

No. 75117-4-I

LANE ELLEN TOLLEFSEN, a Washington resident,

Plaintiff/Appellant,

v.

GREGORY L. JANTZ and LAFON JANTZ, husband and wife, and their marital community; MICHAEL GURIAN and "JANE DOE" GURIAN, husband and wife, and their marital community; ANN MCMURRAY and "JOHN DOE" MCMURRAY, husband and wife, and their marital community; RANDOM HOUSE LLC, a Delaware limited liability company; and CARRIE ABBOTT and "JOHN DOE" ABBOTT, husband and wife, and their marital community,

Defendants/Respondents.

APPEAL FROM THE WASHINGTON STATE SUPERIOR COURT
IN AND FOR THE COUNTY OF SNOHOMISH

Case No. 14-2-05079-6

The Honorable Richard Okrent

OPENING BRIEF OF APPELLANT
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I. INTRODUCTION

Plaintiff Lane Tollefsen is a former sixth grade teacher for King's Elementary School. In 2010, one of Mrs. Tollefsen's sixth grade students was Gregg Jantz, Jr., the son of Defendants Dr. Gregg and LaFon Jantz. From the beginning, Gregg Jr. exhibited serious behavioral issues that were a constant distraction and disruption in Mrs. Tollefsen's classroom. When Mrs. Tollefsen's efforts to control Gregg Jr.'s behavior had no effect, she suggested to Dr. and Mrs. Jantz that they may want have Gregg Jr. tested for "attention and focus" issues.

Dr. and Mrs. Jantz took offense to Mrs. Tollefsen's suggestion and insisted that the problem stemmed from Mrs. Tollefsen's teaching style and that a better teacher would not be having the same issues. The Jantzes subsequently had Gregg Jr. removed from Mrs. Tollefsen's classes. The incident between Mrs. Tollefsen and Dr. and Mrs. Jantz also became Dr. Jantz's motivation for writing *Raising Boys By Design*.

In the book, Dr. Jantz briefly recounts the difficulties Gregg Jr. had in sixth grade and that his teacher suggested that he be placed on medication for attention issues. Dr. Jantz states that he knew that his son did not need medication and that he believed the issues had to do with differences in how boys learn in school

versus how girls learn. Dr. Jantz also stated that his son told him that each morning several of his male classmates paraded up before his teacher and took a pill, which Dr. Jantz said was for "attention issues". In an interview on a radio station operated by King's Elementary School's parent company, Dr. Jantz repeated the story of the difficulties he had with Gregg Jr.'s teacher and the daily ritual of Gregg Jr.'s classmates taking a pill in front of his teacher for "attention issues".

Dr. Jantz's statement that his son observed several of his sixth grade classmates take a pill for "attention issues" in front of his teacher each morning is false. Mrs. Tollefsen is not a person designated to administer medication and she has never distributed any type of medication to students in the classroom. Dr. Jantz's statement, if true, would mean Mrs. Tollefsen was violating school policy and Washington law regarding distribution of medications in school. It is these false and defamatory statements that are the basis for Plaintiff's defamation and emotional distress claims.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting summary judgment dismissing Lane Tollefsen's defamation and intentional/negligent infliction of emotional distress claims.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERRORS

1. Does the Court apply a higher evidentiary standard of proof than that which is applicable at trial when considering a motion for summary judgment in a defamation matter? No.
2. Does the application of a higher standard of proof at the summary judgment stage violate the claimant's right to a jury trial? Yes.
3. Did Lane Tollefsen present sufficient evidence to raise genuine issues of material fact on her claims of defamation and intentional/negligent infliction of emotional distress? Yes.

