# Lawyers For The Talent

by

Richard Dooling

## Defamation and Privacy

by Richard Dooling

Artists have First Amendment rights to tell stories, or write songs, or make movies, but what happens when those free speech rights collide with the rights of others? What if an author's bestselling memoir names names, and defames others in the telling of his tale? What if by telling her own story, she invades the privacy of others? "Steals" their "life story"? Publicly discloses embarrassing private facts about their lives?

Every major film attracts lawsuits, and some plaintiffs sue even though they are not mentioned by name. Docu-dramas invite litigation. Imagine documentary filmmakers wearing hidden microphones and cameras making a documentary about a quack doctor who is selling banned substances, or unsafe herbal remedies? Invasion of privacy? Or investigative journalism or some other species of reality entertainment?

### "Life Story Rights"

Telling "based upon," nonfiction stories about others often treads on what the industry calls "life story rights," not a legal term, just a handy grab bag term for the rights involved. The artist (filmmaker, storyteller, photographer, fine artist, even songwriters) wants to tell a person's "life story" or use their name, image or likeness without getting sued for it.

These so-called life story rights are different in every jurisdiction. Lawyers must watch out for international law, American constitutional law (the First Amendment), and a patchwork quilt of State laws. Some states (notably

Alabama, Tennessee, and California) zealously protect the inherited privacy rights of dead celebrities, and allow the heirs of Martin Luther King, Elvis Presley, and the Three Stooges to protect the rights of their famous dead former citizens. Even dead celebrities sometimes have publicity rights, and their heirs can sue to protect those rights in state court. But those celebrity rights many not tread on the First Amendment rights of authors and artists. Authors are free to tell stories about dead people by creating biographical works, history, film, fiction, news and the like. These works are protected speech under the First Amendment and the Copyright clause. But celebrities have a different parallel right to "commercial" exploitation of their names, image, and likeness.

More important than theoretical doctrinal hair-splitting of First Amendment theories and privacy rights is to make sure that authors and filmmakers who want to tell fact-based stories about people living or dead get a "life rights" agreement, a collection of contract provisions dealing with story rights and waivers of liability. Again all of these rights are jurisdiction-specific and depend on careful, specific drafting of contract provisions .

**Acquiring Life Story Rights**

If possible artist and living subject execute a simple agreement, wherein the subject promises not to sue for defamation, invasion of privacy, use of name, image, or likeness, and a number of other claims. A nice description can be found in a passage called "Fact-Based Stories" from the Independent Producers Survival Guide: A Business and Legal Sourcebook 4th Ed. (2009), by Gunnar Erickson, Mark Halloran & Harris Tulchin. See also, Purchasing Life Story Rights By: Mark Litwak.

Here are some links to sample life story rights agreements and templates:

- [Life Story Rights Agreement, courtesy of the Northern Kentucky University Chase College of Law.] (http://chaselaw.nku.edu/content/dam/chaselaw/docs/centersandinstitute/Law—Informatics/LifeStoryRightsAgreement.pdf)
- Done Deal: Life Rights Option Agreement.
- Done Deal: Life Rights Agreement.

If an agreement can't be had, storytellers and filmmakers may proceed, but often the script or the nonfiction book will be annotated. All factual statements about living people and historical events, will be annotated with sources.

The next case introduces us to what happens when there's no "life story rights" agreement. In *Matthews v. Wozencraft*, the Fifth Circuit Court of Appeals, applying Texas law, said that, at least in Texas, there's no such thing as a property interest in one's life story. In passing, the Court distinguishes "life

story rights" from celebrity/publicity rights. We don't read about those rights, also known by far too many other names (personality rights, celebrity rights, publicity rights or the right of publicity, appropriation of name or likeness), until next week, but the Court discusses them while struggling with the right of an individual to control the commercial use of his or her name, image, likeness, or other unequivocal aspects of one's identity.

## *Matthews v. Wozencraft*

(5th Cir. 1994)

- case on Google Scholar
- how cited Google Scholar
- case on Westlaw
- Texas Right of Publicity Law, citing *Matthews*.

JERRY E. SMITH, Circuit Judge:

Prior to 1979, Creig Matthews was an undercover narcotics officer with the Plano, Texas, police department, in charge of the criminal investigation division. Kim Wozencraft (Kim Ramsey at the time) was hired as a police officer. Matthews trained and then worked with her as an undercover narcotics officer making drug purchases. Both of them used drugs, primarily marijuana and cocaine, while on the Plano drug assignment.

In August 1978, Matthews was hired by the Tyler, Texas, police department as an undercover narcotics officer, where he used the aliases "Jim" and "Jim Myers." Early the next year, Wozencraft joined him in Tyler as an undercover drug officer. Together they conducted a drug investigation that lasted until April 24, 1979. During this time, they became romantically involved and began living together.

Their primary target in Tyler was Ken Bora, for whom Matthews worked undercover as a bartender. After several futile attempts to buy drugs from Bora, Matthews and Wozencraft, on instruction from Tyler police chief Willie Hardy, made a phony "stash" case on Bora.

During the investigation, Matthews and Wozencraft used drugs both to make drug cases and for personal use, eventually becoming addicted. They informed Hardy of Matthews's drug problem. He gave them several days off but insisted that they continue with the investigation. At the end of the Tyler investigation, Matthews and Wozencraft assembled over 200 drug cases, involving the arrest of 100 defendants.

At the conclusion of the investigation, Matthews and Wozencraft were attacked by a shotgun-wielding assailant at Wozencraft's mobile home. She returned fire and was not seriously hurt; Matthews was severely wounded in the

arm and leg and was hospitalized for over a month. After being released from the hospital, Hardy placed them in a house on the outskirts of Tyler. While there, they were visited by H. Ross Perot, who at the time was serving as chairman of a special crime commission. Perot moved them to a secure safe-house in the Dallas area and arranged for Matthews to receive medical treatment for his wounds.

During this time, Matthews and Wozencraft began testifying at the trials of some of the drug defendants. They falsely denied using drugs during the investigation and falsely testified that they had bought cocaine from Bora.

Evidence arose of their misconduct. Eventually they confessed, pleaded guilty to criminal informations alleging civil rights violations, and were sentenced to terms in federal prison.

**The Prison Agreement**

While in prison, Wozencraft, Matthews, and fellow inmate John Rubien signed the contract at issue in this case (the "Prison Agreement"). Matthews and Wozencraft were married at the time the contract was formed, and Wozencraft is identified in it as "Kimberly Ramsey Matthews." The contract specifies that Wozencraft and Rubien were to co-author a book based upon Matthews and Wozencraft's story about the undercover investigations.

Wozencraft was released from prison in the spring of 1983. She divorced Matthews and moved to New York City to join Rubien. She already had started writing the book. She described events in the book, linking them to specific events that had transpired during the investigations. The co-authored book by Wozencraft and Rubien was not finished during the one-year period provided for by the Prison Agreement.

Wozencraft received a masters degree from Columbia University. Her thesis became the basis for the book entitled RUSH. She sold her manuscript to Random House and sold the movie rights for one million dollars.

**Based Upon?**

There is substantial evidence that the character "Jim Raynor" in RUSH is based upon Matthews and that the public recognized him as that character. Nonetheless, the book is labeled as a novel and states on its copyright page that it "is a work of fiction. Any resemblance its characters may have to persons living or dead is purely coincidental."

Matthews concedes that the issue raised in RUSH, i.e., corruption of law enforcement officers, is a matter of public concern. His willingness to discuss the book with the media has made him a public figure. Furthermore, prior to the publication of RUSH, Matthews cooperated with an author named David

Ellsworth in publishing SMITH COUNTY JUSTICE, a non-fiction book detailing Matthews's life and the events surrounding the Tyler operation.

Matthews has received no compensation for the defendants' use, portrayal, or promotion of his likeness in the book and movie.

**Appropriation of Life Story?**

The district court granted summary judgment on Matthews's appropriation claim because Texas law does not recognize a cause of action for appropriation of one's life story and because if it did, there would be an exception for biographies and "fictionalized biographies." We affirm the summary judgment.

"One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy." RESTATEMENT (SECOND) OF TORTS (the "RESTATEMENT") § 652C (1977).

There are three elements to a misappropriation claim under Texas law:

1. that the defendant appropriated the plaintiff's name or likeness for the value associated with it, and not in an incidental manner or for a newsworthy purpose;
2. that the plaintiff can be identified from the publication; and
3. that there was some advantage or benefit to the defendant.

*See Faloona v. Hustler Magazine* (5th Cir. 1986).

Under this test, Matthews is unable to create any issue of material fact as to liability. There is no question that Matthews can be identified from the publication, at least to the point of creating a genuine issue of fact as to the identity of the Jim Raynor character. He claims that his life story was appropriated for Wozencraft's commercial benefit. The protection of "name or likeness" under Texas law, however, does not include a person's life story. If Texas law did protect such a right, it was not "appropriated." And, even if Matthews could state a claim, Wozencraft would be protected by an exception in the state tort law.

Tortious liability for appropriation of a name or likeness is intended to protect the value of an individual's notoriety or skill. Thus, the RESTATEMENT provides for liability only if:

> the defendant … appropriated to his own use or benefit the reputation, prestige, social or commercial standing, public interest or other values of the plaintiff's name or likeness.
>
> RESTATEMENT § 652C, comment c.

The misappropriation tort does not protect one's name *per se;* rather, it protects the value associated with that name.

Appropriation of a name or likeness generally becomes actionable when used "to advertise the defendant's business or product, or for some similar commercial purpose." RESTATEMENT § 652C, comment b. The value of one's likeness is not "appropriated when it is published for purposes other than taking advantage of his reputation, prestige, or other value associated with him, for purposes of publicity… It is only when the publicity is given for the purpose of appropriating to the defendant's benefit the commercial or other values associated with the name or the likeness that the right of privacy is invaded." RESTATEMENT § 652C, comment d.

There is nothing unique about Matthew's name or likeness that creates value for Wozencraft to appropriate. She is not "cashing-in" on goodwill associated with his name but is simply converting factual events that happen to include Matthews into fiction. The use of his name does not provide value to the book, nor is she using his name to "endorse" the book to the public, because his name has no independent value. In short, Matthew's life story, while interesting to readers and film-goers, is not a "name or likeness" for purposes of applying the misappropriation doctrine.

Protecting one's name or likeness from misappropriation is socially beneficial because it encourages people to develop special skills, which then can be used for commercial advantage. Associating one's goodwill with a product transmits valuable information to consumers. Without the artificial scarcity created by the protection of one's likeness, that likeness would be exploited commercially until the marginal value of its use is zero.

For instance, if a well-known public figure's picture could be used freely to endorse commercial products, the value of his likeness would disappear. Creating artificial scarcity preserves the value to him, to advertisers who contract for the use of his likeness, and in the end, to consumers, who receive information from the knowledge that he is being paid to endorse the product. *See Kimbrough v. Coca-Cola* (Tex.Civ.App. 1975 (in which former Texas A & M football star stated valid claim for misappropriation where his picture was used, over his objection, as part of an advertisement for Coca-Cola in a football game program).

As Judge Posner writes,

> It might seem that creating a property right in such uses would not lead to any socially worthwhile investment but would simply enrich already wealthy celebrities. However, whatever information value a celebrity's endorsement has to consumers will be lost if every advertiser can use the celebrity's name and picture.… [T]he value of

> associating the celebrity's name with a particular product will be diminished if others are permitted to use the name in association with their products.

RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 3.3, at 43 (4th ed. 1992).

The tort of misappropriation of name or likeness, therefore, creates property rights only where the failure to do so would result in the excessive exploitation of its value.

[Thus, the term "likeness" includes such things as pictures, drawings, and the use of a singer's distinctive voice.]

The term "likeness" does not include general incidents from a person's life, especially when fictionalized.1 The narrative of an individual's life, standing alone, lacks the value of a name or likeness that the misappropriation tort protects. Unlike the goodwill associated with one's name or likeness, the facts of an individual's life possess no intrinsic value that will deteriorate with repeated use. As Posner observes, "If Brand X beer makes money using Celebrity A's picture in its advertising, competing brands might use the same picture until the picture ceased to have any advertising value at all. In contrast, the multiple use of a celebrity's photograph by competing newspapers is unlikely to reduce the value of the photograph to the newspaper-reading public." RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 258 (2d ed. 1983).

1 *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 117 at 853 (5th ed. 1984) ("Nor is there any liability for misappropriation when the plaintiff's character, occupation and the general outline of his career, with many incidents in his life, are used as the basis for a figure in a novel who is still clearly a fictional one.")

Far from reducing the value of Matthews's story, RUSH increased the value, as reflected in the publication of articles about Matthews and Wozencraft in NEW YORK MAGAZINE, THE WASHINGTON POST, and THE GUARDIAN, among others. Similarly, SMITH COUNTY JUSTICE, although published first, did not reduce the sales of RUSH. As there is no fear that any valuable information provided by the facts of one's life will be reduced by repeated use, the law does not forbid the "appropriation" of this information.

Further, because most of the material facts are a matter of public record because of the highly-publicized trial, it is especially difficult for Matthews to claim that his likeness was unfairly appropriated, as a name cannot be appropriated by reference to it in connection with the legitimate mention of public activities.

**III.**

**A.**

Even if Texas courts recognized a cause of action for misappropriation of events in one's life, it likely would recognize an exception for biographies. As one commentator has written, "Courts long ago recognized that a celebrity's right of publicity does not preclude others from incorporating a person's name, features or biography in a literary work, motion picture, news or entertainment story. Only the use of an individual's identity in advertising infringes on the persona." George M. Armstrong, Jr., *The Reification of Celebrity: Persona as Property,* 51 LA. L.REV. 443, 467 (1991) (citing *Rogers v. Grimaldi* (SDNY 1988), *aff'd,* 875 F.2d 994 (2d Cir.1989)).

**B.**

Matthews also contends that appropriation can occur through the fictionalized account of his life. The cases he cites, however, do not support his argument, as they apply the "false light" doctrine. In each of them, (1) the plaintiff's real name was used; (2) false or defamatory statements were made regarding the plaintiff; and (3) the plaintiff alleged invasion of privacy by false light, not misappropriation.

By contrast, RUSH does not use Matthews's real name, and Matthews admits that all the material facts are true. Thus, assuming he is trying to state a claim under the false light doctrine, rather than misappropriation, his attempt fails.

