to the deliberations of the Senate' and neither was part of the deliberative process."[127]

The second issue the Court had to deal with was the status of Hutchinson. Although both the trial court and the lower appellate court ruled the researcher was a "limited public figure" (see *Gertz v. Welch* later in this chapter) for purpose of comment on his receipt of federal funds, the Supreme Court held he was not a public figure, and thus he did not have to demonstrate actual malice. According to the Court, his activities and public profile "are much like those of countless members of his profession. His published writings reach a relatively small category of professionals concerned with research in human behavior. To the extent his published writings became a matter of controversy it was a consequence of the Golden Fleece Award."[128] The Court emphasized that "Hutchinson did not thrust himself or his views into public controversy to influence others" and that he did not have the requisite regular and continuing access to the news media to be classified as a public figure.

The lessons in *Hutchinson* are (a) absolute privilege has limits even when public officials utter the defamatory statements as part of their perceived official duties, and (b) individuals do not become public figures or officials simply by virtue of their attraction of government funding nor can they be made public figures by the creation of a controversy by someone else. In other words, don't thrust individuals into the limelight and then claim that they are public figures.

State and Local Recognition of Privilege

There are other examples of absolute privilege, but litigation involving them is rare. Most state constitutions contain a provision that parallels the federal Speech or Debate clause so that state lawmakers can debate without fear of libel or another tort as long as they are participating in an official proceeding. Sometimes local governments enact ordinances granting protection for officials. In federal and state courts, judges and trial participants can claim absolute privilege for remarks made during official proceedings. This does not mean witnesses can lie. They may be immune from libel or torts such as invasion of privacy, but can still be charged with perjury or false swearing.

There has been only one modern-day instance in which the Supreme Court has recognized absolute privilege for the media. In a split (5 to 4) decision in *Farmers' Educational and Cooperative Union of America v. WDAY* (1959),[129] the justices held that because the Federal Communications Act of 1934 bars censorship of political speech by radio and TV stations, they can carry required broadcasts, including commercials under the Equal Opportunities Rule under Section 315, and claim absolute immunity from libel suits that may arise from defamatory statements. The ruling itself was not a great surprise because fairness would dictate that the government cannot require a station to carry a broadcast without any censorship and then subject it to potential liability for having complied with the law, but the narrow vote was somewhat surprising. The Court did indicate that the political opponent or

whoever uttered the defamatory statements in the broadcast did not have absolute immunity and thus could face a libel suit.

Qualified Privilege

Qualified, conditional or limited privilege (a rose by any other name . . .) is the most common type of privilege available to the mass media. In proceedings such as legislative hearings and debates, the judicial process (grand jury deliberations, preliminary hearings, trials, etc.) and meetings of government agencies as well as for public records, the press has a qualified right to report information even though it may be defamatory. There is an important condition: *the report must be fair and honest*. Different states employ somewhat different language in specifying the condition, but the gist of it is still the same—the report must be an accurate account of what transpired or what is in the record and it must not be biased so as to unfairly defame an individual or other entity.

The requirement is not that the information be truthful; instead the report must be an accurate rendition. In most jurisdictions, if a plaintiff can prove that the publication was for an improper motive such as revenge or malice, the qualified privilege is defeated. The best tactic for journalists to demonstrate fairness is to show that they were acting to keep readers or viewers informed about a matter of public interest, emphasizing that citizens have a right to know what occurs in government proceedings. Minor errors such as a misspelled name (unless someone can claim the misspelled version) or slightly altering a quote for brevity (which is still an error and thus should not be done even though it may not prove fatal) are usually not enough to lose the privilege defense, but a minor oversight can lead to serious consequences. *Time* magazine learned this in *Time, Inc. v. Mary Alice Firestone*.[130]

Time, Inc. v. Mary Alice Firestone (1976)

In 1961 Mary Alice Firestone separated from her husband, Russell Firestone, heir to the Firestone fortune. She later filed a complaint for separate maintenance in a state trial court in Palm Beach, Florida. Russell Firestone counterclaimed with a request for divorce on grounds of extreme cruelty and adultery. After a trial with testimony from both sides about the other party's extramarital affairs, the Florida judge granted a divorce in a confusing judgment. He said, in part:

> According to certain testimony in behalf of [Russell Firestone], extramarital escapades of [Mary Alice Firestone] were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony, in [her] behalf, would indicate that the defendant was guilty of bounding from one bed partner to another with the erotic zest of a satyr. The court is inclined to discount much of this testimony as unreliable. Nevertheless, it is the conclusion and finding of the court that neither party is domesticated, within the meaning of that term as used by the Supreme Court of Florida. . . . In the present case, it is abundantly clear from the evidence of marital discord that neither of the parties has shown the least susceptibility to domestication, and that the marriage should be dissolved.[131]

Thus the judge was granting the divorce on the ground of lack of domesticity, not on the grounds of extreme cruelty and adultery, although his decision was not entirely clear. The divorce proceedings received extensive local and national publicity, and Mary Alice Firestone held press conferences during the proceedings. *Time* was operating under a tight deadline to get the story published. The divorce decree was announced Saturday. The next deadline for the magazine was Sunday. *Time's* New York bureau heard the decision from an Associated Press wire story indicating "Russell A. Firestone had been granted a divorce from his third wife, whom 'he had accused of adultery and extreme cruelty.'" In its evening edition, the *New York Daily News* published a similar report. *Time's* New York staff got similar information from a bureau and a stringer in Palm Beach, place of the trial. With four sources, *Time* staff wrote this item appearing in the "Milestones" section the following week:

> Divorced. By Russell A. Firestone Jr., 41, heir to the tire fortune: Mary Alice Sullivan Firestone, 32, his third wife; a one-time Palm Beach schoolteacher; on grounds of extreme cruelty and adultery; after six years of marriage, one son; in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extramarital adventures on both sides, said the judge, "to make Dr. Freud's hair curl."[132]

A few weeks later, Mary Alice Firestone requested a retraction of the article, claiming that a portion of it was "false, malicious and defamatory." (Florida law, similar to laws of many states, requires that a demand for retraction be made before a libel suit can be filed and allows the defendant to mitigate damages, if published.) *Time* refused and a suit ensued. In a jury trial in which the plaintiff called witnesses to testify that she suffered anxiety and concern over the inaccurate report, Firestone testified that she feared her young son would be adversely affected by the report. Prior to trial, she withdrew her claim for damages to reputation, asking for compensatory damages for harm other than to reputation, as permitted under Florida law. A sympathetic jury awarded her $100,000 in compensatory damages.

On appeal, Florida's Fourth Circuit Court of Appeals overturned the decision on the grounds that the article was fair and no damages had been demonstrated. The Florida Supreme Court reinstated damages on the basis that false information in the report was clear and convincing evidence of negligence. In a 5 to 3 decision, the U.S. Supreme Court vacated the state Supreme Court decision and sent it back to state court to determine fault, as required under the Court's decision in *Gertz v. Welch* (1994). The Court said under *Gertz* Mary Alice Firestone was a private figure and thus had to demonstrate only that the magazine was negligent, not that it had acted with actual malice. According to the Court, "Respondent did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society, and she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it."[133]

The decision, written by William H. Rehnquist, noted, "Dissolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may

be of interest to some of the public."[134] The Court rejected *Time*'s argument that the report was protected from libel because it was "factually correct" and "faithfully reproduced the precise meaning of the divorce judgment." Accordingly, for the report to have been accurate, "the divorce . . . must have been based on a finding . . . that [Russell Firestone's] wife had committed extreme cruelty towards him *and* that she had been guilty of adultery," not the case, the court said, in light of the trial court's findings.[135] Two years after the U.S. Supreme Court decision, Mary Alice Firestone's attorneys announced that she was dropping the suit because the original jury's verdict had vindicated her.

One difficult problem faced by the media is determining precisely when qualified privilege can be invoked. State laws vary with some granting protection in a range of circumstances from pretrial proceedings and government subcommittee meetings to public records whereas others are more narrowly drawn. The key is to be accurate and fair regardless of deadline or other pressures. In footnote 5 of its *Time* decision, the Supreme Court indicated that it appeared none of the magazine's employees had seen the Firestone divorce decree before the article appeared. *Time*'s attorneys indicated in their appeal that the weekly would have published an identical statement even if the staff had seen the actual judgment before the story was written. The fact remains that a journalist versed in legal matters, as all journalists need to be, might have spotted the error. The third type of privilege, *constitutional privilege,* arose in *New York Times v. Sullivan* (1964).[136]

Negligence or Greater Fault: *New York Times v. Sullivan* (1964)

In 1964, the U.S. Supreme Court recognized a new defense to libel known as *constitutional privilege* in a decision that the Court continues to affirm while simultaneously narrowing its application. In *New York Times v. Sullivan,* the Court established the so-called *actual malice* rule that requires public officials to show defamatory material disseminated by a media defendant was published with knowledge it was false or with reckless disregard for whether it was false or true.

Although only the essentials of the case's history will be laid out here, there are some sources that everyone should read to gain a fuller understanding of this important decision. These include Anthony Lewis' *Make No Law: The Sullivan Case and the First Amendment* (1991), Peter E. Kane's *Errors, Lies, and Libel* (1992), and Rodney A. Smolla's *Suing the Press: Libel, The Media, and Power* (1986). Each offers its unique version of the case in a way that the reader will truly appreciate the importance of the decision that has affected media law for decades.

On Tuesday, March 29, 1960, the *New York Times* published a full page advertisement entitled "Heed Their Rising Voices." Although the ad's descriptions of civil rights violations were faithful to real events in the South, the details of what had occurred in Montgomery, Alabama, were inaccurate. As Smolla pointed out, the Black students who demonstrated on the capitol steps in Montgomery sang the "The Star Spangled Banner" instead of "My Country 'Tis of Thee"; the nine black students were expelled from college for demanding service at a lunch counter in

the county courthouse rather than for leading the demonstration; and police had never "ringed" the Alabama State College campus, although they had been called to campus three times in connection with civil rights protests.[137] Other errors included the claim that Dr. Martin Luther King, Jr. had been arrested seven times (he was arrested four times) and that police ("Southern violators") had twice bombed his home (they were never implicated and reportedly attempted to determine who committed the violence).[138]

Soon after the ad appeared, the *New York Times* was sued by several Alabama politicians, including Governor John Patterson and L. B. Sullivan, a Montgomery city commissioner. The *Times* printed a retraction, as requested by the governor, but rejected the request for a retraction from Sullivan, who, as Commissioner of Public Affairs, was in charge of the police department. Nowhere in the ad is any mention made of Sullivan or his position. Sullivan successfully contended at trial that use of the term *police* implicated him because his duties entailed supervising the police department. He also claimed that he was implicated by reference to "Southern violators," which he asserted meant Montgomery County police because arrests would have been handled by police.