IV. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

On April 16, 2015, the administration at King's Schools informed Plaintiff Lane Tollefsen that they would not be renewing her annual teaching contract for the 2015-2016 school year. Mrs. Tollefsen had been teaching sixth grade at King's Elementary School in Seattle for more than 15 years.¹ Just three years earlier, in March 2012, King's Schools had awarded Mrs. Tollefsen the *Martin Award for Innovative Teaching*, a teacher-endowment award for teaching excellence. The previous October, Mrs. Tollefsen spoke at the National Association for Single Sex Public Education national seminar in Orlando, Florida on the topic of how to teach a

¹ CP 77 (Declaration of Lane Tollefsen, ¶ 4).

single gender in a mixed-gender classroom.²

In the fall of 2010, one of Mrs. Tollefsen's sixth grade students at King's Elementary School had been Gregg Jantz, Jr.³ Gregg Jantz Jr. is the son of Defendants Dr. Gregory and LaFon Jantz. Dr. Jantz is a Washington state-certified psychologist, a best-selling author of several books on various psychological issues and disorders, and nationally known, having appeared on CNN Headline News and other national news syndicates.⁴

Dr. Jantz is also a prominent figure in and substantial benefactor to the CRISTA Ministries community. CRISTA Ministries is a group of Christian ministries that includes King's Elementary School, King's Schools, and CRISTA Media. CRISTA Media operates radio station KCIS, which is a source of information about King's Schools and is listened to by parents, teachers, and school administrators.⁵ Dr. Jantz has his own radio show on KCIS and is also regular guest on *Legacy Out Loud*, a KCIS radio show hosted by Defendant Carrie Abbott.⁶

When Gregg Jantz, Jr. joined Mrs. Tollefsen's sixth grade class at the beginning 2010-2011 school year, she immediately

² CP 77-78 (Declaration of Lane Tollefsen, ¶ 5).

³ CP 78 (Declaration of Lane Tollefsen, ¶ 8).

⁴ CP 271 (Answer, ¶ 5).

⁵ CP 78 (Declaration of Lane Tollefsen, ¶¶ 6 and 7).

⁶ CP 273 (Answer, ¶ 9)

noticed that he was exhibiting serious behavioral issues and was a perpetual distraction in the classroom. Gregg Jr. could not stay in his seat, blurted out constantly, fidgeted, and was disruptive to the learning of his fellow students. Mrs. Tollefsen's efforts to redirect Gregg Jr.'s distracting behavior made no difference. It became clear to her that Gregg Jr. was a child who expected to get his own way.⁷

In early-November 2010, Mrs. Tollefsen met with Dr. and Mrs. Jantz for parent-teacher conferences. When a teacher notices that a student is markedly inattentive, disruptive, cannot sit still, is unable to complete work in class, shows hyperactive behavior, distractibility, forgetfulness, or poor organizational skills, the teacher points out the problems to the parents that their child is having and may recommend that the child be tested for various learning or developmental issues.⁸ Since Gregg Jr. was still exhibiting many of the same concerning behavioral issues he had been exhibiting at the beginning of the school year, Mrs. Tollefsen raised the subject with Dr. and Mrs. Jantz during their parent-teacher conference.⁹

Mrs. Tollefsen described Gregg Jr.'s distracting behavior in

⁷ CP 78 (Declaration of Lane Tollefsen, ¶ 8).

⁸ CP 78 (Declaration of Lane Tollefsen, ¶¶ 9-10).

⁹ CP 78 (Declaration of Lane Tollefsen, ¶ 10).

the classroom and just how disruptive it had become for other students in her class. Mrs. Tollefsen recommended to Dr. and Mrs. Jantz that they may want to have Gregg Jr. tested for "attention and focus" issues. Mrs. Tollefsen felt it would help her understand Gregg Jr.'s learning style and better adapt to his needs in the classroom.¹⁰

Mrs. Tollefsen did not diagnose Gregg Jr. with any specific learning or behavioral disorder, nor did she recommend medication of any kind. In Gregg Jr.'s case, as with any of her students exhibiting concerning behavior, Mrs. Tollefsen merely recommended having Gregg Jr. tested and then left it to Dr. and Mrs. Jantz to follow or not to follow her recommendation.¹¹

When Mrs. Tollefsen suggested that Gregg Jr. be screened by a medical professional, Dr. and Mrs. Jantz reacted hostilely. They insisted that Gregg Jr.'s behavior was just his "learning style", that Mrs. Tollefsen was the problem, and that a better teacher would not be having the same issues.¹²

Mrs. Tollefsen did not have any other interactions with the Jantzes until December 2010. Just before Christmas vacation, Mrs. Jantz arrived 30-45 minutes early for the class Christmas

¹⁰ CP 78-79 (Declaration of Lane Tollefsen, ¶ 10).

