PART V

HARM TO NON-PHYSICAL INTERESTS
Chapter 14
Defamation

Introduction

Most tort law deals with physical injury and accompanying emotional trauma. The injuries arise from the risky activities that we engage in: driving cars, using lawn mowers, undergoing medical procedures. Defamation law covers a different kind of injury, inflicted by a different means: damage to the plaintiff’s reputation caused by words or pictures spoken or printed by the defendant (usually the media). This branch of tort law tries to protect reputations at the same time as protecting the first amendment rights of defendants.

Like intentional torts, defamation claims are ancient causes of action. However, unlike intentional torts they have changed dramatically in the last twenty years, largely as a result of the United States Supreme Court’s rulings that state law is constrained by constitutional guarantees. Originally, defamation law was in the form of strict liability. "Whatever a man publishes he publishes at his peril," said Lord Mansfield. Claims were divided and subdivided based upon whether the defamatory statement was written (libel) or oral (slander); whether it said something particularly bad about the plaintiff (slander per se) or was merely injurious to the reputation. As a result of the application of constitutional protections, however, much of the landscape of common law defamation law now lies buried by the constitutional landslide. Nonetheless, certain features still protrude above the constitutional floor, and in any event, a historical background is useful.

1 Literally, to "defame" someone means to take away their "fame," i.e., the good reputation that one presumably enjoys among one’s circle of acquaintances and friends. As we shall see in Chapter Fifteen, there is a different kind of injury that arises from intruding into a person’s private life; the interest in privacy, in a protected space of one’s own, is distinguishable from the interest in enjoying a good reputation. It is the relationship with others, not one’s own personal feelings, that are protected by this branch of tort law.
§ A. What Is a Defamatory Statement?

BURTON v. CROWELL PUBLISHING CO.
82 F.2d 154 (CA 2, 1936)

L. HAND, Circuit Judge

This appeal arises upon a judgment dismissing a complaint for libel upon the pleadings. The complaint alleged that the defendant had published an advertisement — annexed and incorporated by reference — made up to text and photographs; that one of the photographs was "susceptible of being regarded as representing plaintiff as guilty of indecent exposure and as being a person physically deformed and mentally perverted"; that some of the text, read with the offending photograph, was "susceptible of being regarded as falsely representing plaintiff as an utterer of salacious and obscene language"; and finally that by reason of the premises plaintiff has been subjected to frequent and conspicuous ridicule, scandal, reproach, scorn, and indignity. The advertisement was of "Camel" cigarettes; the plaintiff was a widely known gentleman steeple-chaser, and the text quoted him as declaring that "Camel" cigarettes "restored" him after "a crowded business day." Two photographs were inserted; the larger, a picture of the plaintiff in riding shorts and breeches, seated apparently outside a paddock with a cigarette in one hand and a cap and whip in the other. This contained the legend, "Get a lift with a Camel"; neither it, nor the photograph, is charged as part of the libel, except as the legend may be read upon the other and offending photograph. That represented him coming from a race to be weighed in; he is carrying his saddle in front of him with his right hand under the pommel and his left under the cantle; the line of the seat is about twelve inches below his waist. Over the pommel hangs a stirrup; over the seat at his middle a white girth falls loosely in such a way that it seems to be attached to the plaintiff and not to the saddle. So regarded, the photograph becomes grotesque, monstrous, and obscene; and the legends, which without undue violence can be made to match, reinforce the ribald interpretation. That is the libel.

The answer alleged that the plaintiff had posed for the photographs and been paid for their use as an advertisement; a reply, that they had never been shown to the plaintiff after they were taken. On this showing the judge held that the advertisement did not hold the plaintiff up to the hatred, ridicule, or contempt of fair-minded people, and that in any event he consented to its use and might not complain.

We dismiss at once so much of the complaint as alleged that the advertisement might be read to say that the plaintiff was deformed, or that he had indecently exposed himself, or was making obscene jokes by means of the legends. Nobody could be fatuous enough to believe any of these things; everybody would at once see that it was the camera, and the camera alone, that had made the unfortunate mistake. If the advertisement is a libel, it is such in spite of the fact that it asserts nothing whatever about the plaintiff, even by the remotest implications. It does not profess to depict him as he is; it does not exaggerate any part of his person so as to suggest that he is deformed; it is patent an optical illusion, and carries its correction on its face as much as though it were a verbal utterance which expressly declared that it was false. It would be hard for words so guarded to carry any sting, but the same is not true of caricatures, and this is an example; for, notwithstanding all we have just said, it exposed the plaintiff to overwhelming ridicule. The contrast between the drawn and serious face and the accompanying fantastic and lewd deformity was so extravagant that, though utterly unfair, it in fact made of the plaintiff a preposterously ridiculous spectacle; and the obvious mistake only added to the amusement. Had such a picture been deliberately produced, surely every right-minded person would agree that he would have had a genuine grievance; and the effect is the same whether it is deliberate or not. Such a caricature affects a man's reputation, if by that is meant his position in the minds of others; the association so established may be beyond repair; he may become known indefinitely as the absurd victim of this unhappy mischance. Literally, therefore, the injury falls within the accepted rubric; it exposes the sufferer to "ridicule" and "contempt." Nevertheless, we have not been able to find very much in the books that is in point, for although it has long been recognized that pictures may be libels, and in some cases they have been caricatures, in nearly all they have impugned the plaintiff at least by implication, directly or indirectly uttering some falsehood about him....
The defendant answers that every libel must affect the plaintiff's character; but if by "character" is meant those moral qualities which the word ordinarily includes, the statement is certainly untrue, for there are many libels which do not affect the reputation of the victim in any such way. Thus, it is a libel to say that a man is insane (Totten v. Sun Printing & Pub. Co. (C.C.) 108 F. 289; Southwick v. Stevens, 10 Johns. (N.Y.) 443; Belknap v. Ball, 83 Mich. 583, 47 N.W. 674, 11 L.R.A. 72, 21 Am. St. Rep. 622); or that he has negro blood if he professes to be white (Stultz v. Cousins (C.C.A. 6) 242 F. 794); or is too educated to earn his living (Martin v. Press Pub. Co., 93 App. Div. 531, 87 N.Y.S. 859); or is desperately poor (Moffatt v. Cauldwell, 3 Hun (N.Y.) 26); or that he is a eunuch (Eckert v. Van Pelt, 69 Kan. 357, 76 P. 909, 66 L.R.A. 266); or that he has an infectious disease, even though not venereal (Villers v. Monsley, 2 Wils. 403; Simpson v. Press Pub. Co., 33 Misc. 228, 67 N.Y.S. 402); or that he is illegitimate (Shelby v. Sun P. & P. Ass’n, 38 Hun (N.Y.) 474, affirmed on opinion below, 109 N.Y. 611, 15 N.E. 895); or that his near relatives have committed a crime (Van Wiginton v. Pulitzer Pub. Co., 218 F. 795 (C.C.A. 8); Merrill v. Post Pub. Co., 197 Mass. 185, 83 N.E. 419); or that he was mistaken for Jack Ketch (Cook v. Ward, 6 Bing. 409); or that a woman was served with process in bath tub (Snyder v. New York Press Co., 137 App. Div. 291, 121 N.Y.S. 944). It is indeed not true that all ridicule (Lamberti v. Sun P. & P. Ass’n, 111 App. Div. 437, 97 N.Y.S. 694), or all disagreeable comment (Kimmerle v. New York Evening Journal, Inc., 262 N.Y. 99, 186 N.E. 217; Cohen v. New York Times Co., 153 App. Div. 242, 138 N.Y.S. 206), is actionable; a man must not be too thin-skinned or a self-important prig; but this advertisement was more than what only a morbid person would not laugh at; the mortification, however ill-deserved, was a very substantial grievance.

A more plausible challenge is that a libel must be something that can be true or false, since truth is always a defense. It would follow that if, as we agree, the picture was a mistake on its face and declared nothing about the plaintiff, it was not a libel. We have been able to find very little on the point. In Dunlop v. Dunlop Rubber Co. (1920) 1 Irish Ch. & Ld. Com. 280, 290-292, the picture represented the plaintiff in foppish clothes, and the opinion seems to rely merely upon the contempt which that alone might have aroused, but those who saw it might have taken it to imply that the plaintiff was in fact a fop. In Zbyszko v. New York American, 228 App. Div. 277, 239 N.Y.S. 411, however, though the decision certainly went far, nobody could possibly have read the picture as asserting anything which was in fact untrue; it was the mere association on the plaintiff with a gorilla that was thought to lower him in others' esteem. Nevertheless, although the question is almost tabula rasa, it seems to us that in principle there should be no doubt. The gravamen of the wrong in defamation is not so much the injury to reputation, measured by the opinions of others, as the feelings, that is, the repulsion or the light esteem, which those opinions engender. We are sensitive to the charge of murder only because our fellows deprecate it in most forms; but a head-hunter, or an aboriginal American Indian, or a gangster, would regard such an accusation as a distinction, and during the Great War an "ace," a man who had killed five others, was held in high regard. Usually it is difficult to arouse feelings without expressing an opinion, or asserting a fact; and the common law has so much regard for truth that it excuses the utterance of anything that is true. But it is a non sequitur to argue that whenever truth is not a defense, there can be no libel; that would invert the proper approach to the whole subject. In all wrongs we must first ascertain whether the interest invaded is one which the law will protect at all; that is indeed especially important in defamation, for the common law did not recognize all injuries to reputation, especially when the utterance was oral. But the interest here is by hypothesis one which the law does protect; the plaintiff has been substantially enough ridiculed to be in a position to complain. The defendant must therefore find some excuse, and truth would be an excuse if it could be pleaded. The only reason why the law makes truth a defense is not because a libel must be false, but because the utterance of truth is in all circumstances an interest paramount to reputation; it is like a privileged communication, which is privileged only because the law prefers it conditionally to reputation. When there is no such countervailing interest, there is no excuse; and that is the situation here. In conclusion therefore we hold that because the picture taken with the legends was calculated to expose the plaintiff to more than trivial ridicule, it was prima facie actionable; that the fact that it did not assume to state a fact or an

BURTON v. CROWELL PUBLISHING CO.
opinion is irrelevant; and that in consequence the publication is actionable.

Finally, the plaintiff’s consent to the use of the photographs for which he posed as an advertisement was not a consent to the use of the offending photograph; he had no reason to anticipate that the lens would so distort his appearance. If the defendant wished to fix him with responsibility for whatever the camera might turn out, the result should have been shown him before publication. Possibly any one who chooses to stir such a controversy in a court cannot have been very sensitive originally, but that is a consideration for the jury, which, if ever justified, is justified in actions for defamation.

Judgment reversed; cause remanded for trial.

Questions and Notes

1. In *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), the Supreme Court decided whether *Hustler* was protected in publishing an "ad parody" in which Falwell was featured. The "ad" contained a picture of Falwell and an "interview" in which he describes his "first time" — "an incestuous rendezvous with his mother in an outhouse in Lynchburg, Virginia." A disclaimer appeared at the bottom of the page stating "ad parody — not to be taken seriously." Should Falwell have been able to recover for defamation? For intentional infliction of emotional distress?

The facts of the cause before us are as follows: In August of 1978, eight Oklahomans had become candidates for the Democratic nomination for the office of the United States Senate. Among the candidates were, then Governor, David Boren, former State Senator and Representative, George Miskovsky, and Anthony Points, a newcomer to the political arena. During the campaign, Mr. Miskovsky, along with other candidates, was invited to attend a candidates' forum conducted by the Women's Democratic Club of Canadian County in El Reno, Oklahoma. Although Mr. Miskovsky, Mr. Points, and another candidate, Mr. Bridges, accepted the invitation, other Democratic candidates did not attend the forum, which was held at the Ponderosa Restaurant. During the forum, each candidate was invited to make a brief statement. While addressing the group, candidate Points read from a political flyer, copies of which he had distributed to the audience. In part the flyer read:

I am against homosexuals or bisexuals in office or government. They are threats to our national security. They are subject to being blackmailed and will give out a favor or leak information from the government in return for having their homosexual identity kept secret.

There is a side to David Boren that is a known fact in legal and political circles. And that's the fact that David Boren frequents with homosexuals and I'm putting it lightly.

I don't think that is what you want for a U.S. Senator.

In addition to reading these remarks, candidate Points categorically stated that "Governor David Boren is a homosexual."

Mr. Miskovsky, on the following day, August 10, 1978, delivered a letter to the office of Governor Boren in which he set forth Mr. Points' charges against Boren, asking the Governor to answer several questions. That letter read as follows:
Dear Gov. Boren:

Yesterday I attended a noon meeting of the Canadian County Democratic Women's Club at the Ponderosa Restaurant in El Reno. About three dozen members of the club were present as well as club vice president, Mrs. Donald J. (Floretta) Cholston of El Reno, and two other Democratic candidates for the U.S. Senate, Dean Bridges and Anthony Points.

I was called upon to address the group about issues and I did, as did Mr. Bridges.

Mr. Points addressed the group and distributed a campaign flyer (a copy of which is enclosed herewith) containing the following verbatim transcript:

I am against homosexuals in the school system. They are a threat to our children. They are like vultures "preying" on our young.

I am against homosexuals or bisexuals in office or government. They are a threat to our national security. They are subject to being blackmailed and will give out a favor or leak information from the government in return for having their homosexual identity kept secret.'

There is a side to David Boren that is a known fact in legal and political circles. And that's the fact that David Boren frequents with homosexuals and I’m putting it lightly.

I don't think that is what you want for a U.S. Senator.

In addition to distributing the above written bulletin, Mr. Points added, among other things, the oral categorical statement, 'David Boren is a homosexual.'

After the meeting one of the ladies said she had not heard of this before, and others said they had heard rumors about the charge.

It is the first time I have heard this direct, categorical statement made in public by a candidate for the U.S. Senate.

For this reason I am asking you to respond to the following questions:

Do you know what a homosexual or bisexual is?

Are you a homosexual or bisexual?

Have you ever been a homosexual or bisexual?

Have you ever engaged in homosexual or bisexual activity?

I believe it is the right of every citizen, if it can be ascertained, to know if a candidate for U.S. Senator is afflicted with this kind of abnormal behavior. A U.S. Senator has access to highly sensitive information vital to the defense of this country and our NATO allies.

I believe it is the right of every citizen to know if a candidate is afflicted with any physical, mental or philosophical weakness that might be dangerous to our national security or which might jeopardize the best interests of the majority of the people.

If a candidate is a homosexual, a person who is mentally deranged or a person of bizarre philosophical demeanor, then, the people have a right to know it.

And the candidate should disclose it in order to protect his effectiveness as the representative of the majority and free himself from any politically motivated intrigue, blackmail, extortion or compromise to prevent disclosure of his true identity.

The people are entitled to an immediate response. Such response should be subscribed by you under oath.

Sincerely,
George Miskovsky

The letter was delivered to the Governor's office approximately ten minutes prior to a press conference that Governor Boren held to address the issue.
conference held by Mr. Miskovsky. At the press conference, Mr. Miskovsky told members of the press and the media of Mr. Points' statement and of his letter to the Governor.

In preparation for the press conference, Mr. Miskovsky's press agent personally called various members of the media, telling them that this was going to be a "hot" press conference that would be worthy of their attention.

Governor Boren, who was out on the campaign trail, and away from the Capitol, upon hearing of Miskovsky's press conference, flew back to Oklahoma City and held a make-shift press conference at Wiley Post Airport, categorically denying the charges against him.

The next day, August 11, 1978, the Oklahoma Publishing Company (OPUBCO), publisher of THE DAILY OKLAHOMAN, a morning paper, and THE OKLAHOMA CITY TIMES, an evening paper, published three news articles and an editorial dealing with Mr. Points' charges, Mr. Miskovsky's press conference, and the Governor's response to these events. A few days later, OPUBCO also published an editorial cartoon lampooning Miskovsky's actions. These five publications — three news articles, an editorial, and an editorial cartoon — are the publications which Mr. Miskovsky claims libeled him.

* * *

The first article which allegedly defames Mr. Miskovsky appeared in THE DAILY OKLAHOMAN on August 11, 1978, with the headline, "Sex Charge a Lie, Governor Boren Replies". This article was a straightforward account informing the reader that candidate Miskovsky had called a press conference, and that Mr. Miskovsky had asked Governor Boren to answer accusations made by another candidate that Boren was a homosexual. The article goes on to detail statements made by Mr. Points, Governor Boren's denial of the charges. Additionally, the article quoted from portions of Mr. Miskovsky's letter to Governor Boren, and reported reactions to the accusations and Mr. Miskovsky's letter, by both Governor and Mrs. Boren. Miskovsky argues that within this article the seed of conspiracy between him and Points is planted in the public's mind when the article stated:

"Asked if he thought Miskovsky and Points worked together to discredit him, Boren replied, 'I will just have to leave that to your own speculation.'"

We simply find no merit to Mr. Miskovsky's position that the article, because of the above quoted paragraph, is libelous. The statement quoted is neither false nor defamatory. Because Mr. Miskovsky used Mr. Points' statements, it is understandable that the news media might wonder if Mr. Miskovsky and Mr. Points were working together. It was certainly not libelous to inquire of the Governor whether he thought such could be the case, nor was it libelous to report the Governor's response. The statement does not defame Mr. Miskovsky, as it neither holds him up to ridicule, scorn, or contempt. Nor can the statement be said to be libelous, because the statement is not false. For these reasons, we hold that the trial court erred in permitting the jury to consider this publication as possibly libelous.

The second article, entitled "Allegations Stir Storm", which also appeared in the August 11 issue of THE DAILY OKLAHOMAN, began with the following lead:

Allegations against Gov. David Boren raised by fellow U.S. Senate candidates George Miskovsky and Anthony Points spurred a storm of indignation Thursday in the news media, were deplored by two other candidates and prompted a flurry of support at Boren campaign headquarters.

Continuing, the article chronicled reactions to the events of the past day, quoting from various newspaper articles and radio broadcasts across the State. The article also reported the reactions of Governor Boren's campaign secretary, and the reactions of several other senatorial candidates. Among reactions chronicled were the following:

Rob Pyron, Boren's campaign secretary, said campaign headquarters was swamped with calls Thursday afternoon from persons voicing support for the governor and anger over the allegations of Points and Miskovsky.

Oklahoma City radio station KTOK said the names of Miskovsky and Points should be stricken from the election ballot.

'Such loathsome and degrading statements, which have been made with no proof, speak eloquently of the kind of statesmanship either Miskovsky or Points
would lend to the U.S. Senate if they were elected.'

The Shawnee News-Star editorialized in Friday editions that the charge that Boren is a homosexual `would be more at home on the walls of a saloon toilet'.

'Cesspool allegations have no place in the political arena. We believe George Miskovsky has no place in it any longer either.'

Mr. Miskovsky argues that the above quoted statements are falsehoods which are defamatory. He argues that the allegations against Governor Boren were not made by him, but rather by Anthony Points alone. Thus, Miskovsky concludes that any suggestion that he made the allegations is false, and defames him because it accuses him of a crime — criminal libel.

In addressing these contentions, we would first note that the statement that the allegations against Governor Boren were "raised" by George Miskovsky and Anthony Points is not a false statement. The American Heritage Dictionary of the English Language defines the word "raised" to include "increasing in strength or intensity, and arousing or stirring up." To say that Mr. Miskovsky did not increase the intensity of the allegations made by Mr. Points would be sheer nonsense. It was, after all, Mr. Miskovsky who called Mr. Points' statements to the public's attention. It was, after all, Mr. Miskovsky who called the press conference to discuss that very issue. And it was Mr. Miskovsky who wrote the Governor asking him to respond to the allegations.

The newspaper article also carefully pointed out that Mr. Miskovsky used Points' campaign material as the basis for "implications" of homosexuality. Thus, to report that various people in organizations across the State were disgruntled over the allegations of Mr. Points and Miskovsky could hardly be said to be false, for it was Miskovsky who took the utterances of a minor candidate and publicized them, making them a cause celebre. To hold that Mr. Miskovsky's actions could not be taken as implications of homosexuality would be a denial of the obvious.

With respect to the other statements in the article, in which OPUBCO reported that other news media had referred to Mr. Miskovsky's action as having won him "a place in state history saying he 'took the prize for the filthiest stunt that has ever been played by a serious candidate for major public office in this state'", are simply all statements of opinion, which even Miskovsky admits in his brief are not actionable. As opinions they are not statements of fact, and therefore cannot be false.

For the above stated reasons, we hold that it was error to submit the article entitled "Allegations Stir Storm" to the jury, allowing them to find that this article had defamed Miskovsky.

The third and last news article was published by OPUBCO in The Oklahoma City Times on August 11, 1978. It was entitled "Boren's Friends Express Disgust". The article's lead read:

Longtime friends and close associates of Gov. David Boren expressed shock and disgust in his hometown today after allegations surfaced Thursday that he is a homosexual.

The article then went on to quote the reactions of several Seminole citizens, among them Ward Lynn, father-in-law of Boren's press secretary, Rob Pyron. It is the reporting of Mr. Lynn's comments which Mr. Miskovsky objects to, and characterizes as false and libelous. The paragraph dealing with Mr. Lynn's reaction read as follows:

Ward Lynn, father-in-law of Boren's press secretary, Rob Pyron, said he expected Miskovsky to be the 'hatchet man' in the campaign.