**C.**

Even if Matthews has created a genuine issue of material fact on his misappropriation claim, Wozencraft is entitled to summary judgment as a matter of law because of free speech and public domain defenses.

**1.** While there is no binding authority directly on point, we conclude that Wozencraft's novel falls within the protection of the First Amendment. It is immaterial whether RUSH "is viewed as an historical or a fictional work," *Meeropol v. Nizer* (2d Cir.1977), so long as it is not "simply a disguised commercial advertisement for the sale of goods or services." *Rogers v. Grimaldi* (2d Cir. 1989).

The book and its accompanying publicity have converted Matthews into a public figure under *Gertz v. Robert Welch, Inc.* (S.Ct. 1974) "[T]he same

standards of constitutional protection apply to an invasion of privacy as to libel actions." *Meeropol*.

Accordingly, absent a showing of malice, i.e., a "reckless disregard for the truth," RUSH is protected by the First Amendment. *See Time, Inc. v. Hill* (S.Ct. 1967). Neither the book nor the movie holds out Matthews in a false light or in an embarrassing way; thus, his claim is meritless.

**2.** Liability for misappropriation also will not arise when the information in question is in the public domain, for the public figure no longer has the right to control the dissemination of the information. *See Douglass v. Hustler Magazine* (7th Cir.1985),.

"To whatever degree and whatever connection a man's life ceases to be private before the publication under consideration has been made, to that extent the protection is withdrawn...." Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy,* 4 HARV.L.REV. 193, 214-15 (1890). As one court has commented,

> [A] public figure has no exclusive rights to his or her own life story.... Such life story of the public figure may legitimately extend, to some reasonable degree, to ... information concerning the individual, and to facts about him, which are not public.... Thus the life history of one accused of [crime], together with such heretofore private facts may throw some light upon what kind of person he is, his possible guilt or innocence, or his reasons for committing a crime, are a matter of legitimate public interest.
>
> *Corabi v. Curtis Publishing Co.* (PA 1971).

In the time since his participation in the Tyler drug investigation and his subsequent conviction and prison time for his illegal activity, Matthews voluntarily submitted to numerous interviews with the national media. He also cooperated in the publication of SMITH COUNTY JUSTICE and testified about his activities in Hardy's criminal trial. All the material facts underlying RUSH were a matter of public knowledge and were in the public domain.

Thus, Matthews became a public figure through his activities. The subject matter of his statements — narcotics officers using drugs, perjuring themselves, and making fraudulent charges — was a matter of public interest. *See Trotter v. Jack Anderson Enters.* (5th Cir. 1987).

Because all of the events were a part of the public domain, defendants were entitled to their fair use, including their narration in fictionalized form. *Douglass*.

[The court's discussion of contract matters and division of marital property omitted.]

**VI.**

Matthews has created no genuine issue of material fact under Texas law. Thus, we AFFIRM the district court's grant of summary judgment on all claims.

## Defamation

Stories, songs, movies, even photos about real people, may defame them, if those works of art contain or suggest false statements of fact.

- "Fact-Based Stories" from the Independent Producers Survival Guide: A Business and Legal Sourcebook 4th Ed. 2009.
- Defamation Law Made Simple at Nolo.com.
- FreeAdvice: How to Prove Libel or Slander.
- Eric E. Johnson, Defamation Flowchart.

### Libel v. Slander

Two forms: Libel and slander.

- Libel (mneumonic sounds like "label") is defamation in print; it's written or recorded, as in television or movies.
- Slander is defamation by way of the spoken word.

### Defamation Per Se

All states, except Arizona, Arkansas, Missouri, and Tennessee, recognize that some categories of false statements are so harmful that they are considered to be *defamatory per se*. In the common law tradition, damages for such false statements are presumed and do not have to be proven.

Statements are defamatory per se where they falsely impute to the plaintiff one or more of the following:

1. Allegations or imputations "injurious to another in their trade, business, or profession"
2. Allegations or imputations "of loathsome disease" (historically leprosy and sexually transmitted disease, now also includes mental illness)
3. Allegations or imputations of "unchastity" (usually only in unmarried people and sometimes only in women)
4. Allegations or imputations of criminal activity (sometimes only crimes of moral turpitude)

Wikipedia: Defamation Per Se

### Defamation Meets First Amendment

Sometimes called the constitutionalization of defamation law, *New York Times v. Sullivan* changed everything for public officials who don't like the way they are portrayed in the press. It all started in Montgomery, Alabama and the civil rights movement in the South.

### Elements

First let's look at the rules for stating a claim for defamation as they existed before *New York Time v. Sullivan*.

A plaintiff suing for defamation had to prove:

1. A statement had been made about the plaintiff;
2. The statement had been "published" to at least one other party;
3. The statement was false (presumed at common law);
4. The statement harmed the subject's reputation by lowering his or her standing in at least some part of the community.

Restatement 2nd of Torts §559.

## *New York Times v. Sullivan*

US Supreme Court 1964

- *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).
- Wikipedia.
- NYTimes Editorial: The Uninhibited Press 50 Years Later.
- Image of "Heed Their Rising Voices" ad'
- Transcript of "Heed Their Rising Voices ad

On March 29th, 1960, civil rights groups, including The Committee To Defend Martin Luther King and The Struggle For Freedom In The South ran a full-page advertisement in the New York Times. The ad, captioned "Heed Their Rising Voices,", began:

> As the whole world knows by now, thousands of Southern Negro students are engaged in wide-spread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights. In their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom.

The ad went on to list examples of official police intimidation and alleged that certain actions and events had deprived the students and demonstrators of their rights.

> It is uncontroverted that some of the statements contained in the two paragraphs were not accurate descriptions of events which occurred in Montgomery.

L.B. Sullivan was the police commissioner for the city of Montgomery. Even though he wasn't named in the ad, Sullivan filed suit against the *New York Times*, alleging that it had wrongfully implied that he was guilty of misconduct. Four other suits were filed by other government officials.

At trial the evidence showed that at least some of the statements in the ad were incorrect. The trial jury awarded Sullivan $500,000 in damages, and the Alabama Supreme Court affirmed the verdict.

A unanimous Supreme Court reversed, in essence overruling Alabama's interpretation of its own defamation laws. The Court held that the First Amendment required that in defamation actions brought by public officials, the plaintiff official must prove that the statement was made with "*actual malice*"–meaning it was made *with knowledge that the statement was false* or *with reckeless disregard for the truth*.

> 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 official.

To protect news organizations from defamation claims, the Supreme Court held that the Constitution required public officials to prove actual malice to state a claim. Not only that, but in defamation cases, appellate court were charged with the duty to examine *the entire record* on review to insure that a trial judgment did not tread on First Amendment freedoms.

**Lawsuits Over False Statements of Fact**

In the wake of *New York Times v. Sullivan,* the defamation rules changed and prospective plaintiffs were sorted into at least four different categories:

- Private Figures (Ordinary People)
- Public Officials (Politicians)
- Public Figures (Celebrities)

- Limited Purpose Public Figures (ordinary people who suddenly become famous because of their association with a particular event or issue).

If a public official or a public figure (celebrity) wishes to sue someone for defaming them they must prove actual malice.

> One who publishes a false and defamatory communication concerning a public official or public figure in regard to his conduct, fitness or role in that capacity is subject to liability, if, but only if, he:
>
> 1. knows that the statement is false and that it defames the other person, or
> 2. acts in reckless disregard of these matters.

§ 580A Restatement 2nd of Torts: Defamation of Public Official or Public Figure

Do not confuse *actual malice* with *legal malice*. In defamation law, actual malice means the defendant who allegedly made a defamatory statement did so with *with knowledge that the statement was false* or *with reckeless disregard for the truth* Actual malice does not mean evil intent or evil purpose, it means the defendant knew the statement was false and made it anyway, or had reckless disregard for the truth.

**Complexity**

Like the question of privacy rights, defamation law is complex. How complex? Take a look at a table we use in media law to decide fault standards, damages, and burdens of proof in defamation cases.

| Plaintiff's Status | Minimum Fault Standard | Damages Available | Burden of P |
|---|---|---|---|
| Public official or figure | Clear Actual Malice | Presumed and Punitive | Plaintiff Pro |
| Private Figure, Public Concern | Negligence | Compensatory "Actual" | Plaintiff Pro |
| Private Figure, Private Concern | Probably Strict Liability | Presumed and Punitive | Truth a Def |

1 Not resolved by *Hepps*, in which a state statute said that defendants had the burden of proving that allegedly defamatory statements were true. The trial judge thought the statute was unconstitutional and instructed the jury that the plaintiff bore the burden of proving falsity:

> To ensure that true speech on matters of public concern is not deterred, we hold that the common-law presumption that defamatory

> speech is false cannot stand when a plaintiff seeks damages against a media defendant.
>
> *Philadelphia Newspapers, Inc. v. Hepps.* (S.Ct. 1986)
> And that's just state and federal law in the United States.

**International Comparisons**

Should the law force the allegedly defamed plaintiff to prove that the communications were false? Or should we instead force the defendant media company to prove that the statements were true?

At common law, the defamed plaintiff made her claim, and the allegedly defamatory statement was presumed to be false, and it was up to the defendant to assert truth as a defense. But modern American defamation law sometimes makes the plaintiff prove falsity.

In England, this development was specifically rejected in *Derbyshire County Council v. Times Newspapers Ltd* (1993), and it was also rejected in Canada in *Hill v. Church of Scientology of Toronto* (1995), and more recently in *Grant v. Torstar Corp.* (2009).

In Australia, the High Court held in *Theophanous v. The Herald & Weekly Times Ltd* (1994) that the Australian constitution implied a freedom of political communication and a freedom to publish material discussing government and political matters, but *Theophanous* was overruled by the High Court of Australia in *Lange v Australian Broadcasting Corporation* (1997).

As in privacy rights and celebrity/publicity rights, the protection or licensing of rights call for expert contract draftsmanship.

Now let's look at some entertainment industry cases where public officials and figures alleged defamation.

## *Davis v. Constantin Costa-Gavras*

US District Court, S.D. New York (1987)

- case at Google Scholar
- case at Westlaw
- Loyola Entertainment Law Journal Case Note.

> A summary of events leading up to the lawsuit:
>
> Thomas Hauser wrote a book, *The Execution of Charles Horman,* which developed the thesis of Ed Horman, Charles' father, that the US military in Chile had known and approved of the killing of his son

> by Pinochet's troops. Four years later, Costa-Gavras made a well-received movie, *Missing*, starring Jack Lemmon in the role of Ed Horman and Sally Field as his wife. *Missing* was a fictionalized version of the book, *Execution*, with the U.S. military head named Ray Tower. Davis, who had not sued the book's author or publisher, sued the movie director and studio for defamation. The legal issue posed by the case was whether there was any evidence of "actual malice" that would satisfy the *New York Times* standard.
>
> Paul C. Weiler, Gary Myers, *Entertainment, Media, and the Law: Text, Cases, and Problems* (4th Ed. 2011).

MILTON POLLACK, Senior District Judge.

The defamation charged in the complaint is that in their film, "Missing," defendants (including Universal Studios) allegedly portrayed with actual malice that plaintiff, the Commander of the United States Military Group and Chief of the United States Mission to Chile at the time of the 1973 coup in Chile, ordered or approved a Chilean order to kill Charles Horman, an American residing in Chile.

Actual malice is established in a public figure defamation litigation only where defendant publishes a statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times v. Sullivan,* (S.Ct. 1964). Reckless disregard in such a case means that a defendant published after he "in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson* (S.Ct. 1968.)

***Designated Evidence Offered by Plaintiff***

Plaintiff alleges that there are four general categories of purported evidence in the paper defense to the motion from which to find actual malice on behalf of defendants:

1. that defendants' "entire purpose in making 'Missing' was to show plaintiff as responsible for Charles Horman's death";
2. that defendants' reliance on Thomas Hauser's book *The Execution of Charles Horman ("Execution")* was unreasonable;
3. that defendants never consulted with plaintiff on the facts presented in the film; and
4. that "Missing" contains scenes portraying certain episodes which defendants knew were embroidered.

An analysis of the record shows that to accept the plaintiff's opposition to summary judgment would require a distortion of the proofs, deviation from applicable law, and wrenching of the film out of its plain context.

**A.** ***The Thesis of the Film***

Plaintiff has produced no evidence in his papers to substantiate his assertion that the purpose of "Missing" was to make a non-fictional film establishing that Ray Davis, the plaintiff, was responsible for Charles Horman's death. To the contrary, the papers unalterably establish that the film is not a non-fictional documentary or aimed at Ray Davis as an individual, and that it cannot be understood as other than a dramatization of a true story. The film includes fictional characters and a composite portrayal of the American military presence in Chile at the time of the uprising and Allende coup.

The theme of the film is the search for a missing man by his father and his wife. The man who disappeared is finally found to have been executed by the Chilean military. The film is *based upon* a true story. It is only in that setting that the composite conduct of the American governmental representatives in Chile at the time and the degree of their assistance in that search comes under scrutiny and criticism. There is no person named Ray Davis referred to in the film at any time. Ray Tower, with whom the plaintiff associates himself, is a symbolic fictional composite of the entire American political and military entourage in Chile.

The film derives from and is solidly documented and supported by the stories relied on by the filmmakers, taken from the acts and statements of the concerned father and the anguished wife set forth in detail in Thomas Hauser's book, *Execution.* Those sources are shown to have been heavily investigated and confirmed by the filmmakers, who entertained no serious doubts of their truth or knowledge to the contrary of what they portrayed.

We pause to point out that the Supreme Court has emphasized that "actual malice" in the context of the First Amendment does not even include "spite, hostility or intention to harm." … Rather, the actual malice inquiry focuses on the publisher's state of mind regarding the truth of his statements.…

**B.** ***Defendants' Reliance on Hauser's Book***

"Missing" is a dramatic portrayal of events and interpretations detailed in Thomas Hauser's book, *Execution.* The substance of the movie's scenes is extracted directly from *Execution.* To meet those facts, plaintiff purports to suggest that defendants' reliance on Hauser's book was unreasonable and that

Hauser's credentials would have disclosed him to be "suspect" had a good faith search by defendants been made.