¹¹ CP 79 (Declaration of Lane Tollefsen, ¶ 11).

¹² CP 79 (Declaration of Lane Tollefsen, ¶ 12).

party. Mrs. Tollefsen was administering a spelling test and Mrs. Jantz's presence distracted the students. Mrs. Tollefsen quietly asked Mrs. Jantz to "please leave and come back in 30 minutes", which she did.¹³

Following the Christmas break, Mrs. Jantz went to the principal's office, accused Mrs. Tollefsen of yelling at her in front of the whole classroom before the Christmas party, and insisted that she and Dr. Jantz could no longer tolerate Mrs. Tollefsen as Gregg Jr.'s teacher. Soon thereafter, Gregg Jr. was removed from Mrs. Tollefsen's class. The removal of a student from a teacher's class is an extraordinary occurrence at King's Schools. The entire situation humiliated Mrs. Tollefsen. Since then, she has not had any interactions with Dr. and Mrs. Jantz, though Gregg Jr. did remain in her social studies class for the remainder of the 2010-2011 school year.¹⁴

1. Dr. Jantz's defamatory statements.

On October 16, 2013, a fellow teacher at King's Schools, Rona Cornell, sent a text to Mrs. Tollefsen. Ms. Cornell stated that she had heard Dr. Jantz on CRISTA Ministries' radio station KCIS talking about his new book, *Raising Boys By Design*. Ms. Cornell informed Mrs. Tollefsen that she knew the teacher Dr. Jantz was

¹³ CP 79 (Declaration of Lane Tollefsen, ¶ 13).

¹⁴ CP 79-80 (Declaration of Lane Tollefsen, ¶ 14).

referring to was Mrs. Tollefsen.¹⁵

The relevant portion of the transcript from Dr. Jantz's appearance on Ms. Abbott's October 16, 2013 *Legacy Out Loud* radio show reads as follows:

Carrie Abbott: So Gregg, let's get into this book. And of course we can't get into all the great detail, but you have a story for us about your own sons, right?

Gregg Jantz: Well...

Carrie Abbott: Or you have many stories

Gregg Jantz: Yeah, I have many stories. If you have boys, you have stories.

Carrie Abbott: Yes, exactly.

Gregg Jantz: So, and I remember 6th grade for my oldest, he's in high school -- first year of high school now -- and I remember 6th grade was really tough.

Carrie Abbott: It's a weird age.

Gregg Jantz: And it was really tough and it wasn't going well and I wasn't connecting well with his teacher and there was a couple references, "well, maybe your son has some kind of attention issues and so forth," and...

Carrie Abbott: It couldn't be the teaching.

Gregg Jantz: Oh. And so really it sent me on a little bit of a quest. But I asked my son, will

¹⁵ CP 80 (Declaration of Lane Tollefsen, ¶ 15).

you quietly -- 'cause in elementary school when the kids are on medication, they usually have to take them in front of the teacher...

Carrie Abbott: Hmmm.

Gregg Jantz: ... they're sure that they're taking them -- will you just count for me how many kids take a pill in the morning at school... or I said how many boys in your class. And we tried this for a couple days and I think he counted there was 6 to 8 boys that would go forward each day and they have to take their pill in front of the teacher. The pill's for "attention issues."

Carrie Abbott: Wow.

Gregg Jantz: And I thought, oh, this bothers me.

Carrie Abbott: Wow.

Gregg Jantz: And because I also want to say there are legitimate issues but it really bothered me and it bothered me that that was a course they were wanting to take with my son. So we did the "Oh, I'll show you" and we did the neurological testing and it didn't come back with any attention issues. And really, you hinted on to something. It had more to do with relationship and teaching and teachability.¹⁶

Then, during the week of October 21, 2013, Dr. Jantz distributed free copies of the book *Raising Boys By Design* to all

¹⁶ CP 196-197 (Exhibit B to the Declaration of Carrie Abbott).