Although we can appreciate why Mr. Miskovsky is not fond of the epithet "hatchet man", such an epithet is not libelous because it is not a statement of fact, but rather a judgmental statement in which the maker of the same expresses his views. It is similar to calling someone a "scalawag", a "rake", or a "scoundrel". Such statements are opinionative and not factual in nature. Thus, such statements can hardly be said to constitute falsehoods. As they cannot be false, they cannot be considered libelous. Thus, once again the trial court erred in submitting this article to the jury, allowing the jury to find such statements to be libelous.

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§ B. When Is a Defamatory Statement Actionable?

PECK v. TRIBUNE CO.
214 U.S. 185 (1909)

Mr. Justice HOLMES delivered the opinion of the court.

This is an action on the case for a libel. The libel alleged is found in an advertisement printed in the defendant's newspaper, THE CHICAGO SUNDAY TRIBUNE, and, so far as is material, is as follows: "Nurse and Patients Praise Duffy's. Mrs. A. Schuman, One of Chicago's Most Capable and Experienced Nurses, Pays an Eloquent Tribute to the Great Invigorating, Life-Giving, and Curative Properties of Duffy's Pure Malt Whisky." Then followed a portrait of the plaintiff, with the words, "Mrs. A. Schuman," under it. Then, in quotation marks, "After years of constant use of your Pure Malt Whisky, both by myself and as given to patients in my capacity as nurse, I have no hesitation in recommending it as the very best tonic and stimulant for all local and run-down conditions," etc., etc., with the words, "Mrs. A. Schuman, 1576 Mozart St., Chicago, Ill.," at the end, not in quotation marks, but conveying the notion of a signature, or at least that the words were hers. The declaration alleged that the plaintiff was not Mrs. Schuman, was not a nurse, and was a total abstainer from whisky and all spirits. There was also a count for publishing the plaintiff's likeness without leave. The defendant pleaded not guilty. At the trial, subject to exceptions, the judge excluded the plaintiff's testimony in support of her allegations just stated, and directed a verdict for the defendant. His action was sustained by the circuit court of appeals, 83 C.C.A. 202, 154 Fed. 330.

Of course, the insertion of the plaintiff's picture in the place and with the concomitants that we have described imported that she was the nurse and made the statements set forth, as rightly was decided in Wandt v. Hearst's Chicago American, 129 Wis. 419, 421, 6 L.R.A.(N.S.) 919, 116 Am. St. Rep. 959, 109 N.W. 70, 9 A. & E. Ann, Cas. 864; Morrison v. Smith, 177 N.Y. 366, 69 N.E. 725. Therefore the publication was of and concerning the plaintiff, notwithstanding the presence of another fact, the name of the real signer of the certificate, if that was Mrs. Schuman, that was inconsistent, when all the facts were known, with the plaintiff's having signed or adopted it. Many might recognize the plaintiff's face without knowing her name, and those who did know it might be led to infer that she had sanctioned the publication under an alias. There was some suggestion that the defendant published the portrait by mistake, and without knowledge that it was the plaintiff's portrait, or was not what it purported to be. But the fact, if it was one, was no excuse. If the publication was libelous, the defendant took the risk. As was said of such matters by Lord Mansfield, "Whenever a man publishes, he publishes at his peril." R. v. Woodfall, Loftt 776, 781. See further, Hearne v. Stowell, 12 Ad. & El. 719, 726; Shepheard v. Whitaker, L.R. 10 C.P. 502; Clarke v. North American Co. 203 Pa. 346, 351, 352, 53 Atl. 237. The reason is plain. A libel is harmful on its face. If a man sees fit to publish manifestly hurtful statements concerning an individual, without other justification than exists for an advertisement or a piece of news, the usual principles of tort will make him liable if the statements are false, or are true only of someone else. See Morasse v. Brochu, 151 Mass. 567, 575, 8 L.R.A. 524, 21 Am. St. Rep. 474, 25 N.E. 74.

The question, then, is whether the publication was a libel. It was held by the circuit court of appeals not to be, or, at most, to entitle the plaintiff only to nominal damages, no special damage being alleged. It was pointed out that there was no general consensus of opinion that to drink whisky is wrong, or that to be a nurse is discreditable. It might have been added that very possibly giving a certificate and the use of one's portrait in aid of an advertisement would be regarded with irony, or a stronger feeling, only by a few. But it appears to us that such inquiries are beside the point. It may be that the action for libel is of little use, but, while it is maintained, it should be governed by the general principles of tort. If the advertisement obviously would hurt the plaintiff in the estimation of an important and respectable part of the community, liability is not a question of a majority vote.

We know of no decision in which this matter is discussed upon principle. But obviously an unprivileged falsehood need not entail universal hatred to constitute a cause of action. No falsehood
is thought about or even known by all the world. No conduct is hated by all. That it will be known by a large number, and will lead an appreciable fraction of that number to regard the plaintiff with contempt, is enough to do her practical harm. Thus, if a doctor were represented as advertising, the fact that it would affect his standing with other of his profession might make the representation actionable, although advertising is not reputed dishonest, and even seems to be regarded by many with pride. See Martin v. The Picayune (Martin v. Nicholson Pub. Co.) 115 La. 979, 4 L.R.A. (N.S.) 861, 40 So. 376. It seems to us impossible to say that the obvious tendency of what is imputed to the plaintiff by this advertisement is not seriously to hurt her standing with a considerable and respectable class in the community. Therefore it was the plaintiff's right to prove her case and go to the jury, and the defendant would have got all that it could ask if it had been permitted to persuade them, if it could, to take a contrary view. Culmer v. Canby, 41 C.C.A. 302, 101 Fed. 195, 197; Twombly v. Monroe, 136 Mass. 464, 469. See Gates v. New York Recorder Co. 155 N.Y. 228, 49 N.E. 769.

It is unnecessary to consider the question whether the publication of the plaintiff's likeness was a tort per se. It is enough for the present case that the law should at least be prompt to recognize the injuries that may arise from an unauthorized use in connection with other facts, even if more subtlety is needed to state the wrong than is needed here. In this instance we feel no doubt.

Judgment reversed.

THORLEY v. LORD KERRY

Court of Exchequer Chamber, 128 Eng. Rep. 367 (1812)

MANSFIELD, C.J. on this day delivered the opinion of the Court

This is a writ of error, brought to reverse a judgment of the Court of King's Bench, in which there was no argument. It was an action on a libel published in a letter, which the bearer of the letter happened to open. The declaration has certainly some very curious recitals. It recites that the Plaintiff was tenant to Archibald Lord Douglas of a messuage in Petersham, that being desirous to become a parishioner and to attend the vestry, he agreed to pay the taxes of the said house; that the Plaintiff in error was churchwarden, and that the Defendant in error gave him notice of his agreement with Lord Douglas, and that the Plaintiff in error, intending to have it believed that the said earl was guilty of the offences and misconducts thereinafter mentioned, (offences there are none, misconduct there may be,) wrote the letter to the said earl which is set forth in the pleadings. There is no doubt that this was a libel, for which the Plaintiff in error might have been indicted and punished; because, though the words impute no punishable crimes, they contain that sort of imputation which is calculated to vilify a man, and bring him, as the books say, into hatred, contempt, and ridicule; for all words of that description an indictment lies; and I should have thought that the peace and good name of individuals was sufficiently guarded by the terror of this criminal proceeding in such cases. The words, if merely spoken would not be of themselves sufficient to support an action. But the question now is whether an action will lie for these words so written, notwithstanding that such an action would not lie for them if spoken; and I am very sorry it was not discussed in the Court of King's Bench, that we might have had the opinion of all the twelve judges on the point, whether there be any distinction as to the right of action, between written and parol scandal; for myself, after having heard it extremely well argued, and especially, in this case, by Mr. Barnewall, I cannot, upon principle, make any difference between words written and words spoken, as to the right which arises on them of bringing an action. For the Plaintiff in error it has been truly urged, that in the old books and abridgments no distinction is taken between words written and spoken. But the distinction has been made between written and spoken slander as far back as Charles the Second's time, and the difference has been recognized by the Courts for at least a century back. It does not appear to me that the rights of parties to a good character are insufficiently defended by the criminal remedies which the law gives, and the law gives a very ample field for retribution by action for words spoken in the cases of special damage, of words spoken of a man in his trade or profession, of a man in office, of a magistrate or officer; for all these an action lies. But for mere general abuse spoken, no action lies. In the arguments both of the judges and counsel, in
almost all the cases in which the question has been, whether what is contained in a writing is the subject of an action or not, it has been considered, whether the words, if spoken, would maintain an action. It is curious that they have also adverted to the question, whether it tends to produce a breach of the peace: but that is wholly irrelevant, and is no ground for recovering damages. So it has been argued that writing shews more deliberate malignity; but the same answer suffices, that the action is not maintainable upon the ground of the malignity, but for the damage sustained. So, it is argued that written scandal is more generally diffused than words spoken, and is therefore actionable; but an assertion made in a public place, as upon the Royal exchange, concerning a merchant in London, may be much more extensively diffused than a few printed papers dispersed, or a private letter: it is true that a newspaper may be very generally read, but that is all casual. These are the arguments which prevail on my mind to repudiate the distinction between written and spoken scandal; but that distinction has been established by some of the greatest names known to the law, Lord Hardwicke, Hale, I believe, Holt C.J., and others. Lord Hardwicke C.J. especially has laid it down that an action for a libel may be brought on words written, when the words, if spoken, would not sustain it… If the matter were for the first time to be decided at this day, I should have no hesitation in saying, that no action could be maintained for written scandal which could not be maintained for the words if they had been spoken.

Judgment affirmed.

**ATKINSON v. EQUITABLE LIFE ASSURANCE SOCIETY**

519 F.2d 1112 (CA 5, 1975)

GEE, Circuit Judge

This Florida diversity case presents for review two disparate causes of action, breach of contract and slander, connected solely by identity of parties and by their source in a common employment relationship. Appellee Kenneth W. "Tex" Atkinson (Atkinson) brought suit on both causes and several others which succumbed to presently uncontested rulings by the court below against his former employer, The Equitable Life Assurance Society of the United States (Equitable). A jury trial produced findings favorable to Atkinson on liability and too-favorable on damages: the court thought the latter1 so grossly excessive as to be insusceptible to correction by remittitur and granted retrial of all damages. A second trial, however, produced a verdict of like overall magnitude: in contract, $19,280; for the slander, $15,000 general damages and $125,000 punitive; or a total award of $159,280. This time the court gave judgment on the verdict. Equitable appeals, and we reverse and remand for further proceedings. The two causes being quite distinct, we treat each separately with a statement as to each of its essential facts.

* * *

The evidence supporting Atkinson’s slander action, together with authorities epitomizing Florida law on the question presented, are well stated in Atkinson’s brief: [A successor agent], acting as the representative of Equitable, visited Herbert Enfinger, a client of Atkinson’s. [The agent] confused Enfinger about the details of a policy of insurance which had been sold to Enfinger by Atkinson. When Enfinger indicated that he wanted to talk to Atkinson because of the confusion generated by [the agent, he] made the following statements about Atkinson:

It is the man that sold it to you … he was selling for his own gain and not yours … he ain’t looking out for you.

Enfinger continued:

Well, he [the agent] informed me that his [Atkinson’s] commissions was all that he was interested in, he [Atkinson] wasn’t interested in my part of the policy.

Equitable argues that these and other statements made about an insurance agent to his client do not constitute slander per se as a matter of law. The authorities relied upon by Equitable, however, do not support its position. There is no dispute about the law applicable to the defamatory statements made by [the successor agent].

In Campbell v. Jacksonville Kennel Club, 66

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1 On the contract action, $18,000; on the slander action, $119,000 general damages and $42,000 punitive: grand total, $179,000.
DEFAMATION

So. 2d 495 (Fla. 1953), the Supreme Court of Florida, adopting the Restatement view and the majority view of other jurisdictions held:

It is established in most jurisdictions that an oral communication is actionable per se that is, without a showing of special damages if it imputes to another (a) a criminal offense amounting to a felony, or (b) a presently existing venereal or other loathsome and communicable disease, or (c) conduct, characteristics, or a condition incompatible with the proper exercise of his lawful business, trade, profession, or office, or (d) the other being a woman, acts of unchastity. 66 So. 2d 495, at 497

This principle of law expanding the categories of words considered as slanderous per se is the controlling law in this case. The history of the development of slander per se in Florida was recently summarized in Wolfson v. Kirk, 273 So. 2d 774 (Fla. App. 4th 1973). The Defendant Kirk stated that when he was running a brokerage office he invited the plaintiff out of the office. That was all he said. The Court held that a complaint alleging those facts stated a cause of action for slander per se:

We conclude, however, that from the language of the comment, it does not seem unreasonable to infer that persons hearing the same and possessed of a common mind might have taken it to mean that the plaintiff was a person with whom commercial relations were undesirable. Given this meaning, the comment attributes to the plaintiff a characteristic which is incompatible with the conduct of any lawful business. Hence the comment could come within one of the categories of slander per se recognized in Campbell v. Jacksonville Kennel Club and Teare v. Local Union No. 295 (98 So. 2d 79), supra. Of course the communication might also have been intended to convey and perhaps did convey only innocuous meanings. Where, however, a communication is ambiguous and is reasonably susceptible of a meaning which is defamatory, it is for the trier of fact to decide whether or not the communication was understood in the defamatory sense.


For a full picture, there need only be added to the above that Enfinger, the sole source of testimony for Atkinson's slander case, gave no evidence that he repeated these assertions to anyone, and admitted that they had no effect to denigrate Atkinson in his estimation. Indeed, after taking the matter up with Atkinson and being reassured, he cashed in his Equitable policies despite Atkinson's advice to the contrary because he was unwilling to maintain any relationship with a concern related, however tenuously, to such assertions. For them the jury mulcted Equitable, in general damages, $15,000 (a figure not far from Atkinson's average annual earned commission income), and $125,000 punitive damages.

The disproportion of such damages as compensation, or as punishment, for the nasty gossip of a commission employee remarks not shown by any faintest evidence to have been authorized, tolerated, or even known of by Equitable requires no comment. It is intolerable that Tex. Atkinson should be so blackguarded behind his back. It is equally so that he should receive $140,000 in compensation and salve for the single smear, made to one client and neither credited nor passed on. Attempting a remittitur from such a slash would amount to restoring a reasonable portion of the severed head. We decline to do so. Without relish, and recognizing fully that we are, in this function, not finders but "unfinders," we conclude that another attempt must be made, by another finder of fact, at a rational award. It sometimes happens that when one continues to receive unmeaning answers, the wrong question is being asked. It may be that the slander cause should be retried in whole, rather than merely as to damages, and the tardily-procured testimony of the successor agent heard. But this is for the trial court.

Reversed and remanded.

GODBOLD, Circuit Judge (dissenting in part): [omitted]
§ C. What Defenses Are Available?

1. Absolute Privilege

BROWN v. SHIMABUKURO
118 F.2d 17 (CA DC, 1940)

EDGERTON, Associate Justice

This appeal is from an order dismissing, on the ground of privilege, a complaint charging libel. The alleged libel is in an affidavit which defendant Shimabukuro executed, and defendant Wattawa filed, in a previous suit.

In that suit Shimabukuro’s wife was seeking a divorce, and Wattawa was his attorney. In the course of that suit Shimabukuro moved for a rehearing on his wife’s motion for counsel fees, suit money, and alimony pendente lite. The offending affidavit was filed in support of that motion. In the affidavit Shimabukuro made various charges of misconduct against his wife, and various statements tending to show his own poverty and lack of earning capacity. He stated, among other things, that his wife “and her father preferred charges against him before the U.S. Attorney’s Office; that such charges were wholly false and in affiant’s opinion were made for the sole purpose of intimidating and blackmailing him; that as a result of the persistent litigation against him by plaintiff and her father and the preferment of these false charges, and of the notoriety and publicity, and certain race feeling, which their litigation and actions have caused, and by reason of the severe financial reverses which he has sustained, affiant has suffered great mental anguish, and is unable intelligently and consistently to carry on any business or occupation, even if he should be able to find the same.” "Her father," referred to in the affidavit, is the present plaintiff. He alleges that the charge of blackmail was false and was intended to injure him.

In this jurisdiction, among others, statements in pleadings and affidavits are absolutely privileged if they have enough appearance of connection with the case in which they are filed so that a reasonable man might think them relevant. They need not be relevant in any strict sense. A reasonable man might think that the statements of the defendants regarding the plaintiff were relevant, for they had some appearance of connection with the questions what the wife deserved, what her motives were in bringing the divorce suit, and what the husband could pay, questions which might influence a court’s discretion in fixing alimony. They were therefore privileged, and the complaint was rightly dismissed.

Affirmed.

BARR v. MATTEO
360 U.S. 564 (1959)

Mr. Justice HARLAN announced the judgment of the Court, and delivered an opinion, in which Mr. Justice FRANKFURTER, Mr. Justice CLARK, and Mr. Justice WHITTAKER join.

We are called upon in this case to weigh in a particular context two considerations of high importance which now and again come into sharp conflict — on the one hand, the protection of the individual citizen against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government; and on the other, the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or illfounded damage suits brought on account of action taken in the exercise of their official responsibilities.

This is a libel suit, brought in the District Court of the District of Columbia by respondents, former employees of the Office of Rent Stabilization. The alleged libel was contained in a press release issued by the office on February 5, 1953, at the direction of petitioner, then its Acting Director.¹ The circumstances which gave rise to the issuance of the release follow.

In 1950 the statutory existence of the Office of Housing Expediter, the predecessor agency of the Office of Rent Stabilization, was about to expire. Respondent Madigan, then Deputy Director in charge of personnel and fiscal matters, and respondent Matteo, chief of the personnel branch,

¹ Petitioner was appointed Acting Director of the agency effective February 9, 1953. On February 5 he occupied that position by designation of the retiring Director, who was absent from the city.
suggested to the Housing Expediter a plan designed to utilize some $2,600,000 of agency funds earmarked in the agency's appropriation for the fiscal year 1950 exclusively for terminal-leave payments. The effect of the plan would have been to obviate the possibility that the agency might have to make large terminal-leave payments during the next fiscal year out of general agency funds, should the life of the agency be extended by Congress. In essence, the mechanics of the plan were that agency employees would be discharged, paid accrued annual leave out of the $2,600,000 earmarked for terminal-leave payments, rehired immediately as temporary employees, and restored to permanent status should the agency's life in fact be extended.

Petitioner, at the time General Manager of the agency, opposed respondents' plan on the ground that it violated the spirit of the Thomas Amendment, 64 Stat. 768; and expressed his opposition to the Housing Expediter. The Expediter decided against general adoption of the plan, but at respondent Matteo's request gave permission for its use in connection with approximately fifty employees, including both respondents, on a voluntary basis. Thereafter the life of the agency was in face extended.

Some two and a half years later, on January 28, 1953, the Office of Rent Stabilization received a letter from Senator John J. Williams of Delaware, inquiring about the terminal-leave payments made under the plan in 1950. Respondent Madigan drafted a reply to the letter, which he did not attempt to bring to the attention of petitioner, and then prepared a reply which he sent to petitioner's office for his signature as Acting Director of the agency. Petitioner was out of the office, and a secretary signed the submitted letter, which was then delivered by Madigan to Senator Williams on the morning of February 3, 1953.

On February 4, 1953, Senator Williams delivered a speech on the floor of the Senate strongly criticizing the plan, stating that "to say the least it is an unjustifiable raid on the Federal Treasury, and heads of every agency in the Government who have condoned this practice should be called to task." The letter above referred to was ordered printed in the Congressional Record. Other Senators joined in the attack on the plan. Their comments were widely reported in the press on February 5, 1953, and petitioner, in his capacity as Acting Director of the agency, received a large number of inquiries from newspapers and other news media as to the agency's position on the matter.

On that day petitioner served upon respondents letters expressing his intention to suspend them from duty, and at the same time ordered issuance by the office of the press release which is the subject of this litigation, and the text of which appears in the margin.

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2 This statute, part of the General Appropriation Act of 1951, provided that: "No part of the funds, of, or available for expenditure by any corporation or agency included in this Act, including the government of the District of Columbia, shall be available to pay for annual leave accumulated by any civilian officer or employee during the calendar year 1950 and unused at the close of business on June 30, 1951...."

3 The General Accounting Office subsequently ruled that the payments were illegal, and respondents were required to return them. Respondent Madigan challenged this determination in the Court of Claims, which held that the plan was not in violation of law. *Madigan v. United States*, 142 Ct. Cl. 641.

4 The plan was referred to by various Senators as "a highly questionable procedure," a "raid on the Federal Treasury," "a conspiracy to defraud the Government of funds," "a new racket," and as "definitely involv[ing] criminal action." It was suggested that it might constitute "a conspiracy by the head of an agency to defraud the Government of money," and that "it is highly irregular, if not actually immoral, for the heads of agencies to use any such device...." *90 CONG. REC. 868-87.