As a matter of law, to prevail on a defamation claim against a public official a plaintiff must do more than propound potential avenues of investigation that a defendant might have pursued. "[M]ere proof of failure to investigate, without more, cannot establish reckless disregard for the truth." *Gertz v. Robert Welch* (S.Ct. 1974),

> Rather, a public figure defamation plaintiff must show either that the publisher actually entertained serious doubts about the veracity of the publication, or that there are '*obvious* reasons to doubt the veracity of the informant or the accuracy of his reports.'"…

There is nothing in the record tending to show that the filmmakers questioned Hauser's credentials or his book in any respect at the time "Missing" was made. The record is to the contrary. The filmmakers met with Hauser, went over his investigation and sources, supplied him with drafts of the script under preparation and were satisfied that there was no reason to doubt his work. No evidence whatever challenges those facts. Certainly the filmmakers obtained no knowledge contradicting the veracity or accuracy of Hauser's book and the stories of the Hormans as told to them and reflected in the book. There is no suggestion to the contrary from any provable sources. Indeed, nothing in plaintiff's papers demonstrates that either Hauser's credentials or his book, which was nominated for a Pulitzer Prize, are in fact "suspect" in any way.

The filmmakers knew that Hauser was a lawyer who had served as a judicial clerk in the Chambers of a Federal Judge and then worked for a prestigious Wall Street law firm. They knew that Hauser interviewed Captain Ray Davis, as well as other United States officials in Chile and numerous other persons when preparing *Execution*. The filmmakers also knew that no legal action whatsoever was taken against the book in the approximately four years since its publication. In an August 1980 meeting where Costa-Gavras, the film's director, and Stewart, the co-scriptwriter, met with Hauser to verify the accuracy of his book, Hauser described his meticulous research methods and broad inquiries. There is no evidence to the contrary.

The filmmakers then met with Charles Horman's parents, his wife, and one Terry Simon, a close friend who was in Chile with Charles around the time of his disappearance. Each of these individuals made clear to Costa-Gavras and Stewart that Hauser's book accurately and reliably depicted events as they knew and believed them. There is no evidence that any of defendants' further research and review of documents regarding Horman and events in Chile during the coup caused them to doubt the veracity of Hauser's book.

Plaintiff argues that an effective search of Hauser's background would have disclosed "fraudulent letters" sent by Hauser to political figures and The New York Times. This allusion is to Hauser's political satires where he had written on public issues to officials in the voice of a nine-year old boy, "Martin Bear." The New York Times, in fact, solicited from Hauser and published on its "op-ed" page one of these satirical pieces, which can hardly be reason to "suspect" the veracity of his book.

In any event, plaintiff has neither presented nor designated specific facts suggesting or from which it could be reasonably inferred and found that defendants entertained serious doubts as to Hauser's account or that there were obvious reasons to doubt the veracity or accuracy of Hauser's book. Absent such evidence, reliance on *Execution* is not evidence of actual malice. *Herbert v. Lando* (plaintiff must show either that publisher "entertained serious doubts" or "obvious reasons" to doubt source). *St. Amant* ("[R]eckless conduct is not measured by whether a reasonably prudent man would have published or would have investigated before publishing.")

**C. *Failure to Consult Plaintiff Prior to Making Film***

Plaintiff argues that defendant's failure to consult plaintiff personally prior to presentation of the film is evidence of actual malice.

However, plaintiff cannot prove actual malice merely by asserting that a publisher failed to contact the subject of his work. *See Vandenburg v. Newsweek, Inc.* (5th Cir.1975) (failure to verify story with plaintiff prior to publication insufficient evidence of actual malice.).

The actual malice standard cannot be satisfied by evidence of a failure to check with third parties prior to publication without proof that a publisher knew his publication was false, entertained serious doubts as to its truth, or had obvious reasons to doubt the veracity or accuracy of the source of published information. *See New York Times v. Sullivan* (and others).

While "verification of facts" of a story with its subjects and with others is a desirable and responsible practice and "an important reporting standard, a reporter, without a 'high degree of awareness of their probable falsity,' may rely on statements made by a single source even though they reflect only one side of the story without fear of libel prosecution...." *New York Times v. Connor* (5th Cir.1966).

Plaintiff has not designated specific facts suggesting an awareness or even suspicion by defendants of probable falsity of their source material.

**D.** ***Scenes in "Missing" as Evidence Of Actual Malice***

Plaintiff enumerates nine scenes in "Missing" which the filmmakers allegedly created, or in which they distorted the context, or made baseless suggestions. None of these scenes provides or contributes to the requisite evidence of actual malice.

It should be made clear that "Missing" is not a documentary, but a dramatization of the Horman disappearance and search. The film does not purport to depict a chronology of the events precisely as they actually occurred; it opens with the prologue: "This film is *based on* a true story. The incidents and facts are documented. Some of the names have been changed to protect the innocent and also to protect the film." (emphasis supplied). No one challenged the accuracy and veracity of Hauser's book to the knowledge of defendants. Defendants concede that although the substance of the film's scenes is extracted almost directly from Thomas Hauser's book, not everything in their film is literally faithful to the actual historical record as if in a documentary. That is not to say that which was not historical was set out in bad faith, portrayed with actual malice, or established or increased the defamatory impact.

The film is not a documentary. A documentary is a non-fictional story or series of historical events portrayed in their actual location; a film of real people and real events as they occur. A documentary maintains strict fidelity to fact.

"Missing," on the other hand, is an art form sometimes described as "Docu-Drama." The line separating a documentary from a docudrama is not always sharply defined, but is nonetheless discernible. Both forms are necessarily selective, given the time constraints of movies and the attention span of the viewing audience. The docudrama is a dramatization of an historical event or lives of real people, using actors or actresses. Docudramas utilize simulated dialogue, composite characters, and a telescoping of events occurring over a period into a composite scene or scenes. This treatment is singularly appropriate and unexceptionable if the context is not distorted when dealing with public and political figures.

Self-evidently a docudrama partakes of author's license — it is a creative interpretation of reality — and if alterations of fact in scenes portrayed are not made with serious doubts of truth of the essence of the telescoped composite, such scenes do not ground a charge of actual malice.

Each scene questioned by the plaintiff is a telescoped composite of events, personalities, and of the American representatives in Chile who are involved therein. Each uses permissible literary license to fit historical detail into a suitable dramatic context. Such dramatic embellishments as are made do not distort the fundamental story being told — the frantic search by his family for a missing man who has suddenly disappeared, their emotions, anxieties, impatience,

frustration, and doubts of assistance from American officialdom. The scenes are thus a hybrid of fact and fiction which however do not materially distort the analysis. Always to be remembered is that they fairly represent the source materials for the film believed to be true by the filmmakers. Leeway is properly afforded to an author who thus attempts to recount a true event.

As a matter of law, the dramatic overlay supplied by the film does not serve to increase the impact of what plaintiff charges as defamatory since it fairly and reasonably portrays the unassailable beliefs of the Hormans, the record thereof in the Hauser book, and the corroborative results of the authors' inquiries. In docudrama, minor fictionalization cannot be considered evidence or support for the requirement of actual malice.

The nine scenes selected by plaintiff as support for the requirement of actual malice do no such thing. Each is related solely and unquestionably to the theme of this film. The movie's Ray Tower character is a fictional composite of the American presence operating in Chile at the time. He is a symbolic figure. The artistic input in the scenes questioned is found in permissible syntheses and composite treatment in the film. Although in actuality particular individuals were not physically present when certain dialogue occurred, in the movie scene the composite character portrayed was.

The content of the film reflects what happened according to the book, the persons who complained, and the sources relied on by defendants. While the actual persons involved in the events portrayed do not appear in on-scene interviews to describe their experiences, actions, and motivations, the real names of some individuals are employed. But the name Ray Davis is never mentioned. Real life personalities are accordingly represented by telescoped composites in many instances.

The cases on point demonstrate that the First Amendment protects such dramatizations and does not demand literal truth in every episode depicted; publishing a dramatization is not of itself evidence of actual malice.

In *Street v. National Broadcasting Co.* (6th Cir.),, the Court of Appeals affirmed a ruling on a directed verdict that the dramatization embodied in defendant's broadcast program on the Scottsboro rape trial was protected by the *New York Times v. Sullivan* standard, and not chargeable with actual malice. While the dramatization contained certain literal falsehoods, including undocumented statements and conversations … the movie was based "in all material respects" on the Judge's findings in the Scottsboro case, and a book by a historian documenting the Scottsboro trial. *Id.* at 1237.

> Such techniques do not rise to the constitutional level of clear and convincing showing of reckless disregard.… [D]eviations from or embellishments upon the information obtained from the primary

> sources relied upon were miniscule and can be attributed to the leeway afforded an author who attempts to recount and popularize an historic event."

*Hotchner v. Castillo-Puche* (2d Cir. 1977). Defendant published a book which purported to quote derogatory remarks by Ernest Hemingway about plaintiff. Defendant did not print the literal words used by Hemingway, and "was fictionalizing to some extent." *Hotchner,* 551 F.2d at 914. The Court of Appeals held that such fictionalization or dramatization does not satisfy the requirement of clear and convincing evidence from which a jury might reasonably find that defendant published the alleged libel with actual malice. Actual malice could not be inferred because "the change did not increase the defamatory impact or alter the substantive content" of Hemingway's original statement which defendants relied upon. *Id.*

***Conclusion***

The issue on the motion is not the truth of whether Davis (qua Ray Tower) ordered or approved a Chilean order to kill Charles Horman because he "knew too much" about alleged American involvement in the Chilean coup; the issue is whether the filmmakers intentionally portrayed such a defamatory suggestion, knowing that it was false or with serious doubts of its truth. There is no doubt that Ed Horman, the father of the missing man, asserted such a theory and that assertion is documented in Hauser's book. Plaintiff has not presented evidence that defendants knew the theory of the father was false, or entertained serious doubts as to its truth. There is no evidence that defendants acted with actual malice or disbelieved what the Hormans thought and said or what Hauser wrote.

In sum, returning to the *ratio decidendi;* no provable, clear and convincing, affirmative evidence nor specific facts showing actual malice on the part of the defendants in publishing the alleged defamation have been shown, and the complaint by plaintiff, a public figure, falls as not sustainable under the law.

The complaint is dismissed, with costs.

SO ORDERED.

**APPENDIX**

The plaintiff has designated the following nine scenes in the film purportedly as the evidence he has that defendants published the film with actual malice.

**1.** ***Initial Embassy Scene*** The scene depicts a meeting where it is reported that Tower and his staff have conducted interviews in the area where Charles was last seen. Tower states he is having dinner with the Junta's chief-of-staff Admiral Huidobro, implying close connections with the Chilean military, and asks Beth Horman for a list of Charles' friends which was refused.

Every element in the dramatized scene is traceable to an actual fact about or statement by Ray Davis derived from Hauser's book. The book establishes that Ray Davis was in charge of the American investigation into Charles Horman's disappearance.

**2.** ***The Hotel Meeting*** The film depicts a meeting at the Hormans' hotel at which Putnam, Clay, and Tower are present. Clay states that a fingerprint check made at all the morgues came up negative in the search for Horman's whereabouts and that Captain Tower checked them himself.

The book describes the fingerprint report by governmental officials, and this scene is a composite of those who checked on the morgue and the fingerprints. *Execution* chronicles Ray Davis' statements that he made inquiries with friends in the Chilean military and was checking "all possible leads."

**3.** ***The Stadium*** In this scene the language is taken straight from *Execution;* the scene indicates that Tower and Putnam accompany Ed and Beth Horman to the National Stadium to search for Charles. American official presence at the stadium, including the suggestion that Davis was involved in the investigation into Charles' disappearance, are clearly indicated in Hauser's account. Indeed, *Execution* portrays that Ray Davis was "in charge of the investigation."

**4.** ***The Final Embassy Meeting*** In this scene Ed Horman tells Tower and the Embassy officials that he does not think that the military would kill Charles "unless an American official co-signed a kill order" and further indicates that he believes that American officials knew from the start that Charles was dead. These statements by Horman in the film directly reflect his beliefs as described in Hauser's book and as known to the filmmakers.

**5.** ***The Airport Scene*** In this scene Ed Horman tells Putnam, with Tower standing nearby, "I'm gonna sue you, Phil, and Tower and the Ambassador, and everybody who let that boy die." While the locale for this confrontation is not placed at an airport by *Execution,* the speech accurately depicts Ed Horman's state of mind as described in *Execution.* Horman did sue eleven government officials.

**6.** ***The Bathroom Scene*** This scene shows Beth Horman in the bathtub at Tower's house when Tower walks into the bathroom with a drink in his hand. Tower says, "You know, if I were you, I'd quit living in the past. I think it's about time you started thinking about your future." Tower exhorts Beth to "stay ahead of the power curve" as Beth quickly exits the room.

Each of these events is taken almost directly from Hauser's book. According to Costa-Gavras' affidavit, Joyce Horman told Costa-Gavras that the book's description of events at Ray Davis's home was actually understated and overly charitable to Davis, both in describing how much he had to drink and in detailing precisely what occurred when he entered her bathroom.

**7.** ***The Meeting with Paris*** In this scene, Paris, described as a desperate former employee of the Junta, tells Ed Horman that a friend was present and saw Charles detained at the Ministry of Defense in the office of Chilean General Lutz, after he was arrested. According to the friend, an American official was present in the office when the decision was made that the prisoner "must 'disappear' " because "he knew too much." Paris could not identify the American official but noted that, "The ministry is full of them. Their Milgroup office is just down the hall from the General."

This scene is taken directly from Hauser's book, which describes in detail the allegations of a Chilean defector and former employee of the Chilean Intelligence Service, Rafael Gonzalez.

**8.** ***The Mafia Speech*** Tower analogizes Charles' death with the murder of someone who becomes involved with the Mafia. In fact, plaintiff Ray Davis himself made such a statement and this is documented in *Execution*. Interestingly, these statements were made by Davis to Thomas Hauser while the latter was researching his book.

**9.** ***The Telephone Repair Scene*** This scene contains the suggestion that Ed Horman's telephone at his hotel is wiretapped. A telephone repairman leaves the hotel room and Ed Horman tells him there was nothing wrong with the phone, and Beth is portrayed as saying, "hello Ray Tower, how's every little thing."

*Execution* documents the incident with Ed Horman's clear impression that either the Chilean government or American officials had bugged his phone.

## Privacy Rights

### Invasion of Privacy

Privacy rights come in four different flavors, best described by Justice Louis Brandeis in a famous 1890 Harvard Law Review article as "the right to be left alone."