King's Schools teachers and administrators. Shortly after Dr. Jantz had distributed his book to the King's Schools staff, a fellow teacher, Katrina Pepler, approached Mrs. Tollefsen and said the book contained a story about her.¹⁷ Ms. Pepler showed Mrs. Tollefsen a passage on pages 8-9 of the book that was similar to the fabrication Dr. Jantz had told on *Legacy Out Loud* on October 16, 2013:

As I established my career, I thought I had put all of that early anxiety and struggle behind me. Imagine to my surprise when many of those feelings came flooding back as my sons began their schooling. Through my sons' eyes, I realized that not much had changed since I'd been in school. The tipping point toward looking at the design of boys for the sake of my sons came soon after my oldest - my namesake, Gregg - started sixth grade at a new school. One day he reported a weird thing that had caught his attention. At the start of the day, a line of boys paraded up to the teacher's desk and took some sort of pill. When he relayed this oddity, my heart sank. The only conclusion I could draw was that these boys were being medicated, probably with Ritalin or a similar drug, probably for ADD or ADHD.¹⁸

When Mrs. Tollefsen read the false passage, she burst into tears. Since then, she has suffered repeated bouts of depression, has had anti-depression medications prescribed, has suffered from insomnia, and has experienced severe mental distress.¹⁹

¹⁷ CP 80 (Declaration of Lane Tollefsen, ¶ 16).

¹⁸ CP 80 (Declaration of Lane Tollefsen, ¶ 16) and CP 279 (Answer, ¶ 21).

¹⁹ CP 80 (Declaration of Lane Tollefsen, ¶ 17).

In April 2014, Mrs. Tollefsen served all Defendants, with the exception of Carrie Abbott, with a complaint setting forth claims of defamation and emotional distress based on Dr. Jantz's defamatory statements in *Raising Boys By Design* and in the radio interview on *Legacy Out Loud*. The original complaint was served but never filed.²⁰

In May 2014, counsel for Defendants provided Plaintiff's counsel with a proposed clarification of the defamatory statements in the book and in the radio interview, which Dr. Jantz would read during an airing of *Legacy Out Loud*.

Hi, this Dr. Gregg Jantz. On October 16, 2013, I appeared on this program to discuss a book I co-authored, *Raising Boys by Design*. In the book and on the broadcast, I described an experience my son had in elementary school. My son recounted a daily routine in which several boys proceeded to the front of the classroom to take a pill in the morning. The pill, I explained on this program, was for "attention issues." An elementary school teacher, Lane Tollefsen, has filed a lawsuit against me and the others, claiming I falsely accused her of distributing controlled substances to boys and therefore engaged in criminal acts. I wish to clarify that neither my co-authors nor I intended to imply Mrs. Tollefsen or any other teacher had engaged in any criminal activity whatsoever, nor do I have any reason to believe any teachers did. I believed, and expected readers and listeners to believe, that the medication was legally prescribed and parents had authorized this conduct in school.²¹

²⁰ CP 58-68.

²¹ CP 70.

Before Plaintiff's counsel could fully comment on the inadequacy of the proposed clarification, Dr. Jantz moved forward with publishing a slightly modified version of the statement, removing Lane Tollefsen's name.²² On May 21 and 23, 2014, the following pre-recorded statement by Defendant Jantz was aired during *Legacy Out Loud*:

Hi, this Dr. Gregg Jantz. On October 16, 2013, I appeared on this program to discuss a book I co-authored, *Raising Boys by Design*. In the book and on the broadcast, I described an experience my son had in elementary school. My son recounted a daily routine in which several boys proceeded to the front of the classroom to take a pill in the morning. The pill, I explained on this program, was for "attention issues." An elementary school teacher has filed a lawsuit against me and the others, claiming I falsely accused her of distributing controlled substances to boys and therefore engaged in criminal acts. I wish to clarify that neither my co-authors nor I intended to imply that any teacher had engaged in any criminal activity whatsoever, nor do I have any reason to believe any teachers did. I believed, and expected readers and listeners to believe, that the medication was legally prescribed and parents had authorized this conduct in school.²³

2. Medications at King's Schools.

Like all schools, King's Schools has a strict policy regarding the administration of over-the-counter and prescription

²² CP 55-56 (Declaration of Chris Rosfjord, ¶ 5) and CP 73-74 (Rosfjord Exhibit 3).