5 "William G. Barr, Acting Director of Rent Stabilization today served notice of suspension on the two officials of the agency who in June 1950 were responsible for the plan which allowed 53 of the agency's 2,681 employees to take their accumulated annual leave in cash.

"Mr. Barr's appointment as Acting Director becomes effective Monday, February 9, 1953, and the suspension of these employees will be his first act of duty. The employees are John J. Madigan, Deputy Director for Administration, and Linda Matteo, Director of Personnel.

"In June 1950, Mr. Barr stated, 'my position in the agency was not one of authority which would have permitted me to stop the action. Furthermore, I did not know about it until it was almost completed.

"When I did learn that certain employees were receiving cash annual leave settlements and being returned to agency employment on a temporary basis, I specifically notified the employees under my supervision that if they applied for such cash settlements I would demand their resignations and the record will show that my immediate employees complied with my request.

(continued...)
Respondents sued, charging that the press release, in itself and as coupled with the contemporaneous news reports of senatorial reaction to the plan, defamed them to their injury, and alleging that its publication and terms had been actuated by malice on the part of petitioner. Petitioner defended, inter alia, on the ground that the issuance of the press release was protected by either a qualified or an absolute privilege. The trial court overruled these contentions, and instructed the jury to return a verdict for respondents if it found the release defamatory. The jury found for respondents.

Petitioner appealed, raising only the issue of absolute privilege. The judgment of the trial court was affirmed by the Court of Appeals, which held that "in explaining his decision [to suspend respondents] to the general public [petitioner] ... went entirely outside his line of duty" and that thus the absolute privilege, assumed otherwise to be available, did not attach. 100 U.S. App. D.C. 319, 244 F.2d 767, 768. We granted certiorari, vacated the Court of Appeals' judgment, and remanded the case "with directions to pass upon petitioner's claim of a qualified privilege." 355 U.S. 171, 173, 78 S. Ct. 204, 206, 2 L. Ed. 2d 179. On remand the Court of Appeals held that the press release was protected by a qualified privilege, but that there was evidence from which a jury could reasonably conclude that petitioner had acted maliciously, or had spoken with lack of reasonable grounds for believing that his statement was true, and that either conclusion would defeat the qualified privilege. Accordingly it remanded the case to the District Court for retrial. 103 U.S. App. D.C. 176, 256 F.2d 890. At this point petitioner again sought, and we again granted certiorari, 358 U.S. 917, 79 S. Ct. 287, 3 L. Ed. 2d 237, to determine whether in the circumstances of this case petitioner's claim of absolute privilege should have stood as a bar to maintenance of the suit despite the allegations of malice made in the complaint.

The law of privilege as a defense by officers of government to civil damage suits for defamation and kindred torts has in large part been of judicial making, although the Constitution itself gives an absolute privilege to members of both Houses of Congress in respect to any speech, debate, vote, report, or action done in session. 6 This Court early held that judges of courts of superior or general authority are absolutely privileged as respects civil suits to recover for actions taken by them in the exercise of their judicial functions, irrespective of the motives with which those acts are alleged to have been performed, Bradley v. Fisher, 13 Wall. 335, 20 L. Ed. 646, and that a like immunity extends to other officers of government whose duties are related to the judicial process. Yaselli v. Goff, 2 Cir., 12 F.2d 396, 56 A.L.R. 1239, affirmed per curiam, 275 U.S. 503, 48 S. Ct. 155, 72 L. Ed. 395, involving a Special Assistant to the Attorney General. 7 Nor has the privilege been confined to officers of the legislative and judicial branches of the Government and executive officers of the kind involved in Yaselli. In Spalding v. Vilas, 161 U.S. 483, 16 S. Ct. 631, 40 L. Ed. 780, petitioner brought suit against the Postmaster General, alleging that the latter had maliciously circulated widely among postmasters, past and present, information which he knew to be false and which was intended to deceive the postmasters to the detriment of the plaintiff. This Court sustained a plea by the Postmaster General of absolute privilege, stating that 161 U.S. at pages 498-499, 16 S. Ct. at page 637:

In exercising the functions of his office, the head of an executive department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official

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1(continued)

"...While I was advised that the action was legal, I took the position that it violated the spirit of the Thomas Amendment and I violently opposed it. Monday, February 9th, when my appointment as Acting Director becomes effective, will be the first time my position in the agency has permitted me to take any action on this matter, and the suspension of these employees will be the first official act I shall take."

"Mr. Barr also revealed that he has written to Senator Joseph McCarthy, Chairman of the Committee on Government Operations, and to Representative John Phillips, Chairman of the House Subcommittee on Independent Offices Appropriations, requesting an opportunity to be heard on the entire matter."

BARR v. MATTEO

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conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he was subjected to any such restraint. He may have legal authority to act, but he may have such large discretion in the premises that it will not always be his absolute duty to exercise the authority with which he is invested. But if he acts, having authority, his conduct cannot be made the foundation of a suit against him personally for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals.\(^8\)

The reasons for the recognition of the privilege have been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties — suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government. The matter has been admirably expressed by Judge Learned Hand:

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.\(^\ldots\)

The decisions have, indeed, always imposed as a limitation upon the immunity that the official’s act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment’s reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine.

What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him.\ldots Gregoire v. Biddle, 2 Cir., 177 F.2d 579, 581.

We do not think that the principle announced in Vilas can properly be restricted to executive officers of cabinet rank, and in fact it never has

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\(^8\) The communication in Spalding v. Vilas was not distributed to the general public, but only to a particular segment thereof which had a special interest in the subject matter. Statements issued at the direction of Cabinet officers and disseminated to the press in the form of press releases have also been accorded an absolute privilege, so long as their contents and the occasion for their issuance relate to the duties and functions of the particular department. Mellon v. Brewer, 57 App. D.C. 126, 18 F.2d 168, 53 A.L.R. 1519; Glass v. Ikez, 73 App. D.C. 3, 117 F.2d 273, 132 A.L.R. 1328.
been so restricted by the lower federal courts. The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy.

To be sure, the occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion, it entails. It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted — the relation of the act complained of to "matters committed by

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10 See the striking description in Cummings and McFarland, Federal Justice (1937), pp. 80-81, quoted in Cooper v. O'Connor, supra, 69 App. D.C. 100, 107, 99 F.2d 135, 142, note 28, of the office of Attorney General of the United States in the early days of the Republic: "Not only were there no records but the government provided neither an office nor clerical assistance. As far back as December 1791, Attorney General Randolph, through President Washington, without success had urged Congress to provide a clerk. President Madison, when it became evident that residence at Washington had greatly increased the Attorney General's labor, in 1816 urged that he be supplied with 'the usual appurtenances to a public office.' A bill to provide offices and a clerk came to the Senate floor on January 10, 1817.... Thirty years had passed since the federal government was first organized. Now, Congress provided offices in the Treasury and a clerk at $1,000 a year, with an additional small contingent fund of $500 for such essentials as stationery, fuel, and 'a boy to attend the menial duties.'"

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11 The record indicates that in 1950 the Office of Housing Expediter had some 2,500 employees.

speak out cannot be controlling in the case of an official of policy-making rank, for the same considerations which underlie the recognition of the privilege as to acts done in connection with a mandatory duty apply with equal force to discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority.\textsuperscript{13}

The fact that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable, despite the allegations of malice in the complaint, for as this Court has said of legislative privilege:

The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. \textit{Tenney v. Brandhove}, 341 U.S. 367, 377, 71 S. Ct. 783, 788, 95 L. Ed. 1019.

We are told that we should forbear from sanctioning any such rule of absolute privilege lest it open the door to wholesale oppression and abuses on the part of unscrupulous government officials. It is perhaps enough to say that fears of this sort have not been realized within the wide area of government where a judicially formulated absolute privilege of broad scope has long existed. It seems to us wholly chimerical to suggest that what hangs in the balance here is the maintenance of high standards of conduct among those in the public service. To be sure, as with any rule of law which attempts to reconcile fundamentally antagonistic social policies, there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good. And there are of course other sanctions than civil tort suits available to deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner. We think that we should not be deterred from establishing the rule which we announce today by any such remote forebodings.

Reversed.

[\textit{The concurring and dissenting opinions are omitted.}]

\section{2. Conditional Privilege}

\textbf{JACRON SALES v. SINDORF}

350 A.2d 688 (Md. 1976)

LEVINE, Judge

We are asked here to determine the extent to which the First and Fourteenth Amendments to the Federal Constitution are applicable to actions for defamation by private individuals against defendants who are not publishers or broadcasters; alternatively, we shall decide as a matter of state law whether the law of defamation should be changed in view of recent decisions of the Supreme Court. \textit{See Gertz v. Robert Welch, Inc.}, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). These questions arise from an action for slander brought by appellee, Jack Sindorf (Sindorf), against his former employer, Jacron Sales Co., Inc. (Jacron). When the case came on for trial before a jury in the Circuit Court for Prince George's County, the court directed a verdict for Jacron at the close of all the evidence. On appeal, the Court of Special Appeals reversed the judgment and remanded the case to the circuit court for a new trial. \textit{Sindorf v. Jacron Sales Co.}, 27 Md. App. 53, 341 A.2d 856 (1975). We then granted certiorari.

Early in 1972, Sindorf entered the employ of Jacron, a Philadelphia-based company, as a construction tools salesman. Sindorf submitted a letter of resignation terminating that relationship some 18 months later, and within a few days thereafter began working in a similar capacity for a Maryland company known as the Tool Box Corporation. In his letter of resignation to Jacron, Sindorf had acknowledged that he was in possession of inventory belonging to Jacron worth $2,451.77, and further stated that although he

regarded the material in his possession as part payment of commissions due him, he would return the property "at such time as" he received the sum of $2,561.50, representing unpaid commissions of $2,100 and other miscellaneous amounts owed to him by Jacron. In addition to enclosing invoices for the inventory in his possession, he expressed his regret at the need for proceeding in such a manner, which was pursuant to the advice of counsel, but noted that his efforts to "collect the money" due him "through normal business channels" had been unsuccessful.

Within two days after he commenced his employment with Tool Box, Sindorf was asked to come from his Pennsylvania home to Maryland for a conference with William R. Brose (Brose), the president of the company. At that meeting, Brose related a recorded telephone conversation between him and one Robert Fridkis (Fridkis), vice president of Jacron Sales of Virginia, a subsidiary of Jacron, who had never been Sindorf's employer. The tape recording was played for the jury, and a transcript of the dialogue was received in evidence. As related by Brose, the substance of Fridkis' statement was that there were "quite a few cash sales and quite a bit of merchandise that were uncounted [sic] for." This suggested to Brose, according to his testimony, that possibly Sindorf "had taken items, either for possibly for his own use ... or for a cash sale," i.e., implying that they had been stolen by Sindorf. When confronted by Brose with Fridkis' statements, Sindorf branded them as untrue; furthermore, despite an "extremely careful" check of the Tool Box inventory entrusted to Sindorf during his nine months of employment, nothing was ever found to be missing. We note that neither in the Court of Special Appeals nor in this Court has appellant contended that Fridkis' statements did not constitute slander per se.

Testimony revealed that Fridkis had placed the call to Brose on instructions from the president of the parent corporation in Philadelphia. Those instructions, however, had not implicated Sindorf in any theft or other criminal conduct. In the president's own words, he told Fridkis:

[To call the Tool Box and see if Mr. Sindorf was working for them. We

explained to Bob how the man had left us, keeping the merchandise in his possession, our merchandise, and we wanted to verify his employment, whether he was working there while he was still on our payroll or had he just started with Tool Box.

Apparently, when Fridkis reported to the president the outcome of his discussion with Brose, he merely "verified [Sindorf's] employment...".

In directing a verdict for the defendant, the trial court ruled that although Sindorf had established a case of slander per se warranting its submission to the jury, Jacron was protected by a common law conditional privilege which had not been lost because Sindorf had failed "to show actual malice." Shortly after an appeal had been lodged, the Court of Special Appeals ordered the parties to address their briefs, in part, to the decision in Gertz v. Robert Welch, Inc., supra, which the Supreme Court had handed down on June 25, 1974, more than two months after the trial of this case. The Court of Special Appeals held that Sindorf had presented sufficient evidence of malice to warrant submission of the question of abuse of the common law conditional privilege to the jury, thus compelling a reversal of the circuit court decision. Further, the Court of Special Appeals said that since the defamatory statements here were of a "purely private" nature, this case was beyond the reach of Gertz.

* * *

IV

Essential to the disposition of this case is the status of the common law conditional privileges in Maryland, especially in light of Gertz. As we indicated earlier, the trial judge directed a verdict for Jacron on the ground that Sindorf had failed to present sufficient evidence of "actual malice" to defeat the common law privilege protecting Jacron. In reversing, the Court of Special Appeals held that "the question of malice was properly for the jury." Sindorf v. Jacron Sales Co., supra, 27 Md. App. at 72, 341 A.2d at 868.

It has been suggested that adoption of the negligence standard of fault in defamation cases would have the practical effect of rendering obsolete the common law defense of conditional privilege. See, e.g., Anderson, supra, 53 TEXAS L. REV. at 443 n.97; Frakt, supra, 6 RUTGERS-CAMDEN L.J. at 496-97. The reasoning

1 Mr. Fridkis was deceased by the time the case came to trial.

JACRON SALES v. SINDORF
which underlies this position is that many jurisdictions follow the rule that one of the means by which a conditional privilege may be defeated is by proving negligence of the part of the defendant. F. Harper & F. James, supra, § 5.27; W. Prosser, supra, § 115. Indeed, the first Restatement of Torts, supra, at § 601 expressly adopted such a rule:

"Except as stated in § 602, one who upon a conditionally privileged occasion publishes false and defamatory matter of another abuses the occasion if, although believing the defamatory matter to be true, he has no reasonable grounds for so believing."

Section 601 thus embodied the common law rule that one was held to have abused a qualified privilege if he did not believe the statement to be true or if he did not have reasonable grounds to believe in its truth. See Restatement (Second) of Torts § 580B, Comment 1 (Tent. Draft No. 21, 1975).

If the rule stated in § 601 of the first Restatement were the law of Maryland, we might well question the efficacy of retaining a conditional privilege defeasible by the very proof of negligence which must be presented to establish falsity and defamation in the first instance. The fault required by Gertz to be proved to establish liability would amount to an abuse of, and thereby defeat, a conditional privilege. In Maryland, however, we have never held that negligence is among the grounds on which the conditional privilege may be forfeited.2

The Maryland cases on abuse of conditional privilege are couched in terms of "express malice" or "actual malice." See, e.g., Evening News Co. v. Bowie, 154 Md. 604, 611, 141 A. 416 (1928); Jump v. Barnes, 139 Md. 101, 111, 114 A. 734 (1921); Bavington v. Robinson, 124 Md. 85, 90, 91 A. 777 (1914); Garrett v. Dickerson, 19 Md. 418, 450 (1863). The explanation in some of the earlier cases was that malice is an element of the tort of defamation, but is generally presumed in the publication of defamatory matter unless a privilege is established, in which event the presumption is rebutted and malice must be proved. See Fresh v. Cutter, 73 Md. 87, 92, 20 A. 774, 10 L.R.A. 67, 25 Am.St. Rep. 575 (1890). Malice was variously defined in the cases as a lack of good faith, ill-will, hostility, or hatred. See, e.g., Evening News Co. v. Bowie, supra; Deckelman v. Lake, 149 Md. 533, 536, 131 A. 762, 764 (1926). Excessive publication and unnecessarily abusive language were held to be evidence of malice. Fresh v. Cutter, supra, 73 Md. at 93-94, 20 A. 774.

Express or actual malice represents something more than conduct that is merely negligent. In Deckelman v. Lake, supra, the Court, quoting from 17 R.C.L. 321, defined malice as "wanton disposition grossly negligent of the rights of others." Speaking generally in Fresh v. Cutter, supra, 73 Md. at 92, 20 A. at 775, the Court defined malice as "knowingly stat[ing] what was untrue and injurious," but more specifically in Stevenson v. Baltimore Club, 250 Md. 482, 243 A.2d 533 (1968), we defined malice in part as the reckless disregard of truth:

The privilege may be lost, however, if the plaintiff in a defamation case can show malice, which in this context means not hatred or spite but rather a reckless disregard of truth, the use of unnecessarily abusive language, or other circumstances which would support a conclusion that the defendant acted in an ill-tempered manner or was motivated by ill-will. 250 Md. at 486-87, 243 A.2d at 536 (emphasis added).

We repeated the Stevenson definition in Orrison v. Vance, 262 Md. 285, 295, 277 A.2d 573 (1971), and thus the reckless disregard standard now appears to be firmly established in Maryland as a test, albeit not the exclusive test, for abuse of a conditional privilege. This being a higher standard than negligence, we retain the common law conditional privilege in Maryland which, in a given case, may suffice to avoid liability even though the Gertz standard regarding falsity and defamation is met by the plaintiff.3

3 It is interesting to note that the rule of the first Restatement quoted earlier has now been supplanted in the Restatement (Second) of Torts § 600 (Tent. Draft No. 21, 1975), which provides that abuse of a conditional privilege takes place when the defendant publishes a statement knowing it to be false or acting in reckless disregard as to its truth or falsity. This is the same as the

(continued...)

JACRON SALES v. SINDORF
should be noted, however, that in a case where a common law conditional privilege is found to exist, the negligence standard of Gertz is logically subsumed in the higher standard for proving malice, reckless disregard as to truth or falsity, and therefore becomes irrelevant to the trial of the case. Were the plaintiff who is confronted with a conditional privilege incapable of proving the malice necessary to overcome that hurdle, it would be of no consequence that he might have met the lesser standard of negligence.

While the question of whether a defamatory communication enjoys a conditional privilege is one of law for the court, whether it has been forfeited by malice is usually a question for the jury. Hanrahan v. Kelly, 269 Md. 21, 29, 305 A.2d 151 (1973); Jump v. Barnes, supra, 139 Md. at 112, 114 A. 734; Bavington v. Robinson, supra, 124 Md. at 90, 91 A. 777; Fresh v. Cutter, supra, 73 Md. at 93, 20 A. 774. We need not belabor this opinion with a detailed summary of the trial testimony. We agree with the Court of Special Appeals that the trial court erred in ruling that there was insufficient evidence of malice, as defined in our cases, to defeat the conditional privilege. Reasonable minds could have concluded that the suggestion of Sindorf's discharge for stealing was not only false, but far exceeded the facts that had been related to Fridkis by the corporation president who had done little more than instruct him to verify Sindorf's employment. This was evidence on which a finding by the trier of fact of malice in the form of reckless disregard of truth overcoming the conditional privilege could have been based. Hence, the Court of Special Appeals was correct in reversing the judgment of the circuit court and in remanding the case for a new trial.

Unless a conditional privilege is found to have existed, the plaintiff shall be required at the new trial of this case to establish the liability of the defendant through proof of negligence by the preponderance of the evidence, and may recover compensation for actual injury, as defined in Gertz and outlined earlier, but neither presumed nor punitive damages, unless he establishes liability under the more demanding New York Times standard of knowing falsity or reckless disregard for the truth. Should the court determine that a common law conditional privilege existed, the question of its forfeiture vel non shall be governed by the views expressed herein.

Judgment of the Court of Special Appeals affirmed; costs to be paid by appellant.

TIME, INC. v. FIRESTONE
424 U.S. 448 (1976)

Mr. Justice REHNQUIST delivered the opinion of the Court

Petitioner is the publisher of Time, a weekly news magazine. The Supreme Court of Florida affirmed a $100,000 libel judgment against petitioner which was based on an item appearing in Time that purported to describe the result of domestic relations litigation between respondent and her husband. We granted certiorari, 421 U.S. 909, 95 S. Ct. 1557, 43 L. Ed. 2d 773 (1975), to review petitioner's claim that the judgment violates its rights under the First and Fourteenth Amendments to the United States Constitution.

I

Respondent, Mary Alice Firestone, married Russell Firestone, the scion of one of America's wealthiest industrial families, in 1961. In 1964, they separated, and respondent filed a complaint for separate maintenance in the Circuit Court of Palm Beach County, Fla. Her husband counterclaimed for divorce on grounds of extreme cruelty and adultery. After a lengthy trial the Circuit Court issued a judgment granting the divorce requested by respondent's husband. In relevant part the court's final judgment read:

This cause came on for final hearing before the court upon the plaintiff wife's second amended complaint for separate maintenance [alimony unconnected with the causes of divorce], the defendant husband's answer and counterclaim for divorce on grounds of extreme cruelty and adultery, and the wife's answer thereto setting up certain affirmative defenses....

According to certain testimony in

3(...continued)

constitutional standard used for determining whether liability will be imposed for a defamatory communication about a public officer or public figure. In sum, negligence is no longer sufficient under the Restatement to establish abuse of a conditional privilege.
of the defendant, extramarital escapades of the plaintiff were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony, in plaintiff's behalf, would indicate that defendant was guilty of bounding from one bedpartner to another with the erotic zest of a satyr. The court is inclined to discount much of this testimony as unreliable. Nevertheless, it is the conclusion and finding of the court that neither party is domesticated, within the meaning of that term as used by the Supreme Court of Florida. . . .