Sullivan's attorneys called witnesses to indicate whether the ad was "of and concerning" the plaintiff, as required under Alabama libel law. All of them said they associated the allegedly defamatory statements with Sullivan or the police department.[139] Although lawyers for the newspaper argued Sullivan was not identified, the jury and the trial court judge were convinced otherwise. The paper's attorneys raised defenses of privilege, truth, and lack of malice. In reversing the Alabama Supreme Court, the U.S. Supreme Court did not buy Sullivan's contention that he was identified in the ad. According to Justice Brennan's majority opinion:

> [The evidence] was incapable of supporting the jury's finding that the allegedly libelous statements were made "of and concerning" respondent [Sullivan]. Respondent relies upon the words of the advertisement and the testimony of six witnesses to establish a connection between it and himself. . . . There was no reference to respondent in the advertisement, either by name or official position.[140]

The Court noted that several of the allegedly libelous statements did not concern police and reference to "they" "could not reasonably be read as accusing [Sullivan] of personal involvement in the acts in question."[141] The Court went on to say, "Although the statements may be taken as referring to the police, they did not on their face make even an oblique reference to [Sullivan] as an individual."[142] The justices reasoned that identification must be established through testimony of witnesses for the plaintiff, but "none of them suggested any basis for the belief that [Sullivan] 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."[143] If identification or colloquium could be established on this basis, as the Alabama Supreme Court indicated in upholding the verdict, then criticism of government (seditious libel) would rear its ugly head because any criticism

of government could easily become criticism of government officials and therefore be punished. According to the U.S. Supreme Court:

> 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. [footnote omitted] We hold that such a proposition may not be constitutionally utilized to establish that an otherwise impersonal attack on government operations was 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 [Sullivan], the evidence was constitutionally insufficient to support a finding that the statements referred to [Sullivan].[144]

The Court did not rule out public officials being able to sue for libel for criticism in connection with their official duties, but the Court was not willing to permit plaintiffs such as Sullivan to infer libel simply because government actions connected with them were criticized. This aspect of *Sullivan* is often overlooked in discussions of the case, although lack of identification was a clearly a major reason the U.S. Supreme Court reversed the Alabama Supreme Court's upholding of the trial court verdict against the *Times*.

At the time the *New York Times* decision originated, the climate for civil rights, especially in the South, was hostile. The trial judge announced before the trial began in earnest that the 14th Amendment "has no standing whatever in this Court, it is a pariah and an outcast."[145]

The 14th Amendment was ratified after the Civil War. It was aimed at ensuring individuals would be protected against state actions that attempted to override rights guaranteed under the U.S. Constitution. ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.") This amendment, interpreted by the Supreme Court, assures all persons have the same rights as state citizens as they do as U.S. citizens. That meant a state or local government can impose no greater restriction on free speech or press freedom than what the federal government may impose, as the Court made clear in 1925 in *Gitlow v. New York*.[146]

The judge in *Sullivan* permitted several of the jurors in the trial to be seated in the jury box with Confederate uniforms. They had just participated in a re-enactment of the swearing in of Confederate President Jefferson Davis.[147] Seating at the trial was segregated by race. During the trial, one of Sullivan's attorneys, Calvin Whitesell, appeared to be saying *nigger* instead of *Negro* when he read the ad to the jury.[148] One defense raised by the *Times* was lack of *in personam* jurisdiction by the state court because only 394 copies out of a circulation of 650,000 had been distributed in the state. The trial court judge rejected the motion.

The local lawyer for the newspaper, T. Eric Embry, made what is known as a *special appearance*—a procedure by which an attorney is allowed to make a one-time appearance before a court to challenge its jurisdiction. With a special appearance, unlike a general appearance, the attorney is not agreeing for the client to come

under the authority of the court, but simply to come before the judge to argue that the court does not have the authority to hear the case. He followed steps enunciated by Judge Jones in a book the judge had written, entitled *Alabama Pleading and Practice,* only to have the judge overrule his own book. The Judge declared Embry's presence was a *general appearance,* subjecting Embry's client to the court's jurisdiction.[149]

At the time of the *New York Times* trial, Alabama, like a few other states, had a strict liability libel statute. Under this, a judge instructs a jury that once the statements are determined to be libelous per se (as he ruled) and are not privileged, to find the defendants liable, the jury needs only to find that they had published the ad and the statements were "made of and concerning" the plaintiff. The jury was told 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."[150]

After a three day trial, the jury deliberated for two hours and awarded the plaintiff the full amount he sought—$500,000—against the *Times* and four ministers, also defendants. It was at that time the largest libel judgment in the state's history. The jury gave no indication of how much of the award was for actual damages and how much for punitive damages. The Alabama Supreme Court sprung no surprises in its decision on appeal, sustaining the trial court verdict in its entirety. The U.S. Supreme Court granted certiorari and heard oral arguments on January 6, 1964. Two months later, the Court handed down its historic unanimous opinion written by Justice William Brennan.

Actual Malice Requirement

Federal courts, including the U.S. Supreme Court, are barred from hearing cases that do not involve a *federal question* (or diversity if the case originates in U.S. District Court). *Federal question* means the case must concern the U.S. Constitution, Acts of Congress, treaties or another area in which jurisdiction has been granted to the federal courts. Thus the Supreme Court had to find jurisdictional authority before it could hear the appeal from the *New York Times*. The Court readily disposed of both major arguments against its jurisdictional power over the case. First, the Court rejected the contention of the Alabama Supreme Court that the case involved private action, not state action, and that the 14th Amendment could not be invoked. The Court said the fact that the case involved a civil suit in common law was irrelevant because 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."[151] The Court had no problem finding state action in Alabama's attempt to impose restrictions on the constitutional rights of the defendants.

Second, the justices disagreed with the Alabama courts that First Amendment rights were inapplicable in the case because the libel involved a paid commercial advertisement. Noting that this argument relied on *Valentine v. Chrestensen*, the Supreme

Court said the *Times* ad was not a commercial ad in the sense of *Chrestensen*. The Court instead characterized it as an *editorial advertisement* that "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."[152] The Court felt public officials should take the heat of criticism, even when false information is involved:

> 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. [citations omitted] 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.[153]

In another significant part of the decision, the Court rejected the ruling of the Alabama court that the First Amendment's limit on repression of freedom of speech and freedom of the press under criminal statutes such as the federal Sedition Act did not apply to state civil libel statutes. "[W]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of prosecution under a civil statute," according to the Court. The justices enunciated a new actual malice rule: "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 with actual malice—that is, with the knowledge that it was false or with reckless disregard of whether it was false or not."[154]

With this statement, the U.S. Supreme Court set a new standard for determining when media defendants can be held liable for publication of defamatory information about public officials. For the first time, the Court was granting First Amendment protection for false, defamatory statements under certain conditions. As subsequent cases have demonstrated, proving actual malice with convincing clarity (as the Court said was necessary) is a tough but by no means impossible burden for a libel plaintiff. When it applied this standard to the *Sullivan* case, the Court ruled in favor of the *New York Times* and the other four defendants.

More than four decades after *New York Times v. Sullivan* was handed down, much of the general public is unaware of the case and the principle it established. One statewide survey found that almost seven out of ten respondents felt that if a newspaper accidentally used false information in an editorial criticizing a well-known person, that individual would be justified in suing for libel.[155] Similar surveys in other states would likely find the same results, although the Supreme Court made it clear that public officials (later extended to public figures) would not be able to

recover for accidental disclosure of false information that would constitute negligence, not the requisite actual malice.

Garrison v. Louisiana (1964): The Death of Criminal Libel?

The U.S. Supreme Court later expanded the actual malice rule to apply to criminal libel. In *Jim Garrison v. Louisiana* (1964),[156] the Court unanimously reversed the conviction of Orleans Parish (Louisiana) District Attorney Jim Garrison[157] for criminal libel for attacking the conduct of eight judges of his parish's criminal district court at a press conference. Garrison attributed a large backlog of cases to "the inefficiency, laziness, and excessive vacations of the judges" and accused them of hampering his efforts to enforce state vice laws by refusing to approve disbursements for the expenses of undercover investigations of vice in New Orleans. He was tried without a jury by a judge in another parish and convicted of criminal libel under a Louisiana statute providing criminal penalties for the utterance of truthful statements with actual malice ("hatred, ill will or enmity or a wanton desire to injure") and for false statements about public officials unless made "in reasonable belief of truth." The Louisiana Supreme Court upheld the conviction. The U.S. Supreme Court reversed.

The Louisiana statute was unconstitutional, according to majority opinion. Neither civil nor criminal liability can be imposed for false statements about official conduct unless statements are made with knowledge of falsity or reckless disregard for truth. The actual malice rule of *Sullivan* now applied to both civil and criminal libel for criticism of officials. The Court took an opportunity to clarify the meaning of *actual malice* by defining the term to include having "serious doubts" about the truth of the publication and uttering "false statements made with . . . [a] high degree of awareness of their probable falsity." The justices indicated that the use of a "calculated falsehood" would not be immune from liability and that the *New York Times* rule "absolutely prohibits punishment of truthful criticism" of the official conduct of public officials.

The Court did not toll the death of criminal defamation in *Garrison v. Louisiana*. Twelve years before *Garrison,* the Court upheld the constitutionality of an Illinois criminal libel statute. In *Beauharnais v. Illinois* (1952),[158] the Court upheld a statute that made it a crime to ". . . sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play drama or sketch, which . . . portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion to contempt, derision, or obloquy, or which is productive of breach of the peace or riots. . . ."[159]

Beauharnais, president of the White Circle League, was convicted by a jury of violating the statute and fined $200. He distributed racist leaflets on streets in Chicago urging the mayor and city council "to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro" and called upon "[o]ne million self-respecting white people in Chicago to unite . . . If persuasion and the need to prevent the white race from

becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will."[160]

The Court rejected Beauharnais' argument that the statute violated his free speech and press rights guaranteed against states under the 14th Amendment Due Process clause. According to the 5 to 4 majority decision, libelous statements, including criminal libel, are not protected by the Constitution. *Beauharnais* has never been directly overturned by the Court although dissenting opinions of Justices Black, Reed, Douglas, and Jackson have found more favor over the decades. *Beauharnais*, in fact, continues to be cited by the Court to support the principle that libelous speech does not have First Amendment protection, including its citation in 1992 in *R.A.V. v. City of St. Paul*,[161] which struck down a city ordinance used to punish teenagers for allegedly burning a cross on the lawn of an African American family.