²³ CP 199 (Exhibit C to the Declaration of Carrie Abbott).

medications.²⁴ The policy is based on RCW 28A.210.260, which provides detailed conditions that must be followed to avoid criminal prosecution and the institution of civil proceedings. They include the preparation of a written school policy regarding safeguarding of the drugs, maintaining a record of administration of the drugs, a form signed by the child's physician, and administration by a trained school employee.²⁵

The form containing King's Schools' policy is given in a packet of forms distributed to each child at the beginning of the year. In addition, the King's Schools weekly newsletter contains a reminder about the form and medications at school.²⁶

King's Elementary School designates a trained person to administer medication. That person is in the school office. Lane Tollefsen has never been a person trained to administer medication, does not have access to the medication locked in the school office, and has never administered medication in the classroom to any student, not even Aspirin.²⁷

B. PROCEDURAL HISTORY

Lane Tollefsen filed her Complaint against Defendants for

²⁴ CP 80 (Declaration of Lane Tollefsen, ¶ 18).

²⁵ RCW 28A.210.260

²⁶ CP 80 (Declaration of Lane Tollefsen, ¶ 18-19) and CP 83-90 (Tollefsen Exhibits 1 and 2).

²⁷ CP 81 (Declaration of Lane Tollefsen, ¶ 20).

Libel, Slander, and Negligent/Intentional Infliction of Emotional Distress, on July 14, 2014.²⁸ On August 8, 2014, Defendants filed their Answer to Complaint for Libel, Slander, and Negligent/Intentional Infliction of Emotional Distress.²⁹

On September 12, 2014, Defendants filed a Special Motion to Strike Plaintiff's Complaint Pursuant Washington's now constitutionally invalidated Anti-Strategic Litigation Against Public Participation statute, RCW 4.24.525. Lane Tollefsen filed her opposition to Defendants' Special Motion to Strike, on September 29, 2014. Defendants filed their reply brief on October 6, 2014.

Following oral argument from the parties on Defendants' Special Motion to Strike, on October 10, 2014, the trial granted Defendants' Special Motion to Strike and awarded Defendants statutory damages of \$50,000 and reasonable attorney fees pursuant to RCW 4.24.525(6). Plaintiff filed a Motion for Reconsideration, which the trial court denied.

On December 19, 2014, Plaintiff appealed the trial court's order granting Defendants' Special Motion to Strike and award of statutory damages and attorney fees. Plaintiff filed her opening appellate brief on April 20, 2015.

Prior to the filing of Defendants' opposition brief, The

²⁸ CP 328-346 (Complaint).

²⁹ CP 268-327 (Answer).

Washington State Supreme Court issued its decision in *Davis v. Cox*. In a unanimous decision, the *Davis* Court found that section (4)(b) of RCW 4.24.525 unconstitutionally violates the right to a jury trial. The *Davis* Court further held that, because every other section in RCW 4.24.525 is dependent upon section (4)(b), the provision is non-severable and the statute is invalid as a whole.³⁰

On November 16, 2015, in light of in the ruling in *Davis v. Cox*, this Court remanded this matter back “to the trial court with instructions to vacate the order of dismissal, the award of statutory damages and attorney fees, and to conduct such further proceedings as are necessary”.³¹

On January 27, 2016, Defendants filed Defendants’ Motion for Summary Judgment seeking dismissal of Plaintiff’s complaint.³² Plaintiff filed her opposition to Defendants’ Motion for Summary Judgment on February 16, 2016³³ and Defendants filed their Reply brief on February 22, 2016.³⁴

The parties appeared before the trial court for oral argument on February 26, 2016. Following oral argument, the trial court took Defendants’ Motion for Summary Judgment under advisement. On

³⁰ *Davis v. Cox*, 183 Wn.2d 269, 351 P.3d 862 (2015).

³¹ CP 255-260 (Court of Appeals Opinion).

³² CP 97-267 (Defendants’ Motion for Summary Judgment).

³³ CP 26-53 (Plaintiff’s Opposition), CP 55-76 (Declaration of Chris Rosfjord), and CP 77-93 (Declaration of Lane Tollefsen).

³⁴ CP 11-23 (Defendants’ Reply).

March 22, 2016, the trial court issued an order granting Defendants' Motion for Summary Judgment.³⁵ Plaintiff now appeals that March 22, 2016 order.