In the present case, it is abundantly clear from the evidence of marital discord that neither of the parties has shown the least susceptibility to domestication, and that the marriage should be dissolved.

The premises considered, it is thereupon ORDERED AND ADJUDGED as follows:

1. That the equities in this cause are with the defendant; that defendant's counterclaim for divorce be and the same is hereby granted, and the bonds of matrimony which have heretofore existed between the parties are hereby forever dissolved.

4. That the defendant shall pay unto the plaintiff the sum of $3,000 per month as alimony beginning January 1, 1968, and a like sum on the first day of each and every month thereafter until the death or remarriage of the plaintiff. App. 523-525, 528.

Time's editorial staff, headquartered in New York, was alerted by a wire service report and an account in a New York newspaper to the fact that a judgment had been rendered in the Firestone divorce proceeding. The staff subsequently received further information regarding the Florida decision from Time's Miami bureau chief and from a "stringer" working on a special assignment basis in the Palm Beach area. On the basis of these four sources, Time's staff composed the following item, which appeared in the magazine's "Milestones" section the following week:

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

Within a few weeks of the publication of this article respondent demanded in writing a retraction from petitioner, alleging that a portion of the article was "false, malicious and defamatory." Petitioner declined to issue the requested retraction. 1

Respondent then filed this libel action against petitioner in the Florida Circuit Court. Based on a jury verdict for respondent, that court entered judgment against petitioner for $100,000, and after review in both the Florida District Court of Appeal, 279 So. 2d 389 and the Supreme Court of Florida, the judgment was ultimately affirmed. 305 So. 2d 172 (1974). Petitioner advances several contentions as to why the judgment is contrary to decisions of this Court holding that the First and Fourteenth Amendments of the United States Constitution limit the authority of state courts to impose liability for damages based on defamation.

II

Petitioner initially contends that it cannot be liable for publishing any falsehood defaming respondent unless it is established that the publication was made "with actual malice," as that term is defined in New York Times v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). 2 Petitioner advances two arguments in support of this contention: that respondent is a "public figure" within this Court's decisions

1 Under Florida law the demand for retraction was a prerequisite for filing a libel action, and permits defendants to limit their potential liability to actual damages by complying with the demand. Fla. STAT. ANN. §§ 770.01-770.02 (1963).

2 The "actual malice" test requires that a plaintiff prove that the defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S., at 280, 84 S. Ct., at 726.

TIME, INC. v. FIRESTONE
extending *New York Times* to defamation suits brought by such individuals, see, e.g., *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967); and that the *Time* item constituted a report of a judicial proceeding, a class of subject matter which petitioner claims deserves the protection of the "actual malice" standard even if the story is proved to be defamatorily false or inaccurate. We reject both arguments.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345, 94 S. Ct. 2997, 3009, 41 L. Ed. 2d 789 (1974), we have recently further defined the meaning of "public figure" for the purposes of the First and Fourteenth Amendments:

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.

Respondent did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society, and she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it. Petitioner contends that because the Firestone divorce was characterized by the Florida Supreme Court as a "cause célèbre," it must have been a public controversy and respondent must be considered a public figure. But in so doing petitioner seeks to equate "public controversy" with all controversies of interest to the public. Were we to accept this reasoning, we would reinstate the doctrine advanced in the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S. Ct. 1811, 29 L. Ed. 2d 296 (1971), which concluded that the *New York Times* privilege should be extended to falsehoods defamatory of private persons whenever the statements concern matters of general or public interest. In *Gertz*, however, the Court repudiated this position, stating that "extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge [a] legitimate state interest to a degree that we find unacceptable." 418 U.S., at 346, 94 S. Ct., at 3010.

Dissolution of a marriage through judicial proceedings is not the sort of "public controversy" referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public. Nor did respondent freely choose to publicize issues as to the propriety of her married life. She was compelled to go to court by the State in order to obtain legal release from the bonds of matrimony. We have said that in such an instance "[r]esort to the judicial process ... is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court." *Boddie v. Connecticut*, 401 U.S. 371, 376-377, 91 S. Ct. 780, 785, 28 L. Ed. 2d 113 (1971). Her actions, both in instituting the litigation and in its conduct, were quite different from those of General Walker in *Curtis Publishing Co.*, *supra*. She assumed no "special prominence in the resolution of public questions." *Gertz*, *supra*, 418 U.S., at 351, 94 S. Ct., at 3013. We hold respondent was not a "public figure" for the purpose of determining the constitutional protection afforded petitioner's report of the factual and legal basis for her divorce.

For similar reasons we likewise reject petitioner's claim for automatic extension of the *New York Times* privilege to all reports of judicial proceedings. It is argued that information concerning proceedings in our Nation's courts may have such importance to all citizens as to justify extending special First Amendment protection to the press when reporting on such events. We have recently accepted a significantly more confined version of this argument by holding that the Constitution precludes States from imposing civil liability based upon the publication of truthful information contained in official court records open

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3 Nor do we think the fact that respondent may have held a few press conferences during the divorce proceedings in an attempt to satisfy inquiring reporters converts her into a "public figure." Such interviews should have had no effect upon the merits of the legal dispute between respondent and her husband or the outcome of that trial, and we do not think it can be assumed that any such purpose was intended. Moreover, there is no indication that she sought to use the press conferences as a vehicle by which to thrust herself to the forefront of some unrelated controversy in order to influence its resolution. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345, 94 S. Ct. 2997, 3009, 41 L. Ed. 2d 789 (1974).

Petitioner would have us extend the reasoning of *Cox Broadcasting* to safeguard even inaccurate and false statements, at least where "actual malice" has not been established. But its argument proves too much. It may be that all reports of judicial proceedings contain some informational value implicating the First Amendment, but recognizing this is little different from labeling all judicial proceedings matters of "public or general interest," as that phrase was used by the plurality in *Rosenbloom*. Whatever their general validity, use of such subject-matter classifications to determine the extent of constitutional protection afforded defamatory falsehoods may too often result in an improper balance between the competing interests in this area. It was our recognition and rejection of this weakness in the *Rosenbloom* test which led us in *Gertz* to eschew a subject-matter test for one focusing upon the character of the defamation plaintiff. See 418 U.S., at 344-346, 94 S. Ct., at 3009-3010. By confining inquiry to whether a plaintiff is a public officer or a public figure who might be assumed to "have voluntarily exposed [himself] to increased risk of injury from defamatory falsehoods," we sought a more appropriate accommodation between the public's interest in an uninhibited press and its equally compelling need for judicial redress of libelous utterances. *Cf. Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942).

Presumptively erecting the *New York Times* barrier against all plaintiffs seeking to recover for injuries from defamatory falsehoods published in what are alleged to be reports of judicial proceedings would effect substantial deprivation of the individual's interest in protection from such harm, without any convincing assurance that such a sacrifice is required under the First Amendment. And in some instances such an undiscriminating approach might achieve results directly at odds with the constitutional balance intended. Indeed, the article upon which the *Gertz* libel action was based purported to be a report on the murder trial of a Chicago police officer. *See* 418 U.S., at 325-326, 94 S. Ct., at 3000. Our decision in that case should make it clear that no such blanket privilege for reports of judicial proceedings is to be found in the Constitution.

It may be argued that there is still room for application of the *New York Times* protections to more narrowly focused reports of what actually transpires in the courtroom. But even so narrowed, the suggested privilege is simply too broad. Imposing upon the law of private defamation the rather drastic limitations worked by *New York Times* cannot be justified by generalized references to the public interest in reports of judicial proceedings. The details of many, if not most, courtroom battles would add almost nothing toward advancing the uninhibited debate on public issues thought to provide principal support for the decision in *New York Times*. See 376 U.S., at 270, 84 S. Ct., at 720; *cf. Rosenblatt v. Baer*, 383 U.S. 75, 86, 86 S. Ct. 669, 676, 15 L. Ed. 2d 597 (1966). And while participants in some litigation may be legitimate "public figures," either generally or for the limited purpose of that litigation, the majority will more likely resemble respondent, drawn into a public forum largely against their will in order to attempt to obtain the only redress available to them or to defend themselves against actions brought by the State or by others. There appears little reason why these individuals should substantially forfeit that degree of protection which the law of defamation would otherwise afford them simply by virtue of their being drawn into a courtroom. The public interest in accurate reports of judicial proceedings is substantially protected by *Cox Broadcasting Co.*, *supra*. As to inaccurate and defamatory reports of facts, matters deserving no First Amendment protection, see 418 U.S., at 340, 94 S. Ct., at 3007; we think *Gertz* provides an adequate safeguard for the constitutionally protected interests of the press and affords it a tolerable margin for error by requiring some type of fault.

III

Petitioner has urged throughout this litigation that it could not be held liable for publication of the "Milestones" item because its report of respondent's divorce was factually correct. In its view the Time article faithfully reproduced the precise meaning of the divorce judgment. But this issue was submitted to the jury under an instruction intended to implement Florida's limited privilege for accurate reports of judicial proceedings, App. 509; *see* 305 So. 2d, at 177. By returning a verdict for respondent the jury necessarily found that the identity of meaning which petitioner claims does
not exist even for laymen. The Supreme Court of Florida upheld this finding on appeal, rejecting petitioner's contention that its report was accurate as a matter of law. Because demonstration that an article was true would seem to preclude finding the publisher at fault, see Cox Broadcasting Co., 420 U.S., at 498-500, 95 S. Ct., at 1047 (POWELL, J., concurring), we have examined the predicate for petitioner's contention. We believe the Florida courts properly could have found the "Milestones" item to be false.

For petitioner's report to have been accurate, the divorce granted Russell Firestone must have been based on a finding by the divorce court that his wife had committed extreme cruelty toward him. And that she had been guilty of adultery. This is indisputably what petitioner reported in its "Milestones" item, but it is equally indisputable that these were not the facts. Russell Firestone alleged in his counterclaim that respondent had been guilty of adultery, but the divorce court never made any such finding. Its judgment provided that Russell Firestone's "counterclaim for divorce be and the same is hereby granted," but did not specify that the basis for the judgment was either of the two grounds alleged in the counterclaim. The Supreme Court of Florida on appeal concluded that the ground actually relied upon by the divorce court was "lack of domestication of the parties," a ground not theretofore recognized by Florida law. The Supreme Court nonetheless affirmed the judgment dissolving the bonds of matrimony because the record contained sufficient evidence to establish the ground of extreme cruelty. Firestone v. Firestone, 263 So. 2d 223, 225 (1972).

Petitioner may well argue that the meaning of the trial court's decree was unclear, but this does not license it to choose from among several conceivable interpretations the one most damaging to respondent. Having chosen to follow this tack, petitioner must be able to establish not merely that the item reported was a conceivable or plausible interpretation of the decree, but that the item was factually correct. We believe there is ample support for the jury's conclusion, affirmed by the Supreme Court of Florida, that this was not the case. There was, therefore, sufficient basis for imposing liability upon petitioner if the constitutional limitations we announced in Gertz have been satisfied. These are a prohibition against imposing liability without fault, 418 U.S., at 347, 94 S. Ct., at 3010, and the requirement that compensatory awards "be supported by competent evidence concerning the injury." Id., at 350, 94 S. Ct., at 3012.

As to the latter requirement little difficulty appears. Petitioner has argued that because respondent withdrew her claim for damages to reputation on the eve of trial, there could be no recovery consistent with Gertz. Petitioner's theory seems to be that the only compensable injury in a defamation action is that which may be done to one's reputation, and that claims not predicated upon such injury are by definition not actions for defamation. But Florida has obviously decided to permit recovery for other injuries without regard to measuring the effect the falsehood may have had upon a plaintiff's reputation. This does not transform the action into something other than an action for defamation as that term is meant in Gertz. In that opinion we made it clear that States could base awards on elements other than injury to reputation, specifically listing "personal humiliation, and mental anguish and suffering" as examples of injuries which might be compensated consistently with the Constitution upon a showing of fault. Because respondent has decided to forgo recovery for injury to her reputation, she is not prevented from obtaining compensation for such other damages that a defamatory falsehood may have caused her.

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4 Petitioner is incorrect in arguing that a rational interpretation of an ambiguous document is constitutionally protected under our decision in Time, Inc. v. Pape, 401 U.S. 279, 91 S. Ct. 633, 28 L. Ed. 2d 45 (1971). There we were applying the New York Times standard to test whether the defendant had acted in reckless disregard of the truth. Id., at 292, 91 S. Ct., at 640. But as we have concluded that the publication in this case need not be tested against the "actual malice" standard, Pape is of no assistance to petitioner.

5 In fact, it appears that none of petitioner's employees actually saw the decree prior to publication of the "Milestones" article. But we do not think this can affect the extent of constitutional protection afforded the statement. Moreover, petitioner has maintained throughout that it would have published an identical statement if its editorial staff had had an opportunity to pursue the judgment prior to their publication deadline, and has consistently contended that its article was true when compared to the words of that judgment.
The trial court charged, consistently with *Gertz*, that the jury should award respondent compensatory damages in "an amount of money that will fairly and adequately compensate her for such damages," and further cautioned that "[i]t is only damages which are a direct and natural result of the alleged libel which may be recovered." App. 509. There was competent evidence introduced to permit the jury to assess the amount of injury. Several witnesses testified to the extent of respondent’s anxiety and concern over Time’s inaccurately reporting that she had been found guilty of adultery, and she herself took the stand to elaborate on her fears that her young son would be adversely affected by this falsehood when he grew older. The jury decided these injuries should be compensated by an award of $100,000. We have no warrant for re-examining this determination. *Cf. Lincoln v. Power*, 151 U.S. 436, 38 L. Ed. 224 (1894).

IV

*Gertz* established, however, that not only must there be evidence to support an award of compensatory damages, there must also be evidence of some fault on the part of a defendant charged with publishing defamatory material. No question of fault was submitted to the jury in this case, because under Florida law the only findings required for determination of liability were whether the article was defamatory, whether it was true, and whether the defamation, if any, caused respondent harm.

The failure to submit the question of fault to the jury does not of itself establish noncompliance with the constitutional requirements established in *Gertz*, however. Nothing in the Constitution requires that assessment of fault in a civil case tried in a state court be made by a jury, nor is there any prohibition against such a finding being made in the first instance by an appellate, rather than a trial, court. The First and Fourteenth Amendments do not impose upon the States any limitations as to how, within their own judicial systems, factfinding tasks shall be allocated. If we were satisfied that one of the Florida courts which considered this case had supportably ascertained petitioner was at fault, we would be required to affirm the judgment below.

But the only alternative source of such a finding, given that the issue was not submitted to the jury, is the opinion of the Supreme Court of Florida. That opinion appears to proceed generally on the assumption that a showing of fault was not required, but then in the penultimate paragraph it recites:

Furthermore, this erroneous reporting is clear and convincing evidence of the negligence in certain segments of the news media in gathering the news. *Gertz v. Welch, Inc.*, supra. Pursuant to Florida law in effect at the time of the divorce judgment (Section 61.08, Florida Statutes), a wife found guilty of adultery could not be awarded alimony. Since petitioner had been awarded alimony, she had not been found guilty of adultery nor had the divorce been granted on the ground of adultery. A careful examination of the final decree prior to publication would have clearly demonstrated that the divorce had been granted on the grounds of extreme cruelty, and thus the wife would have been saved the humiliation of being accused of adultery in a nationwide magazine. This is a flagrant example of ‘journalistic negligence.’ 305 So. 2d, at 178.

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6 These included respondent’s minister, her attorney in the divorce proceedings, plus several friends and neighbors, one of whom was a physician who testified to having to administer a sedative to respondent in an attempt to reduce discomfort wrought by her worrying about the article.

7 After reiterating its conclusion that the article was false, the Florida court noted that falsely accusing a woman of adultery is libelous per se and normally actionable without proof of damages. The court then recognized that our opinion in *Gertz* necessarily displaced this presumption of damages but ruled that the trial court’s instruction was consistent with *Gertz* and that there was evidence to support the jury’s verdict conclusions with which we have agreed. The court went on to reject a claim of privilege under state law, pointing out that the privilege shielded only "fair and accurate" reports and the jury had resolved these issues against petitioner. The court appears to have concluded its analysis of petitioner’s legal claims with this statement, which immediately precedes the paragraph set out in the text: "Careful examination and consideration of the record discloses that the judgment of the trial court is correct and should have been affirmed on appeal to the District Court." 305 So. 2d, at 177-178. There is nothing in the court’s opinion which appears to make any reference to the relevance of some concept of fault in determining petitioner’s liability.
It may be argued that this is sufficient indication the court found petitioner at fault within the meaning of Gertz. Nothing in that decision or in the First or Fourteenth Amendment requires that in a libel action an appellate court treat in detail by written opinion all contentions of the parties, and if the jury or trial judge had found fault in fact, we would be quite willing to read the quoted passage as affirming that conclusion. But without some finding of fault by the judge or jury in the Circuit Court, we would have to attribute to the Supreme Court of Florida from the quoted language not merely an intention to affirm the finding of the lower court, but an intention to find such a fact in the first instance.

Even where a question of fact may have constitutional significance, we normally accord findings of state courts deference in reviewing constitutional claims here. See, e.g., Lyons v. Oklahoma, 322 U.S. 596, 602-603, 64 S. Ct. 1208, 1212-1213, 88 L. Ed. 1481 (1944); Gallegos v. Nebraska, 342 U.S. 55, 60-61, 72 S. Ct. 141, 144-145, 96 L. Ed. 86 (1951) (opinion of REED, J.). But that deference is predicated on our belief that at some point in the state proceedings some factfinder has made a conscious determination of the existence or nonexistence of the critical fact. Here the record before us affords no basis for such a conclusion.

It may well be that petitioner's account in its "Milestones" section was the product of some fault on its part, and that the libel judgment against it was, therefore, entirely consistent with Gertz. But in the absence of a finding in some element of the state court system that there was fault, we are not inclined to canvass the record to make such a determination in the first instance. Cf. Rosenblatt v. Baer, 383 U.S., at 87-88, 86 S. Ct., at 676-677. Accordingly, the judgment of the Supreme Court of Florida is vacated and the case remanded for further proceedings not inconsistent with this opinion.

So ordered.

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§ D. Constitutional Limitations

NEW YORK TIMES CO. v. SULLIVAN
376 U.S. 254 (1964)

Mr. Justice BRENNAN delivered the opinion of the Court

We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct.

Respondent L. B. Sullivan is one of the three elected Commissioners of the City of Montgomery, Alabama. He testified that he was "Commissioner of Public Affairs and the duties are supervision of the Police Department, Fire Department, Department of Cemetery and Department of Seals." He brought this civil libel action against the four individual petitioners, who are Negroes and Alabama clergymen, and against petitioner the New York Times Company, a New York corpora-
purported to illustrate the "wave of terror" by describing certain alleged events. The text concluded with an appeal for funds for three purposes: support of the student movement, "the struggle for the right-to-vote," and the legal defense of Dr. Martin Luther King, Jr., leader of the movement, against a perjury indictment then pending in Montgomery.

The text appeared over the names of 64 persons, many widely known for their activities in public affairs, religion, trade unions, and the performing arts. Below these names, and under a line reading "We in the south who are struggling daily for dignity and freedom warmly endorse this appeal," appeared the names of the four individual petitioners and of 16 other persons, all but two of whom were identified as clergymen in various Southern cities. The advertisement was signed at the bottom of the page by the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South," and the officers of the Committee were listed.

Of the 10 paragraphs of text in the advertisement, the third and a portion of the sixth were the basis of respondent's claim of libel. They read as follows: Third paragraph:

In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.

Sixth paragraph:

Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times — for 'speeding,' 'loitering' and similar 'offenses.' And now they have charged him with 'perjury' — a felony under which they could imprison him for ten years. . . .

Although neither of these statements mentions respondent by name, he contended that the word "police" in the third paragraph referred to him as the Montgomery Commissioner who supervised the Police Department, so that he was being accused of "ringing" the campus with police. He further claimed that the paragraph would be read as imputing to the police, and hence to him, the padlocking of the dining hall in order to starve the students into submission. 1

As to the sixth paragraph, he contended that since arrests are ordinarily made by the police, the statement "They have arrested [Dr. King] seven times" would be read as referring to him; he further contended that the "They who did the arresting would be equated with the "They" who committed the other described acts and with the "Southern violators." Thus, he argued, the paragraph would be read as accusing the Montgomery police, and hence him, of answering Dr. King's protests with "intimidation and violence," bombing his home, assaulting his person, and charging him with perjury. Respondent and six other Montgomery residents testified that they read some or all of the statements as referring to him in his capacity as Commissioner.