Two years after *Garrison*, the U.S. Supreme Court handed down another decision involving criminal libel—this time, common law rather than statutory law—without specifically referring to *Sullivan's* actual malice rule. In *Steve Ashton v. Kentucky* (1966),[162] a unanimous court reversed the conviction of a man who had committed the common law offense of criminal defamation by circulating a pamphlet in Hazard, Kentucky, during a bitter labor battle. It criticized the city police chief, sheriff, and owner of a local newspaper for not supporting striking miners. Steve Ashton accused the sheriff of "probably" buying off the jury "for a few thousand dollars" and state police of escorting "scabs into the mines and hold[ing] the pickets at gunpoint." The trial judge, who fined Ashton $3,000 and sentenced him to 6 months in prison, defined criminal libel as "any writing calculated to create disturbances of the peace, corrupt the public morals, or lead to any act, which, when done, is indictable." In the majority opinion, the Court held such a law was too vague because punishing someone for publishing that tends to breach the peace makes that person "a criminal simply because his neighbors have no self-control and cannot refrain from violence."

Three months before *Ashton,* the U.S. Supreme Court elaborated on circumstances under which a public official can be defamed under *Sullivan,* including how to separate criticism of officials from criticism of government. In *Alfred D. Rosenblatt v. Frank P. Baer* (1966),[163] six justices, in an opinion written by Justice Brennan, reversed a jury award of damages to a former supervisor of county recreation against a local unpaid newspaper columnist. The columnist alleged mismanagement by a ski resort after the plaintiff was discharged and claimed, "On any sort of comparative basis, the Area this year is doing literally hundreds of percent BETTER than last year." The column made no mention of the plaintiff, but the jury and trial court judge felt the criticism referred to the former supervisor. The Court said, "in the absence of sufficient evidence that the attack focused on the plaintiff, an otherwise impersonal attack on governmental operations cannot be utilized to establish a libel of those administering the operations."[164]

The decision clearly defined *public official*, which the Court said "applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[165]

New York Times' Progeny: Extending the Actual Malice Rule

Three years after *Sullivan*, the U.S. Supreme Court extended application of the *actual malice rule* to *public figures*, which the Court defined as persons who thrust themselves "into the 'vortex' of an important public controversy." In *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker* (1967),[166] the Court combined two cases whose trial court decisions had been made prior to *New York Times v. Sullivan*. University of Georgia Athletic Director Wallace Butts was awarded $60,000 in general damages and $3 million in punitive damages by a jury for an article in the *Saturday Evening Post* magazine that accused him and legendary Alabama football coach, Paul "Bear" Bryant, of fixing a game between the schools. The magazine relied on information from an Atlanta insurance salesman who said he accidentally overheard a phone conversation between the men. The judge reduced the award to $460,000, and upon appeal by the publisher, the Fifth Circuit U.S. Court of Appeals affirmed. The U.S. Supreme Court also upheld the verdict.

The second case involved an Associated Press story about retired Army General Edwin Walker, which erroneously said he had led a violent crowd of protesters at the University of Mississippi to block federal marshals attempting to carry out a court order permitting James Meredith, an African American, to enroll at the segregated public university. Walker won $500,000 in compensatory damages and $300,000 in punitive damages in a jury trial, but the judge struck the award of punitive damages. The U.S. Supreme Court reversed the verdict.

In a plurality opinion written by Justice Harlan, the Court distinguished the two cases. Both individuals were public figures, according to the Court, but the evidence indicated "the Butts story was in no sense 'hot news' and the editors of the magazine recognized the need for a thorough investigation of the serious charges. Elementary precautions were, nevertheless, ignored." The Court found the second case much different:

> There the trial court found the evidence insufficient to support more than a finding of even ordinary negligence and the Court of Civil Appeals supported the trial court's view of the evidence . . . In contrast to the *Butts* article, the dispatch which concerns us in *Walker* was news which required immediate dissemination. The Associated Press received the information from a correspondent who was present at the scene of the events and gave every indication of being trustworthy and competent.[167]

The plurality opinion also advocated a different test for actual malice in the case of public figures versus public officials: "We consider and would hold that a 'public figure' who is not a public official may also recover damages 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."[168] This test attracted support of only three justices besides Harlan. Since then, some state courts and an occasional federal court have cited the test as appropriate, but the U.S. Supreme Court has never explicitly adopted this standard.

The same year as *Curtis Publishing,* the Court ruled in a *per curiam* opinion that a county clerk up for reelection in West Virginia had failed to demonstrate actual malice with the convincing clarity required under the *New York Times* standard when he was attacked in three local newspaper editorials. In *Beckley Newspapers Corp. v. C. Harold Hanks* (1967),[169] the Court reversed a $5,000 jury verdict because the evidence showed no "high degree of awareness of . . . probable falsity."

Serious doubts became the buzzwords for actual malice in 1968 when the Court ruled 8 to 1 in *Phil A. St. Amant v. Herman A. Thompson*[170] that a public official failed to show defamatory statements about him in a televised political speech were made with actual malice. According to the opinion written by Justice White: "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice."[171]

Two years after *St. Amant,* the U.S. Supreme Court held in *Greenbelt Cooperative Publishing Assoc. v. Charles Bresler* (1970)[172] that use of the term *blackmail* in referring to a real estate developer's negotiating stance could not be reasonably understood as a criminal accusation because it was merely rhetorical hyperbole. The Court overturned a $17,500 jury verdict for the defendant.

In a similar vein, the Court reversed the $20,000 jury verdict evenly split against a newspaper and the distributor of a syndicated column for referring to the criminal records of one of several candidates for the U.S. Senate primary in New Hampshire and for calling him a "former small-time bootlegger." According to the Court, the judge in *Monitor Patriot Co. v. Roselle A. Roy* (1971)[173] erroneously instructed the jury that actual malice had to be shown only if the libel concerned the plaintiff's fitness for office. The judge allowed the jury to determine whether the alleged conduct was relevant, but the U.S. Supreme Court said "a charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or candidate's fitness for office for purposes of application" of the actual malice rule.[174]

In *Time, Inc. v. Pape* (1971)[175] the justices attempted to clarify the actual malice rule in a complex case. The Court's analysis focused on whether omission of the qualifier "alleged" in a *Time* magazine story about an incident reported in a commission's report could be considered by a jury as evidence of actual malice. Characterizing the report as "extravagantly ambiguous," the Court's majority felt failure on the magazine's part was "at most an error of judgment rather than reckless disregard of the truth" and could not be construed as actual malice, which the defendant would have needed to demonstrate because he was considered a public figure.

In *Ocala Star-Banner Co. v. Leonard Damron* (1971),[176] the Supreme Court wrestled with an issue similar to that in *Monitor Patriot Company*—whether a false report of the alleged criminal misconduct of a public official is relevant to the person's qualifications. The case arose when a small daily newspaper accidentally used the name of the plaintiff instead of his brother who had been charged with perjury. The mistake was committed by an editor who had been at the paper for about a month. Citing *Monitor Patriot*, the Court reversed a $22,000 verdict awarding compensatory damages.

The Court issued another libel decision in 1971, *George A. Rosenbloom v. Metromedia*,[177] a plurality opinion that the justices subsequently rejected. The essence of the ruling was that both public figures and private individuals involved in events of public concern must demonstrate actual malice. That view was never adopted by a majority of justices, although some state courts applied versions of it. The Court was obviously struggling to give meaning to the actual malice rule. On the tenth anniversary of *New York Times v. Sullivan,* the U.S. Supreme Court had the opportunity to deal with questions that continued to surround its 1964 landmark decision.

Gertz v. Welch (1974): Handing the Standard of Care for Private Individuals Back to the States

In *Elmer Gertz v. Robert Welch, Inc.* (1974),[178] the Court for the first time dealt with the standard of care to be applied in the case of a private figure. In a 5 to 4 opinion, second only to *New York Times v. Sullivan* in its stature among libel rulings, the justices held that each state may set its own standard so long as the standard is not one of strict liability. A defendant cannot be held liable simply because defamatory information was published, but instead the plaintiff must show, at the very least, that the defendant violated the prevailing standard of care. In other words, the defendant must, at a minimum, have acted unreasonably. In some states, this means the defendant did not do what a reasonable journalist would have done. In other states the standard is *reasonable person*.

The case began when Elmer Gertz, a well-known Chicago attorney, was severely criticized in *American Opinion*, a magazine published by the right-wing John Birch Society. Gertz had represented the Nelson family in a civil suit against a Chicago police officer, Richard Nuccio, who had been convicted of second degree murder in the death of their son. Although Gertz had played no role in the criminal proceeding against Nuccio, the magazine article, entitled "Frame-Up: Richard Nuccio and the War on Police," accused the attorney of being an architect in a frame-up against police. The story said the police file on Gertz took "a big Irish cop to lift," that he had been an official of the "Marxist League for Industrial Democracy," and that he was a "Leninist," a "Communist fronter," and a former officer of the National Lawyers Guild. The article described the guild as a communist organization that "probably did more than any other outfit to plan the communist attack on the Chicago police during the 1968 Democratic Convention."

The statements were false. Gertz had no criminal record. There was no evidence that he was a "Leninist" or "Communist fronter," and he had never been a member of the Marxist League. He had been a member of the National Lawyers Guild 15 years earlier, but there was no evidence that he or the organization had taken any part in demonstrations. Robert Welch, the magazine's managing editor, "made no effort to verify or substantiate the charges" against Gertz, according to the Court. "The principal issue in this case is whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against the liability for the injury inflicted by those statements,"[179] the Court said.

Gertz won $50,000 in damages in a jury trial against the magazine, but the judge instructed the jury that the plaintiff was a private individual, not a public figure, concluding after the verdict that the actual malice standard of *New York Times v. Sullivan* should have been applied instead of the state's negligence standard. He issued a *jnov* overturning the jury's decision. The U.S. Supreme Court reversed the trial court decision and ordered a new trial.

Many states now have a *negligence* standard. Alaska, Colorado, Indiana, and New Jersey adopted an actual malice standard for private figures. New York imposes a gross irresponsibility standard, and it is unclear from four states—Connecticut, Louisiana, Montana, and New Hampshire—exactly what rule applies.[180]

The Court made two more significant points in *Gertz*. First, it determined that Gertz was not a public figure:

> He played a minimal role at the coroner's inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution of Officer Nuccio. Moreover, he never discussed either the civil or criminal litigation with the press and was never quoted as having done so. He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome.[181]

The Court further indicated there are two types of public figures. One type is a person who has achieved such "pervasive fame or notoriety that he [she] becomes a public figure for all purposes and in all contexts." This type of public figure is now generally called an *all-purpose public figure*. The second and more common type of public figure is "an individual [who] voluntarily injects [her] himself or is drawn into a public controversy, becoming a public figure for a limited range of issues." This category is known as a *limited-purpose public figure*.