V. STANDARD OF REVIEW AND STANDARD OF PROOF

This matter comes before the Court for review of the trial court's order granting Defendants' Motion for Summary Judgment and dismissing Plaintiff's claims of defamation and intentional/negligent infliction of emotional distress.

The appellate court reviews all rulings made in conjunction with a summary judgment motion *de novo*.³⁶ The appellate court conducts the same inquiry as the trial court.³⁷ "An appellate court would not be properly accomplishing its charge if the appellate court did not examine all the evidence presented to the trial court[.]"³⁸ Furthermore, the determinations and decisions made by the trial court are not entitled to any deference.³⁹

Summary judgment is appropriate only "if the pleadings, depositions, and admissions on file, together with the affidavits... show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law".⁴⁰

³⁵ CP 77-78 (Order Granting Defendants' Motion for Summary Judgment).

³⁶ Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

³⁷ Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

³⁸ Folsom, 135 Wn.2d at 663.

³⁹ Jones, 146 Wn.2d at 300.

⁴⁰ CR 56(c); Trimble v. Washington State University, 140 Wn.2d 88, 93, 993 P.2d 259 (2000).

The party moving for summary judgment bears the initial burden of proving “by uncontroverted facts that there is no genuine issue of material fact”.⁴¹ If the nonmoving party bears the burden of proof at trial, the moving party may meet its initial burden on summary judgment (1) by presenting evidence to negate an essential element of the nonmoving party's claim; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's claim.⁴²

“If the moving party does not sustain [its initial] burden, summary judgment should not be entered, irrespective of whether the nonmoving party has submitted affidavits or other materials”.⁴³ If the moving defendant meets its burden, the burden shifts to the non-moving party to establish the existence of a genuine issue of material fact.⁴⁴

“A material fact is one that affects the outcome of the litigation”.⁴⁵ The court does not weigh the evidence and may only determine a question of fact as a matter of law “when reasonable minds could reach but one conclusion”.⁴⁶ The court treats all facts

⁴¹ LaPlante v. State, 85 Wn.2d 154, 158, 531 P.2d 299, (1975).

⁴² Celotex Corp. v. Catrett, 477 U.S. 317, 323-325 (1986).

⁴³ Young v. Key Pharm., Inc., 112 Wn.2d 216, 235, 770 P.2d 182 (1989).

⁴⁴ Hiatt v. Walker Chevrolet Co., 120 Wn.2d 57, 66, 837 P.2d 618 (1992).

⁴⁵ Owen v. Burlington N. Santa Fe R.R., 153 Wn.2d 780, 789, 108 P.3d 1220 (2005).

⁴⁶ Havens v. C&D Plastics, Inc., 124 Wn.2d 158, 177 (1994).

and inferences in the light most favorable to the nonmoving party.⁴⁷ Even if certain facts are undisputed, if reasonable minds could draw different conclusions, summary judgment is improper.⁴⁸ Any doubt as to the existence of a genuine issue of material fact must be resolved against the moving party and the summary judgment motion must be denied.⁴⁹

A. Standard of Proof at Summary Judgment

“[T]he inquiry involved in a ruling on a motion for summary judgment... necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits”.⁵⁰ Applying the same standard of proof required at trial, the court views all facts and inferences in the light most favorable to the party opposing summary judgment.⁵¹ If the evidence is sufficient for a reasonable jury to find in favor of the non-moving party, genuine issues of material fact exist and the court must deny the motion.⁵²

To establish a prima facie defamation claim, a plaintiff must

⁴⁷ Green v. A.P.C., 136 Wn.2d 87, 94, 960 P.2d 912 (1998).

⁴⁸ Chelan County Deputy Sheriffs' Ass'n v. Chelan County, 109 Wn.2d 282, 295, 745 P.2d 1 (1987).