1. Intrusion - Unreasonable intrusion on personal solitude.
2. Publication of Private Facts - Public disclosure of true but embarrassing private facts.
3. False Light - Presentation of people in a false light in the public eye.
4. Celebrity Publicity Rights - Appropriation of one's name, image, or likeness.

- Wikipedia: Privacy Laws of the United States
- Wikipedia: Privacy Laws By Country
- If Only J-Law Could Retain Brandeis.

### 1. Intrusion Upon Seclusion

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.
>
> Restatement 2nd of Torts § 652B: Intrusion upon Seclusion

### 2. Publication of Private Facts

> aka Public disclosure of true but embarrassing private facts.
>
> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that:
>
> (a) would be highly offensive to a reasonable person, and
> (b) is not of legitimate concern to the public.
>
> Restatement 2nd of Torts § 652D: Publicity Given to Private Life

### 3. False Light

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if:
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Restatement 2nd of Torts § 652E: Publicity Placing Person in False Light

False light is a close cousin to defamation, and the two torts are often pled together. In *Douglass v. Hustler Magazine,* (7th Cir 1985), Judge Richard Posner explained the difference this way:

> The false-light tort, to the extent distinct from the tort of defamation (but there is indeed considerable overlap), rests on an awareness that people who are made to seem pathetic or ridiculous may be shunned, and not just people who are thought to be dishonest or incompetent or immoral.

Defamation focuses on the damage to the plaintiff's reputation in the community, while false light privacy concentrates on the psychological harm done to the plaintiff from objectionable misrepresentations.

#### *Shulman v. Group W. Productions* (CA 1998)

Please read this case in its entirety. It reads like a law review article on the differences between various privacy rights.

- case at Google scholar
- case at Westlaw, 955 P.2d 469 (Cal. Sct. 1998).

A medical news team (with a private paramedic and a ride-along cameraman) covered a car crash in which Ruth Shulman was gravely injured. The news team filmed the scene and put a mic on a nurse, who went into the helicopter where Ruth Shulman was being treated for her injuries.

The accident turned Ruth Shulman into a paraplegic. The news team videotaped her saying things like, "I just want to die. I don't want to go through with this." Shulman was in a state of shock at the accident scene, so she did not recall that her statements were videotaped and recorded.

Three months after the accident, Ruth Shulman watched herself on *On Scene: Emergency Response*, a reality news show. The producers did not use her last name, but Shulman was upset that her comments and images of her were enhanced, and then aired on national television – without her permission.

Ruth Shulman sued for invasion of privacy. Her case was dismissed when the Superior Court ruled that the media had a First Amendment right to videotape and broadcast the sights and sounds of her ordeal.

Shulman then appealed to the California Supreme Court. In an important decision for the right of privacy, the Supreme Court found for Ruth Shulman by ruling that the reality TV show producers intruded on Ruth Shulman's right of privacy at the scene of the highway accident by filming and recording her ordeal without her permission.

## Haynes v. Alfred A. Knopf, Inc.

US Court of Appeals, 7th Circuit (1993)

- case on Google Scholar
- case on Westlaw

POSNER, Chief Judge.

Luther Haynes and his wife, Dorothy Haynes née Johnson, appeal from the dismissal on the defendants' motion for summary judgment of their suit against Nicholas Lemann, the author of a highly praised, best-selling book of social and political history called *The Promised Land: The Great Black Migration and How It Changed America* (1991), and Alfred A. Knopf, Inc., the book's publisher. The plaintiffs claim that the book libels Luther Haynes and invades both plaintiffs' right of privacy. Federal jurisdiction is based on diversity, and the common law of Illinois is agreed to govern the substantive issues. The appeal presents difficult issues at the intersection of tort law and freedom of the press.

Between 1940 and 1970, five million blacks moved from impoverished rural areas in the South to the cities of the North in search of a better life. Some found it, and after sojourns of shorter or greater length in the poor black districts of the cities moved to middle-class areas. Others, despite the ballyhooed efforts of the federal government, particularly between 1964 and 1972, to erase poverty and racial discrimination, remained mired in what has come to be called the "urban ghetto." *The Promised Land* is a history of the migration. It is not history as a professional historian, a demographer, or a social scientist would write it. Lemann is none of these. He is a journalist and has written a journalistic history, in which the focus is on individuals whether powerful or representative. In the former group are the politicians who invented, executed, or exploited the "Great Society" programs. In the latter are a handful of the actual migrants.

Foremost among these is Ruby Lee Daniels. Her story is the spine of the book. We are introduced to her on page 7; we take leave of her on page 346, within a few pages of the end of the text of the book.

When we meet her, it is the early 1940s and she is a young woman picking cotton on a plantation in Clarksdale, Mississippi. "[B]lack sharecropper society on the eve of the introduction [in the 1940s] of the mechanical cotton picker [a major spur to the migration] was the equivalent of big-city ghetto society today in many ways. It was the national center of illegitimate childbearing and of the female-headed family." Ruby had married young, but after her husband had been inducted into the army on the eve of World War II she had fallen in love with a married man, by whom she had had a child. The man's wife died and Ruby married him, but they broke up after a month. Glowing reports from an aunt who had moved to Chicago persuaded Ruby Daniels to move there in 1946. She found a job doing janitorial work, but eventually lost the job and went on public aid. She was unmarried, and had several children, when in 1953 she met "the most important man in her life." Luther Haynes, born in 1924 or 1925, a sharecropper from Mississippi, had moved to Chicago in an effort to effect a reconciliation with his wife. The effort had failed. When he met Ruby Daniels he had a well-paying job in an awning factory. They lived together, and had children. But then "Luther began to drink too much. When he drank he got mean, and he and Ruby would get into ferocious quarrels. He was still working, but he wasn't always bringing his paycheck home." Ruby got work as a maid. They moved to a poorer part of the city. The relationship went downhill. "It got to the point where [Luther] would go out on Friday evenings after picking up his paycheck, and Ruby would hope he wouldn't come home, because she knew he would be drunk. On the Friday evenings when he did come home — over the years Ruby developed a devastating imitation of Luther, and could recreate the scene quite vividly — he would walk into the apartment, put on a record and turn up the volume, and saunter into their bedroom, a bottle in one hand and a cigarette in the other, in the mood for love. On one such night, Ruby's last child, Kevin, was conceived. Kevin always had something wrong with him — he was very moody, he was scrawny, and he had a severe speech impediment. Ruby was never able to find out exactly what the problem was, but she blamed it on Luther; all that alcohol must have gotten into his sperm, she said."

Ruby was on public aid, but was cut off when social workers discovered she had a man in the house. She got a night job. Luther was supposed to stay with the children while she was at work, especially since they lived in a dangerous neighborhood; but often when she came home, at 3:00 a.m. or so, she would "find the older children awake, and when she would ask them if Luther had been there, the answer would be, 'No, ma'am.' " Ruby's last aid check, arriving providentially after she had been cut off, enabled the couple to buy a

modest house on contract — it "was, by a wide margin, the best place she had ever lived." But "after only a few months, Luther ruined everything by going out and buying a brand-new 1961 Pontiac. It meant more to him than the house did, and when they couldn't make the house payment, he insisted on keeping the car" even though she hadn't enough money to buy shoes for the children. The family was kicked out of the house. They now moved frequently. They were reaching rock bottom. At this nadir, hope appeared in the ironic form of the Robert Taylor Homes, then a brand-new public housing project, now a notorious focus of drug addiction and gang violence. Ruby had had an application for public housing on file for many years, but the housing authority screened out unwed mothers. Told by a social worker that she could have an apartment in the Taylor Homes if she produced a marriage license, she and Luther (who was now divorced from his first wife) were married forthwith and promptly accepted as tenants. "The Haynes family chose to rejoice in their good fortune in becoming residents of the Robert Taylor Homes. As Ruby's son Larry, who was twelve years old at the time, says, 'I thought that was the beautifullest place in the world.' "

Even in the halcyon days of 1962, the Robert Taylor Homes were no paradise. There was considerable crime, and there were gangs, and Ruby's son Kermit joined one. Kermit was not Luther's son and did not recognize his authority. The two quarreled a lot. Meanwhile Luther had lost his job in the awning factory "that he had had for a decade, and then bounced around a little. He lost jobs because of transportation problems, because of layoffs, because of a bout of serious illness, because of his drinking, because he had a minor criminal record (having been in jail for disorderly conduct following a fight with Ruby), and because creditors were after him." He resumed "his old habit of not returning from work on Fridays after he got his paycheck." One weekend he didn't come home at all. In a search of his things Ruby discovered evidence that Luther was having an affair with Dorothy Johnson, a former neighbor. "Luther was not being particularly careful; he saw in Dorothy, who was younger than Ruby, who had three children compared to Ruby's eight, who had a job while Ruby was on public aid, the promise of an escape from the ghetto, and he was entranced." The children discovered the affair. Kermit tried to strangle Luther. In 1965 Luther moved out permanently, and eventually he and Ruby divorced.

Ruby remained in the Robert Taylor Homes until 1979, when she moved back to Clarksdale. She had become eligible for social security in 1978; and with her surviving children (one of her sons had died, either a suicide or murdered) now adults, though most of them deeply troubled adults and Kevin, whom Ruby in a custody proceeding described as retarded, still living at home, Ruby "is settling into old age with a sense of contentment about the circumstances she has found." But "there has always been that nagging sensation of incompleteness, which made itself felt most directly in her relationships with men."

After divorcing Ruby, Luther Haynes married Dorothy Johnson. He is still married to her, "owns a home on the far South Side of Chicago, and has worked for years as a parking-lot attendant; only recently have he and Ruby found that they can speak civilly to each other on the phone."

There is much more to the book than our paraphrase and excerpts—much about other migrants, about the travails of Ruby's children, about discrimination against blacks in both the North and the South, and about the politics of poverty programs in Washington and Chicago. But the excerpts we have quoted contain all the passages upon which the Hayneses' lawsuit is founded.

**Defamation**

The charge of libel is confined to three statements in the book: that Haynes left his children alone at night when he was supposed to be watching them; that he lost a job or jobs because of drinking; and that he spent money on a car that he should have used to buy shoes for his children. We do not agree with the defendants that the dismissal of the libel claim must be upheld because Haynes has failed to allege pecuniary loss from the alleged libels ("special damages"). The rule in Illinois, which used to be limited to slander cases but has been extended to all defamation cases, *Brown & Williamson Tobacco Corp. v. Jacobson* (7th Cir.1983) is that a plaintiff can maintain a suit for defamation without proof of special damages only if the defamatory statement falls into one of four "per se" categories: commission of a crime; infection with a type of communicable disease that could cause the infected person to be shunned; malfeasance or misfeasance in the performance of an office or a job; and (what is closely related, but less redolent of actual misconduct and usable by business firms as well as by workers or professionals) unfitness for one's profession or trade. *Id.* at 267-68; *Mittelman v. Witous* (Ill. 1989). The statements that Haynes claims are libelous can be interpreted, though just barely, as implying that he was guilty of criminal neglect of his children and was unable to discharge the duties of at least one of his jobs because of alcohol. Ever since modification of the "innocent construction" doctrine in *Chapski v. Copley Press* (Ill. 1982), which left the doctrine meaning merely that a court should not strain to put a defamatory interpretation on an ambiguous statement, Illinois courts (and federal courts when interpreting Illinois law) have been quick to find implications of criminal conduct or of employee or business misconduct in statements that might have seemed susceptible of an interpretation that would have taken them out of the per se categories. See *Babb v. Minder* (7th Cir. 1986) (statement that employee had "mooned" held actionable as an accusation of the crime of indecent exposure); *Costello v. Capital Cities Communications, Inc.* (Ill. 1988) (statement that employee had lied held actionable as implying lack of

integrity in performance of duties); *Crinkley v. Dow Jones & Co.*(Ill.App.3d 1983) (statement alleging payoffs to agents of foreign governments held actionable); *Brown & Williamson Tobacco Corp. v. Jacobson* (7th Cir. 1983) (allegations that cigarette company attempted through its advertising to entice children to smoke held actionable).

The requirement of proving special damages does prevent Haynes from basing a libel claim on two other statements in the book that he contends are false: that his drinking was responsible for Kevin's defects and that his motives for leaving Ruby for Dorothy were financial. (The second is an implication rather than an outright statement, but we shall give Haynes the benefit of the doubt and assume with him that the book implies that his motives were financial rather than—an interpretation that the passage also supports, and that the innocent-construction rule, even in its tempered form after *Chapski,* might therefore require be placed on it — a more diffuse hope of betterment.) These statements are not within any of the per se categories and therefore are not actionable, because Haynes alleges no pecuniary injury. They probably would be nonactionable in any event as obvious statements of opinion (Ruby's and Lemann's respectively) rather than of fact. A statement of fact is not shielded from an action for defamation by being prefaced with the words "in my opinion," but if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable. *Milkovich v. Lorain Journal Co.* (S.Ct. 1990);

The facts about Kevin's condition and about the respective financial circumstances of Ruby and Dorothy were uncontested, and Ruby and Lemann were entitled to their interpretation of them. Luther drank heavily; the proposition that a man's heavy drinking can, and that Luther's heavy drinking did, damage a fetus is represented in the book merely as Ruby's conjecture. A reasonable reader would not suppose that she had proof, or even the scientific knowledge that might ground a reasonable inference. As for Luther's motives for leaving Ruby for Dorothy, they can never be known for sure (even by Luther) and anyone is entitled to speculate on a person's motives from the known facts of his behavior. Luther Haynes left a poor woman for a less poor one, and Lemann drew a natural though not inevitable inference. He did not pretend to have the inside dope. He and Ruby claim insight, not information that the plaintiff might be able to prove false in a trial.

Lemann's source for the only statements upon which Luther Haynes can base his claim for defamation, as for most of the rest of what he wrote about Haynes, was Ruby Daniels. He had interviewed Haynes as well, but Haynes in his deposition denied that Lemann had questioned him about his relationship with Ruby. Haynes swears that he never left his children alone in a dangerous

neighborhood when he was supposed to be with them, did not by his expenditures on the Pontiac deprive his children of shoes, and was fired not for drinking but because he had been given a bottle of liquor by a friend which was found unopened in his pocket by his supervisor; since his job was that of an armed security guard, the supervisor was unwilling to take a chance on the truthfulness of his story. Haynes's version of how he lost a job because of "drinking" is corroborated by Lemann's notes of his interview with Haynes, but is not mentioned in the book.