Under the *Gertz* rationale, both the all-purpose public figure and the public official must show actual malice before they can recover any damages for libel unless the libelous statements do not relate to their public performance. However, limited-purpose public figures need to demonstrate actual malice only if the libelous matter concerns the public issue or issues on which they have voluntarily thrust themselves into the vortex. The private individual need demonstrate only that the particular standard of care was violated, which is typically negligence, a much lower standard than actual malice. The Court said that "hypothetically, it may be possible for someone to become a public figure through no purposeful action of his [her] own, but the instances of truly involuntary public figures must be exceedingly rare."[182] The instances are so rare that since *Gertz* was handed down, the U.S. Supreme Court has yet to uphold a libel decision in which a plaintiff was classified as an involuntary public figure. It is safe to assume when reporting about people who have somehow been involuntarily thrust into the public spotlight that they are private figures, not public figures for libel purposes. Elmer Gertz, Mary Alice Firestone, and Ronald R. Hutchinson were all private figures, not public figures.

What about Richard Jewell? When a bomb exploded in summer 1996 at Centennial Olympic Park in Atlanta, killing one person and injuring 111 others, Jewell

became a hero because he had discovered a suspicious knapsack, alerted police, and helped clear people away. Three days later, the 33-year old security guard was questioned by the FBI under circumstances for which Attorney General Janet Reno made an apology months later.[183] The *Atlanta Journal-Constitution* was the first media outlet to identify Jewell as a "prime suspect," citing anonymous sources. Others followed suit including CNN, *Time* magazine, and NBC-TV. For the next 88 days, the FBI kept Jewell and his apartment where he lived with his mother under surveillance, and followed him with an entourage. His apartment was searched and his mother interviewed, as were acquaintances and former employers, but he was never arrested or charged with any crimes. Throughout the ordeal, he was the subject of intense media coverage. On October 26, 1996, the U.S. Department of Justice sent his attorney a letter, saying, "Based on evidence developed to date, your client Richard Jewell is not considered a target of the federal criminal investigation into the bombing."[184]

Jewell sued or threatened to sue several media outlets for libel and invasion of privacy, including WABC-AM in New York (owned by Walt Disney Co.), the *New York Post,* NBC-TV, CNN, and the *Atlanta Journal-Constitution*. Most media law experts quoted in news accounts and in an article in the *American Bar Association Journal* generally agreed that Jewell had little chance of winning his lawsuits, primarily because they believed he would likely be considered a public figure for purposes of libel and thus would have to prove actual malice.[185] They pointed to the fact that Jewell had voluntarily granted interviews, especially after the bombing. An attorney for Jewell criticized the media for crossing the ethical line and prematurely judging his client.[186]

NBC became the first media outlet to settle with Jewell, paying him an estimated $500,000 for comments made by the then-dominant news anchor Tom Brokaw.[187] CNN also settled for an undisclosed amount. *Time* made no payment, but indicated in a "clarification" that it regretted what "may have been some inaccurate or incomplete" statements.[188] In the final analysis, Richard Jewell was cleared of all charges and all allegations made in the media against him. The media did not fare as well. Other prominent news organizations including Cox Enterprises (parent to the *Atlanta Journal-Constitution*) and the *New York Post* were targeted for their inaccurate coverage and misreporting of aspects of Richard Jewell's story. Some news outlets, including CNN, continue to maintain their coverage was fair and accurate. The Georgia Court of Appeals ruled that reporters did not have to reveal confidential sources unless Jewell could show a need for this sensitive information. In *Jewell v. Atlanta Journal-Constitution* (2001), the state appellate court also ruled that Jewell had become a voluntary public figure, pointing to his "ten interviews and one photo shoot in three days," most of them to the national press.[189]

In the current environment, particularly in the aftermath of the World Trade Center Attack of September 11, 2001 and subsequent bombings in Madrid, Spain and London, England, among others, similar concerns have been expressed regarding use of the terms, "person of interest" or "persons of interest." Army scientist

Steven J. Hatfill, for example, requested in 2005 that a federal court of appeals reinstate a lawsuit claiming the *New York Times* had ruined his reputation by publishing false accusations implying that he was responsible for the deadly anthrax mailings of 2001. Then U.S. Attorney General John Ashcroft had labeled Hatfill a "person of interest."[190]

In *Gertz* the U.S. Supreme Court indicated that *self-help* is an important factor for courts to consider in distinguishing categories of libel plaintiffs. Is there an opportunity to address an unfounded allegation, contradict a lie, or correct an error, thereby minimizing adverse impact on a person's reputation? The Court in *Gertz* noted that private individuals usually lack "effective opportunities for rebuttal," whereas those who seek public office "must accept certain necessary consequences of that involvement in public affairs." This point was clearly a warning of what was to come. The Court held that no libel plaintiffs—public or private—could recover punitive damages unless the person demonstrated actual malice. The Court noted, "It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury."[191] The justices declined to define *actual injury*, deferring instead to the trial courts. They did indicate that the term was not to be limited to "out-of-pocket loss" but could include "personal humiliation, and mental anguish and suffering."

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. (1985): *Gertz* Clarified or Modified?

In 1985, the U.S. Supreme Court upheld in a split 5 to 4 vote a jury award of punitive damages. In this case, the trial court judge had not instructed the jury that a showing of actual malice was required. On appeal of the trial court decision, the Vermont Supreme Court upheld the award on the ground that *Gertz* was not applicable to non-media defendants. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[192] Justice Powell, joined by Justices Rehnquist and O'Connor, disagreed with the state supreme court. Powell said that for matters of private concern, states could determine whether punitive and presumed damages require a showing of actual malice.

The case began when Dun & Bradstreet, a credit reporting agency, sent a confidential report to five clients that falsely reported that Greenmoss Builders, a construction contractor, had gone bankrupt. Greenmoss won $50,000 in compensatory damages and $300,000 in punitive damages. Justice Powell noted that the report did not concern a matter of public interest but instead was "speech solely in the individual interest of the speaker" and its confidential subscribers. Some First Amendment experts viewed the decision as nothing more than a reaffirmation of *Gertz* because, as Justice Brennan indicated in his dissent, at least six justices appeared to agree that the press ("institutional media") has no greater or lesser protection against defamation than other defendants. Other experts disagreed, asserting that the Court was granting states the opportunity to lower the Gertz standard for punitive damages below actual malice.

Harte-Hanks Communications, Inc. v. Connaughton (1989): A Public Official Recovers for Actual Malice

Only rarely has the Supreme Court permitted a public official to recover damages. The Court took the opportunity to do so in *Harte-Hanks Communications, Inc. v. Connaughton*.[193] This case involved a front-page story in the Hamilton, Ohio, *Journal-News*, which quoted Alice Thompson, a grand jury witness, as saying that municipal judge candidate Daniel Connaughton, had used "dirty tricks" in his campaign and had offered her and her sister jobs and a vacation in Florida "in appreciation" for help in an ongoing investigation of bribery charges against incumbent James Dolan's director of court services. The gist of the story was that Connaughton had engaged in a smear campaign against Dolan. The story was published a month before the election in which the newspaper supported Dolan.

After he lost the election, Connaughton sued the *Journal-News* for libel. A jury awarded $5,000 in compensatory damages and $195,000 in punitive damages. A court of appeals upheld the decision and the U.S. Supreme Court unanimously affirmed. In an opinion written by Justice Stevens, the Court pointed to strong evidence of actual malice, as determined by the trial court. The paper did not bother to interview the one witness that both the plaintiff and Thompson said could verify conflicting accounts of events surrounding alleged charges—Thompson's sister, Patty Stephens: "It is utterly bewildering in light of the fact that the *Journal-News* committed substantial resources to investigating Thompson's claims, yet chose not to interview Stephens—while denials coming from Connaughton's supporters might be explained as motivated by a desire to assist Connaughton, a denial from Stephens would quickly put an end to the story."[194]

The reporter and editors deliberately chose not to listen to tape recordings of the original interview in which Thompson made her allegations of dirty tricks. There was evidence that Thompson may not have been a credible witness. She had a criminal record, had been treated for mental instability, and her version of events was disputed by six witnesses. Finally, the newspaper printed an editorial before its investigative story appeared, indicating that damaging information would appear later about the candidates during the final days of the campaign. To the Court, this showed a lack of concern for unearthing the truth or bias against Connaughton. There was conflicting testimony at trial from the newspaper's own staff about how the story was investigated.

Bose Corporation v. Consumers Union of the United States (1984): De Novo Review

The Supreme Court dealt with one other important, related issue in the *Harte-Hanks* case—whether the appellate court had conducted the required de novo review established in *Bose Corporation v. Consumers Union of the United States*[195] on the 20th anniversary of *New York Times v. Sullivan* and the 10th anniversary of *Gertz v. Welch*.

Bose began with an article in the May 1970 *Consumer Reports* rating stereo speakers, which claimed that the Bose 901 speaker system reproduced the sound of individual musical instruments in such a way that they "tended to wander about the room." According to testimony at the trial, the sounds tended to wander "along the wall" between the speakers, not "about the room." The judge ruled the company was a public figure but that there was clear and convincing evidence of actual malice. A U.S. District Court judge at a second trial ordered Consumers Union to pay $115,296 in damages to compensate Dr. Amar G. Bose, who had invented the innovative speaker system, for $9,000 he had said he spent to counter the bad publicity and $106,296 in lost sales.

On appeal, the First Circuit U.S. Court of Appeals agreed that the article was "disparaging" but reversed the district court decision after conducting a de novo review or independent review of both the facts and the law in the case and finding there was no evidence of actual malice. Bose appealed the appellate court's decision on the ground that Rule 52(a) of the Federal Rules of Civil Procedure (which bars federal appeals courts from determining facts in a case unless the trial court's decision was "clearly erroneous") should have been the standard of review, not a de novo review. The U.S. Supreme Court affirmed the court of appeals decision, holding that federal appellate courts must conduct a de novo review "in order to preserve the precious liberties established and ordained by the Constitution" in cases related to First Amendment issues. Note that such a review is mandatory if an appeal involving the First Amendment is considered in the federal courts; it is not optional.

In *Harte-Hanks,* the Supreme Court found that the court of appeals conducted the independent review mandated in *Bose* and thus did not give undue weight to the jury's findings.

Michael Milkovich v. Lorain Journal Company (1990): Protection for Opinion

In *dicta* in the *Gertz* case, the Court said, "Under the First Amendment there is no such thing as a false idea." To some courts and media defendants, this implied that ideas or opinions were libel-proof. However, *dicta* (officially known as *obiter dicta* or "remarks by the way"[196]) are comments or opinions of a judge not directly related to the issue or question in the case and thus not meant to represent the law.