It is uncontroverted that some of the statements contained in the two paragraphs were not accurate descriptions of events which occurred in Montgomery. Although Negro students staged a demonstration on the State Capital steps, they sang the National Anthem and not "My Country, 'Tis of Thee." Although nine students were expelled by the State Board of Education, this was not for leading the demonstration at the Capitol, but for demanding service at a lunch counter in the Montgomery County Courthouse on another day. Not the entire student body, but most of it, had protested the expulsion, not by refusing to register, but by boycotting classes on a single day; virtually all the students did register for the ensuing semester. The campus dining hall was not padlocked on any occasion, and the only students who may have been barred from eating there were the few who had neither signed a preregistration application nor requested temporary meal tickets. Although the police were deployed near the campus in large numbers on three occasions, they

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1 Respondent did not consider the charge of expelling the students to be applicable to him, since "that responsibility rests with the State Department of Education."
did not at any time "ring" the campus, and they were not called to the campus in connection with the demonstration on the State Capitol steps, as the third paragraph implied. Dr. King had not been arrested seven times, but only four; and although he claimed to have been assaulted some years earlier in connection with his arrest for loitering outside a courtroom, one of the officers who made the arrest denied that there was such an assault.

On the premise that the charges in the sixth paragraph could be read as referring to him, respondent was allowed to prove that he had not participated in the events described. Although Dr. King’s home had in fact been bombed twice when his wife and child were there, both of these occasions antedated respondent’s tenure as Commissioner, and the police were not only not implicated in the bombings, but had made every effort to apprehend those who were. Three of Dr. King’s four arrests took place before respondent became Commissioner. Although Dr. King had in fact been indicted (he was subsequently acquitted) on two counts of perjury, each of which carried a possible five-year sentence, respondent had nothing to do with procuring the indictment.

Respondent made no effort to prove that he suffered actual pecuniary loss as a result of the alleged libel. One of his witnesses, a former employer, testified that if he had believed the statements, he doubted whether he "would want to be associated with anybody who would be a party to such things that are stated in that ad," and that he would not re-employ respondent if he believed "that he allowed the Police Department to do the things that the paper say he did." But neither this witness nor any of the others testified that he had actually believed the statements in their supposed reference to respondent.

The cost of the advertisement was approximately $4800, and it was published by the Times upon an order from a New York advertising agency acting for the signatory Committee. The agency submitted the advertisement with a letter from A. Philip Randolph, Chairman of the Committee, certifying that the persons whose names appeared on the advertisement had given their permission. Mr. Randolph was known to the Times' Advertising Acceptability Department as a responsible person, and in accepting the letter as sufficient proof of authorization it followed its established practice. There was testimony that the copy of the advertisement which accompanied the letter listed only the 64 names appearing under the text, and that the statement, "We in the south ... warmly endorse this appeal," and the list of names thereunder, which included those of the individual petitioners, were subsequently added when the first proof of the advertisement was received. Each of the individual petitioners testified that he had not authorized the use of his name, and that he had been unaware of its use until receipt of respondent’s demand for a retraction. The manager of the Advertising Acceptability Department testified that he had approved the advertisement for publication because he knew nothing to cause him to believe that anything in it was false, and because it bore the endorsement of "a number of people who are well known and whose reputation" he "had no reason to question." Neither he nor anyone else at the Times made an effort to confirm the accuracy of the advertisement, either by checking it against recent Times news stories relating to some of the described events or by any other means.

Alabama law denies a public officer recovery of punitive damages in a libel action brought on account of a publication concerning his official conduct unless he first makes a written demand for a public retraction and the defendant fails or refuses to comply. ALABAMA CODE, Tit. 7, § 914. Respondent served such a demand upon each of the petitioners. None of the individual petitioners responded to the demand, primarily because each took the position that he had not authorized the use of his name on the advertisement and therefore had not published the statements that respondent alleged had libeled him. The Times did not publish a retraction in response to the demand, but wrote respondent a letter stating, among other things, that "we ... are somewhat puzzled as to how you think the statements in any way reflect on you," and "you might, if you desire, let us know in what respect you claim that the statements in the advertisement reflect on you." Respondent filed this suit a few days later without answering the letter. The Times, however, subsequently publish a retraction of the advertisement upon the demand of Governor John Patterson of Alabama,

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2 Approximately 394 copies of the edition of the Times containing the advertisement were circulated in Alabama. Of these, about 35 copies were distributed in Montgomery County. The total circulation of the Times for that day was approximately 650,000 copies.
who asserted that the publication charged him with "grave misconduct and ... improper actions and omissions as Governor of Alabama and Ex-Officio Chairman of the State Board of Education of Alabama." When asked to explain why there had been a retraction for the Governor but not for respondent, the Secretary of the Times testified: "We did that because we didn't want anything that was published by The Times to be a reflection on the State of Alabama and the Governor was, as far as we could see, the embodiment of the State of Alabama and the proper representative of the State and, furthermore, we had by that time learned more of the actual facts which the ad purported to recite and, finally, the ad did refer to the action of the State authorities and the Board of Education presumably of which the Governor is the ex-officio chairman...." On the other hand, he testified that he did not think that "any of the language in there referred to Mr. Sullivan."

The trial judge submitted the case to the jury under instructions that the statements in the advertisement were "libelous per se" and were not privileged, so that petitioners might be held liable if the jury found that they had published the advertisement and that the statements were made "of and concerning" respondent. The jury was instructed that, because the statements were libelous per se, "the law ... implies legal injury from the bare fact of publication itself," "falsity and malice are presumed," "general damages need not be alleged or proved but are presumed," and "punitive damages may be awarded by the jury even though the amount of actual damages is neither found nor shown." An award of punitive damages — as distinguished from "general" damages, which are compensatory in nature — apparently requires proof of actual malice under Alabama law, and the judge charged that "mere negligence or carelessness is not evidence of actual malice or malice in fact, and does not justify an award of exemplary or punitive damages." He refused to charge, however, that the jury must be "convinced" of malice, in the sense of "actual intent" to harm or "gross negligence and recklessness," to make such an award, and he also refused to require that a verdict for respondent differentiate between compensatory and punitive damages. The judge rejected petitioners' contention that his rulings abridged the freedoms of speech and of the press that are guaranteed by the First and Fourteenth Amendments.

In affirming the judgment, the Supreme Court of Alabama sustained the trial judge's rulings and instructions in all respects. 273 Ala. 656, 144 So. 2d 25. It held that "[w]here the words published tend to injure a person libeled by them in his reputation, profession, trade or business, or charge him with an indictable offense, or tends to bring the individual into public contempt," they are "libelous per se"; that "the matter complained of is, under the above doctrine, libelous per se, if it was published of and concerning the plaintiff"; and that it was actionable without "proof of pecuniary injury ..., such injury being implied." Id., at 673, 676, 144 So. 2d, at 37, 41. It approved the trial court's ruling that the jury could find the statements to have been made "of and concerning" respondent, stating: "We think it common knowledge that the average person knows that municipal agents, such as police and firemen, and others, are under the control and direction of the city governing body, and more particularly under the direction and control of a single commissioner.

In measuring the performance or deficiencies of such groups, praise or criticism is usually attached to the official in complete control of the body." Id., at 674-675, 144 So. 2d at 39. In sustaining the trial court's determination that the verdict was not excessive, the court said that malice could be inferred from the Times' "irresponsibility" in printing the advertisement while "the Times in its own files had articles already published which would have demonstrated the falsity of the allegations in the advertisement"; from the Times' failure to retract for respondent while retracting for the Governor, whereas the falsity of some of the allegations was then known to the Times and "the matter contained in the advertisement was equally false as to both parties"; and from the testimony of the Times' Secretary that, apart from the statement that the dining hall was padlocked, he thought the two paragraphs were "substantially correct." Id., at 686-687, 144 So. 2d, at 50-51. The court reaffirmed a statement in an earlier opinion that "There is no legal measure of damages in cases of this character." Id., at 686, 144 So. 2d, at 50. It rejected petitioners' constitutional contentions with the brief statements that "The First Amendment of the U.S. Constitution does not protect libelous publications" and "The Fourteenth Amendment is directed against State action and not private action." Id., at 676, 144 So. 2d, at 40.

Because of the importance of the constitutional
issues involved, we granted the separate petitions for certiorari of the individual petitioners and of the Times. 371 U.S. 946, 83 S. Ct. 510, 9 L. Ed. 2d 496. We reverse the judgment. We hold that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct. 3 We further hold that under the proper safeguards the evidence presented in this case is constitutionally insufficient to support the judgment for respondent.

I

We may dispose at the outset of two grounds asserted to insulate the judgment of the Alabama courts from constitutional scrutiny. The first is the proposition relied on by the State Supreme Court — that "The Fourteenth Amendment is directed against State action and not private action." That proposition has no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. See, e.g., Alabama Code, Tit. 7, §§ 908-917. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised. See Ex parte Virginia, 100 U.S. 339, 346-347, 25 L. Ed. 676; American Federation of Labor v. Swing, 312 U.S. 321, 61 S. Ct. 568, 85 L. Ed. 855.

The second contention is that the constitutional guarantees of freedom of speech and of the press are inapplicable here, at least so far as the Times is concerned, because the allegedly libelous statements were published as part of a paid, "commercial" advertisement. The argument relies on Valentine v. Chrestensen, 316 U.S. 52, 62 S. Ct. 920, 86 L. Ed. 1262, where the Court held that a city ordinance forbidding street distribution of commercial and business advertising matter did not abridge the First Amendment freedoms, even as applied to a handbill having a commercial message on one side but a protest against certain official action on the other. The reliance is wholly misplaced. The Court in Chrestensen reaffirmed the constitutional protection for "the freedom of communicating information and disseminating opinion"; its holding was based upon the factual conclusions that the handbill was "purely commercial advertising" and that the protest against official action had been added only to evade the ordinance.

The publication here was not a "commercial" advertisement in the sense in which the word was used in Chrestensen. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern. See N.A.A.C.P. v. Button, 371 U.S. 415, 435, 83 S. Ct. 328, 9 L. Ed. 2d 405. That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold. Smith v. California, 361 U.S. 147, 150, 80 S. Ct. 215, 4 L. Ed. 2d 205; cf. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 64, n. 6, 83 S. Ct. 631, 9 L. Ed. 2d 584. Any other conclusion would discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities — who wish to exercise their freedom of speech even though they are not members of the press. Cf. Lovell v. City of Griffin, 303 U.S. 444, 452, 58 S. Ct. 666, 82 L. Ed. 949; Schneider v. State, 308 U.S. 147, 164, 60 S. Ct. 146, 84 L. Ed. 155.

3 Since we sustain the contentions of all the petitioners under the First Amendment's guarantees of freedom of speech and of the press as applied to the States by the Fourteenth Amendment, we do not decide the questions presented by the other claims of violation of the Fourteenth Amendment. The individual petitioners contend that the judgment against them offender the Due Process Clause because there was no evidence to show that they had published or authorized the publication of the alleged libel, and that the Due Process and Equal Protection Clauses were violated by racial segregation and racial bias in the courtroom. The Times contends that the assumption of jurisdiction over its corporate person by the Alabama courts overreaches the territorial limits of the Due Process Clause. The latter claim is foreclosed from our review by the ruling of the Alabama courts that the Times entered a general appearance in the action and thus waived its jurisdictional objection; we cannot say that this ruling lacks "fair or substantial support" in prior Alabama decisions. See Thompson v. Wilson, 224 Ala. 299, 140 So. 439 (1932); compare N.A.A.C.P. v. Alabama, 357 U.S. 449, 454-458, 78 S. Ct. 1163, 2 L. Ed. 2d 1488.
effect would be to shackle the First Amendment in its attempt to secure "the widest possible dissemination of information from diverse and antagonistic sources." Associated Press v. United States, 326 U.S. 1, 20, 65 S. Ct. 1416, 1424, 89 L. Ed. 2013. To avoid placing such a handicap upon the freedoms of expression, we hold that if the allegedly libelous statements would otherwise be constitutionally protected from the present judgment, they do not forfeit that protection because they were published in the form of a paid advertisement. 4

II

Under Alabama law as applied in this case, a publication is "libelous per se" if the words "tend to injure a person ... in his reputation" or to "bring [him] into public contempt"; the trial court stated that the standard was met if the words are such as to "injure him in his public office, or impute misconduct to him in his office, or want of official integrity, or want of fidelity to a public trust...." The jury must find that the words were published "of and concerning" the plaintiff, but where the plaintiff is a public official his place in the governmental hierarchy is sufficient evidence to support a finding that his reputation has been affected by statements that reflect upon the agency of which he is in charge. Once "libelous per se" has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars. Alabama Ride Co. v. Vance, 235 Ala. 263, 178 So. 438 (1938); Johnson Publishing Co. v. Davis, 271 Ala. 474, 494-495, 124 So. 2d 441, 457-458 (1960). His privilege of "fair comment" for expressions of opinion depends on the truth of the facts upon which the comment is based. Parsons v. Age-Herald Publishing Co., 181 Ala. 439, 450, 61 So. 345, 350 (1913). Unless he can discharge the burden of proving truth, general damages are presumed, and may be awarded without proof of pecuniary injury. A showing of actual malice is apparently a prerequisite to recovery of punitive damages, and the defendant may in any event forestall a punitive award by a retraction meeting the statutory requirements. Good motives and belief in truth do not negate an inference of malice, but are relevant only in mitigation of punitive damages if the jury chooses to accord them weight. Johnson Publishing Co. v. Davis, supra, 271 Ala., at 495, 124 So. 2d, at 458.

The question before us is whether this rule of liability, as applied to an action brought by a public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments.

Respondent relies heavily, as did the Alabama courts, on statements of this Court to the effect that the Constitution does not protect libelous publications. Those statements do not foreclose our inquiry here. None of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials. The dictum in Pennekamp v. Florida, 328 U.S. 331, 348-349, 66 S. Ct. 1029, 1038, 90 L. Ed. 1295, that "when the statements amount to defamation, a judge has such remedy in damages for libel as do other public servants," implied no view as to what remedy might constitutionally be afforded to public officials. In Beauharnais v. Illinois, 343 U.S. 250, 72 S. Ct. 725, 96 L. Ed. 919, the Court sustained an Illinois criminal libel statute as applied to a publication held to be both defamatory of a racial group and "liable to cause violence and disorder." But the Court was careful to note that it "retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel"; for "public men, are, as it were, public property," and "discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled." Id., at 263-264, 72 S. Ct. at 734, 96 L. Ed. 919 and n.18. In the only previous case that did present the question of constitutional limitations upon the power to award damages for libel of a public official, the Court was equally divided and the question was not decided. Schenectady Union Pub.

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4 See American Law Institute, Restatement of Torts, § 593, Comment b (1938).

believed ... that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."

Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. See Terminiello v. Chicago, 337 U.S. 1, 4, 69 S. Ct. 894, 93 L. Ed. 1131; De Jonge v. Oregon, 299 U.S. 353, 365, 57 S. Ct. 255, 81 L. Ed. 278. The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent. Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker. Cf. Speiser v. Randall, 357 U.S. 513, 525-526, 78 S. Ct. 1332, 2 L. Ed. 2d 1460. The constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." N.A.A.C.P. v. Button, 371
U.S. 415, 445, 83 S. Ct. 328, 344, 9 L. Ed. 2d 405. As Madison said, "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION (1876), p. 571. In Cantwell v. Connecticut, 310 U.S. 296, 310, 60 S. Ct. 900, 906, 84 L. Ed. 1213, the Court declared:

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the "breathing space" that they "need ... to survive," N.A.A.C.P. v. Button, 371 U.S. 415, 433, 83 S. Ct. 328, 338, 9 L. Ed. 2d 405, was also recognized by the Court of Appeals for the District of Columbia Circuit in Sweeney v. Patterson, 76 U.S. App. D.C. 23, 24, 128 F.2d 457, 458 (1942), cert. denied, 317 U.S. 678, 63 S. Ct. 160, 87 L. Ed. 544. Judge Edgerton spoke for a unanimous court which affirmed the dismissal of a Congressman's libel suit based upon a newspaper article charging him with anti-Semitism in opposing a judicial appointment. He said:

Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors.... The interest of the public here outweighs the interest of appellant or any other individual. The protection of the public requires not merely discussion, but information. Political conduct and views which some respectable people approve, and others condemn, are constantly imputed to Congressmen. Errors of fact, particularly in regard to a man's mental states and processes, are inevitable.... Whatever is added to the field of libel is taken from the field of free debate."

Injury to official reputation error affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. Bridges v. California, 314 U.S. 252, 62 S. Ct. 190, 86 L. Ed. 192. This is true even though the utterance contains "half-truths" and "misinformation." Pennekamp v. Florida, 328 U.S. 331, 342, 343, n.5, 345, 66 S. Ct. 1029, 90 L. Ed. 1295. Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. See also Craig v. Harney, 331 U.S. 367, 67 S. Ct. 1249, 91 L. Ed. 1546; Wood v. Georgia, 370 U.S. 375, 82 S. Ct. 1364, 8 L. Ed. 2d 569. If judges are to be treated as "men of fortitude, able to thrive in a hardy climate," Craig v. Harney, supra, 331 U.S., at 376, 67 S. Ct., at 1255, 91 L. Ed. 1546, surely the same must be true of other government officials, such as elected city commissioners.7 Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.

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6 See also MILL, ON LIBERTY (Oxford: Blackwell, 1947), at 47: "[T]o argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion ... all this, even to the most aggravated degree, is so continually done in perfect good faith, by persons who are not considered, and in many other respects may not deserve to be considered, ignorant or incompetent, that it is rarely possible, on adequate grounds, conscientiously to stamp the misrepresentation as morally culpable; and still less could law presume to interfere with this kind of controversial misconduct."

7 The climate in which public officials operate, especially during a political campaign, has been described by one commentator in the following terms: "Charges of gross incompetence, disregard of the public interest, communist sympathies, and the like usually have filled the air; and hints of bribery, embezzlement, and other criminal conduct are not infrequent." Noel, Defamation of Public Officers and Candidates, 49 Col. L. Rev. 875 (1949). For a similar description written 60 years earlier, see Chase, Criticism of Public Officers and Candidates for Office, 23 Am. L. Rev. 346 (1889).
If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate. This is the lesson to be drawn from the great controversy over the Sedition Act of 1798, 1 Stat. 596, which first crystallized a national awareness of the central meaning of the First Amendment. . . .

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What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. See City of Chicago v. Tribune Co., 307 Ill. 595, 607, 139 N.E. 86, 90 (1923). Alabama, for example, has a criminal libel law which subjects to prosecution "any person who speaks, writes, or prints . . . statements honestly made is no less punishable upon conviction a fine not exceeding $500 and a prison sentence of six months. ALABAMA CODE, Tit. 14, § 350. Presumably a person charged with violation of this statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action. The judgment awarded in this case — without the need for any proof of actual pecuniary loss — was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the Sedition Act. And since there is no double-jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded against petitioners for the same publication. . . .

Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive. Plainly the Alabama law of civil libel is "a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70, 83 S. Ct. 631, 639, 9 L. Ed. 2d 584.

The state rule of law is not saved by its allowance of the defense of truth. A defense for erroneous statements honestly made is no less essential here than was the requirement of proof of guilty knowledge which, in Smith v. California, 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205, we held indispensable to a valid conviction of a bookseller for possessing obscene writings for sale. We said:

For if the bookseller is criminally liable without knowledge of the contents, . . . he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. . . . And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. . . . His timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded. (361 U.S. 147, 153-154, 80 S. Ct. 215, 218, 4 L. Ed. 2d 205.)

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions — and to do so on pain of libel judgments virtually

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9 The Times states that four other libel suits based on the advertisement have been filed against it by others who have served as Montgomery City Commissioners and by the Governor of Alabama; that another $500,000 verdict has been awarded in the only one of these cases that has (continued . . .)

NEW YORK TIMES CO. v. SULLIVAN

9(continued)
yet gone to trial; and that the damages sought in the other three total $2,000,000.
unlimited in amount—leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adding legal proofs that the alleged libel was true in all its factual particulars. See, e.g., Post Publishing Co. v. Hallam, 59 F. 530, 540 (C.A. 6th Cir. 1893); see also Noel, Defamation of Public Officers and Candidates, 49 Col. L. Rev. 875, 892 (1949). Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." Speiser v. Randall, supra, 357 U.S., at 526, 78 S. Ct. at 1342, 2 L. Ed. 2d 1460. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

* * *

Such a privilege for criticism of official conduct is appropriately analogous to the protection accorded a public official when he is sued for libel by a private citizen. In Barr v. Matteo, 360 U.S. 564, 575, 79 S. Ct. 1335, 1341, 3 L. Ed. 2d 1434, this Court held the utterance of a federal official to be absolutely privileged if made "within the outer perimeter" of his duties. The States accord the same immunity to statements of their highest officers, although some differentiate their lesser officials and qualify the privilege they enjoy. But all hold that all officials are protected unless actual malice can be proved. The reason for the official privilege is said to be that the threat of damage suits would otherwise "inhibit the fearless, vigorous, and effective administration of policies of government" and "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." Barr v. Matteo, supra, 360 U.S., at 571, 79 S. Ct., at 1339, 3 L. Ed. 2d 1434. Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer. See Whitney v. California, 274 U.S. 357, 375, 47 S. Ct. 641, 648, 71 L. Ed. 1095 (concurring opinion of Mr. Justice BRANDEIS), quoted supra, pp. 720, 721. As Madison said, see supra, p. 723, "the censorial power is in the people over the Government, and not in the Government over the people." It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves.