⁴⁹ Atherton Condo. Apartment Owners Ass'n Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

⁵⁰ Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-56, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

⁵¹ Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 860, 93 P.3d 108 (2004); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-56, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

⁵² Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Trimble v. Washington State University, 140 Wn.2d 88, 93, 993 P.2d 259 (2000).

prove four elements: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication, (3) fault, and (4) damages.⁵³ The standard of proof on each element at trial is a preponderance of the evidence, except where the applicable standard of fault is actual malice.⁵⁴ If the applicable standard of fault is actual malice, then the plaintiff's standard of proof will be clear and convincing evidence.⁵⁵

VI. ARGUMENT

- A. **The Court does not apply a higher evidentiary standard than that applicable at trial when considering a motion for summary judgment in a defamation action.**
1. **Imposition of a higher evidentiary standard at summary judgment than that required at trial violates Plaintiff's constitutional right to a jury trial.**

In their motion for summary judgment, Defendants' argued that a claimant in a defamation case must establish a prima facie case by convincing clarity to survive summary judgment.⁵⁶ Defendants relied upon the 1981 Washington State Supreme Court case Mark v. Seattle Times.

Five years after Mark, the United States Supreme Court decided Anderson v. Liberty Lobby, Inc. The Anderson case involved summary judgment on a defamation claim. In its opinion,

⁵³ Mark v. Seattle Times, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981), cert. denied, 457 U.S. 1124, 73 L. Ed. 2d 1339, 102 S. Ct. 2942 (1982).

⁵⁴ Richmond v. Thompson, 130 Wn.2d 368, 385-86, 922 P.2d 1343 (1996).

⁵⁵ Richmond v. Thompson, 130 Wn.2d 368, 385-86, 922 P.2d 1343 (1996).

⁵⁶ CP 113-114.

the Anderson court discussed the nature of a trial court's inquiry on a motion for summary judgment and whether or not requiring a plaintiff to meet the higher clear and convincing standard of proof at the summary judgment stage on the element of actual malice was proper. The Anderson court held that the higher standard on the element of actual malice should apply to the summary judgment because "the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case".⁵⁷

In light of Anderson, in Haueter v. Cowles Pub. Co., the Washington Court of Appeals rejected Mark's holding that a plaintiff resisting summary judgment in a defamation must establish a prima facie case on all four elements by convincing clarity.⁵⁸ The Haueter court, instead, applied a preponderance of evidence standard, which would have been the standard at trial.⁵⁹

Then in Richmond v. Thompson, the Washington State Supreme Court recognizing the decisions in Haueter⁶⁰ and Anderson, held that "Anderson rejects the idea that the First Amendment demands the application of a higher evidentiary

⁵⁷ Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986),

⁵⁸ Haueter v. Cowles Pub. Co., 61 Wn. App. 572, 584 (1991).

⁵⁹ Id.

⁶⁰ See Haueter v. Cowles Pub. Co., 61 Wn. App. 572, 577-584 (1991) (discussing the development of Washington and U.S. Supreme Court caselaw on the applicable standard of proof in defamation cases).

standard when the court considers summary judgment in a defamation action. Rather, the court must be guided by the evidentiary standards that apply to the case".⁶¹ In a defamation action, that standard of proof is a preponderance of the evidence on all elements, except when actual malice must be shown. "Neither the common law nor the First Amendment, as interpreted by the United States Supreme Court, requires proof of any element of a defamation action, other than actual malice, by evidence of convincing clarity".⁶²

Rather, by requiring a plaintiff to satisfy a higher standard of proof at summary judgment than that applicable at trial, the end result is the dismissal of claims on which the plaintiff could prevail at trial under the lesser applicable standard and is a violation of the plaintiff's right to a jury to a trial.

Article I, Section 21 of the Washington Constitution states, "[t]he right of trial by jury shall remain inviolate".⁶³ "The term 'inviolate' connotes deserving of the highest protection" and "indicates that the right must remain the essential component of

⁶¹ Richmond v. Thompson, 130 Wn.2d 368, 386, 922 P.2d 1343 (1996).

⁶² Richmond v. Thompson, 130 Wn.2d 368, 385-86, 922 P.2d 1343 (1996) (quoting Haueter v. Cowles Publ'g Co., 61 Wn. App. 572, 582, 811 P.2d 231 (1991)).

⁶³ Wash. Const. art. I, § 21.

our legal system that it has always been".⁶⁴ "The right 'must not diminish over time and must be protected from all assaults to its essential guaranties'".⁶⁵ "At its core, the right of trial by jury guarantees litigants the right to have a jury resolve questions of disputed material facts".⁶⁶

Since the trial court did make any oral rulings or issue an opinion, it is unknown if the trial court applied the higher standard or standard of proof applicable in its decision to grant Defendants' summary judgment motion. However, since the Court gives no deference to the trial court's ruling, it must decide whether to apply the higher standard of proof argued by Defendants' or the trial standard of proof as the U.S. Supreme Court has said applies at summary judgment. By applying the higher standard, the Court would be violating Mrs. Tollefsen's right to have the jury determine questions of fact under the lesser standard of proof she is entitled to meet at trial.

