

Lawyers For The Talent

by

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Chapter 1

Defamation

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.

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 (mnemonic 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 reckless 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 Proof
Public official or figure	Clear Actual Malice	Presumed and Punitive	Plaintiff Proves Falsity
Private Figure, Public Concern	Negligence	Compensatory "Actual"	Plaintiff Proves Falsity
Private Figure, Private Concern	Probably Strict Liability	Presumed and Punitive	Truth a Defense ¹

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.”

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.

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 voluntarily 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)

- [Hustler v. Falwell](#) at Google Scholar.
- [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 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

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

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.

From *The Hollywood Reporter*

A judge is allowing Paul Brodeur to proceed with claims that in the film, he was harmfully named as the source of information that microwaves take nutrition out of food.

"Wolf of Wall Street" Defamation Lawsuit

Paramount (Almost) Beats 'Wolf of Wall Street' Defamation Lawsuit

Andrew Greene, who was on the board of directors at Stratton Oakmont when Jordan Belfort resigned after a federal law enforcement crackdown, filed the lawsuit in February 2014.

According to his complaint, he was the basis for the toupee-wearing character of Nicky "Rugrat" Koskoff, played by actor P.J. Byrne, who memorably was the subject of mean comments from others including Leonardo DiCaprio's Belfort, who remarked, "Swear to God, I want to choke him to death."

Greene says the film changed his nickname from "Wigwam" to "Rugrat," but that his likeness was unmistakable and that the film "portrayed [him] as a criminal, drug user, degenerate, depraved, and/or devoid of any morality or ethics."

More

- [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-Gavras* (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 Johanssen 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..](#)