It would take a trial to decide whether Ruby Daniels (and hence Nicholas Lemann) or Luther Haynes should be believed on these three matters. But the district judge was nevertheless correct to dismiss the defamation claim because if the gist of a defamatory statement is true, if in other words the statement is substantially true, error in detail is not actionable (citations omitted).

To evaluate the application of this rule to Haynes's libel claims requires us to consider facts brought out in discovery and not contested, although they are not in the book. Haynes in his deposition admitted to drinking heavily during the period when he lost his job because of the unopened liquor bottle in his pocket. He admitted to being arrested and jailed for assaulting a police officer after drinking. When he walked out on Ruby he also walked out on his four children by her, and he refused to support them. She was forced to obtain court orders for child support. Haynes repeatedly flouted the orders and eventually was jailed for contempt. During their divorce proceedings it came out that, after leaving Ruby, he and Dorothy Johnson had had a marriage ceremony and he had entered their names in the marriage registry of the county clerk's office —two years before his divorce from Ruby.

Beside these uncontested facts — not to mention the facts about Haynes in the book that he does not contend are false — the alleged falsehoods pale. They do not exhibit him in a worse light than a bare recitation of the uncontested facts about his behavior in relation to Ruby and her children would do. For Lemann left out much that was true. He did not mention the bigamous marriage, the repeated flouting of child-support orders, the arrest for assaulting a police officer, or the jailing for contempt. Substitute the true for the false (if Haynes is believed), and the damage to Haynes's reputation would be no less.

The rule of substantial truth is based on a recognition that falsehoods which do no *incremental* damage to the plaintiff's reputation do not injure the only interest that the law of defamation protects. A news report that contains a false statement is actionable "only when 'significantly greater opprobrium' results from the report containing the falsehood than would result from the report without the falsehood." *Herron v. King Broadcasting Co., supra,*. Even when the plaintiff in a defamation suit is not a public figure, the Supreme Court insists in the name of the First Amendment that unless the author is deliberately

lying or is recklessly indifferent to the truth or falsity of what he says (neither is a plausible hypothesis here), the plaintiff must prove actual though not necessarily pecuniary harm in order to recover damages. *Gertz v. Robert Welch, Inc.* (S.Ct. 1974). Falsehoods that do not harm the plaintiff's reputation more than a full recital of the true facts about him would do are thus not actionable. The rule making substantial truth a complete defense and the constitutional limitations on defamation suits coincide.

Ordinarily the question whether a defamatory work is substantially true although erroneous in some details is for the jury. *Kohn v. West Hawaii Today, Inc.*, (HW 1982). But no reasonable jury, even if it believed Luther Haynes over Ruby Daniels on every issue on which they differ, could find that *The Promised Land* was not substantially true in its depiction of Luther at the time he lived with Ruby. He *was* a heavy drinker, a bad husband, a bad father, an erratic employee. These are things either that he concedes or that are incontestably established by the judicial records in his matrimonial litigation. Whether he left the children alone at night on some occasions when Ruby was working, or was fired for drinking rather than for having liquor on his person while working, or preferred to spend money on his car than on his children's shoes, are details that, while not trivial, would not if corrected have altered the picture that the true facts paint. And it makes no difference that the true facts were unknown until the trial. A person does not have a legally protected right to a reputation based on the concealment of the truth. This is implicit in the rule that truth — not just known truth (see *Restatement (Second) of Torts* § 581A, comment h (1977); *Prosser and Keeton on the Law of Torts* § 116, at pp. 840-41 (5th ed. 1984)) — is a complete defense to defamation. And the burden of proving falsity rests on the plaintiff. *Philadelphia Newspapers, Inc. v. Hepps* (S.Ct. 1986)

We must be careful, however, that we are not construing the gist of the allegedly defamatory statements so broadly as to invite defendants to commit, in effect, a further but privileged libel, by bringing to light every discreditable act that the plaintiff may have committed, in an effort to show that he is as "bad" as the defamatory statements depict him. This would strip people who had done bad things of any legal protection against being defamed; they would be defamation outlaws. The true damaging facts must be closely related to the false ones. But that test is satisfied. Luther abandoned his children and was eventually jailed for doing so. These truths encompass and transcend what, whether or not it might be elevated to criminal neglect, is, after all, common enough — leaving children, some of them teenagers, unattended late at night. (And how different is that from leaving a child at night with a teenage babysitter?) An armed security guard who is discovered by his employer to have a bottle of liquor in his pocket is equivalent in irresponsible employee conduct to an ordinary worker found drinking on the job. And a decision to spend money on a car rather than on

one's children's clothes is subsumed by total financial abandonment of one's children in violation of court orders, an abandonment compounded by a bigamous marriage to a woman who herself had children. The allegedly false facts about Luther were variants of the true that did not paint him in a worse light. Corresponding to the "immaterial error[s]" of which the substantial-truth cases speak, *Sivulich v. Howard Publications, Inc.*, 126 Ill.App.3d 129, 81 Ill. Dec. 416, 418, 466 N.E.2d 1218, 1220 (1984), the alleged falsehoods were merely illustrations of undoubted truths about Luther Haynes's character at the time, illustrations that even if false in detail conveyed an accurate impression. They were therefore substantially true within the meaning which this term must bear to make sense of the cases.

**Invasion of Privacy**

The major claim in the complaint, and the focus of the appeal, is not defamation, however; it is invasion of the right of privacy. In tort law the term "right of privacy" covers several distinct wrongs. Using a celebrity's (or other person's) name or picture in advertising without his consent. *Carson v. Here's Johnny Portable Toilets, Inc.*, (6th Cir. 1983); *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc.*, (GA 1982); *Haelan Laboratories v. Topps Chewing Gum* (2d Cir. 1953); *Douglass v. Hustler Magazine, Inc.* (7th Cir. 1985). Tapping someone's phone, or otherwise invading a person's private space. [*De May v. Roberts* (MI 1881)] (many citations omitted);

Harassing a celebrity by following her too closely, albeit on a public street. Cf. *Galella v. Onassis* (2d Cir. 1973). Casting a person in a false light by publicizing details of the person's life that while true are so selected or highlighted as to convey a misleading impression of the person's character. *Time, Inc. v. Hill* (S.Ct. 1967). Publicizing personal facts that while true and not misleading are so intimate that their disclosure to the public is deeply embarrassing to the person thus exposed and is perceived as gratuitous by the community (many citations omitted).

The last, the publicizing of personal facts, is the aspect of invasion of privacy charged by the Hayneses.

Even people who have nothing rationally to be ashamed of can be mortified by the publication of intimate details of their life. Most people in no wise deformed or disfigured would nevertheless be deeply upset if nude photographs of themselves were published in a newspaper or a book. They feel the same way about photographs of their sexual activities, however "normal," or about a narrative of those activities, or about having their medical records publicized. Although it is well known that every human being defecates, no adult human

being in our society wants a newspaper to show a picture of him defecating. The desire for privacy illustrated by these examples is a mysterious but deep fact about human personality. It deserves and in our society receives legal protection. The nature of the injury shows, by the way, that the defendants are wrong to argue that this branch of the right of privacy requires proof of special damages.

But this is not the character of the depictions of the Hayneses in *The Promised Land*. Although the plaintiff's claim that the book depicts their "sex life" and "ridicules" Luther Haynes's lovemaking (the reference is to the passage we quoted in which the author refers to Ruby's "devastating imitation" of Luther's manner when he would come home Friday nights in an amorous mood), these characterizations are misleading. No sexual act is described in the book. No intimate details are revealed. Entering one's bedroom with a bottle in one hand and a cigarette in the other is not foreplay. Ruby's speculation that Kevin's problems may have been due to Luther's having been a heavy drinker is not the narration of a sexual act.

We said that proof of special damages is not required in a case in which the public revelation of personal facts is claimed to be an invasion of privacy. Even so, a plaintiff is not allowed to evade the rule that requires proof of such damages in defamation cases (outside the per se categories) by attempting to prove that some of the personal facts publicized about him are false, unless he is prepared to prove special damages — and perhaps, as we are about to see, there is no "unless." Haynes denies that his drinking had anything to do with his son Kevin's defects or that he was actuated by mercenary considerations in leaving Ruby for Dorothy. These denials, we have seen, could not be made the basis of a libel case in the absence of proof of special damages, here lacking. No more, we think, can they be used to enhance a privacy case, whether it is a false-light case, *Brown & Williamson Tobacco Corp. v. Jacobson, supra,*

See generally *Restatement (Second) of Torts, supra,* § 652E, comment e. Indeed, that type of case presupposes the truth of the facts disclosed. *Id.* If they are false, the interest invaded is that protected by the defamation and false-light torts: the interest in being represented truthfully to the world.

Absence of special damages may be the reason why the Hayneses have not appealed the dismissal of their claim that the defendants cast Luther in a false light — though in fairness to him we should point out that they may have placed him in a false light with respect to his motives for leaving Ruby. Lemann's interview notes suggest (as the book does not, at least not clearly) that the major difference which Haynes perceived between the two women was one of character rather than of financial wherewithal. According to the notes, Haynes told Lemann that Ruby "never wanted to work. She wanted to sit around and be on aid. I called Ruby and asked her why she let 'Nita [their daughter] have a baby and she said, She's grown. I couldn't handle that talk, so I said forget it. Ruby

was on aid when I met her, and she wanted to have more kids so she could have more aid. Dorothy had three kids, and a job."

This is an aside. The branch of privacy law that the Hayneses invoke in their appeal is not concerned with, and is not a proper surrogate for legal doctrines that are concerned with, the accuracy of the private facts revealed. It is concerned with the propriety of stripping away the veil of privacy with which we cover the embarrassing, the shameful, the tabooed, truths about us. *Leidholdt v. L.F.P. Inc., supra,*. The revelations in the book are not about the intimate details of the Hayneses' life. They are about misconduct, in particular Luther's. (There is very little about Dorothy in the book, apart from the fact that she had had an affair with Luther while he was still married to Ruby and that they eventually became and have remained lawfully married.) The revelations are about his heavy drinking, his unstable employment, his adultery, his irresponsible and neglectful behavior toward his wife and children. So we must consider cases in which the right of privacy has been invoked as a shield against the revelation of previous misconduct.

Two early cases illustrate the range of judicial thinking. In *Melvin v. Reid,* 112 Cal.App. 285, 297 Pac. 91 (1931), the plaintiff was a former prostitute, who had been prosecuted but acquitted of murder. She later had married and (she alleged) for seven years had lived a blameless respectable life in a community in which her lurid past was unknown — when all was revealed in a movie about the murder case which used her maiden name. The court held that these allegations stated a claim for invasion of privacy. The Hayneses' claim is similar although less dramatic. They have been a respectable married couple for two decades. Luther's alcohol problem is behind him. He has steady employment as a doorman. His wife is a nurse, and in 1990 he told Lemann that the couple's combined income was $60,000 a year. He is not in trouble with the domestic relations court. He is a deacon of his church. He has come a long way from sharecropping in Mississippi and public housing in Chicago and he and his wife want to bury their past just as Mrs. Melvin wanted to do and in *Melvin v. Reid* was held entitled to do.

In Luther Haynes's own words, from his deposition, "I know I haven't been no angel, but since almost 30 years ago I have turned my life completely around. I stopped the drinking and all this bad habits and stuff like that, which I deny, some of [it] I didn't deny, because I have changed my life. It take me almost 30 years to change it and I am deeply in my church. I look good in the eyes of my church members and my community. Now, what is going to happen now when this public reads this garbage which I didn't tell Mr. Lemann to write? Then all this is going to go down the drain. And I worked like a son of a gun to build myself up in a good reputation and he has torn it down."

But with *Melvin v. Reid* compare *Sidis v. F-R Publishing Corp.*, 113 F.2d

806 (2d Cir. 1940), another old case but one more consonant with modern thinking about the proper balance between the right of privacy and the freedom of the press. A child prodigy had flamed out; he was now an eccentric recluse. The *New Yorker* ran a "where is he now" article about him. The article, entitled "April Fool," did not reveal any misconduct by Sidis but it depicted him in mocking tones as a comical failure, in much the same way that the report of Ruby's "devastating imitation" of the amorous Luther Haynes could be thought to have depicted him as a comical failure, albeit with sinister consequences absent from Sidis's case. The invasion of Sidis's privacy was palpable. But the publisher won. No intimate physical details of Sidis's life had been revealed; and on the other side was the undoubted newsworthiness of a child prodigy, as of a woman prosecuted for murder. Sidis, unlike Mrs. Melvin, was not permitted to bury his past.

Evolution along the divergent lines marked out by *Melvin* and *Sidis* continued … until *Cox Broadcasting Corp. v. Cohn* (S.Ct. 1975), which may have consigned the entire *Melvin* line to the outer darkness. A Georgia statute forbade the publication of names of rape victims. A television station obtained the name of a woman who had been raped and murdered from the indictment of her assailants (a public document), and broadcast it in defiance of the statute. The woman's father brought a tort suit against the broadcaster, claiming that the broadcast had violated his right of privacy. The broadcaster argued that the name of the woman was a matter of public concern, but the Georgia supreme court held that the statute established the contrary, and affirmed a finding of liability. The U.S. Supreme Court reversed, holding that the statute violated the First Amendment. The Court declined to rule whether the publication of truthful information can ever be made the basis of a tort suit for invasion of privacy, but held that the First Amendment creates a privilege to publish matters contained in public records even if publication would offend the sensibilities of a reasonable person. Years later the Court extended the rule laid down in *Cox* to a case in which a newspaper published a rape victim's name (again in violation of a state statute) that it had obtained from a police report that was not a public document. *Florida Star v. B.J.F.* (S.Ct. 1989). Again the Court was careful not to hold that states can never provide a tort remedy to a person about whom truthful, but intensely private, information of some interest to the public is published.

We do not think the Court was being coy in *Cox* or *Florida Star* in declining to declare the tort of publicizing intensely personal facts totally defunct. (Indeed, the author of *Cox* dissented in *Florida Star.*) The publication of facts in a public record or other official document, such as the police report in the *Florida Star,* is not to be equated to publishing a photo of a couple making love or of a person undergoing some intimate medical procedure; we even doubt that it would make a difference in such a case if the photograph had been printed in a government

document (say the patient's file in a Veterans Administration hospital).