In *Michael Milkovich v. Lorain Journal Company* (1990),[197] in a 7 to 2 decision written by Chief Justice Rehnquist, the Court ruled that the First Amendment does not require a separate privilege for statements of opinion. The justices held that the protection offered by *New York Times v. Sullivan, Curtis Publishing Co. v. Butts,* and *Gertz v. Welch* is sufficient for both opinions and statements of fact:

> Thus, where a statement of "opinion" on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth. Similarly, where such a statement involves a private figure on a matter of public concern,

> a plaintiff must show that the false connotations were made with some level of fault as required by *Gertz*. Finally, the enhanced appellate review required by *Bose Corp.* provides assurance that the foregoing determinations will be made in a manner so as not to "constitute a forbidden intrusion of the field of free expression." [cites and footnotes omitted][198]

Milkovich concerned a sports column that said a high school wrestling coach "had beat the system with the big lie" and that "anyone who attended the meet . . . knows in his heart that [Milkovich, the plaintiff] lied at the hearing after giving his solemn oath to tell the truth." The Supreme Court said that a "reasonable fact finder could conclude that the statements in the . . . column imply an assertion that Milkovich [the plaintiff] perjured himself in a judicial proceeding." According to the majority, "The article did not use the sort of loose, figurative, or hyperbolic language that would negate the impression that [the columnist] was seriously maintaining Milkovich committed perjury."[199] The Court reversed the trial court's summary judgment in favor of the newspaper.

Many journalists found the decision unsettling, but one First Amendment attorney has characterized the decision in "purely legal terms" as "little more than judicial tinkering, unlikely to have more than a marginal impact, especially on mass media with the sophistication, resources and guts to do their jobs aggressively."[200] Charles N. Davis found in his research that libel suits since *Milkovich* involving opinion often result in summary judgment in favor of the defense. The study "suggests the many gloomy predictions made in the wake of *Milkovich* were overstated and concludes that most statements of opinion are still protected by the libel doctrines created in earlier Supreme Court decisions."[201]

A good illustration to support this premise is *NBC Subsidiary (KCNC-TV), Inc. v. The Living Will Center* (1994),[202] in which the Colorado Supreme Court ruled 4 to 3 that characterizing a company's marketing of living will kits a "scam" was constitutionally privileged as opinion. The case arose when the station aired two segments in its afternoon newscasts about the Living Will Center, which sold a $29.95 kit enabling a person to draft and execute a living will. A medical ethicist commented in one of the reports that when people get the kits they will realize they have been "totally taken," adding that he thought the marketing was a "scam." Newscasts pointed out that the living will forms could be obtained free from the University of Colorado Health Sciences Center and that the company's president was neither a lawyer nor a doctor. Reversing a lower appellate court, the state supreme court said, "The terms 'scam' and 'taken' as well as the substance and gist of the broadcasts neither contain or imply a verifiable fact nor can they be reasonably understood as an assertion of actual fact about [the center's] product."[203]

It is rare for any appellate court to reconsider a case and reverse itself upon a request for a rehearing, but that is what happened in 1994. Much to the amazement of observers on both sides, the U.S. Court of Appeals for the D.C. Circuit concluded it had made a mistake in a previous decision. In *Moldea v. New York Times Co. (Moldea I,* 1994),[204] the Court of appeals in a 2 to 1 decision reinstated writer Dan

E. Moldea's suit against the *New York Times*, which had won a summary judgment in the U.S. District Court for the District of Columbia. The suit involved a review of Moldea's book, *Interference: How Organized Crime In uences Professional Football*, in the *New York Times Book Review*. The reviewer, sportswriter Gerald Eskenazi, said, ". . . there is too much sloppy journalism to trust the bulk of this book's 512 pages—including its whopping 64 pages of footnotes." Moldea claimed five other passages in the negative review were defamatory, including the reviewer's statement that the author had characterized a meeting involving Joe Namath as "sinister" and that Moldea was reviving "the discredited notion" that the owner of a West Coast football team had "met foul play when he drowned in Florida 10 years ago."

Moldea I held that "the term [sloppy] has obvious, measurable effects when applied to the field of investigative journalism" and thus criticized his abilities as a journalist. The court rejected the plaintiff's contention that three of the statements in question were actionable but ruled that the statements regarding the "sinister" meeting and "discredited notion" could be verified and thus should be sent to a jury for determination of their truth or falsity. Upon reconsideration, the three-member panel did an about-turn. In *Moldea II,* the court unanimously held "the challenged statements in the *Times* review are supportable interpretations of *Interference,* that as a matter of law the review is substantially true. Accordingly, we affirm the District Court's grant of summary judgment in favor of the *Times*."[205]

In admitting the appellate court's mistake in the first ruling, a circuit court judge said the majority's first opinion was "misguided" and "applied an inappropriate standard." The court said it was "highly debatable" whether the "sloppy journalism" characterization was verifiable. The book examples were "supportable interpretations." The judges were troubled by the "sinister meeting" reference but said it "does not come within the compass of 'incremental harm.'"

Under the *incremental harm doctrine*, the harm created by the allegedly false information is compared to the harm created by any true information. In other words, if a story accurately describes someone in a negative way but at the same time uses false information, the plaintiff would lose because the published truth was more damaging than the falsehoods. As the court noted, "Because the review relies principally on statements that are true, supportable opinions or supportable interpretations to justify the 'sloppy [footnote omitted] journalism' assessment, we are constrained to find that it is substantially true and therefore not actionable."[206] As media defense attorney Lee Levine said, "*Moldea II* may not warrant . . . [dancing in the streets] . . . but journalists do have reason to permit themselves a little jig in the privacy of their newsrooms."[207]

Different states have different approaches to protect opinions in light of *Milkovich*. Some states continue to offer more protection for opinions than factual statements while others adhere to the idea that opinions have no special protection. The most common approach, as illustrated in a Florida case, is to grant protection to statements of opinion when facts supporting the opinions are either contained in the report or the statements are based upon facts that are publicly known. In *Miami Child's World v. Sunbeam Television Corp.* (1996),[208] a Florida appellate court held that a TV station and its reporter could not be found liable for libel for broadcasting

a news report about a company's business with the Miami Beach City Commission that the report called a "rip-off," "inside deal," and "land giveaway." The court said the descriptions were reasonable in light of the factual statements that were used to support the characterizations.

Masson v. New Yorker Magazine (1991): Altered Quotes

In *Masson v. New Yorker Magazine* (1991),[209] the U.S. Supreme Court reversed a Ninth Circuit U.S. Court of Appeals decision upholding a summary judgment by a California U.S. District Court judge in favor of a magazine, author, and book publisher. The Supreme Court held that although a libel defendant's intentional alteration of direct quotes did not automatically equate with actual malice, such changes could constitute an issue of fact to be presented to a jury. The Court was particularly bothered by a passage in which the plaintiff, psychoanalyst Jeffrey Masson, was quoted as saying Sigmund Freud Archive officials had characterized him as an "intellectual gigolo" when a tape recording contained a much different statement. The opinion also suggested the term *actual malice* not be used in jury instructions because of the confusion surrounding the term. According to the Court, "[I]t is better practice that the jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity." In 1993 a U.S. District Court jury in San Francisco in a retrial determined that the author, Janet Malcolm, had libeled Masson, but the case ended in a mistrial when the jury could not agree on damages.

Injury

There is one final element for proof of libel: The plaintiff must be injured. Damages fall into five major categories: (a) nominal, (b) special, (c) general, (d) actual, and (e) punitive. The U.S. Supreme Court has never dealt directly with nominal damages, but there is some question whether such damages are still available after *Gertz*,[210] in which the Court said that compensation can be made only for actual injury, which the Court broadly defined. Nominal damages are symbolic, such as the award of $1, a way of recognizing that a plaintiff has been defamed but no real harm occurred.

Special damages are awarded to libel plaintiffs to compensate for out-of-pocket, pecuniary (economic) harm. The judge in the *Bose* trial awarded the plaintiff special damages representing his actual loss of sales because of the critical review. Ordinarily, plaintiffs do not seek special damages in libel cases because they are fairly difficult to demonstrate.

General damages are awarded to libel plaintiffs to compensate them for losses that cannot necessarily be measured. In 1986 a federal district court jury awarded Brown & Williamson Tobacco Corp. $3 million in general or compensatory damages and $2 million in punitive damages against CBS for a commentary on a network-owned television station, WBBM-TV in Chicago, which accused the company of advertising its Viceroy cigarettes so children would associate smoking with sex, alcohol, and marijuana. The judge reduced the compensatory damages to $1 because

he said the company had failed to show loss of sales. In 1987 the Seventh Circuit U.S. Court of Appeals upheld the punitive damages but restored the $1 million compensatory damages. The U.S. Supreme Court denied certiorari.[211]

With *Gertz* and its requirement of actual injury for all plaintiffs, *actual damages* have become the norm. As the Court indicated in *Gertz,* these can be awarded for such injuries as harm to reputation, humiliation, and mental anguish. In *Hustler Magazine and Larry C. Flynt v. Jerry Falwell,*[212] the U.S. Supreme Court reversed a U.S. District Court jury verdict awarding the TV evangelist $200,000 in damages, including $100,000 in compensatory damages and $50,000 each against the magazine and its publisher in punitive damages for intentional infliction of emotional distress. *Hustler* had published a parody of a Campari Liqueur ad in which Falwell talked about his "first time." See Figure 8.1. The Campari ads referred to the "first time" celebrities tasted the liqueur, but the magazine parody included a picture of Falwell with the text of a fictional interview in which he describes his "first time" as incest with his mother in an outhouse.

The Supreme Court ruled that because the jury had determined Falwell had not been libeled, the minister was not entitled to damages for intentional infliction of emotional distress. The majority opinion written by Chief Justice Rehnquist said, "There is no doubt that the caricature of respondent and his mother published in *Hustler* is at best a distant cousin of the political cartoons . . . [of Thomas Nast] . . . and a rather poor cousin at that."[213] To recover such damages, the plaintiff would have to show that the publication contained a false statement of fact which was made with actual malice, which Falwell had failed to do, according to the Court. The moral of this story: intentional infliction of emotional distress will be virtually impossible to demonstrate for libelous statements unless plaintiffs can show that they were also defamed and, for a public figure, that the statements were published or broadcast with actual malice.