We conclude that such a privilege is required by the First and Fourteenth Amendments.

III

We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action, the


13 We have no occasion here to determine how far down into the lower ranks of government employees the "public official" designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. Cf. Barr v. Matteo, 360 U.S. 564, 573-575, 79 S. Ct. 1335, 1340-1341, 3 L. Ed. 2d 1434. Nor need we here determine the boundaries of the "official conduct" concept. It is enough for the present case that respondent's position as an elected city commissioner clearly made him a public official, and that the allegations in the advertisement concerned what was

(continued...)

NEW YORK TIMES CO. v. SULLIVAN
rule requiring proof of actual malice is applicable. While Alabama law apparently requires proof of actual malice for an award of punitive damages, where general damages are concerned malice is "presumed." Such a presumption is inconsistent with the federal rule. "The power to create presumptions is not a means of escape from constitutional restrictions," Bailey v. Alabama, 219 U.S. 219, 239, 31 S. Ct. 145, 151, 55 L. Ed. 191; 
"[t]he showing of malice required for the forfeiture of the privilege is not presumed but is a matter for proof by the plaintiff...." Lawrence v. Fox, 357

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13(...)continued

allegedly his official conduct as Commissioner in charge of the Police Department. As to the statements alleging the assaulting of Dr. King and the bombing of his home, it is immaterial that they might not be considered to involve respondent's official conduct if he himself had been accused of perpetrating the assault and the bombing. Respondent does not claim that the statements charged him personally with these acts; his contention is that the advertisement connects him with them only in his official capacity as the Commissioner supervising the police, on the theory that the police might be equated with the "They" who did the bombing and assaulting. Thus, if these allegations can be read as referring to respondent at all, they must be read as describing his performance of his official duties.

14 Johnson Publishing Co. v. Davis, 271 Ala. 474, 487, 124 So. 2d 441, 450 (1960). Thus, the trial judge here instructed the jury that "mere negligence or carelessness is not evidence of actual malice or malice in fact, and does not justify an award of exemplary or punitive damages in an action for libel."

The court refused, however, to give the following instruction which had been requested by the Times:

I charge you ... that punitive damages, as the name indicates, are designed to punish the defendant, the New York Times Company, a corporation, and the other defendants in this case, ... and I further charge you that such punitive damages may be awarded only in the event that you, the jury, are convinced by a fair preponderance of the evidence that the defendant ... was motivated by personal illwill, that is actual intent to do the plaintiff harm, or that the defendant ... was guilty of gross negligence and recklessness and not of just ordinary negligence or carelessness in publishing the matter complained of so as to indicate a wanton disregard of plaintiff's rights.

The trial court's error in failing to require any finding of actual malice for an award of general damages makes it unnecessary for us to consider the sufficiency under the federal standard of the instructions regarding actual malice that were given as to punitive damages.

NEW YORK TIMES CO. v. SULLIVAN


Since the trial judge did not instruct the jury to differentiate between general and punitive damages, it may be that the verdict was wholly an award of one or the other. But it is impossible to know, in view of the general verdict returned. Because of this uncertainty, the judgment must be reversed and the case remanded. Stromberg v. California, 283 U.S. 359, 367-368, 51 S. Ct. 532, 535, 75 L. Ed. 1117; Williams v. North Carolina, 317 U.S. 287, 291-292, 63 S. Ct. 207, 209-210, 87 L. Ed. 279; see Yates v. United States, 354 U.S. 298, 311-312, 77 S. Ct. 1064, 1073, 1 L. Ed. 2d 1356; Cramer v. United States, 325 U.S. 1, 36, n.45, 65 S. Ct. 918, 935, 940, 89 L. Ed. 1441.

Since respondent may seek a new trial, we deem that considerations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across "the line between speech unconditionally guaranteed and speech which may legitimately be regulated." Speiser v. Randall, 357 U.S. 513, 525, 78 S. Ct. 1332, 1342, 2 L. Ed. 2d 1460. In cases where that line must be drawn, the rule is that we "examine for ourselves the statements in issue and the circumstances under which they were made to see ... whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect."

Pennekamp v. Florida, 328 U.S. 331, 335, 66 S. Ct. 1029, 1031, 90 L. Ed. 1295; see also One Inc., v. Olesen, 355 U.S. 371, 78 S. Ct. 364, 2 L. Ed. 2d 352; Sunshine Book Co. v. Summerville, 355 U.S. 372, 78 S. Ct. 365, 2 L. Ed. 2d 352. We must "make an independent examination of the whole record," Edwards v. South Carolina, 372 U.S. 229, 235, 83 S. Ct. 680, 683, 9 L. Ed. 2d 697, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the

field of free expression.  

Applying these standards, we consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law. The case of the individual petitioners requires little discussion. Even assuming that they could constitutionally be found to have authorized the use of their names on the advertisement, there was no evidence whatever that they were aware of any erroneous statements or were in any way reckless in that regard. The judgment against them is thus without constitutional support.

As to the Times, we similarly conclude that the facts do not support a finding of actual malice. The statement by the Times' Secretary that, apart from the padlocking allegation, he thought the advertisement was "substantially correct," affords no constitutional warrant for the Alabama Supreme Court's conclusion that it was a "cautious opinion of the falsity of the advertisement [from which], the jury could have but been impressed with the bad faith of The Times, and itsmaliciousness inferable therefrom." The statement does not indicate malice at the time of the publication; even if the advertisement was not "substantially correct" — although respondent's own proofs tend to show that it was — that opinion was at least a reasonable one, and there was no evidence to impeach the witness' good faith in holding it. The Times' failure to retract upon respondent's demand, although it later retracted upon the demand of Governor Patterson, is likewise not adequate evidence of malice for constitutional purposes. Whether or not a failure to retract may ever constitute such evidence, there are two reasons why it does not here. First, the letter written by the Times reflected a reasonable doubt on its part as to whether the advertisement could reasonably be taken to refer to respondent at all. Second, it was not a final refusal, since it asked for an explanation on this point — a request that respondent chose to ignore. Nor does the retraction upon the demand of the Governor supply the necessary proof. It may be doubted that a failure to retract which is not itself evidence of malice can retroactively become such by virtue of a retraction subsequently made to another party. But in any event that did not happen here, since the explanation given by the Times' Secretary for the distinction drawn between respondent and the Governor was a reasonable one, the good faith of which was not impeached.

Finally, there is evidence that the Times published the advertisement without checking its accuracy against the news stories in the Times' own files. The mere presence of the stories in the files does not, of course, establish that the Times "knew" the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement. With respect to the failure of those persons to make the check, the record shows that they relied upon their knowledge of the good reputation of many of those whose names were listed as sponsors of the advertisement, and upon the letter from A. Philip Randolph, known to them as a responsible individual, certifying that the use of the names was authorized. There was testimony that the persons handling the advertisement saw nothing in it that would render it unacceptable under the Times' policy of rejecting advertisements containing "attacks of a personal character," their failure to reject it on this ground

\[16\] The Seventh Amendment does not, as respondent contends, preclude such an examination by this Court. That Amendment, providing that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law," is applicable to state cases coming here. Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 242-243, 17 S. Ct. 581, 587, 41 L. Ed. 979; cf. The Justices v. Murray, 9 Wall. 274, 19 L. Ed. 658. But its ban on re-examination of facts does not preclude us from determining whether governing rules of federal law have been properly applied to the facts. "[T]his Court will review the finding of facts by a State court ... where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." Fiske v. Kansas, 274 U. S. 380, 385-386, 47 S. Ct. 655; 656-657, 71 L. Ed. 1108. See also Haynes v. Washington, 373 U. S. 503, 515-516, 83 S. Ct. 1336, 1344, 10 L. Ed. 2d 513.

\[17\] The Times has set forth in a booklet its "Advertising Acceptability Standards." Listed among the classes of advertising that the newspaper does not accept are advertisements that are "fraudulent or deceptive," that are "ambiguous in wording and ... may mislead," and that contain "attacks of a personal character." In relying to respondent's interrogatories before the trial, the Secretary of the Times stated that "as the advertisement made no attacks of a personal character upon any individual and (continued...)"
was not unreasonable. We think the evidence against the TIMES supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice. Cf. Charles Parker Co. v. Silver City Crystal Co., 142 Conn. 605, 618, 116 A.2d 440, 446 (1955); Phoenix Newspapers, Inc. v. Choissner, 82 Ariz. 271, 277-278, 312 P.2d 150, 154-155 (1957).

We also think the evidence was constitutionally defective in another respect: it was incapable of supporting the jury’s finding that the allegedly libelous statements were made "of and concerning" respondent. Respondent relies on the words of the advertisement and the testimony of six witnesses to establish a connection between it and himself. Thus, in his brief to this Court, he states:

The reference to respondent as police commissioner is clear from the ad. In addition, the jury heard the testimony of a newspaper editor ...; a real estate and insurance man ...; the sales manager of a men’s clothing store ...; a food equipment man ...; a service station operator ...; and the operator of a truck line for whom respondent had formerly worked.... Each of these witnesses stated that he associated the statements with respondent...." (Citations to record omitted.)

There was no reference to respondent in the advertisement, either by name or official position. A number of the allegedly libelous statements — the charges that the dining hall was padlocked and that Dr. King’s home was bombed, his person assaulted, and a perjury prosecution instituted against him — did not even concern the police; despite the ingenuity of the arguments which would attach this significance to the word "They," it is plain that these statements could not reasonably be read as accusing respondent of personal involvement in the acts in question. The statements upon which respondent principally relies as referring to him are the two allegations that did concern the police or police functions: that "truckloads of police ... ringed the Alabama State College Campus" after the demonstration on the State Capitol steps, and that Dr. King had been "arrested ... seven times." These statements were false only in that the police had been "deployed near" the campus but had not actually "ringed" it and had not gone there in connection with the State Capitol demonstration, and in that Dr. King had been arrested only four times. The ruling that these discrepancies between what was true and what was asserted were sufficient to injure respondent’s reputation may itself raise constitutional problems, but we need not consider them here. Although the statements may be taken as referring to the police, they did not on their face make even an oblique reference to respondent as an individual. Support for the asserted reference must, therefore, be sought in the testimony of respondent’s witnesses. But none of them suggested any basis for the belief that respondent himself was attacked in the advertisement beyond the bare fact that he was in overall charge of the Police Department and thus bore official responsibility for police conduct; to the extent that some of the witnesses thought respondent to have been charged with ordering or approving the conduct or otherwise being personally involved in it, they based this notion not on any statements in the advertisement, and not on any evidence that he had in fact been so involved, but solely on the unsupported assumption that, because of his official position, he must have been. This reliance on the bare fact of

17 (...continued)
otherwise met the advertising acceptability standards promulgated, it had been approved for publication.
respondent's official position\(^\text{19}\) was made explicit by the Supreme Court of Alabama. That court, in holding that the trial court "did not err in overruling the demurrer [of the TIMES] in the aspect that the libelous matter was not of and concerning the [plaintiff]," \(^\text{9}\) based its ruling on the proposition that:

We think it common knowledge that the average person knows that municipal agents, such as police and firemen, and others, are under the control and direction of the city governing body, and more particularly under the direction and control of a single commissioner. In measuring the performance or deficiencies of such groups, praise or criticism is usually attached to the official in complete control of the body." 273 Ala., at 674-675, 144 So. 2d, at 39.

This proposition has disquieting implications for criticism of governmental conduct. For good reason, "no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence." \textit{City of Chicago v. Tribune Co.}, 307 Ill. 595, 601, 139 N.E. 86, 88, 28 A.L.R. 1368 (1923). The present proposition would sidestep this obstacle by transmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed. There is no legal alchemy by which a State may thus create the cause of action that would otherwise be denied for a publication which, as respondent himself said of the advertisement, "reflects not only on me but on the other Commissioners and the community." Raising as it does the possibility that a good-faith critic of government will be penalized for his criticism, the proposition relied on by the Alabama courts strikes at the very center of the constitutionally protected area of free expression.\(^\text{20}\)

We hold that such a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations. Since it was relied on exclusively here, and there was no other evidence to connect the statements with respondent, the evidence was

\(^{19}\)(...continued)

the statement about the padlocking of the dining hall, he would have thought "that the people on our police force or the heads of our police force were acting without their jurisdiction and would not be competent for the position."

"I would assume that the Commissioner had ordered the police force to do that and therefore it would be his responsibility."

Harry W. Kaminsky associated the statement about "truckloads of police" with respondent "because he is the Police Commissioner." He thought that the reference to arrests in the sixth paragraph "implicates the Police Department, I think, or the authorities that would do that—arrest folks for speeding and loitering and such as that."

Asked whether he would associate with respondent a newspaper report that the police had "beat somebody up or assaulted them on the streets of Montgomery," he replied: "I still say he is the Police Commissioner and those men are working directly under him and therefore I would think that he would have something to do with it."

In general, he said, "I look at Mr. Sullivan when I see the Police Department."

H.M. Price, Sr., testified that he associated the first sentence of the third paragraph with respondent because: "I would just automatically consider that the Police Commissioner in Montgomery would have to put his approval on those kind of things as an individual."

William M. Parker, Jr., testified that he associated the statements in the two paragraphs with the Commissioners of the City of Montgomery, and since respondent "was the Police Commissioner," he "thought of him first." He told the examining counsel: "I think if you were the Police Commissioner I would have thought it was speaking of you."

Horace W. White, respondent's former employer, testified that the statement about "truckloads of police" made him think of respondent "as being the head of the Police Department." Asked whether he read the statement as charging respondent himself with ringing the campus or having shotguns and teargas, he replied: "Well, I thought of his department being charged with it, yes, sir. He is the head of the Police Department as I understand it." He further said that the reason he would have been unwilling to re-employ respondent if he had believed the advertisement was "the fact that he allowed the Police Department to do the things that the paper say he did."


\(^\text{20}\)Insofar as the proposition means only that the statements about police conduct libeled respondent by implicitly criticizing his ability to run the Police Department, recovery is also precluded in this case by the doctrine of fair comment. \textit{See American Law Institute, Restatement of Torts} (1938), § 607. Since the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact. Both defenses are of course defeasible if the public official proves actual malice, as was not done here.

\textit{NEW YORK TIMES CO. v. SULLIVAN}
constitutorally insufficient to support a finding that the statements referred to respondent.

The judgment of the Supreme Court of Alabama is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice BLACK, with whom Mr. Justice DOUGLAS joins (concurring).

I concur in reversing this half-million-dollar judgment against the New York Times Company and the four individual defendants. In reversing the Court holds that "the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct." Ante, p. 727. I base my vote to reverse on the belief that the First and Fourteenth Amendments not merely "delimit" a State's power to award damages to "public officials against critics of their official conduct" but completely prohibit a State from exercising such a power....

* * *

Mr. Justice GOLDBERG, with whom Mr. Justice DOUGLAS joins (concurring in the result)

The Court today announces a constitutional standard which prohibits "a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" —that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Ante, at p. 726. The Court thus rules that the Constitution gives citizens and newspapers a "conditional privilege" immunizing nonmalicious misstatements of fact regarding the official conduct of a government officer. The impressive array of history and precedent marshaled by the Court, however, confirms my belief that the Constitution affords greater protection than that provided by the Court's standard to citizen and press in exercising the right of public criticism.

* * *

GERTZ v. ROBERT WELCH, INC.

418 U.S. 323 (1974)

[Elmer Gertz, a lawyer, sued Welch, publisher of AMERICAN OPINION (the magazine of the John Birch Society), for libel. AMERICAN OPINION published a story about a police officer who had been charged with the death of a boy. After the policeman was convicted of second degree murder, Gertz represented the boy's parents in a civil suit against the police officer. In the article Welch portrayed Gertz as a Communist who was the "architect" of a "frame-up" against the police officer. In fact, he was not involved in the prosecution of the case. Several other inaccuracies about Gertz' background were included in the article, which was not checked by the managing editor of AMERICAN OPINION.

Gertz recovered a jury verdict, but the verdict was reversed by the court of appeals, which held that the NEW YORK TIMES standard had not been met.]

Justice POWELL delivered the opinion of the Court.

* * *

III

We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. New York Times Co. v. Sullivan, 376 U.S., at 270, 84 S. Ct., at 721. They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Chaplinsky v. New Hampshire, 315

1 As Thomas Jefferson made the point in his first Inaugural Address: "If there be any among us who would wish to dissolve this Union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."
Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. As James Madison pointed out in the Report on the Virginia Resolutions of 1798: "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." 4 J. Elliot, Debates on the Federal Constitution of 1787, p. 571 (1876). And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally freedoms of speech and press. Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship. Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties. As the Court stated in New York Times Co. v. Sullivan, supra, 376 U.S., at 279, 84 S. Ct., at 725: "Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred." The First Amendment requires that we protect some falsehood in order to protect speech that matters.

The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation. See New York Times Co. v. Sullivan, supra, at 293, 84 S. Ct., at 733 (BLACK, J., concurring); Garrison v. Louisiana, 379 U.S., at 80, 85 S. Ct., at 218 (1964) (DOUGLAS, J., concurring); Curtis Publishing Co. v. Butts, 388 U.S., at 170, 87 S. Ct., at 1999 (opinion of BLACK, J.). Such a rule would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation.

The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose, for, as Mr. Justice Stewart has reminded us, the individual's right to the protection of his own good name reflects no more than our basic concept of the essential dignity and worth of every human being —a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system." Rosenblatt v. Baer, 383 U.S. 75, 92, 86 S. Ct. 669, 679, 15 L. Ed. 2d 597 (1966) (concurring opinion).

Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury. As Mr. Justice Harlan stated, "some antithesis between freedom of speech and press and libel actions persists, for libel remains premised on the content of speech and limits the freedom of the publisher to express certain sentiments, at least without guaranteeing legal proof of their substantial accuracy." Curtis Publishing Co. v. Butts, supra, 388 U.S., at 152, 87 S. Ct., at 1990. In our continuing effort to define the proper accommodation between these competing concerns, we have been especially anxious to assure to the freedoms of speech and press that "breathing space" essential to their fruitful exercise. NAACP v. Button, 371 U.S. 415, 433, 83 S. Ct. 328, 338, 9 L. Ed. 2d 405 (1963). To that end this Court has extended a measure of strategic protection to defamatory falsehood.

The New York Times standard defines the level of constitutional protection appropriate to the context of defamation of a public person. Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth. This standard administers an extremely powerful antidote to the inducement to
media self-censorship of the common-law rule of strict liability for libel and slander. And it exacts a correspondingly high price from the victims of defamatory falsehood. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the New York Times test. Despite this substantial abridgment of the state law right to compensation for wrongful hurt to one’s reputation, the Court has concluded that the protection of the New York Times privilege should be available to publishers and broadcasters of defamatory falsehood concerning public officials and public figures. New York Times Co. v. Sullivan, supra; Curtis Publishing Co. v. Butts, supra. We think that these decisions are correct, but we do not find their holdings justified solely by reference to the interest of the press and broadcast media in immunity from liability. Rather, we believe that the New York Times rule states an accommodation between this concern and the limited state interest present in the context of libel actions brought by public persons. For the reasons stated below, we conclude that the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them. Theoretically, of course, the balance between the needs of the press and the individual’s claim to compensation for wrongful injury might be struck on a case-by-case basis. As Mr. Justice Harlan hypothesized, “it might seem, purely as an abstract matter, that the most utilitarian approach would be to scrutinize carefully every jury verdict in every libel case, in order to ascertain whether the final judgment leaves fully protected whatever First Amendment values transcend the legitimate state interest in protecting the particular plaintiff who prevailed.” Rosenbloom v. Metromedia, Inc., 403 U.S., at 63, 91 S. Ct., at 1829 (footnote omitted). But this approach would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an ad hoc resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application. Such rules necessarily treat alike various cases involving differences as well as similarities. Thus it is often true that not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority.

With that caveat we have no difficulty in distinguishing among defamation plaintiffs. The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

More important than the likelihood that private individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. And society’s interest in the officers of government is not strictly limited to the formal discharge of official duties. As the Court pointed out in Garrison v. Louisiana, 379 U.S., at 77, 85 S. Ct., at 217, the public’s interest extends to “anything which might touch on an official’s fitness for office... Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official’s private character.”

Those classed as public figures stand in a similar position. 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

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2 Of course, an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie. But the fact that the self-help remedy of rebuttal, standing alone, is inadequate to its task does not mean that it is irrelevant to our inquiry.
particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual. He has not accepted public office or assumed an "influential role in ordering society." Curtis Publishing Co. v. Butts, 388 U.S., at 164, 87 S. Ct., at 1996 (WARREN, C.J., concurring in result). He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.