Yet despite the limited scope of the holdings of *Cox* and *Florida Star,* the implications of those decisions for the branch of the right of privacy that limits the publication of private facts are profound, even for a case such as this in which, unlike *Melvin v. Reid*, the primary source of the allegedly humiliating personal facts is not a public record. (The primary source is Ruby Daniels.) The Court must believe that the First Amendment greatly circumscribes the right even of a private figure to obtain damages for the publication of newsworthy facts about him, even when they are facts of a kind that people want very much to conceal. To be identified in the newspaper as a rape victim is intensely embarrassing. And it is not invited embarrassment. No one asks to be raped; the plaintiff in *Melvin v. Reid* did not ask to be prosecuted for murder (remember, she was acquitted, though whether she actually was innocent is unknown); Sidis did not decide to be a prodigy; and Luther Haynes did not aspire to be a representative figure in the great black migration from the South to the North. People who do not desire the limelight and do not deliberately choose a way of life or course of conduct calculated to thrust them into it nevertheless have no legal right to extinguish it if the experiences that have befallen them are newsworthy, even if they would prefer that those experiences be kept private. The possibility of an involuntary loss of privacy is recognized in the modern formulations of this branch of the privacy tort, which require not only that the private facts publicized be such as would make a reasonable person deeply offended by such publicity but also that they be facts in which the public has no legitimate interest. *Restatement (Second) of Torts, supra,* § 652D(b).

The two criteria, offensiveness and newsworthiness, are related. An individual, and more pertinently perhaps the community, is most offended by the publication of intimate personal facts when the community has no interest in them beyond the voyeuristic thrill of penetrating the wall of privacy that surrounds a stranger. The reader of a book about the black migration to the North would have no legitimate interest in the details of Luther Haynes's sex life; but no such details are disclosed. Such a reader does have a legitimate interest in the aspects of Luther's conduct that the book reveals. For one of Lemann's major themes is the transposition virtually intact of a sharecropper morality characterized by a family structure "matriarchal and elastic" and by an "extremely unstable" marriage bond to the slums of the northern cities, and the interaction, largely random and sometimes perverse, of that morality with governmental programs to alleviate poverty. Public aid policies discouraged Ruby and Luther from living together; public housing policies precipitated a marriage doomed to fail. No detail in the book claimed to invade the Hayneses' privacy is not germane to the story that the author wanted to tell, a story not only of legitimate but of transcendent public interest.

The Hayneses question whether the linkage between the author's theme and their private life really is organic. They point out that many social histories do not mention individuals at all, let alone by name. That is true. Much of social science, including social history, proceeds by abstraction, aggregation, and quantification rather than by case studies; the economist Robert Fogel has won a Nobel prize for his statistical studies of economic history, including, not wholly unrelated to the subject of Lemann's book, the history of Negro slavery in the United States. But it would be absurd to suggest that cliometric or other aggregative, impersonal methods of doing social history are the only proper way to go about it and presumptuous to claim even that they are the best way. Lemann's book has been praised to the skies by distinguished scholars, among them black scholars covering a large portion of the ideological spectrum — Henry Louis Gates Jr., William Julius Wilson, and Patricia Williams. Lemann's methodology places the individual case history at center stage. If he cannot tell the story of Ruby Daniels without waivers from every person who she thinks did her wrong, he cannot write this book.

Well, argue the Hayneses, at least Lemann could have changed their names. But the use of pseudonyms would not have gotten Lemann and Knopf off the legal hook. The details of the Hayneses' lives recounted in the book would identify them unmistakably to anyone who has known the Hayneses well for a long time (members of their families, for example), or who knew them before they got married; and no more is required for liability either in defamation law (citations omitted).

Lemann would have had to change some, perhaps many, of the details. But then he would no longer have been writing history. He would have been writing fiction. The nonquantitative study of living persons would be abolished as a category of scholarship, to be replaced by the sociological novel. That is a genre with a distinguished history punctuated by famous names, such as Dickens, Zola, Stowe, Dreiser, Sinclair, Steinbeck, and Wolfe, but we do not think that the law of privacy makes it (or that the First Amendment would permit the law of privacy to make it) the exclusive format for a social history of living persons that tells their story rather than treating them as data points in a statistical study. Reporting the true facts about real people is necessary to "obviate any impression that the problems raised in the [book] are remote or hypothetical." *Gilbert v. Medical Economics Co., supra*. And surely a composite portrait of ghetto residents would be attacked as racial stereotyping.

*The Promised Land* does not afford the reader a titillating glimpse of tabooed activities. The tone is decorous and restrained. Painful though it is for the Hayneses to see a past they would rather forget brought into the public view, the public needs the information conveyed by the book, including the information about Luther and Dorothy Haynes, in order to evaluate the

profound social and political questions that the book raises. Given the *Cox* decision, moreover, all the discreditable facts about the Hayneses that are contained in judicial records are beyond the power of tort law to conceal; and the disclosure of those facts alone would strip away the Hayneses' privacy as effectively as *The Promised Land* has done. (This *case,* it could be argued, has stripped them of their privacy, since their story is now part of a judicial record — the record of this case.) We do not think it is an answer that Lemann got his facts from Ruby Daniels rather than from judicial records. The courts got the facts from Ruby. We cannot see what difference it makes that Lemann went to the source.

Ordinarily the evaluation and comparison of offensiveness and newsworthiness would be, like other questions of the application of a legal standard to the facts of a particular case, matters for a jury, not for a judge on a motion for summary judgment. But summary judgment is properly granted to a defendant when on the basis of the evidence obtained in pretrial discovery no reasonable jury could render a verdict for the plaintiff, *Anderson v. Liberty Lobby, Inc.* (S.Ct. 1986) and that is the situation here. No modern cases decided after *Cox,* and precious few before, go as far as the plaintiffs would have us go in this case. Almost all the recent cases on which they rely … involve the vindication of paramount social interests, such as the protection of children, patients, and witnesses — interests not involved in this case. The plaintiffs' best post-*Cox* cases are *Vassiliades v. Garfinckel's, supra* and *Huskey v. National Broadcasting Co.* (N.D.Ill.1986), the former involving before-and-after photos of a face lift, the latter involving television pictures of a prisoner dressed only in gym shorts. Photographic invasions of privacy usually are more painful than narrative ones, and even partial nudity is a considerable aggravating factor. *Vassiliades* also involved the special issue of patient rights, though it was not emphasized by the court.

Illinois has been a follower rather than a leader in recognizing claims of invasion of privacy (citations omitted). The plaintiffs are asking us to innovate boldly in the name of the Illinois courts, and such a request is better addressed to those courts than to a federal court. If the plaintiffs had filed this case in an Illinois state court and it had been removed to the federal district court, they would have had no choice, and then we would have been duty-bound to be as innovative as we thought it plausible to suppose the Illinois courts would be. But the plaintiffs filed this suit in the district court originally — they *chose* the federal forum. And we have said before and will say again that plaintiffs who seek innovations in state law are ill advised to choose a federal court as their forum.

To any suggestion that the outer bounds of liability should be left to a jury to decide we reply that in cases involving the rights protected by the speech and press clauses of the First Amendment the courts insist on firm judicial control of

the jury. For the general principle, see *New York Times Co. v. Sullivan* (S.Ct. 1964).

The publication of books is not at the sufferance of juries.

Does it follow, as the Hayneses' lawyer asked us rhetorically at oral argument, that a journalist who wanted to write a book about contemporary sexual practices could include the intimate details of named living persons' sexual acts without the persons' consent? Not necessarily, although the revelation of such details in the memoirs of former spouses and lovers is common enough and rarely provokes a lawsuit even when the former spouse or lover is still alive. The core of the branch of privacy law with which we have been dealing in this case is the protection of those intimate physical details the publicizing of which would be not merely embarrassing and painful but deeply shocking to the average person subjected to such exposure. The public has a legitimate interest in sexuality, but that interest may be outweighed in such a case by the injury to the sensibilities of the persons made use of by the author in such a way. *Restatement (Second) of Torts, supra,* § 652D, comment h. At least the balance would be sufficiently close to preclude summary judgment for the author and publisher (citations omitted).

The judgment for the defendants is

AFFIRMED.

**Public Figures**

Most defamation and privacy cases deal early on with the issue of whether plaintiff is a public or a private figure. In struggling with these question, courts have discussed at least three varieties of public figures.

1. General-purpose public figures;
2. Limited-purpose public figures;
3. Involuntary public figures.

**General Purpose Public Figures.**

These are easy to spot, as the D.C. Circuit put it in *Waldbaum v. Fairchild Publications*:

> A general public figure is a well-known "celebrity," his name a "household word." The public recognizes him and follows his words and deeds, either because it regards his ideas, conduct, or judgment as worthy of the attention or because he actively pursues that consideration.

**Limited-Purpose Public Figure**

In its leading opinion on public *figures*, *Gertz v. Robert Welch, Inc.* (S.Ct. 1974), as opposed to public *officials*, *New York Times v. Sullivan* (S.Ct. 1968), the United States Supreme Court identified at least two kinds of public figures:

> In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an *individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues*. In either case such persons assume special prominence in the resolution of public questions.
>
> Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.

The states and federal circuits have developed different tests for deciding whether and when a person is a limited-purpose public figure. The Fifth Circuit uses a three-part test:

1. The controversy at issue must be public both in the sense that people are discussing it and people other than the immediate participants in the controversy are likely to feel the impact of its resolution;
2. The plaintiff must have more than a trivial or tangential role in the controversy; and,
3. The alleged defamation must be germane to the plaintiff's participation in the controversy.

The Second Circuit uses a four-factor inquiry, which focuses on plaintiff's participation in the public controversy. This test requires the defendant to prove that plaintiff:

1. Successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation;
2. Voluntarily injected himself into a public controversy related to the subject of the litigation;
3. Assumed a position of prominence in the public controversy; and

4. Maintained regular and continuing access to the media.

*Lerman v. Flynt Distrib, Co.* (2d Cir. 1984).

The plaintiff in *Street v. NBC* (below) is a textbook example of a public figure for a limited purpose.

**Involuntary Public Figures**

Some read *Gertz* as identifying yet a third variety of public figure, the involuntary public figure, based upon the Court's observation that:

> Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, *but the instances of truly involuntary public figures must be exceedingly rare.* For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

These distinction in the small number of cases discussing involuntary public figures seems to turn on whether the plaintiff voluntary sought to play a public role in the controversy that gave rise to her notoriety. Modern commentators suggest that even vigorous use of social media (Twitter, Facebook, and the like) could be used as evidence of one's public figure status.

***Street v. National Broadcasting Co.***

(6th Circuit 1981)

- Case in Google Scholar
- Case in Wikipedia
- Case in Westlaw

This is a Tennessee diversity case against the National Broadcasting Company for libel and invasion of privacy. The plaintiff-appellant, Victoria Price Street, was the prosecutrix and main witness in the famous rape trials of the Scottsboro boys, which occurred in Alabama more than forty years ago. NBC televised a play or historical drama entitled "Judge Horton and the Scottsboro Boys," dramatizing the role of the local presiding judge in one of those trials.

The movie portrays Judge Horton as a courageous and tragic figure struggling to bring justice in a tense community gripped by racial prejudice and intent on vengeance against nine blacks accused of raping two white women. In the movie Judge Horton sets aside a jury verdict of guilty because he believes that the evidence shows that the prosecutrix — plaintiff in this action — falsely accused the Scottsboro defendants. The play portrays the plaintiff in the derogatory light that Judge Horton apparently viewed her: as a woman attempting to send nine innocent blacks to the electric chair for a rape they did not commit.

This case presents the question of what tort and First Amendment principles apply to an historical drama that allegedly defames a living person who participated in the historical events portrayed. The plaintiff's case is based on principles of libel law and "false light" invasion of privacy arising from the derogatory portrayal. NBC raises alternative claims and defenses: (1) the claim that the published material is not defamatory; (2) the claim of truth; (3) the common law privilege of fair comment; (4) the common law privilege of fair report on a judicial proceeding; (5) the First Amendment claim that because the plaintiff is a public figure recovery must be based on a showing of malice; and (6) even if the malice standard is inapplicable, the claim that recovery must be based on a showing of negligence.

At the end of all the proof, District Judge Neese directed a verdict for defendant on the ground that even though plaintiff was not a public figure at the time of publication the defamatory matter was not negligently published. We affirm for the reason that the historical events and persons portrayed are "public" as distinguished from "private." A malice standard applies to public figures under the First Amendment, and there is no evidence that the play was published with malice.

## I. STATEMENT OF FACTS

In April 1931, nine black youths were accused of raping two young white women while riding a freight train between Chattanooga, Tennessee, and Huntsville, Alabama. The case was widely discussed in the local, national, and foreign press. The youths were quickly tried in Scottsboro, Alabama, and all were found guilty and sentenced to death. The Alabama Supreme Court affirmed the convictions.

The United States Supreme Court reversed all convictions on the ground that the defendants were denied the right to counsel guaranteed by the Sixth Amendment. The defendants were retried separately after a change of venue from Scottsboro to Decatur, Alabama. Patterson was the first defendant retried, and this trial was the subject of the NBC production. In a jury trial before Judge Horton, he was tried, convicted, and sentenced to death. Judge Horton set the

verdict aside on the ground that the evidence was insufficient. Patterson and one other defendant, Norris, were then tried before another judge on essentially the same evidence, convicted, and sentenced to death. The judge let the verdicts stand, and the convictions were affirmed by the Alabama Supreme Court.

The United States Supreme Court again reversed, this time because blacks were systematically excluded from grand and petit juries. At his fourth retrial, Patterson was convicted and sentenced to seventy-five years in prison. Defendants Weems and Andrew Wright were also convicted on retrial and sentenced to a term of years. Defendant Norris was convicted and his death sentence was commuted to life imprisonment by the Alabama governor. Defendants Montgomery, Roberson, Williams, and Leroy Wright were released without retrial. Powell pled guilty to assault allegedly committed during an attempted escape. The last Scottsboro defendant was paroled in 1950.

The Scottsboro case aroused strong passions and conflicting opinions in the 1930s throughout the nation. Several all white juries convicted the Scottsboro defendants of rape. Two trial judges and the Alabama Supreme Court, at times by divided vote, let these verdicts stand. Judge Horton was the sole trial judge to find the facts in favor of the defendants. Liberal opinion supported Judge Horton's conclusions that the Scottsboro defendants had been falsely accused.