Finally, *punitive damages* are designed to send a message to defendants and to punish them for the libel. There is no real cap on such damages, although judges will often reduce huge awards. Entertainer Wayne Newton initially won $19 million in compensatory and punitive damages from NBC for a TV news report that he claimed falsely implied that the Mafia and mob sources helped him purchase the Aladdin in exchange for a hidden share of the hotel and casino and that he had lied under oath to Nevada gaming authorities about his relationship with the Mafia. The trial court judge reduced the amount to $225,000 for physical and mental injury, $50,000 as presumed damages to reputation, and $5 million in punitive damages. The Ninth Circuit U.S. Court of Appeals overturned the verdict, and the U. S. Supreme Court denied certiorari.[214]

Punitive damages, in general, have received a lot of attention, both from the media and from politicians. Everyone from the Internal Revenue Service (which, with the support of the Supreme Court, considers punitive damages taxable[215]) to the courts have addressed punitive damages. With each new president, the U.S. Congress usually makes noise about imposing caps on punitive damages for torts such as medical malpractice. The U.S. Supreme Court's decision in *Honda Motor Co. v. Oberg* (1994)[216] was beneficial to some libel defendants, especially those in states where judges tend to lack discretion to review jury awards of punitive damages. Although this case

concerned a provision of a state constitution, state and federal statutes that attempt to accomplish the same result—the preservation of jury punitive damage awards—could not survive scrutiny of the Due Process clause. This assures judges the right to review, reduce, or overturn punitive damages. The impact of that Court's decision was minimal since the majority of jurisdictions already have a review mechanism.

In *BMW of North America v. Gore* (1997),[217] the U.S. Supreme Court established guidelines for punitive damages. The case began when Ira Gore Jr., a physician, bought a new BMW sports sedan for $40,750.88 from a Birmingham, Alabama, dealer. He later took the car to a detailer to make the car look "snazzier." A detailer told Gore that the car appeared to have been repainted—apparently due to acid rain damage. Gore sued BMW, asking for $500,000 in compensatory and punitive damages. At trial, BMW admitted it had had a policy of selling cars as new if they had been repaired after being damaged during manufacture or transportation, if the damage did not exceed three percent of the suggested retail price.

Gore requested $4 million in punitive damages. He presented evidence at the trial that BMW had sold about 1,000 damaged cars in the country since 1983 and that his car was worth about $4,000 less than it would have been if it had not been repainted ($4,000 × 1,000 cars = $4 million). The jury obliged and awarded $4 million in punitive damages and $4,000 in compensatory damages. The Alabama Supreme Court upheld the award but halved punitive damages.

In a 5 to 4 decision, the U.S. Supreme Court held that the $2 million award was grossly excessive and thus violated the Due Process clause of the 14th Amendment. The Court made it clear that a state has a legitimate interest in punishing unlawful conduct and preventing repetition but cannot set policies for the whole country by punishing parties for conduct that occurred in other states. The award should have been made based upon what happened in Alabama. BMW sold only 14 such cars in Alabama since 1983.

Next, the Court pointed to three guideposts to be used in determining whether the award was excessive because the defendant did not have fair notice of the conduct for which it could be punished as well as the severity of the penalties, as required under the Constitution. Under each guidepost, BMW was not given fair notice, thereby rendering the $2 million punitive award "grossly excessive." The Court said a court must first look at "the *degree of reprehensibility* (emphasis added) of the defendant's conduct." It noted that Gore's damages were "purely economic" because repainting had no effect on his auto's performance, safety features, or appearance, and there was no evidence that the company had acted in bad faith, made deliberate false statements or engaged in affirmative misconduct.

The second guidepost is "*the ratio between the plaintiff's compensatory damages and the amount of punitive damages*" (emphasis added). The Court said, "Although it is not possible to draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case . . . the ratio here (the punitive award is 500 times the compensatory award) is clearly outside the acceptable range."[218] The last guidepost is the *difference between the punitive damages award and "the criminal or civil sanctions that could be imposed for comparable misconduct"* (emphasis added). Again, the award against BMW failed the test. The Court pointed

out that the maximum fine in Alabama at the time was only $2,000, similar to maximums in other states. The Court concluded: ". . . we are fully convinced that the grossly excessive award imposed in this case transcends the constitutional limit."[219]

The U.S. Supreme Court remanded the case back to the Alabama Supreme Court, which reduced the punitive damages to $50,000.[220] According to legal affairs journalist Mark Thompson, federal and state courts have frequently used the *BMW* ruling to substantially cut multimillion-dollar punitive awards, with federal courts doing so more often than state courts.[221] One often cited case involved a woman who convinced a jury to award her $2.7 million in damages against McDonald's Corporation for severe burns sustained when hot coffee she ordered at a drive-thru spilled in her lap. A judge reduced the award to $480,000. The case was eventually settled out of court.

In a 5-4 decision written by Justice Stephen G. Breyer, the U.S. Supreme Court vacated a $79.5 million judgment against tobacco giant Philip Morris USA in 2007. In *Philip Morris USA v. Williams*,[222] the Court held that it is a violation of the due process clause when a jury is permitted to base a punitive damage award "upon its desire to punish the defendant for harming persons who are not before the court" such as victims not represented by the parties. The case arose after a jury awarded $821,000 in compensatory damages and $79.5 million in punitive damages for deceit in marketing that led to the death of a smoker. In practical terms this means that juries must base punitive damages on the harm to the plaintiff(s) not to other individuals who may be been victims as well.

Defenses to Libel

There are five major defenses to libel and three ways for a defendant to attack libel and either have the case dismissed or mitigate damages. The five hard-line defenses are truth, privilege (absolute and qualified), fair comment and criticism, consent, and the statute of limitations. The other three methods of attack are retraction or correction, libel-proof plaintiff, and neutral reportage.

Truth

Since the John Peter Zenger trial in 1735, truth has been a defense to libel, or at least to criminal libel, in America. Every state permits truth as a defense in some form. Truth must be published with "justification" or "good motives" in many states, but this is theoretical and probably would not survive a constitutional challenge in light of *New York Times v. Sullivan*. In its decision in the case, the Court prominently mentioned the value of truth and, in some circumstances even falsehoods, in the uninhibited and robust debate that we cherish on controversial issues of public importance. Thus, it can be safely assumed that truth is an absolute bar to a successful libel suit. There are two problems that interfere with this defense. First, most libel suits do not involve truthful information. Plaintiffs generally do not sue unless the information is false. Whether there are damages or the degree of falsity is sufficient to warrant a suit may be questionable, but nearly always a suit that survives a motion to dismiss involves false information.

In *Philadelphia Newspapers, Inc. v. Maurice S. Hepps* (1986),[223] the U.S. Supreme Court ruled in a 5 to 4 opinion written by Justice O'Connor that when a private individual sues the media for libel and the information published is a matter of public concern, the plaintiff has the burden of demonstrating the allegedly defamatory statements were false. Thus a suit fails if the plaintiff does not provide clear and convincing evidence that the information was false. The defendant does not have the burden of showing the information was true. Although the Court did not indicate in its ruling that this requirement would prevail for public figures and public officials, there is little doubt that this would be the standard. It is highly unlikely that the Court would impose a tougher standard of proof on private individuals than on public figures and public officials.

The Court did not indicate what the rule would be in cases involving private individuals and nonpublic issues. It would be safe to assume from the split vote and the fact that the Court chose to specifically tie the rule to matters of public concern that states would make their own determinations of the burden of proof in nonpublic matters whether they involve private individuals or public figures, especially limited-purpose public figures, as defined in *Gertz*. The public issue in *Philadelphia Newspapers* was alleged ties of a franchised business to organized crime and the use of these supposed ties to allegedly influence the state's government.

Privilege

As discussed earlier in this chapter, there are three major types of privilege—absolute, conditional, and constitutional. The latter two are most useful as defenses. Each type has limited applicability, but all have proven useful in specific situations. Public figures and public officials occasionally win libel suits from sympathetic juries, but the vast majority of those verdicts have damages reduced or are tossed out altogether by an appellate court conducting a de novo review. The key is having an individual declared a public official or public figure. One libel case[224] involving the *Lexington* (Kentucky) *Herald-Leader*, in which the first author of this text served the defense as an expert witness before trial, illustrates the point. A former University of Pittsburgh assistant basketball coach sued the newspaper for information about him in a 1986 reprint of an earlier article that alleged he made an improper recruiting offer to a high school player. Before the trial began, Fayette Circuit Court Judge James E. Keller ruled that the plaintiff coach was not a public figure. As the suit neared trial, he reversed himself and ruled the plaintiff was a public figure and would have to show actual malice.

After the plaintiff's attorney had presented his side at the trial itself, the judge granted the defense's motion for a directed verdict on the ground that the plaintiff had not met his burden of proof. The plaintiff appealed the decision to the Kentucky Court of Appeals, which reversed the trial court decision, and ruled the individual was not a public figure and the directed verdict was not warranted. The defendants then appealed the decision to the state's supreme court, which affirmed the lower appellate court's holding and ordered a new trial. The U.S. Supreme Court denied certiorari. The case was settled out of court for an undisclosed sum.

This case illustrates the extreme importance of the constitutional privilege mandated by *New York Times v. Sullivan*. It is far easier to prove negligence, which was the standard of care for private individuals in the Kentucky case, than actual malice. Conditional privilege can also be excellent protection, but it is conditional—journalists must take steps, sometimes unusual ones, to ensure reporting is fair and honest. Otherwise, they can expect no protection from the statutes.

The New Jersey Supreme Court made an exception to its long standing principle that most businesses are private figures rather than public figures for purposes of libel. In *Turf Lawnmower Repair, Inc. v. Bergen Record Corporation* (1995),[225] the court ruled that a "regular" business—in this case, a lawnmower repair company—had to demonstrate that a newspaper published a story with actual malice when the business was involved in matters of public health and safety and was subject to substantial government regulation or involved in practices that could violate consumer protection laws. About the same time, the Supreme Court of Louisiana unanimously ruled in *Romero v. Thomson Newspapers* (1995)[226] that a private figure, a physician, involved in a matter of great public concern was required to show actual malice to recover for libel. Dr. Alton Romero, an obstetrician, sued the Lafayette, Louisiana *Daily Advertiser* after it published a story based on a report by the Public Citizens Health Research Group about the performance of unnecessary Caesarean sections. The story quoted the organization's director as saying, "Louisiana's women are being butchered by their obstetricians in the way they do so many C-sections." The story concluded with a quote from the administrator of the local hospital asserting that the high rate there can be attributed to the only obstetrician, Dr. Romero, who "is nearing retirement and only attends long-time patients who have had previous children—the category of women most likely to have a Caesarean."

Dr. Romero argued that the article contained several false statements including that he was nearing retirement (which the administrator denied saying but said he had instead indicated that Romero was "semi-retired") and that the hospital had the highest C-section rate in the country. The trial court dismissed the newspaper's motion for a summary judgment, and the state Court of Appeals refused to hear the case. However, the state Supreme Court accepted the appeal and reversed the ruling. The court said the "butchering" quote was protected hyperbole that "was not of and concerning" the plaintiff and that the other statements were substantially true and published without actual malice, which Dr. Romero had to demonstrate because of the issue involved.

One First Amendment expert advocates a new test for determining whether an individual is a public figure for purposes of libel. John R. Bender of the University of Nebraska at Lincoln proposes having only one category of public figure—not the two types from *Gertz* (general-purpose and limited-purpose). His test would consist of three questions:

1. Does the plaintiff occupy a position in the community's social, political, or economic life that would allow him or her to exercise appreciably more influence over matters of general or public interest than could ordinary citizens?

