Entertainment Law

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Law & Business For Artists

by Richard Dooling

Defamation - Privacy

"Life Story Rights"

Artists have First Amendment rights to tell stories, or write songs, or make movies, but what happens when those speech rights collide with the rights of others? What if the artist's free speech defames someone else? Invades their privacy? "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? Is that an invasion of the doctor's privacy?

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.

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.

If an agreement can't be had, storytellers and filmmakers may proceed, but often the script or the nonfiction book will be annotated with sources for any factual statements made about real people, and permissions will be obtained to use anyone's name image or likeness.

In the international context, these rights are all jurisdiction-specific and depend on careful, specific drafting of contract provisions.

Let's look first at defamation.

Defamation

Stories, songs, movies, even photos about real people, may defame them, especially 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.

New York Times v. Sullivan

US Supreme Court 1964

- *New York Times Co. v. Sullivan*.
- 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 affirma-tion 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 commisioner 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 wongfully 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 judgement 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.

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
- 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."

> 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.…"

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."...

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.

The next case introduces us to how a state court addresses the question of "life story rights" and celebrity/publicity rights.

Matthews v. Wozencraft

(5th Cir. 1994)

- case on Google Scholar
- 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 dismissed Matthews claims 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.]

Excerpts from the court's opinion

In Texas, "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."

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. . . .

Matthews 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.

[The tort of appropriation of a name or likeness is intended to protect the value of an individual's notoriety or skill. Thus, defendant is liable 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.

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." ... 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."

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. 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).

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.

Life Story Rights

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."

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.

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," ... so long as it is not "simply a disguised commercial advertisement for the sale of goods or services."

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."

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.

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.

"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.

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.. . .

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.

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

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.

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)**

- case at Google scholar

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

POSNER, Chief Judge.

Luther Haynes and his wife, Dorothy Haynes ne 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.. . .

[The court said that the district court properly dismissed these claims because they were substantial true, and (as we know) truth is a defense to a claim of defamation.]

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); *Douglass v. Hustler Magazine, Inc.* (7th Cir. 1985). Tapping someone's phone, or otherwise invading a person's private space. 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.. . .

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 . . . No more, we think, can they be used to enhance a privacy case.. . .

Indeed, that type of case presupposes the truth of the facts disclosed. 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.. . .

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. . . .

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.. . .

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. . . .

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.

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." . . . 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. . . .

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.

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.

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)

- case at Google Scholar
- case 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 Falwell 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 Falwell and his mother as drunk and immoral, and suggests that Falwell 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.. . .

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.

Falwell 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.

In Falwell'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. . . . 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."

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 Falwell 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.…

> 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.

Totally Optional Readings & Viewings

'American Hustle' Sparks $1 Million Libel Lawsuit From *The Hollywood Reporter*

> 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.

Journalist Paul Brodeur says his reputation was damaged by claims about microwaves that the film falsely attributes to him.

From *The Hollywood Reporter*

More Movies & Articles

- *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?

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..