During the lengthy course of the Scottsboro trials, newspapers frequently wrote about Victoria Price. She gave some interviews to the press. Thereafter, she disappeared from public view. The Scottsboro trials and her role in them continued to be the subject of public discussion, but there is no evidence that Mrs. Street sought publicity. NBC incorrectly stated in the movie that she was no longer living. After the first showing of "Judge Horton and the Scottsboro Boys," plaintiff notified NBC that she was living, and shortly thereafter she filed suit. Soon after plaintiff filed suit, NBC rebroadcast the dramatization omitting the statement that plaintiff was no longer living.

**The Dramatization**

The script for "Judge Horton and the Scottsboro Boys" was based on one chapter of a book by Dr. Daniel Carter, an historian, entitled *Scottsboro: A Tragedy of the American South*. The movie is based almost entirely on the information in Dr. Carter's book, which, in turn, was based on Judge Horton's findings at the 1933 trial, the transcript of the trial, contemporaneous newspaper reports of the trial, and interviews with Judge Horton and others. NBC purchased the movie from an independent producer.

Plaintiff's major libel and invasion of privacy claims are based on nine scenes in the movie in which she is portrayed in a derogatory light. The essential facts concerning these claims are as follows:

1. After an opening prologue, black and white youths are shown fighting on a train. The train is halted, and the blacks are arrested. The next scene shows plaintiff standing next to Ruby Bates at the tracks. Plaintiff claims that this scene, in effect, makes her a perjurer because she testified at the 1933 trial and in this case that she fainted while alighting from the train and did not regain consciousness until she was taken to a local grocery store. Judge Horton, in his opinion sustaining the motion for a new trial, found that the observations of other witnesses and the testimony of the examining doctor contradicted her testimony in this respect. Horton concluded that it was unlikely that Victoria Price had fainted.

2. As plaintiff and Ruby Bates are led away from the tracks by the sheriff and his men, the sheriff in the play calls the two women a "couple of bums." There is no indication in Judge Horton's opinion, in the 1933 trial transcript, or in Dr. Carter's book that this comment was actually made.

3. In a pretrial conversation between two lawyers representing the defendant, the play portrays one of them as advising restraint in the cross-examination of plaintiff Price. He says to the other defense lawyer: "The Scottsboro transcripts are really clear …. The defense at the last trial made one thing very clear, Victoria was a *whore,* and they got it in the neck for it …." (Emphasis added.) There is no evidence that this specific conversation between the two defense lawyers actually occurred. Dr. Carter does state in his book that one of the purposes of the defense in cross-examining plaintiff was to discredit her testimony by introducing evidence that she was a common prostitute. *Scottsboro* at 206.

4. Plaintiff in this action contends that the movie falsely portrays her as defensive and evasive during her direct and cross-examination.

5. Plaintiff claims that the last question put to her on cross-examination in the play is inaccurate. In the movie the defense attorney asks: "One more question: have you ever heard of a white woman being arrested for perjury when she was the complaining witness against Negroes in the entire history of the state of Alabama?" According to the 1933 trial transcript, the actual question was, "I want to ask you if you have ever heard of any single white woman ever being locked up in jail when she is the complaining witness against Negroes in the history of the state of Alabama?" Plaintiff objects to the insertion of the word "perjury" in the play.

6. In the play, Dr. Marvin Lynch, one of the doctors who examined plaintiff after she alighted from the train, approaches Judge Horton outside the courtroom and confides that he does not believe that the two women were

raped by the Scottsboro boys. Dr. Lynch refuses to go on the witness stand and so testify, however. Plaintiff argues that this scene is improper because it is not supported in the 1933 trial record. This is true. Neither the 1933 trial transcript nor Judge Horton's opinion make reference to this incident. The Carter book does state, however, that Judge Horton told the author in a later interview that this incident occurred. *Scottsboro* at 214-15.

7. The play portrays events leading up to plaintiff's trip to Chattanooga with her friend, Ruby Bates. It was on the return trip to Alabama that the rape alleged occurred. Lester Carter, a defense witness in the play, testifies that he had intercourse with Ruby Bates on the night before the trip to Chattanooga and that plaintiff had intercourse with Jack Tiller. During the testimony there is a flashback that shows an exchange in a boxcar in which Ruby Bates suggests that they all go to Chattanooga and plaintiff says, "[m]aybe Ruby and me could hustle there while you two [Carter and Tiller] got some kind of fill-in work. What do you say?" This is an accurate abridgement of the substance of the actual testimony of Lester Carter at the 1933 trial, although Price denied, both at the 1933 trial and in the defamation trial below, that she had had intercourse with Tiller. Judge Horton specifically found that she did not tell the truth. The dramatization quoted or closely paraphrased substantial portions of Judge Horton's 1933 opinion.

8. Lester Carter also testifies in the play that plaintiff urged him to say that he had seen her raped. The 1933 trial transcript reveals that Carter actually testified that he overheard plaintiff tell another white youth that "if you don't testify according to what I testify I will see that you are took off the witness stand...." Judge Horton in his opinion observed that there was evidence presented at the trial showing that Price encouraged others to support her version of what had happened.

9. Another witness in the play, Dallas Ramsey, testifies that he saw plaintiff and Ruby Bates in a "hobo jungle" near the train tracks in Chattanooga the night before the train trip back to Alabama. Ramsey testifies that plaintiff stated that she and her husband were looking for work and that "her old man" was uptown scrounging for food. The play dramatizes Ramsey's testimony while he is on the stand by a flashback to the scene at the "hobo jungle." The flashback gives the impression that plaintiff is perhaps inviting sexual advances from Ramsey, although the words used do not state this specifically. The substance of Ramsey's testimony, as portrayed in the play, is found in the 1933 trial transcript. The record provides no basis for the suggestive flashback.

## II. COMMON LAW CLAIMS AND DEFENSES

### A. Defamatory Nature of the Published Material

Taken as a whole, the play conveys a defamatory image of the plaintiff. Although the words "bum" and "hustle" may be considered rhetorical hyperbole and therefore not necessarily defamatory, *Letter Carriers v. Austin*, (S.Ct. 1974), the reference to plaintiff as a "whore" and her portrayal as a perjurer and a suborner of perjury is obviously defamatory. The suggestive flashbacks showing her inviting sexual advances of Ramsey and Tiller reinforce the defamation. The effect of the drama as a whole is to create a character, Victoria Price. She is portrayed as a loose woman who falsely accuses the Scottsboro boys of raping her. This image of her character is created throughout the play by her own words and actions in the flashbacks and in the witness chair and by what others say about her.

### B. The Privilege of Fair Comment

The portrayal of Victoria Price in this way is not expressed in the play as a matter of opinion. The characterization is expressed as concrete fact. The common law privilege of fair comment, adopted in Tennessee and explained in *Venn v. Tennessean Newspapers, Inc.*,(M.D.Tenn. 1962), *aff'd*, 313 F.2d 639 (6th Cir.), *cert. denied*, 374 U.S. 830 (1963), is now protected as opinion under the First Amendment, *Gertz v. Robert Welch, Inc.*, (S.Ct. 1974). But this play does not say to the viewer that this is NBC's opinion about the character and actions of Victoria Price. It shows her inviting sexual intercourse and swearing falsely. We do not believe this characterization fits within the traditional fair comment privilege protecting opinion. *See Cianci v. New York Times Publishing Co.*, (2nd Cir. 1980, *as amended* Oct. 27, 1980) (magazine article interpreting evidence of rape not expression of opinion).

### C. The Defense of Truth and the Privilege of Fair Report of a Judicial Proceeding

In his opinion setting aside the verdict, Judge Horton found, in effect, that NBC's characterization of Victoria Price was true. The movie characterizes her as Judge Horton found the facts in his opinion. This does not mean, however, that the case should be withdrawn from the jury on the basis of the defense of truth or the privilege of fair report of a judicial proceeding.

Neither Judge Horton's findings nor the final convictions based on the testimony of Victoria Price and affirmed on appeal settle the question of truth. That still remains an open question. Technical doctrines of res judicata and collateral estoppel do not apply in this context. Neither Victoria Price nor NBC

were parties in the 1930s trials. In addition, citizens obviously have a right to attack the fairness of a trial. Judicial proceedings resolve disputes, but they do not establish the truth for all time. In libel cases the question of truth is normally one for the jury in a defamation action.

Many of the scenes actually quote or paraphrase the trial transcript, but the movie is not a completely accurate report of the trial. Witnesses who corroborate Victoria Price's version of the facts are omitted. The portions of the original trial that show her as a perjurer and a promiscuous woman are emphasized. The flashbacks consistently show plaintiff's conduct in a derogatory light. The flashbacks entirely accept the theory of the case presented by Judge Horton and the defense and reject the theory of the case presented by the state and the plaintiff. Under such circumstances the common law privilege permitting publication of defamatory material as a part of a fair and accurate report on judicial proceedings is not satisfied. The element of balance and neutrality is missing. *See Langford v. Vanderbilt University,* (Tenn.App. 1958).

## III. THE FIRST AMENDMENT DEFENSES

### A. Plaintiff was a Public Figure During the Scottsboro Trials

Since common law defenses do not support the directed verdict for NBC, we must reach the constitutional issues, particularly the question whether plaintiff should be characterized as a "public figure." In *Gertz,* the Supreme Court held that one characterized as a "public figure," as distinguished from a private individual, "may recover for injury to reputation *only on clear and convincing proof* that the defamatory falsehood was made *with knowledge of its falsity or with reckless disregard for the truth*." *Gertz* (emphasis added). In balancing the need to protect "private personality" and reputation against the need "to assure to the freedoms of speech and press that 'breathing space' essential to their free exercise," the Supreme Court has developed a general test to determine public figure status.

*Gertz* establishes a two-step analysis to determine if an individual is a public figure. First, does a "public controversy" exist? Second, what is "the nature and extent of [the] individual's participation" in that public controversy? *Gertz*. Three factors determine the "nature and extent" of an individual's involvement: the extent to which participation in the controversy is voluntary, the extent to which there is access to channels of effective communication in order to counteract false statements, and the prominence of the role played in the public controversy. *Gertz*.

The Supreme Court has not clearly defined the elements of a "public controversy." It is evident that it is not simply any controversy of general or public interest. Not all judicial proceedings are public controversies. Several

factors, however, lead to the conclusion that the Scottsboro case is the kind of public controversy referred to in *Gertz*. The Scottsboro trials were the focus of major public debate over the ability of our courts to render even-handed justice. It generated widespread press and attracted public attention for several years. It was also a contributing factor in changing public attitudes about the right of black citizens to equal treatment under law and in changing constitutional principles governing the right to counsel and the exclusion of blacks from the jury.

The first factor in determining the nature and extent of plaintiff's participation is the prominence of her role in the public controversy. She was the only alleged victim, and she was the major witness for the State in the prosecution of the nine black youths. Ruby Bates, the other young woman who earlier had testified against the defendants, later recanted her incriminating testimony. Plaintiff was left as the sole prosecutrix. Therefore, she played a prominent role in the public controversy.

The second part of the test of public figure status is also met. Plaintiff had "access to the channels of effective communication and hence … a … realistic opportunity to counteract false statements." *Gertz*. The evidence indicates that plaintiff recognized her importance to the criminal trials and the interest of the public in her as a personality. The press clamored to interview her. She clearly had access to the media and was able to broadcast her view of the events.

The most troublesome issue is whether plaintiff "voluntarily" "thrust" herself to the forefront of this public controversy. It cannot be said that a rape victim "voluntarily" injects herself into a criminal prosecution for rape. *See Time, Inc. v. Firestone*, (S.Ct. 1976). In such an instance, voluntariness in the legal sense is closely bound to the issue of truth. If she was raped, her participation in the initial legal proceedings was involuntary for the purpose of determining her public figure status; if she falsely accused the defendants, her participation in this controversy was "voluntary." But legal standards in libel cases should not be drawn so that either the courts or the press must first determine the issue of truth before they can determine whether an individual should be treated as a public or a private figure. The principle of libel law should not be drawn in such a way that it forces the press, in an uncertain public controversy, to guess correctly about a woman's chastity.

When the issue of truth and the issue of voluntariness are the same, it is necessary to determine the public figure status of the individual without regard to whether she "voluntarily" thrust herself in the forefront of the public controversy. If there were no evidence of voluntariness other than that turning on the issue of truth, we would not consider the fact of voluntariness. In such a case, the other factors — prominence and access to media — alone would determine public figure status. But in this case, there is evidence of voluntariness

not bound up with the issue of truth. Plaintiff gave press interviews and aggressively promoted her version of the case outside of her actual courtroom testimony. In the context of a widely-reported, intense public controversy concerning the fairness of our criminal justice system, plaintiff was a public figure under *Gertz* because she played a major role, had effective access to the media and encouraged public interest in herself.

**B. Plaintiff Remains a Public Figure**

The Supreme Court has explicitly reserved the question of "whether or when an individual who was once a public figure may lose that status by the passage of time." *Wolston v. Reader's Digest Ass'n, Inc.,* (S.Ct. 1979). In *Wolston* the District of Columbia Circuit found that plaintiff was a public figure and retained that status for the purpose of later discussion of the espionage case in which he was called as a witness. The Supreme Court found that the plaintiff's role in the original public controversy was so minor that he was not a public figure. It therefore reserved the question of whether a person retains his public figure status.

Plaintiff argues that even if she was a public figure at the time of the 1930s trial, she lost her public figure status over the intervening forty years. We reject this argument and hold that once a person becomes a public figure in connection with a particular controversy, that person remains a public figure thereafter for purposes of later commentary or treatment of *that controversy.* This rule finds support in both case law and analysis of the constitutional malice standard.

On this issue the Fifth Circuit has reached the same conclusion as the District of Columbia Circuit in *Wolston.* In *Brewer v. Memphis Publishing Co., Inc.,* (5th Cir. 1980), plaintiff sued when a newspaper implied that she was reviving a long-dormant romantic relationship with Elvis Presley. The Fifth Circuit concluded that although the passage of time might narrow the range of topics protected by a malice standard, plaintiff remained a public figure when the defendant commented on her romantic relationship. The court noted that plaintiff's name continued to be connected with Presley even after her retirement from show business.