2. Does the plaintiff have a reputation within the community as one who possesses a degree of influence over matters of general or public interest appreciably greater than that of the ordinary citizen?
3. Has the plaintiff participated in or tried to influence, to a degree greater than that of the ordinary citizen, the decision-making process on any matter of general or public interest?[227]

Bender's test focuses on influence and involvement in matters of public concern rather than celebrity, prominence, and notoriety—traditional indicators of status as a public figure.

Fair Comment and Criticism

Fair comment and criticism is opinion in slightly different clothing. Both the common law and statutes have generally permitted criticism of matters of public concern and of public individuals in their public performance, whether political, artistic, literary, or whatever. Contrary to what some doomsayers contend, *Milkovich* did not kill fair comment and criticism, nor did it kill opinion. Facts that are cloaked (in the eyes of the Court, at least) in the guise of opinions have no greater protection than other factual statements. There have been a few isolated instances, and *Milkovich* is one, in which commentary was considered libelous. The fact remains that comment and criticism of public persons and public events—so long as they are (a) based on facts the source believes to be true but not factual statements per se, and (b) not published with malice—are protected. Scathing reviews of movies and books and slams at public officials are alive and well but must be opinions, not statements of fact. A movie review that says a lead actor was "extremely convincing in his role as a hardened drug addict" is protected, but an assertion that he was such a "convincing actor that one would think he may have had experience with such drugs before taking on the role as addict" may step over the line. It could result in a successful lawsuit.

During Bill Clinton's presidency two videotapes produced by a California organization called Citizens for Honest Government were offered for sale on the Rev. Jerry Falwell's TV program, "The Old Time Gospel Hour."[228] The tapes, *Bill Clinton's Circle of Power* and *The Clinton Chronicles,* made allegations characterizing Clinton as a drug addict and murderer. Should such tapes qualify as fair comment, especially when the target was then still serving in office?

Consent

Consent, if it can be demonstrated, is a good defense, but rarely available because individuals and corporations rarely grant permission to a journalist to disseminate defamatory information about themselves. Permission must be granted voluntarily, intelligently, and knowingly. As with torts such as invasion of privacy, minors generally cannot grant consent.

Ethical Concerns with Consent

Consent involves an ethical concern. When individuals, whether they are public figures or private ones, grant permission to communicate potentially damaging information about themselves, a red flag should go up. The person may be mentally unstable or even setting up the journalist for a potential lawsuit. Obviously, there may be occasions in which information that is potentially harmful to someone may be disclosed by that person and be newsworthy. A political candidate responding to an attack by an opponent could, in a weak moment, say something like "I admit that I have had extramarital affairs in the past, but I haven't had one in the past two years. I've reformed." Such disclosures could be relevant and deadline pressures would dictate that only limited verification could be achieved. Consent would be a strong defense in the case if the politician knew he was revealing information for public consumption. If he named past liaisons, their names should probably not be publicized for ethical reasons. No purpose is served by disseminating such information.

Statute of Limitations

A U.S. Supreme Court decision, *Kathy Keeton v. Hustler Magazine* (1984),[229] involved an interesting aspect of the statute of limitations defense. If a defendant can show that a defamation suit was filed even one day past deadline under the statute, the suit must be dismissed, no matter how much harm has occurred. This defense, if successful, is complete.

Kathy Keeton, associate publisher of *Penthouse* magazine and the common law wife of publisher Robert C. Guccione, filed a defamation suit against *Hustler* magazine for a series of items published between September 1975 and May 1976, including a cartoon in the May issue alleging Guccione had infected Keeton with a venereal disease. Keeton first filed suit in Ohio against Larry Flynt, *Hustler's* publisher, but the case was dismissed because the statute of limitations had tolled. Keeton then sued the defendant in New Hampshire because it was the only state of the 50 whose statute of limitations could be met. At that time New Hampshire's limit was six years. The legislature later reduced it to three years (still longer than the one-year limits in most states). Keeton was a resident of New York and had no contact with New Hampshire. *Hustler* had only a limited contact with the state through the 10,000 to 15,000 copies of the magazine distributed each month.

A U.S. District Court judge ruled that the state's *long-arm statute* (a statute under which a state under certain circumstances, known as *minimum* contacts, can establish jurisdiction over an out-of-state resident) was too short to reach Flynt in Ohio. The U.S. Court of Appeals for the First Circuit affirmed the decision, but a unanimous U.S. Supreme Court held that the limited circulation of the magazine was sufficient to constitute requisite minimum contacts.

Keeton could take advantage of what is known as the *single publication rule*, the Court said, which exists in some states to permit a libel plaintiff to file one action in one jurisdiction for damages suffered in other jurisdictions. The Court rejected the defendant's argument that application of the single publication rule and the longer

statute of limitations was unfair. As Chief Justice Rehnquist noted in the Court's opinion, "New Hampshire . . . has a substantial interest in cooperating with other States, through the 'single publication rule' to provide a forum for efficiently litigating all issues and damages arising out of a libel in a unitary proceeding."[230]

In *Iain Calder and John South v. Shirley Jones* (1984),[231] the Court held that actress Shirley Jones, who lived in California, could file suit in her home state and home county against the *National Enquirer*—a weekly tabloid with a circulation of 4 million, of which 60,000 copies were sold each week in California. As with *Keeton,* the Court said the test of "minimum contacts" was met even though neither the reporter nor editor had visited the state during preparation for the story.

An unusual twist to the statute of limitations defense arose in a billion-dollar libel suit filed by stockbroker Julian H. Robertson, Jr. against *Business Week* publisher McGraw-Hill Companies, Inc.[232] The print version of an article entitled "The Fall of the Wizard of Wall Street" was published on March 22, 1996, and Robertson filed suit on March 24, 1997, right on time for New York's one-year statute of limitations because March 22 fell on a weekend. However, the electronic version of the magazine was placed online on March 21. If March 21 counted as the publication date, the plaintiff would have missed the statute of limitations.

A media defendant should assume that the statute of limitations for the state in which it does most of its business or has its home office may not necessarily be the statute that prevails in a libel suit. As both *Keeton* and *Calder* demonstrate, establishing the necessary minimum contacts for asserting long-arm jurisdiction over a defendant is not that difficult.

Other Defensive Maneuvers

There are several alternatives that defendants are sometimes forced to use or otherwise choose to assert in lieu of or in addition to the traditional defenses. Technically, these are not defenses, although they can sometimes serve to mitigate or eliminate damages. The most common of these is correction or retraction. This incomplete defense is available in most states under a statute that permits a potential defendant to publish a bona fide correction of a previously published false statement. This may work so long as it appears within a specified time frame after it is requested by the subject of the statement and is published in a position as prominent as the original item.

These statutes are usually strict and operate only if a time limitation is met and a correction admits an error and provides correct information. Publishing or broadcasting a correction has a primary benefit. It typically prevents a plaintiff from recovering punitive damages. The party is usually still allowed to seek actual, special, and compensatory damages. The correction/retraction has the disadvantage that it is, in effect, an admission of negligence. It also brings attention to the media error. However, if a journalist has "goofed," this may be the best strategy for avoiding punitive damages and may, in fact, satisfy the aggrieved party. Studies on libel indicate that plaintiffs are often not seeking monetary awards when they believe they

have been defamed, but simply want an apology so their reputations remain intact.[233] The decision on whether to issue a correction or retraction is difficult because of a risk of having to pay damages other than punitive, and it may be made tough with little time—days or hours—to decide.

Apologies can sometimes prevent a libel suit, but they have no real legal standing unless they are in the form of a retraction/correction or part of an out-of-court settlement. For example, Internet service provider Prodigy Services Co. apologized to an investment firm in 1995 for messages posted on Prodigy's computer bulletin board. The messages that were posted by an anonymous consumer were highly critical of the investment company.[234]

Comedian Dennis Miller apologized to Russell Newsome on his HBO show, "Dennis Miller Live," in 1996 for comments he made about Newsome on an earlier show. Miller showed a photo of Newsome drinking and said: "Nothing tapers the heat than to drink your own urine." An apology was part of an out-of-court settlement of a threatened libel suit in which Miller agreed to make a "sincere on-the-air apology" in return for halting Newsome's legal action.[235] The wording of an insult or what might best be termed on-air name calling will often determine whether an apology is necessary. In 2002, two radio talk show hosts at San Francisco radio station KLLC called a local woman a "skank," "chicken butt," and "local loser" because of her participation in the TV program "Who Wants to Marry a Millionaire?" The woman sued the station, but a judge determined that the terms were "too vague" to be found true or false.[236]

In some cases, the issue of libel has become a consequence of press coverage. In one instance, the *Boston Herald* published 17 articles and columns in the aftermath of a case in 2002, in which a judge was alleged to have told a prosecutor "tell her to get over it," in a rape trial. The judge denied ever having made that comment. What complicated the case further was an exchange between *Herald* reporter Dave Wedge and the host of Fox TV's "O'Reilly Factor," in which the reporter was pressed by Bill O'Reilly to verify that the judge actually made that statement. The judge sued for libel on grounds that the attribution related to his official role as judge, alleging actual malice, well beyond basic errors in reporting. In a discussion of the case on the "News Hour" in 2004, Alex Jones, director of the Shorenstein Center at Harvard, and Alicia Mundy, Washington correspondent for the *Seattle Times,* noted the difficulty of reviewing details when the orientation of some talk television programs is "action." Jones maintained that in that environment, sources are "being pushed to say as much as they can be pushed to say and sometimes you can get caught in the heat of a situation and misspeak." [237]

Libel-proof plaintiffs are very rare but there are individuals whose reputations are so damaged by their own actions, they have no reputation to defend. Two possible examples are convicted mass murderers and former political leaders convicted of multiple felonies. In *Lamb v. Rizzo* (2004), [238] the Tenth Circuit U.S. Court of Appeals upheld a trial court ruling that, if given the opportunity, the Kansas Supreme Court would likely recognize the libel-proof plaintiff defense. The state trial court had ruled against a felon serving three consecutive life sentences for murder and kidnapping who sued a newspaper reporter for libel. The journalist published an article containing false and inaccurate statements about the criminal. The story correctly

reported that the plaintiff had made a violent escape from prison and had taken hostages. However, it incorrectly said he raped two of the victims and abducted one victim while prowling shopping centers, "dressed as a woman."

According to the federal appellate court, the plaintiff's reputation had been damaged so extensively by his life sentences that no further harm could occur: "[T]here comes a time when the individual's reputation for specific conduct, or his general reputation for honesty and fair dealing is sufficiently low in the public's estimation" that he becomes libel-proof. [239]

The idea of this defensive maneuver is to claim that the person's reputation has been so lowered in the eyes of the public that the individual cannot be harmed with false, defamatory statements. Even when dealing with notorious criminals, a journalist should follow the same precautions to prevent a potential libel suit. Almost everyone has some redeeming quality that could be infringed upon.