For these reasons we conclude that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual. The extension of the New York Times test proposed by the Rosenbloom plurality would abridge this legitimate state interest to a degree that we find unacceptable. And it would occasion the additional difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of "general or public interest" and which do not—to determine, in the words of Mr. Justice Marshall, "what information is relevant to self-government." Rosenbloom v. Metromedia, Inc., 403 U.S., at 79, 91 S. Ct., at 1837. We doubt the wisdom of committing this task to the conscience of judges. Nor does the Constitution require us to draw so thin a line between the drastic alternatives of the New York Times privilege and the common law of strict liability for defamatory error. The "public or general interest" test for determining the applicability of the New York Times standard to private defamation actions inadequately serves both of the competing values at stake. On the one hand, a private individual whose reputation is injured by defamatory falsehood that does concern an issue of public or general interest has no recourse unless he can meet the rigorous requirements of New York Times. This is true despite the factors that distinguish the state interest in compensating private individuals from the analogous interest involved in the context of public persons. On the other hand, a publisher or broadcaster of a defamatory error which a court deems unrelated to an issue of public or general interest may be held liable in damages even if it took every reasonable precaution to ensure the accuracy of its assertions. And liability may far exceed compensation for any actual injury to the plaintiff, for the jury may be permitted to presume damages without proof of loss and even to award punitive damages.

We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. Our caveat against strict liability is the prime target of Mr. Justice WHITE'S dissent. He would hold that a publisher or broadcaster may be required to prove the truth of a defamatory statement concerning a private individual and, failing such proof, that the publisher or broadcaster may be held liable for defamation even though he took every conceivable precaution to ensure the accuracy of the offending statement prior to its dissemination. In Mr. Justice WHITE'S view, one who publishes a statement that later turns out to be inaccurate can never be "without fault" in any meaningful sense, for "[i]t is he who circulated a falsehood that he was not required to publish." Post, at 3033 (emphasis added).

Mr. Justice WHITE characterizes New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), as simply a case of seditious libel. Post, at 3030. But that rationale is certainly inapplicable to Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967), where Mr. Justice White joined four other Members of the Court to extend the knowing-or-reckless-falsity standard to media defamation of persons identified as public figures but not connected with the Government. Mr. Justice WHITE now suggests that he would abide by that vote, post, at 3036, but the full thrust of his dissent — as we read it — contradicts that suggestion. Finally, in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 57, 91 S. Ct. 1811, 1827, 29 L. Ed. 2d 296 (1971), Mr. Justice White voted to apply the New York Times privilege to media defamation of an individual who was neither a public official nor a public figure. His opinion states that the knowing-or-reckless-falsity standard should apply to media "comment upon the official actions of public servants," id., at 62, 91 S. Ct., at 1829 including defamatory falsehood about a person arrested by the police. If adopted by the Court, this conclusion would significantly extend the New York Times privilege.

Mr. Justice WHITE asserts that our decision today "trivializes and denigrates the interest in reputation," Miami Herald Publishing Co. v. Tornillo, 418 U.S., at 262, 94 S. Ct., at 2842 (concurring opinion), that it

GERTZ v. ROBERT WELCH, INC.
provides a more equitable boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation. At least this conclusion obtains where, as here, the substance of the defamatory statement "makes substantial danger to reputation apparent." This phrase places in perspective the conclusion we announce today. Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential. Cf. Time, Inc. v. Hill, 385 U.S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967). Such a case is not now before us, and we intimate no view as to its proper resolution.

IV

Our accommodation of the competing values at stake in defamation suits by private individuals allows the States to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by New York Times. This conclusion is not based on a belief that the considerations which prompted the adoption of the New York Times privilege for defamation of public officials and its extension to public figures are wholly inapplicable to the context of private individuals. Rather, we endorse this approach in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation. But this countervailing state interest extends no further than compensation for actual injury. For the reasons stated below, we hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth. The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.

We would not, of course, invalidate state law simply because we doubt its wisdom, but here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment. It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved. It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. We need not define "actual injury," as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

We also find no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined

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"scuttle[s] the libel laws of the States in ... wholesale fashion" and renders ordinary citizens "powerless to protect themselves." Post, at 3022. In light of the progressive extension of the knowing-or-reckless-falsity requirement detailed in the preceding paragraph, one might have viewed today's decision allowing recovery under any standard save strict liability as a more generous accommodation of the state interest in comprehensive reputational injury to private individuals than the law presently affords.


GERTZ v. ROBERT WELCH, INC.
standards of liability for defamation. In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence. In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by New York Times may recover only such damages as are sufficient to compensate him for actual injury.

V

Notwithstanding our refusal to extend the New York Times privilege to defamation of private individuals, respondent contends that we should affirm the judgment below on the ground that petitioner is either a public official or a public figure. There is little basis for the former assertion. Several years prior to the present incident, petitioner had served briefly on housing committees appointed by the mayor of Chicago, but at the time of publication he had never held any remunerative governmental position. Respondent admits this but argues that petitioner's appearance at the coroner's inquest rendered him a "de facto public official." Our cases recognized no such concept. Respondent's suggestion would sweep all lawyers under the New York Times rule as officers of the court and distort the plain meaning of the "public official" category beyond all recognition. We decline to follow it. Respondent's characterization of petitioner as a public figure raises a different question. That designation may rest on either of two alternative bases. 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.

Petitioner has long been active in community and professional affairs. He has served as an officer of local civic groups and of various professional organizations, and he has published several books and articles on legal subjects. Although petitioner was consequently well known in some circles, he had achieved no general fame or notoriety in the community. None of the prospective jurors called at the trial had ever heard of petitioner prior to this litigation, and respondent offered no proof that this response was atypical of the local population. We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes. 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. In this context it is plain that petitioner was not a public figure. He played a minimal role at the coroner's inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution of Officer Nuccio. Moreover, he never discussed either the criminal or civil litigation with the press and was never quoted as having done so. He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome. We are persuaded that the trial court did not err in refusing to characterize petitioner as a public figure for the purpose of this litigation. We therefore conclude that the New York Times standard is inapplicable to this case and that the trial court erred in entering judgment for respondent. Because the jury was allowed to impose liability without fault and was permitted to presume damages without proof of injury, a new trial is necessary. We reverse and remand for further proceedings in accord with this opinion.

It is so ordered.

Reversed and remanded.

Mr. Justice BLACKMUN, concurring. [omitted]
Mr. Chief Justice BURGER, dissenting

The doctrines of the law of defamation have had a gradual evolution primarily in the state courts. In New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), and its progeny this Court entered this field. Agreement or disagreement with the law as it has evolved to this time does not alter the fact that it has been orderly development with a consistent basic rationale. In today's opinion the Court abandons the traditional thread so far as the ordinary private citizen is concerned and introduces the concept that the media will be liable for negligence in publishing defamatory statements with respect to such persons. Although I agree with much of what Mr. Justice WHITE states, I do not read the Court's new doctrinal approach in quite the way he does. I am frank to say I do not know the parameters of a "negligence" doctrine as applied to the news media. Conceivably this new doctrine could inhibit some editors, as the dissents of Mr. Justice DOUGLAS and Mr. Justice BRENNAN suggest. But I would prefer to allow this area of law to continue to evolve as it has up to now with respect to private citizens rather than embark on a new doctrinal theory which has no jurisprudential ancestry. The petitioner here was performing a professional representative role as an advocate in the highest tradition of the law, and under that tradition the advocate is not to be invidiously identified with his client. The important public policy which underlies this tradition — the right to counsel — would be gravely jeopardized if every lawyer who takes an "unpopular" case, civil or criminal, would automatically become fair game for irresponsible reporters and editors who might, for example, describe the lawyer as a "mob mouthpiece" for representing a client with a serious prior criminal record, or as an "ambulance chaser" for representing a claimant in a personal injury action.

I would reverse the judgment of the Court of Appeals and remand for reinstatement of the verdict of the jury and the entry of an appropriate judgment on that verdict.

Mr. Justice DOUGLAS, dissenting

The Court describes this case as a return to the struggle of "defin[ing] the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." It is indeed a struggle, once described by Mr. Justice Black as "the same quagmire" in which the Court "is now helplessly struggling in the field of obscenity." Curtis Publishing Co. v. Butts, 388 U.S. 130, 171, 87 S. Ct. 1975, 2000, 18 L. Ed. 2d 1094 (concurring opinion). I would suggest that the struggle is a quite hopeless one, for, in light of the command of the First Amendment, no "accommodation" of its freedoms can be "proper" except those made by the Framers themselves.

Unlike the right of privacy which, by the terms of the Fourth Amendment, must be accommodated with reasonable searches and seizures and warrants issued by magistrates, the rights of free speech and of a free press were protected by the Framers in verbiage whose prescription seems clear. I have stated before my view that the First Amendment would bar Congress from passing any libel law. This was the view held by Thomas Jefferson and it is one Congress has never challenged through enactment of a civil libel statute. The sole congressional attempt at this variety of First Amendment muzzle was in the Sedition Act of 1798 — a criminal libel act never tested in this Court and one which expired by its terms three years after enactment. As President, Thomas Jefferson pardoned those who were convicted under the Act, and fines levied in its prosecution were repaid by Act of Congress. The general consensus was that the Act constituted a regrettable legislative exercise plainly in violation of the First Amendment.

With the First Amendment made applicable to the States through the Fourteenth, I do not see how States have any more ability to "accommodate" freedoms of speech or of the press than does Congress. This is true whether the form of the accommodation is civil or criminal since "[w]hat a State may not constitutionally bring about by

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5 In 1798 Jefferson stated:
[The First Amendment] thereby guard[s] in the same sentence, and under the same words, the freedom of religion, of speech, and of the press: insomuch, that whatever violates either, throws down the sanctuary which covers the others, and that libels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals.... 8 The Works of Thomas Jefferson 464-465 (Ford ed. 1904) (emphasis added).
The impact of today's decision on the traditional law of libel is immediately obvious and indisputable. No longer will the plaintiff be able to rest his case with proof of a libel defamatory on its face or proof of a slander historically actionable per se. In addition, he must prove some further degree of culpable conduct on the part of the publisher, such as intentional or reckless falsehood or negligence. And if he succeeds in this respect, he faces still another obstacle: recovery for loss of reputation will be conditioned upon "competent" proof of actual injury to his standing in the community. This will be true regardless of the nature of the defamation and even though it is one of those particularly reprehensible statements that have traditionally made slanderous words actionable without proof of fault by the publisher or of the damaging impact of his publication. The Court rejects the judgment of experience that some publications are so inherently capable of injury, and actual injury so difficult to prove, that the risk of falsehood should be borne by the publisher, not the victim. Plainly, with the additional burden on the plaintiff of proving negligence or other fault, it will be exceedingly difficult, perhaps impossible, for him to vindicate his reputation interest by securing a judgment for nominal damages, the practical effect of such a judgment being a judicial declaration that the publication was indeed false. Under the new rule the plaintiff can lose, not because the statement is true, but because it was not negligently made.

So too, the requirement of proving special injury to reputation before general damages may be awarded will clearly eliminate the prevailing rule, worked out over a very long period of time, that, in the case of defamations not actionable per se, the recovery of general damages for injury to reputation may also be had if some form of material or pecuniary loss is proved. Finally, an inflexible federal standard is imposed for the award of punitive damages. No longer will it be enough to prove ill will and an attempt to injure.

These are radical changes in the law and severe invasions of the prerogatives of the States. They should at least be shown to be required by the First Amendment or necessitated by our present circumstances. Neither has been demonstrated.

* * *

The Court evinces a deep-seated antipathy to "liability without fault." But this catch-phrase has
no talismanic significance and is almost meaningless in this context where the Court appears to be addressing those libels and slanders that are defamatory on their face and where the publisher is no doubt aware from the nature of the material that it would be inherently damaging to reputation. He publishes notwithstanding, knowing that he will inflict injury. With this knowledge, he must intend to inflict that injury, his excuse being that he is privileged to do so — that he has published the truth. But as it turns out, what he has circulated to the public is a very damaging falsehood. Is he nevertheless "faultless"? Perhaps it can be said that the mistake about his defense was made in good faith, but the fact remains that it is he who launched the publication knowing that it could ruin a reputation.

In these circumstances, the law has heretofore put the risk of falsehood on the publisher where the victim is a private citizen and no grounds of special privilege are invoked. The Court would now shift this risk to the victim, even though he has done nothing to invite the calumny, is wholly innocent of fault, and is helpless to avoid his injury. I doubt that jurisprudential resistance to liability without fault is sufficient ground for employing the First Amendment to revolutionize the law of libel, and in my view, that body of legal rules poses no realistic threat to the press and its service to the public. The press today is vigorous and robust. To me, it is quite incredible to suggest that threats of libel suits from private citizens are causing the press to refrain from publishing the truth. I know of no hard facts to support that proposition, and the Court furnishes none.

The communications industry has increasingly become concentrated in a few powerful hands operating very lucrative businesses reaching across the Nation and into almost every home.7 Neither the industry as a whole nor its individual components are easily intimidated, and we are fortunate that they are not. Requiring them to pay for the occasional damage they do to private reputation will play no substantial part in their future performance or their existence.

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daily papers is there a competing newspaper under separate ownership. Total daily circulation has passed 62 million copies, but over 40 percent of this circulation is controlled by only 25 ownership groups. Newspaper owners have profited greatly from the consolidation of the journalism industry. Several of them report yearly profits in the tens of millions of dollars, with after tax profits ranging from seven to 14 percent of gross revenues. Unfortunately, the owners have made their profits at the expense of the public interest in free expression. As the broad base of newspaper ownership narrows, the variation of facts and opinions received by the public from antagonistic sources is increasingly limited. Newspaper publication is indeed a leading American industry. Through its evolution in this direction, the press has come to be dominated by a select group whose prime interest is economic.

The effect of consolidation within the newspaper industry is magnified by the degree of intermedia ownership. Sixty-eight cities have a radio station owned by the only local daily newspaper, and 160 television stations have newspaper affiliations. In 11 cities diversity of ownership is completely lacking with the only television station and newspaper under the same control.” Id., at 892-893 (footnotes omitted).

See also Congress, FCC Consider Newspaper Control of Local TV, 32 Cong. Q. 659-663 (1974).

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7 A recent study has comprehensively detailed the role and impact of mass communications in this Nation. See Note, Media and the First Amendment in a Free Society, 60 Geo. L. J. 867 (1972). For example, 99% of the American households have a radio, and 77% hear at least one radio newscast daily. In 1970, the yearly average home television viewing time was almost six hours per day. Id., at 883 n.53.

Sixty years ago, 2,442 newspapers were published daily nationwide, and 689 cites had competing dailies. Today, in only 42 of the cities served by one of the 1,748 American
§ E. Speech Not Involving Matters of Public Concern

DUN & BRADSTREET, INC. v. GREENMOSS BUILDERS, INC.
472 U.S. 749 (1985)

Justice POWELL announced the judgment of the Court and delivered an opinion, in which Justice REHNQUIST and Justice O'CONNOR joined.

In <cite>Gertz v. Robert Welch, Inc.</cite>, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), we held that the First Amendment restricted the damages that a private individual could obtain from a publisher for a libel that involved a matter of public concern. More specifically, we held that in these circumstances the First Amendment prohibited awards of presumed and punitive damages for false and defamatory statements unless the plaintiff shows "actual malice," that is, knowledge of falsity or reckless disregard for the truth. The question presented in this case is whether this rule of <cite>Gertz</cite> applies when the false and defamatory statements do not involve matters of public concern.

I

Petitioner Dun & Bradstreet, a credit reporting agency, provides subscribers with financial and related information about businesses. All the information is confidential; under the terms of the subscription agreement the subscribers may not reveal it to anyone else. On July 26, 1976, petitioner sent a report to five subscribers indicating that respondent, a construction contractor, had filed a voluntary petition for bankruptcy. This report was false and grossly misrepresented respondent's assets and liabilities. That same day, while discussing the possibility of future financing with its bank, respondent's president was told that the bank had received the defamatory report. He immediately called petitioner's regional office, explained the error, and asked for a correction. In addition, he requested the names of the firms that had received the false report in order to assure them that the company was solvent. Petitioner promised to look into the matter but refused to divulge the names of those who had received the report.

After determining that its report was indeed false, petitioner issued a corrective notice on or about August 3, 1976 to the five subscribers who had received the initial report. The notice stated that one of respondent's former employees, not respondent itself, had filed for bankruptcy and that respondent "continued in business as usual." Respondent told petitioner that it was dissatisfied with the notice and it again asked for a list of subscribers who had seen the initial report. Again petitioner refused to divulge their names.

Respondent then brought this defamation action in Vermont state court. It alleged that the false report had injured its reputation and sought both compensatory and punitive damages. The trial established that the error in petitioner's report had been caused when one of its employees, a seventeen year old high school student paid to review Vermont bankruptcy pleadings, had inadvertently attributed to respondent a bankruptcy petition filed by one of respondent's former employees. Although petitioner's representative testified that it was routine practice to check the accuracy of such reports with the businesses themselves, it did not try to verify the information about respondent before reporting it.

After trial, the jury returned a verdict in favor of respondent and awarded $50,000 in compensatory or presumed damages and $300,000 in punitive damages. Petitioner moved for a new trial. It argued that in <cite>Gertz v. Robert Welch, Inc.</cite>, supra, at 349, 94 S. Ct., at 3011, this Court had ruled broadly "that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth," and it argued that the judge's instructions in this case permitted the jury to award such damages on a lesser showing. The trial court indicated some doubt as to whether <cite>Gertz</cite> applied to "non-media cases," but granted a new trial "[b]ecause of ... dissatisfaction with its charge and ... conviction that the interests of justice require[d]" it. App. 26.

The Vermont Supreme Court reversed. 143 Vt. 66, 461 A.2d 414 (1983). Although recognizing that "in certain instances the distinction between media and nonmedia defendants may be difficult to draw," the court stated that "no such difficulty is presented with credit reporting agencies, which are in the business of selling financial information to a limited number of subscribers who have paid substantial fees for their
services." Id., at 73, 461 A.2d, at 417. Relying on this distinguishing characteristic of credit reporting firms, the court concluded that such firms are not "the type of media worthy of First Amendment protection as contemplated by New York Times [Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964),] and its progeny." 143 Vt., at 73-74, 461 A.2d, at 417-418. It held that the balance between a private plaintiff's right to recover presumed and punitive damages without a showing of special fault and the First Amendment rights of "nonmedia" speakers "must be struck in favor of the private plaintiff defamed by a nonmedia defendant." Id., at 75, 461 A.2d, at 418. Accordingly, the court held "that as a matter of federal constitutional law, the media protections outlined in Gertz are inapplicable to nonmedia defamation actions." Ibid., 461 A.2d, at 75.

Recognizing disagreement among the lower courts about when the protections of Gertz apply,1 we granted certiorari. --- U.S. ----, 104 S. Ct. 389, 78 L. Ed. 2d 334 (1983). We now affirm, although for reasons different from those relied upon by the Vermont Supreme Court.

II

As an initial matter, respondent contends that we need not determine whether Gertz applies in this case because the instructions, taken as a whole, required the jury to find "actual malice" before awarding presumed or punitive damages.2 The trial court instructed the jury that because the report was libelous per se, respondent was not required "to prove actual damages ... since damage and loss [are] conclusively presumed." App. 17; accord, id., at 19. It also instructed the jury that it could award punitive damages only if it found "actual malice." Id., at 20. Its only other relevant instruction was that liability could not be established unless respondent showed "malice or lack of good faith on the part of the Defendant." Id., at 18. Respondent contends that these references to "malice," "lack of good faith," and "actual malice" required the jury to find knowledge of falsity or reckless disregard for the truth—the "actual malice" of New York Times — before it awarded presumed or punitive damages.

We reject this claim because the trial court failed to define any of these terms adequately. It did not, for example, provide the jury with any definition of the term "actual malice." In fact, the only relevant term it defined was simple "malice."3 And its definitions of this term included not only the New York Times formulation but also other concepts such as "bad faith" and "reckless disregard of the [statement's] possible consequences." Id., at 19. The instructions thus permitted the jury to award presumed and punitive damages on a lesser showing than "actual malice." Consequently, the trial court's conclusion that the instructions did not satisfy Gertz was correct, and the Vermont Supreme Court's determination that Gertz was inapplicable was necessary to its decision that the trial court erred in granting the motion for a new trial. We therefore must consider whether Gertz applies to the case before us.

III

In New York Times Co. v. Sullivan, supra, the Court for the first time held that the First Amendment limits the reach of state defamation laws. That case concerned a public official's

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2 Respondent also argues that petitioner did not seek the protections outlined in Gertz before the jury instructions were given and that the issue therefore was not preserved for review. Since the Vermont Supreme Court considered the federal constitutional issue properly presented and decided it, there is no bar to our review. See Orr v. Orr, 440 U.S. 268, 274-275, 99 S. Ct. 1102, 1109, 59 L. Ed. 2d 306 (1979).