Other courts have assumed *sub silentio* that the public figure status was retained over the passage of time. *See, e. g., Meeropol v. Nizer,* (2d Cir. 1977), *cert. denied,* (S.Ct. 1978) (having spent most of their early years in limelight, sons of Julius and Ethel Rosenberg are public figures for purposes of subsequent commentary on Rosenberg trials). Some courts have relied on a pre-*Gertz* "newsworthiness" analysis to support a finding that the passage of time did not alter the standard of liability.

Our nation depends on "robust debate" to determine the best answer to

public controversies of this sort. The public figure doctrine makes it possible for publishers to provide information on such issues to the debating public, undeterred by the threat of liability except in cases of actual malice. Developed in the context of contemporaneous reporting, the doctrine promotes a forceful exchange of views.

Considerations that underlie the public figure doctrine in the context of contemporaneous reporting also apply to later historical or dramatic treatment of the same events. Past public figures who now live in obscurity do not lose their access to channels of communication if they choose to comment on their role in the past public controversy. And although the publisher of history does not operate under journalistic deadlines it generally makes little difference in terms of accuracy and verifiability that the events on which a publisher is reporting occurred decades ago. Although information may come to light over the course of time, the distance of years does not necessarily make more data available to a reporter: memories fade; witnesses forget; sources disappear.

There is no reason for the debate to be any less vigorous when events that are the subject of current discussion occurred several years earlier. The mere passage of time does not automatically diminish the significance of events or the public's need for information. A nation that prizes its heritage need have no illusions about its past. It is no more fitting for the Court to constrain the analysis of past events than to stem the tide of current news. From Alfred Dreyfus to Alger Hiss, famous cases have been debated and reinterpreted by commentators and historians. A contrary rule would tend to restrain efforts to shed new light on historical events and reconsideration of past errors.

The plaintiff was the pivotal character in the most famous rape case of the twentieth century. It became a political controversy as well as a legal dispute. As the white prosecutrix of nine black youths during an era of racial prejudice in the South, she aroused the attention of the nation. The prosecutions were among the first to focus the conscience of the nation on the question of the ability of our system of justice to provide fair trials to blacks in the South. The question persists today. As long as the question remains, the Scottsboro boys case will not be relegated to the dusty pages of the scholarly treatise. It will remain a living controversy.

**C. Evidence Insufficient to Support Malice**

A plaintiff may not recover under the malice standard unless there is "clear and convincing proof" that the defamation was published "with knowledge of its falsity or with reckless disregard for the truth." *Gertz*,. There is no evidence that NBC had knowledge that its portrayal of Victoria Price was false or that NBC recklessly disregarded the truth. The derogatory portrayal of Price in the

movie is based in all material respects on the detailed findings of Judge Horton at the trial and Dr. Carter in his book. When the truth is uncertain and seems undiscoverable through further investigation, reliance on these two sources is not unreasonable.

We gain perspective on this question when we put to ourselves another case. Dr. Carter, in his book, persuasively argues, based on the evidence, that the Communist Party financed and controlled the defense of the Scottsboro boys. A different playwright might choose to portray Judge Horton as some Southern newspapers portrayed him at the time — as an evil judge who associated himself with a Communist cause and gave his approval to interracial rape in order to curry favor with the eastern press. The problem would be similar had Judge Horton — for many years before his death an obscure private citizen — sued the publisher for libel.

Some controversial historical events like the Scottsboro trials become symbolic and take on an overlay of political meaning. Speech about such events becomes in part political speech. The hypothetical case and the actual case before us illustrate that an individual's social philosophy and political leanings color his historical perspective. His political opinions cause him to draw different lessons from history and to see historical events and facts in a different light. He believes the historical evidence he wants to believe and casts aside other evidence to the contrary. So long as there is no evidence of bad faith or conscious or extreme disregard of the truth, the speaker in such a situation does not violate the malice standard. His version of history may be wrong, but the law does not punish him for being a bad historian.

The malice standard is flexible and encourages diverse political opinions and robust debate about social issues. It tolerates silly arguments and strange ways of yoking facts together in unusual patterns. But it is not infinitely expandable. It does not abolish all the common law of libel even in the political context. It still protects us against the "big political lie," the conscious or reckless falsehood. We do not have that in this case.

Accordingly, the judgment of the District Court is affirmed.

## What About Other Torts?

What if instead of suing for defamation, the unhappy public figure sues for intentional infliction of emotional distress?

## *Hustler Magazine, Inc. v. Falwell,*

United States Supreme Court (1988)

- *Hustler v. Falwell* at Google Scholar.

- *Hustler v. Falwell* at Westlaw.
- *Hustler v. Falwell* at Wikipedia.
- Image of the Campari ad.

The inside front cover of the November 1983 issue of Hustler Magazine featured a "parody" of an advertisement for Campari Liqueur that contained the name and picture of preacher Jerry Falwell and was entitled "Jerry Falwell talks about his first time." This parody was modeled after actual Campari ads that included interviews with various celebrities about their "first times." Although it was apparent by the end of each interview that this meant the first time they sampled Campari, the ads clearly played on the sexual double entendre of the general subject of "first times." Copying the form and layout of these Campari ads, Hustler's editors chose respondent as the featured celebrity and drafted an alleged "interview" with him in which he states that his "first time" was during a drunken incestuous rendezvous with his mother in an outhouse. The Hustler parody portrays respondent and his mother as drunk and immoral, and suggests that respondent is a hypocrite who preaches only when he is drunk. In small print at the bottom of the page, the ad contains the disclaimer, "ad parody — not to be taken seriously." The magazine's table of contents also lists the ad as "Fiction; Ad and Personality Parody."

Soon after the November issue of Hustler became available to the public, Falwell sued Hustler Magazine and Larry Flynt to recover damages for libel, invasion of privacy, and intentional infliction of emotional distress. The case proceeded to trial. At the close of the evidence, the District Court granted a directed verdict for Flynt and Hustler on the invasion of privacy claim. The jury then found against Falwell on the libel claim, specifically finding that the ad parody could not "reasonably be understood as describing actual facts about Falwell or actual events in which [he] participated." The jury found for Falwell on the intentional infliction of emotional distress claim, however, and stated that he should be awarded $100,000 in

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed … rejecting Flynt and Hustler's argument that the "actual malice" standard of *New York Times Co.* v. *Sullivan* (S.Ct. 1964) must be met before Falwell (concededly a public figure) could recover for emotional distress.

In the Fourth Circuit's view, the *New York Times* decision emphasized the constitutional importance not of the falsity of the statement or the defendant's disregard for the truth, but of the heightened level of culpability embodied in the requirement of "knowing . . . or reckless" conduct. Here, the *New York Times* standard is satisfied by the state-law requirement, and the jury's finding, that the defendants have acted intentionally or recklessly, and that the sole issue before the court was "whether [the ad's] publication was sufficiently outrageous to

constitute intentional infliction of emotional distress."

This case presents us with a novel question involving First Amendment limitations upon a State's authority to protect its citizens from the intentional infliction of emotional distress. We must decide whether a public figure may recover damages for emotional harm caused by the publication of an ad parody offensive to him, and doubtless gross and repugnant in the eyes of most. Falwell would have us find that a State's interest in protecting public figures from emotional distress is sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury, even when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved. This we decline to do.…

Of course, this does not mean that *any* speech about a public figure is immune from sanction in the form of damages. Since *New York Times Co.* v. *Sullivan* (S.Ct. 1964), we have consistently ruled that a public figure may hold a speaker liable for the damage to reputation caused by publication of a defamatory falsehood, but only if the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." … False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective. See *Gertz,* 418 U. S., at 340, 344, n. 9. But even though falsehoods have little value in and of themselves, they are "nevertheless inevitable in free debate," and a rule that would impose strict liability on a publisher for false factual assertions would have an undoubted "chilling" effect on speech relating to public figures that does have constitutional value. "Freedoms of expression require" 'breathing space.'" … This breathing space is provided by a constitutional rule that allows public figures to recover for libel or defamation only when they can prove *both* that the statement was false and that the statement was made with the requisite level of culpability.

Respondent argues, however, that a different standard should apply in this case because here the State seeks to prevent not reputational damage, but the severe emotional distress suffered by the person who is the subject of an offensive publication. Cf. *Zacchini* v. *Scripps-Howard Broadcasting Co.,* 433 U. S. 562 (1977) (ruling that the "actual malice" standard does not apply to the tort of appropriation of a right of publicity). In respondent's view, and in the view of the Court of Appeals, so long as the utterance was intended to inflict emotional distress, was outrageous, and did in fact inflict serious emotional distress, it is of no constitutional import whether the statement was a fact or an opinion, or whether it was true or false. It is the intent to cause injury that is the gravamen of the tort, and the State's interest in preventing emotional harm simply outweighs whatever interest a speaker may have in speech of this type.

Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently "outrageous." But in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. In *Garrison* v. *Louisiana*, 379 U. S. 64 (1964), we held that even when a speaker or writer is motivated by hatred or ill will his expression was protected by the First Amendment:

> "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth." *Id.*, at 73.

Thus while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures.

Were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject. Webster's defines a caricature as "the deliberately distorted picturing or imitating of a person, literary style, etc. by exaggerating features or mannerisms for satirical effect." The appeal of the political cartoon or caricature is often based on exploitation of unfortunate physical traits or politically embarrassing events — an exploitation often calculated to injure the feelings of the subject of the portrayal. The art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided. One cartoonist expressed the nature of the art in these words:

> "The political cartoon is a weapon of attack, of scorn and ridicule and satire; it is least effective when it tries to pat some politician on the back. It is usually as welcome as a bee sting and is always controversial in some quarters."

Several famous examples of this type of intentionally injurious speech were drawn by Thomas Nast, probably the greatest American cartoonist to date, who was associated for many years during the post-Civil War era with Harper's Weekly. In the pages of that publication Nast conducted a graphic vendetta against William M. "Boss" Tweed and his corrupt associates in New York City's "Tweed Ring." It has been described by one historian of the subject as "a sustained attack which in its passion and effectiveness stands alone in the history of American graphic art." … Another writer explains that the success of the Nast

cartoon was achieved "because of the emotional impact of its presentation. It continuously goes beyond the bounds of good taste and conventional manners."

Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate. Nast's castigation of the Tweed Ring, Walt McDougall's characterization of Presidential candidate James G. Blaine's banquet with the millionaires at Delmonico's as "The Royal Feast of Belshazzar," and numerous other efforts have undoubtedly had an effect on the course and outcome of contemporaneous debate. Lincoln's tall, gangling posture, Teddy Roosevelt's glasses and teeth, and Franklin D. Roosevelt's jutting jaw and cigarette holder have been memorialized by political cartoons with an effect that could not have been obtained by the photographer or the portrait artist. From the viewpoint of history it is clear that our political discourse would have been considerably poorer without them.

Falwell contends, however, that the caricature in question here was so "outrageous" as to distinguish it from more traditional political cartoons. 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 described above, and a rather poor relation at that. If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description "outrageous" does not supply one. "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience. See *NAACP v. Claiborne Hardware Co.* (S.Ct. 1982) ("Speech does not lose its protected character. . . simply because it may embarrass others or coerce them into action").

> We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication *contains a false statement of fact* which was made with "actual malice," *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true.

For reasons heretofore stated this claim cannot, consistently with the First Amendment, form a basis for the award of damages when the conduct in

question is the publication of a caricature such as the ad parody involved here. The judgment of the Court of Appeals is accordingly

*Reversed.*

**Reference/Footnote Cases**

- *Spahn v. Julian Mesner,*, 260 NYS2d 451 (1965).
- False Light at Wikipedia.

**Totally Optional Readings & Viewings**

**'American Hustle' Sparks $1 Million Libel Lawsuit** Former New Yorker writer and journalist, Paul Brodeur says his reputation was damaged by claims about microwaves that the film falsely attributes to him

http://www.hollywoodreporter.com/thr-esq/american-hustle-sparks-1-million-745296

It's a very brief exchange in American Hustle: Jennifer Lawrence's character Roslyn tells her husband, Irving, played by Christian Bale, that microwaves take the nutrition out of food. "That's bullshit," Irving replies, and his wife shows him a magazine and says, "It's not bullshit. I read it in an article. Look, by Paul Brodeur."

The real Brodeur is a science journalist who was a staff writer at The New Yorker for nearly 40 years. He's even written books (such as The Zapping of America) about the dangers of microwave radiation. But he's never said that they take the nutrition out of food, he claims in a new lawsuit.

- *The People Versus Larry Flynt* (stars Woody Harrelson and Courtney Love). This is a love song to the First Amendment directed by Czech director Milos Forman telling the tale of preacher Jerry Falwell's landmark Supreme Court case against Larry Flynt, the publisher of *Hustler Magazine* (on reserve in Schmid Library).
- Amy J. Field, A Curtain Call for Docudrama-Defamation Actions: A Clear Standard Takes a Bow. Casenote discussing *Davis v. Costa-Gavaras* (SDNY 1987).
- *Deangelo Bailey v. Marshall Bruce Mathers, III, aka Eminem Slim Shady,* Macomb County Court (Michigan 2003):
  - summary of case
  - fyi the full opinion(optional reading)
- Reverse defamation, the Newsweek Bitcoin story, and Satoshi Nakamoto
- What is More Defamatory? A False Accusation of Homophobia or of Homosexuality?

**Scarlett Johannsen Sues French Novelist**

- Seeing read: Scarlett Johansson sues French novelist.
- Scarlett Johansson wins defamation case against French novelist.

**Courtney Love & Defamation via Twitter**

- Courtney Love commits defamation via Twitter–Twice!
- Courtney Love wins 'Twibel' case

> Because the attorney was deemed to be a limited-purpose public figure as a result of her connection to a celebrity, Holmes needed to demonstrate that Love acted with malice. Love defended herself by saying she meant the tweet to be a private direct message, and when she learned it had been sent to the public accidentally, quickly deleted it.
>
> Love also testified that she believed her message to be true when she sent it. That might have been the prevailing defense. The jury answered no to the question, "Did Rhonda Holmes prove by clear and convincing evidence that Courtney Love knew it was false or doubted the truth of it?"

**Who Are "The News Media?"** Blurred lines: Ninth Circuit applies same First Amendment protections to bloggers as traditional media. Bloggers enjoy same First Amendment Protections as Traditional Media..