The most controversial of alternative defense strategies is *neutral reportage*. In *Edwards v. National Audubon Society* (1977),[240] the Second Circuit U.S. Court of Appeals held that neutral reportage was a viable defense. However, this ruling is limited to the Second Circuit only, although a few state courts have recognized the defense and several have specifically rejected it or narrowed its application to very limited circumstances. The requirements for this defense are the charges (a) must be serious and newsworthy and create or concern an important public controversy, (b)must be uttered by a responsible person or organization, (c) must relate to a public figure or public official, and (d) must be accurately and disinterestingly reported.

Neutral reportage grants the media an opportunity to act responsibly when allegations about prominent individuals emerge that are hard to confirm, are made by a supposedly trustworthy source, and are newsworthy. Important ethical concerns have to be considered before this kind of information is disseminated. Occasionally, such allegations turn out to be false and before the truth becomes known, harm is done. Prominent people and organizations sometimes make charges about opponents during the heat of political campaigns, in the midst of pronounced controversies. Even where neutral reportage is available, it should be invoked only when strongly justified and thus not used as a shield to report sensational information or information that is not newsworthy.

The Uniform Correction or Clarification of Defamation Act

After more than three years of work, the National Conference of Commissioners on Uniform State Laws formally approved a document known as the "Uniform Correction or Clarification of Defamation Act" (UCCA) in 1993. The House of Delegates of the American Bar Association, as expected, approved the proposed legislation in a 176 to 130 vote. It was submitted to the legislatures of each of the 50 states. As with the Uniform Commercial Code, which was adopted in every state except Louisiana to

govern commercial transactions, the UCCA attempted to establish libel law uniformity throughout the entire country. Unlike "model laws" that give uniformity to the law in a particular area and allow for state differences, "uniform laws" are designed for more strict uniformity so there is greater predictability. Some major provisions of the UCCA include:

1. The Act applies to any defamation action against any defendant brought by any plaintiff. This includes libel as well as slander, private individuals as well as public figures. It also includes defamation, false light, intentional infliction of emotional distress—in fact, any cause of action if it is based upon injury to reputation or emotional distress if related to the dissemination of allegedly false information.
2. All plaintiffs must formally request of any defendant a "correction or clarification" within 90 days after learning that allegedly defamatory statements have been communicated about them.
3. If such a request is not made within the 90 days, the plaintiff can recover in any suit only for economic loss such as lost income—no punitive damages and no damages for general injury to reputation or for emotional distress.
4. The allegedly defamed individual or entity can be required by the defendant to provide all "reasonably available" relevant information about the allegedly false statements.
5. The correction or clarification must be "timely," as defined under the Act.
6. Even if a defendant has up to that point refused to publish a correction or clarification, an offer to correct or clarify can be made prior to the beginning of the trial. If the offer is accepted by the plaintiff the legal action is dismissed, but the defendant must pay reasonable attorney fees owed by the plaintiff. If the offered is turned down, the plaintiff is entitled only to provable economic losses and reasonable attorney fees.[241]

The UCCA received a warm welcome, especially among the media. As communications lawyers Lee J. Levine and Daniel Waggoner (both involved in drafting the Act), conclude:

> . . . if the Conference is successful in securing the Act's passage throughout the United States, the national news media will be governed by one 'uniform' set of rules affecting corrections and clarifications. Such uniformity should serve to minimize uncertainty, reduce risk, and lead to a more predictable and rational system for resolving such disputes.[242]

The reception among journalists was not uniformly warm. Jane Kirtley, attorney and executive director of the Reporters Committee for Freedom of the Press at that time and now professor of media ethics and law at the University of Minnesota,

believed the Act should operate as a model rather than a uniform law so individual states can decide whether to adopt it. According to Kirtley, "Only they can determine whether, taken as a whole, the statute will be an improvement over their existing state law. It should not be foisted upon them, untested and untried."[243]

Libel and the Internet

The new frontier for libel suits is the information superhighway. A reporter for a trade publication *Communications Daily* once settled a lawsuit that had been filed against him for an item he sent on an electronic news service on the Internet. The item was critical of a direct marketing firm. As part of the settlement, the reporter agreed to pay a $64 court fee and submit any questions to the company two days in advance before making any comments about it.[244] That was easy to handle.

In a more complex and costly case, Stratton Oakmont Inc. sued the Prodigy online service, which was jointly owned by Sears and IBM, for $200 million for allegedly defamatory statements made by a subscriber about the securities investment banking firm on a discussion forum. The subscriber was initially sued, but he was later dropped from the suit. His statements included that the firm's offering was "a major criminal fraud," that the company's president was "soon to be proven criminal," and that the firm was a "cult of brokers who either lie for a living or get fired."

The crucial question in this case was whether such services are to be treated like a book or like a bookstore. Prodigy argued that its service was like a bookstore or a telephone system, and that it should not be held responsible for subscriber conversations. The bank contended the service was akin to a book and therefore the owners should be held responsible for the content. In *Stratton Oakmont Inc. v. Prodigy Services Co.*,[245] a New York Supreme Court judge held that Prodigy exercised a sufficient degree of editorial control over the contents of the bulletin board, particularly in reviewing messages posted by its subscribers, that it served an editorial function.

In reaction to the ruling, Congress included a "Good Samaritan" provision in the Communications Decency Act (CDA), effectively overruling the decision. The CDA was signed into law and took effect on February 8, 1996. Under it, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider" and no provider or user can be held liable for "any action voluntarily taken in good faith to restrict access to or availability of" objectionable content.[246]

Two other important early Internet libel cases were *Zeran v. America Online* (1997)[247] and *Blumenthal v. America Online* (1997).[248] In *Zeran,* the Fourth U.S. Circuit Court of Appeals upheld a U.S. District Court decision that an Internet service provider (ISP), America Online, could not be held liable for not quickly removing allegedly libelous messages about a person. The messages had been posted anonymously as part of a promotion for "Naughty Oklahoma T-shirts" six days after the Oklahoma City bombing. The messages referred interested purchasers to "Ken" and listed the plaintiff's Seattle phone number, the number of his home-based

business. The plaintiff, Kenneth Zeran, received angry phone calls, and even death threats. He unsuccessfully argued in his lawsuit that even after he notified AOL, the ISP unreasonably delayed removing messages. A U.S. District Court dismissed Zeran's lawsuit, citing the Good Samaritan provision of the Communications Decency Act, and the appellate court affirmed the decision.

In the *Blumenthal* case, a columnist and his wife, Sidney and Jacqueline Blumenthal, sued AOL for a story written by gossip columnist Matt Drudge in "The Drudge Report," a column for AOL subscribers. The 1997 column alleged that Sidney Blumenthal had a history of spouse abuse. The case differed from earlier Internet libel cases because AOL paid Drudge to write his column and quickly removed the column, once given notice. Because the Blumenthals were well known as public figures (as aides in President Bill Clinton's White House), they needed to demonstrate the report was published with actual malice, including on the part of AOL. According to the Court, "While it appears to this Court that AOL in this case has taken advantage of all the benefits conferred by Congress in the Communications Decency Act, and then some, without accepting any of the burdens that Congress intended, the statutory language is clear: AOL is immune from suit, and the Court therefore must grant its motion for summary judgment."[249]

Blumenthal became even better known as he later testified on President Clinton's behalf at the President's impeachment hearing and was quoted as having allegedly told free-lance journalist Christopher Hitchens that Monica Lewinsky was a "stalker" of Clinton.[250] This raised interesting news coverage issues that anticipated events in the partisan political arena because Blumenthal himself is a journalist.

The 2004 national political campaign was also rife with charges and countercharges concerning use of the Internet and other forms of mass media. It even included news documentaries, traditionally objective, but focusing on candidates, their reputations, and the decision-making processes. These included Michael Moore's "Farenheit 9/11" and "Going Upriver: The Long War of John Kerry." In one instance, a fake photo of John Kerry and Jane Fonda was widely circulated on the Internet.[251]

In the wake of many challenges faced by bloggers, one major news organization, CBS News, created its own blog for analysis of its coverage. After errors occurred in a CBS News "60 Minutes Wednesday" report on President George Bush's National Guard service, that network launched CBS Public Eye in September 2005 as a means of letting the public ask questions of the news staff and follow up important stories. For the first week of coverage CBS provided video of an editorial meeting. The blog was organized to report to the president of CBS Digital Media, Larry Kramer, rather than CBS News President Andrew Hayward, under whom the mistakes had been initially broadcast.[252]

Summary and Conclusions

Libel is false and defamatory information that harms a person's reputation and subjects a person to public hatred, contempt, or ridicule. Libel continues to be a serious threat to the news media, especially because the U.S. Supreme Court has made it

easier, although still difficult, for public figures, public officials, and private individuals to successfully sue for libel. This trend has occurred despite the precedent established in *New York Times v. Sullivan* and later in *Curtis Publishing Company v. Butts* and *Associated Press v. Walker* requiring public officials and public figures suing media defendants to demonstrate *actual malice* (reckless disregard for the truth or knowledge of falsity).

Of all the defenses, *truth* and *constitutional privilege* are the most effective. Truth is an absolute defense. Constitutional privilege under *New York Times v. Sullivan* and its progeny requires a public official or public figure to demonstrate clear and convincing evidence of actual malice. Private individuals in most states need to show only negligence to win a libel suit, but must also prove actual malice to obtain punitive damages, at least when the alleged defamatory statements concern an issue of public importance. Other viable defenses include *qualified privilege*, *statute of limitations*, and *consent*. However, the latter two are not typically applicable. Hurdles to recover punitive damages can be incredibly high because they are designed to punish the offender rather than to compensate the offended.

The trend in the past in both state and federal courts has been toward permitting more plaintiffs to succeed, especially when media defendants have acted irresponsibly, but the most recent trends indicate a swing in favor of media defendants. To mitigate damages, the media should consider publishing a *correction/retraction*. However, such action must be taken with care because it effectively means an admission of negligence or guilt. Finally, *neutral reportage* is a limited defense that must be used responsibly in the few jurisdictions where it is recognized.

The shape of libel has changed significantly with the advent of new technology. These changes will hopefully translate to good news for the media with greater recognition of individual and press rights under the First Amendment. The battle ground for future libel and other torts, such as invasion of privacy, is the Internet. As more users come on board, it is inevitable that more and more libelous information will appear, as subscribers become, in effect, gatekeepers and publishers. The Good Samaritan provision of the Communications Decency Act of 1996 provides some protection for Internet service providers, but protection is limited and does not shield journalists and consumers who post messages from potential libel suits.

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