3 The full instruction on malice reads as follows:

"If you find that the Defendant acted in a bad faith towards the Plaintiff in publishing the Erroneous Report, or that Defendant intended to injure the Plaintiff in its business, or that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously and the privilege is destroyed. Further, if the Report was made with reckless disregard of the possible consequences, or if it was made with the knowledge that it was false or with reckless disregard of its truth or falsity, it was made with malice. App. 18-19 (emphasis added)."
recovery of damages for the publication of an advertisement criticizing police conduct in a civil rights demonstration. As the Court noted, the advertisement concerned "one of the major public issues of our time." Id., at 376 U.S., at 271, 84 S. Ct., at 721. Noting that "freedom of expression upon public questions is secured by the First Amendment," id., at 269, 84 S. Ct., at 720 (emphasis added), and that "debate on public issues should be uninhibited, robust, and wide-open," id., at 270, 84 S. Ct., at 721 (emphasis added), the Court held that a public official cannot recover for defamatory falsehood unless he proves that the false statement was made with "actual malice" — that is, with knowledge that it was false or with reckless disregard of whether it was false or not," id., at 280, 84 S. Ct., at 726. In later cases, all involving public issues, the Court extended this same constitutional protection to libels of public figures, e.g., Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967), and in one case suggested in a plurality opinion that this constitutional rule should extend to libels of any individual so long as the defamatory statements involved a "matter of public or general interest," Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 44, 91 S. Ct. 1811, 1820, 29 L. Ed. 2d 296 (1971) (opinion of BRENNAN, J.).

In Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), we held that the protections of New York Times did not extend as far as Rosenbloom suggested. Gertz concerned a libelous article appearing in a magazine called AMERICAN OPINION, the monthly outlet of the John Birch Society. The article in question discussed whether the prosecution of a policeman in Chicago was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff, Gertz, neither a public official nor a public figure, was a lawyer tangentially involved in the prosecution. The magazine alleged that he was the chief architect of the "frame-up" of the police officer and linked him to Communist activity. Like every other case in which this Court has found constitutional limits to state defamation laws, Gertz involved expression on a matter of undoubted public concern.

In Gertz, we held that the fact that expression concerned a public issue did not by itself entitle the libel defendant to the constitutional protections of New York Times. These protections, we found, were not "justified solely by reference to the interest of the press and broadcast media in immunity from liability." 418 U.S., at 343, 94 S. Ct., at 3008. Rather, they represented "an accommodation between [First Amendment] concern[s] and the limited state interest present in the context of libel actions brought by public persons." Ibid. In libel actions brought by private persons we found the competing interests different. Largely because private persons have not voluntarily exposed themselves to increased risk of injury from defamatory statements and because they generally lack effective opportunities for rebutting such statements, id., at 345, 94 S. Ct., at 3009, we found that the State possessed a "strong and legitimate ... interest in compensating private individuals for injury to reputation." Id., at 348-349, 94 S. Ct., at 3011. Balancing this stronger state interest against the same First Amendment interest at stake in New York Times, we held that a State could not allow recovery of presumed and punitive damages absent a showing of "actual malice." Nothing in our opinion, however, indicated that this same balance would be struck regardless of the type of speech involved.4

IV

We have never considered whether the Gertz balance obtains when the defamatory statements

4 The dissent states that "[a]t several points the Court in Gertz makes perfectly clear [that] the restrictions of presumed and punitive damages were to apply in all cases." Post, at 2960, n. 11. Given the context of Gertz, however, the Court could have made "perfectly clear" only that these restrictions applied in cases involving public speech. In fact, the dissent itself concedes that "Gertz ... focused largely on defining the circumstances under which protection of the central First Amendment value of robust debate of public issues should mandate plaintiffs to show actual malice to obtain a judgment and actual damages ..." Post, at 2955 (original emphasis). The dissent also incorrectly states that Gertz "specifically held," post, at 2956, 2964, both "that the award of presumed and punitive damages on less than a showing of actual malice is not a narrowly tailored means to achieve the legitimate state purpose of protecting the reputation of private persons. ..." id., at 2956, and that "unrestrained presumed and punitive damages were 'unnecessarily' broad ... in relation to the legitimate state interests," id., at 2964. Although the Court made both statements, it did so only within the context of public speech. Neither statement controls here. What was "not ... narrowly tailored" or was "unnecessarily' broad" with respect to public speech is not necessarily so with respect to the speech now at issue. Properly understood, Gertz is consistent with the result we reach today.

DUN & BRADSTREET, INC. v. GREENMOSS BUILDERS, INC.
involve no issue of public concern. To make this determination, we must employ the approach approved in Gertz and balance the State's interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this type of expression. This state interest is identical to the one weighed in Gertz. There we found that it was "strong and legitimate." 418 U.S., at 348, 94 S. Ct., at 3011. A State should not lightly be required to abandon it, "for, as Mr. Justice Stewart has reminded us, the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments....' Rosenblatt v. Baer, 383 U.S. 75, 92 (86 S. Ct. 669, 679, 15 L. Ed. 2d 597) (1966) (concurring opinion)." 418 U.S., at 341, 94 S. Ct., at 3008.

The First Amendment interest, on the other hand, is less important than the one weighed in Gertz. We have long recognized that not all speech is of equal First Amendment importance. 5 It is

5 This Court on many occasions has recognized that certain kinds of speech are less central to the interests of the First Amendment than others. Obscene speech and "fighting words" long have been accorded no protection. Roth v. United States, 354 U.S. 476, 483, 77 S. Ct. 1304, 1308, 1 L. Ed. 2d 1498 (1957); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572, 62 S. Ct. 766, 769, 86 L. Ed. 1031 (1942); cf. Harisiades v. Shaughnessy, 342 U.S. 580, 591-592, 72 S. Ct. 512, 519-520, 96 L. Ed. 586 (1952) (advocating violent overthrow of the government is unprotected speech); Near v. Minnesota ex rel. Olson, 283 U.S. 697, 716, 51 S. Ct. 625, 631, 75 L. Ed. 1357 (1931) (publication of troop ship sailings during war time may be enjoined). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 456, 98 S. Ct. 1912, 1918, 56 L. Ed. 2d 444 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 771-772, 96 S. Ct. 1817, (continued...)


The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' Roth v. United States, 354 U.S. 476, 484 (77 S. Ct. 1304, 1308, 1 L. Ed. 2d 1498) (1957); New York Times Co. v. Sullivan, 376 U.S. 254, 269 (84 S. Ct. 710, 720, 11 L. Ed. 2d 686) (1964). ' [S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' Garrison v. Louisiana, 379 U.S. 64,

In contrast, speech on matters of purely private concern is of less First Amendment concern. 461 U.S., at 146-147, 103 S. Ct., at 1689-1690. As a number of state courts, including the court below, have recognized, the role of the Constitution in regulating state libel law is far more limited when the concerns that activated New York Times and Gertz are absent. In such a case,

[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling. Harley-Davidson Motorsports, Inc. v. Markley, 279 Or. 361, 366, 568 P.2d 1359, 1363 (1977). Accord, Rowe v. Metz, 195 Colo. 424, 426, 579 P.2d 83, 84 (1978); Denny v. Mertz, 106 Wis. 2d 636, 661, 318 N.W.2d 141, 153, cert. denied, 459 U.S. 883, 103 S. Ct. 179, 74 L. Ed. 2d 147 (1982).

While such speech is not totally unprotected by the First Amendment, see Connici v. Myers, 461 U.S., at 147, 103 S. Ct., at 1690, its protections are less stringent. In Gertz, we found that the state interest in awarding presumed and punitive damages was not "substantial" in view of their effect on speech at the core of First Amendment concern. 418 U.S., at 349, 94 S. Ct., at 3011. This interest, however, is "substantial" relative to the incidental effect these remedies may have on speech of significantly less constitutional interest. The rationale of the common law rules has been the experience and judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." W. Prosser, Law of Torts § 112, p. 765 (4th ed. 1971); accord, Rowe v. Metz, supra, 195 Colo., at 425-426, 579 P.2d, at 84; Note, Developments in the Law — Defamation, 69 HARV. L. REV. 875, 891-892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications. RESTATEMENT OF Torts § 568, comment b, at 162 (1938) (noting that Hale announced that damages were to be presumed for libel as early as 1670).

This rule furthers the state interest in providing remedies for defamation by ensuring that those remedies are effective. In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages — even absent a showing of "actual malice."

7 The dissent, purporting to apply the same balancing test that we do today, concludes that even speech on purely private matters is entitled to the protections of Gertz. Post, at 2960. Its "balance," however, rests on a misinterpretation. In particular, the dissent finds language in Gertz that, it believes, shows the State's interest to be "irrelevant." See post, at 2964. It is then an easy step for the dissent to say that the State's interest is outweighed by even the reduced First Amendment interest in private speech. Gertz, however, did not say that the state interest was "irrelevant" in absolute terms. Indeed, such a statement is belied by Gertz itself, for it held that presumed and punitive damages were available under some circumstances. 418 U.S., at 349, 94 S. Ct., at 3011. Rather, what the Gertz language indicates is that the State's interest is not substantial relative to the First Amendment interest in public speech. This language is thus irrelevant to today's decision. The dissent's "balance," moreover, would lead to the protection of all (continued...)

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6 As one commentator has remarked with respect to "the case of a commercial supplier of credit information that defames a person applying for credit" — the case before us today — "If the first amendment requirements outlined in Gertz apply, there is something clearly wrong with the first amendment or with Gertz." Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 NW. L. REV. 1212, 1268 (1983).
V

The only remaining issue is whether petitioner's credit report involved a matter of public concern. In a related context, we have held that "[w]hether ... speech addresses a matter of public concern must be determined by [the expression's] content, form, and context ... as revealed by the whole record." Connick v. Myers, 461 U.S., at 147-148, 103 S. Ct., at 1690. These factors indicate that petitioner's credit report concerns no public issue. It was speech solely in the individual interest of the speaker and its specific business audience. Cf. Central Hudson Gas & Elec. v. Public Service Comm., 447 U.S. 557, 561, 100 S. Ct. 2343, 2348, 65 L. Ed. 2d 341 (1980). This particular interest warrants no special protection when — as in this case — the speech is wholly false and clearly damaging to the victim's business reputation. Cf. id., at 566, 100 S. Ct., at 2351; Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 771-772, 96 S. Ct. 1817, 1830-1831, 48 L. Ed. 2d 346 (1976). Moreover, since the credit report was made available to only five subscribers, who, under the terms of the subscription agreement, could not disseminate it further, it cannot be said that the report involves any "strong interest in the free flow of commercial information." Id., at 764, 96 S. Ct., at 1827. There is simply no credible argument that this type of credit reporting requires special protection to ensure that "debate on public issues [will] be uninhibited, robust, and wide-open." New York Times Co. v. Sullivan, 376 U.S., at 270, 84 S. Ct., at 720.

In addition, the speech here, like advertising, is hardy and unlikely to be deterred by incidental state regulation. See Virginia Pharmacy Board v. Virginia Consumer Council, supra, 425 U.S., at 771-772, 96 S. Ct., at 1830-1831. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. Ibid. Arguably, the reporting here was also more objectively verifiable than speech deserving of greater protection. See ibid. In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental "chilling" effect of libel suits would be of decreased significance.9

VI

We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of "actual malice" does not violate the First Amendment when the defamatory statements do not involve matters of public concern. Accordingly, we affirm the judgment of the Vermont Supreme Court.

It is so ordered.

Chief Justice BURGER, concurring in the judgment...

* * *

I agree that Gertz is limited to circumstances in which the alleged defamatory expression concerns a matter of general public importance, and that the expression in question here relates to a matter of essentially private concern. I therefore agree with the plurality opinion to the extent that it holds that Gertz is

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1(...continued)

... libels — no matter how attenuated their constitutional interest. If the dissent were the law, a woman of impeccable character who was branded a "whore" by a jealous neighbor would have no effective recourse unless she could prove "actual malice" by clear and convincing evidence. This is not malice in the ordinary sense, but in the more demanding sense of New York Times. The dissent would, in effect, constitutionalize the entire common law of libel.

8 The dissent suggests that our holding today leaves all credit reporting subject to reduced First Amendment protection. This is incorrect. The protection to be accorded a particular credit report depends on whether the report's "content, form, and context" indicate that it concerns a public matter. We also do not hold, as the dissent suggests we do, post, at 2960-2964, that the report is subject to reduced constitutional protection because it constitutes economic or commercial speech. We discuss such speech, along with advertising, only to show how many of the same concerns that argue in favor of reduced constitutional protection in those areas apply here as well.

9 The Fifth Circuit Court of Appeals has noted that, while most States provide a qualified privilege against libel suits for commercial credit reporting agencies, in those States that do not there is a thriving credit reporting business and commercial credit transactions are not inhibited. Hood v. Dun & Bradstreet, Inc., 486 F.2d 25, 32 (1973), cert. denied, 415 U. S. 985, 94 S. Ct. 1580, 39 L. Ed. 2d 882 (1974). The court cited an empirical study comparing credit transactions in Boise, Idaho, where there is no privilege, with those in Spokane, Washington, where there is one. Id., at 32, and n.18.
inapplicable in this case for the two reasons indicated. No more is needed to dispose of the present case.

I continue to believe, however, that *Gertz* was ill-conceived, and therefore agree with Justice WHITE that *Gertz* should be overruled....

Consideration of these issues inevitably recalls the aphorism of journalism that, "too much checking on the facts has ruined many a good news story."

Justice WHITE, concurring in the judgment

Until *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 666 (1964), the law of defamation was almost exclusively the business of state courts and legislatures. Under the then prevailing state libel law, the defamed individual had only to prove a false written publication that subjected him to hatred, contempt or ridicule. Truth was a defense; but given a defamatory false circulation, general injury to reputation was presumed; special damages, such as pecuniary loss and emotional distress, could be recovered; and punitive damages were available if common-law malice were shown. General damages for injury to reputation were presumed and awarded because the judgment of history was that "in many cases the effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the effects thereof in loss to the person defamed." *Restatement of Torts* § 621, Comment a, p. 314 (1938). The defendant was permitted to show that there was no reputational injury; but at the very least, the prevailing rule was that at least nominal damages were to be awarded for any defamatory publication actionable per se. This rule performed

"[A] vindicatory function by enabling the plaintiff publicly to brand the defamatory publication as false. The salutary social value of this rule is preventive in character since it often permits a defamed person to expose the groundless character of a defamatory rumor before harm to the reputation has resulted therefrom." *Id.* § 569, Comment b, p. 166.

Similar rules applied to slanderous statements that were actionable per se.10

*New York Times v. Sullivan* was the first major step in what proved to be a seemingly irreversible process of constitutionalizing the entire law of libel and slander...

... I remain convinced that *Gertz* was erroneously decided. I have also become convinced that the Court struck an improvident balance in the *New York Times* case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation.

* * *

The *New York Times* rule thus countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts....

In *New York Times*, instead of escalating the plaintiff's burden of proof to an almost impossible level, we could have achieved our stated goal by limiting the recoverable damages to a level that would not unduly threaten the press. Punitive damages might have been scrutinized as Justice Harlan suggested in *Rosenbloom*, 403 U.S., at 77, 91 S. Ct., at 1836, or perhaps even entirely forbidden....

As I have said, I dissented in *Gertz*, and I doubt that the decision in that case has made any measurable contribution to First Amendment or reputational values since its announcement. Nor am I sure that it has saved the press a great deal of money. Like the *New York Times* decision, the burden that plaintiffs must meet invites long and complicated discovery involving detailed investigation of the workings of the press, how a

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10 At the common law, slander, unlike libel, was actionable per se only when it dealt with a narrow range of statements: those imputing a criminal offense, a venereal or loathsome and communicable disease, improper conduct of a lawful business, or unchastity of a woman. *Restatement of Torts* § 570 (1938). To be actionable, all other slanderous statements required additional proof of special damages other than an injury to reputation or emotional distress. The special damage most often took the form of material or pecuniary loss. *Id.* § 575 and Comment b, pp. 185-187.
news story is developed, and the state of mind of the reporter and publisher. See Herbert v. Lando, 441 U.S. 153, 99 S. Ct. 1635, 60 L. Ed. 2d 115 (1979). That kind of litigation is very expensive. I suspect that the press would be no worse off financially if the common-law rules were to apply and if the judiciary was careful to insist that damages awards be kept within bounds....

* * *

Justice BRENNAN, with whom Justice MARSHALL, Justice BLACKMUN and Justice STEVENS join, dissenting.

This case involves a difficult question of the proper application of Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), to credit reporting — a type of speech at some remove from that which first gave rise to explicit First Amendment restrictions on state defamation law — and has produced a diversity of considered opinions, none of which speaks for the Court....

* * *

II

* * *

The question presented here is narrow. Neither the parties nor the courts below have suggested that Respondent Greenmoss Builders should be required to show actual malice to obtain a judgment and actual compensatory damages. Nor do the parties question the requirement of Gertz that respondent must show fault to obtain a judgment and actual damages. The only question presented is whether a jury award of presumed and punitive damages based on less than a showing of actual malice is constitutionally permissible. Gertz provides a forthright negative answer. To preserve the jury verdict in this case, therefore, the opinions of Justice POWELL and Justice WHITE have cut away the protective mantle of Gertz.

A

Relying on the analysis of the Vermont Supreme Court, Respondent urged that this pruning be accomplished by restricting the applicability of Gertz to cases in which the defendant is a "media" entity. Such a distinction is irreconcilable with the fundamental First Amendment principle that "[t]he inherent worth of ... speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." First National Bank of Boston v. Bellotti, 435 U.S. 765, 777, 98 S. Ct. 1407, 1416, 55 L. Ed. 2d 707 (1978). First Amendment difficulties lurk in the definitional questions such an approach would generate. And the distinction would likely be born an anachronism. Perhaps most importantly, the

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11 An attempt to characterize petitioner Dun & Bradstreet illustrates the point. Like an account of judicial proceedings in a newspaper, magazine or news broadcast, a statement in petitioner’s reports that a particular company has filed for bankruptcy is a report of a timely news event conveyed to members of the public by a business organized to collect and disseminate such information. Thus it is not obvious why petitioner should find less protection in the First Amendment than do established print or electronic media. The Vermont Supreme Court nonetheless characterized petitioner as a nonmedia defendant entitled to less protection because it is "in the business of selling financial information to a limited number of subscribers who have paid substantial fees for [its] services." 461 A.2d, at 417. The court added that "[i]n the business of selling financial information to a limited number of subscribers who have paid substantial fees for [its] services." 461 A.2d, at 417. The court added that "[t]here is a clear distinction between a publication which disseminates news for public consumption and one which provides specialized information to a selective, finite audience." Ibid. No clear line consistent with First Amendment principles can be drawn on the basis of these criteria. That petitioner’s information is "specialized" or that its subscribers pay "substantial fees" hardly distinguishes those reports from articles in many publications that would surely fall on the "media" side of the line the Vermont Supreme Court seeks to draw. Few published statements are of universal interest and few publications are distributed without charge. Much fare of any metropolitan daily is specialized information for which a selective, finite audience pays a fee. Nor is there any reason to treat petitioner differently than a more widely circulated publication because it has "a limited number of subscribers." Indeed, it would be paradoxical to increase protection to statements injurious to reputation as the size of their audience, and hence their potential to injure. Cf. Keeton v. Hustler Magazine, Inc., --- U.S. ---, ----, 104 S. Ct. 1473, ----, 79 L. Ed. 2d 790 (1984).

12 Owing to transformations in the technological and economic structure of the communications industry, there has been an increasing convergence of what might be labeled "media" and "nonmedia." Pool, The New Technologies: Promise of Abundant Channels at Lower Cost, in What’s News: The Media in American Society 87 (1981). See also J. POOL, TECHNOLOGIES OF FREEDOM (1983); FTC, MEDIA POLICY SESSION: TECHNOLOGY AND LEGAL CHANGE (1979); SUBCOMMITTEE ON TELECOMMUNICATIONS, CONSUMER PROTECTION, AND FINANCE OF THE HOUSE COMMITTEE ON ENERGY AND COMMERCE, TELECOMMUNICATIONS IN (continued...)

DUN & BRADSTREET, INC. v. GREENMOSS BUILDERS, INC.
argument that Gertz should be limited to the media misapprehends our cases. We protect the press to ensure the vitality of First Amendment guarantees. This solicitude implies no endorsement of the principle that speakers other than the press deserve lesser First Amendment protection. "In the realm of protected speech, the legislature is constitutionally disqualified from dictating ... the speakers who may address a public issue." First National Bank of Boston v. Bellotti, supra, at 784-785, 98 S. Ct., at 1420. See Bridges v. California, 314 U.S. 252, 277-279, 62 S. Ct. 190, 201, 86 L. Ed. 192 (1941).

The free speech guarantee gives each citizen an equal right to self-expression and to participation in self-government.

* * *

(1)
The five Members of the Court voting to affirm the damage award in this case have provided almost no guidance as to what constitutes a protected "matter of public concern."...

* * *

12(...continued)


It is worth noting in this regard that the common law of most states, although apparently not of Vermont, 461 A.2d, at 419, recognizes a qualified privilege for reports like that at issue here. See Maurer, Common Law Defamation and the Fair Credit Reporting Act, 72 GEO. L. REV. 95, 99-105 (1983). The privilege typically precludes recovery for false and defamatory credit information without a showing of bad faith or malice, a standard of proof which is often defined according to the New York Times formulation. See, e.g., Datacon, Inc. v. Dun & Bradstreet, 465 F. Supp. 706, 708 (ND Tex. 1979). The common law thus recognizes that credit reporting is quite susceptible to libel's chill; this accumulated learning is worthy of respect.

* * *