⁶⁴ Davis v. Cox, 183 Wn.2d 269, 288, 351 P.3d 862 (2015) (quoting Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 183 Wn.2d 289, 771 P.2d 711, 780 P.2d 260 (1989)).

⁶⁵ Davis v. Cox, 183 Wn.2d 269, 289, 351 P.3d 862 (2015) (quoting Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 183 Wn.2d 289, 771 P.2d 711, 780 P.2d 260 (1989)).

⁶⁶ Davis v. Cox, 183 Wn.2d 269, 288, 351 P.3d 862 (2015).

B. Lane Tollefsen has raised genuine issues of material fact on each element of her defamation claim.

1. Dr. Jantz made false and defamatory statements about Lane Tollefsen.

The first element a plaintiff must prove in a defamation action is that the defendant made false and defamatory statements that were of and concerning the plaintiff. The burden of proof is a preponderance of the evidence.⁶⁷

a. Dr. Jantz's statements are of and concerning Lane Tollefsen.

A plaintiff asserting a claim for defamation must demonstrate that the defamatory statements are “of and concerning” the plaintiff.⁶⁸ The defamatory statement does not need to mention the plaintiff by name.⁶⁹ “[I]t is sufficient that if viewers, hearers or readers will conclude ... that the plaintiff is the one against whom publication is aimed”.⁷⁰ Not everyone who reads or hears the statement must identify the person alleging defamation as the intended target. If any “part of the intended audience may reasonably think” that the unnamed person is the party “who is hit”, then the statement is “of and concerning” that person.⁷¹

⁶⁷ Richmond v. Thompson, 130 Wn.2d 368, 386, 922 P.2d 1343 (1996).

⁶⁸ Sims v. Kiro, Inc., 20 Wn. App. 229, 234 (1978).

⁶⁹ Sims v. Kiro, Inc., 20 Wn. App. 229, 234 (1978) (citing Ryan v. Hearst Publications, Inc., 3 Wn.2d 128, 100 P.2d 24 (1940)).

⁷⁰ Id.

⁷¹ Sims v. Kiro, Inc., 20 Wn. App. 229, 234 (1978).

In this case, Mrs. Tollefsen was not identified by name in *Raising Boys By Design* and the *Legacy Out Loud* broadcasts, but it is clear from the evidence that a part of Dr. Jantz's intended audience would reasonably identify Mrs. Tollefsen as the teacher in his statements.

When Mrs. Tollefsen's efforts to control Gregg Jr.'s disruptive behavior in the classroom proved fruitless, she suggested to Dr. and Mrs. Jantz that they may want to have Gregg Jr. tested for "attention and focus" issues. Mrs. Tollefsen's suggestion was met by harsh criticism from the Jantzes, who redirected the blame upon Mrs. Tollefsen's teaching style. The Jantzes were so adamant that Mrs. Tollefsen, not Gregg Jr., was to blame for his behavior in her classroom, they had Gregg Jr. removed from Mrs. Tollefsen's class. The removal of a student from a teacher's class is rare at King's Elementary and the dispute Dr. and Mrs. Jantz had with Mrs. Tollefsen was well-known within King's Schools.

Dr. and Mrs. Jantz's interactions with Mrs. Tollefsen and her suggestion that they may want to have Gregg Jr. tested for attention issues became the motivation for Dr. Jantz to write *Raising Boys By Design*, which is evident from his statements in the book and in the October 2013 *Legacy Out Loud* interview.

According to the book, “[t]he tipping point” for Dr. Jantz supposedly came when Gregg Jr. told him that, “[a]t the start of the day, a line of boys paraded up to the [sixth grade] teacher’s desk and took some sort of pill”, which Dr. Jantz assumed was for ADD or ADHD. He then goes on to state that it was suggested that his son may have attention issues, but that he knew that his son did not have such issues. Though the Jantzes had Gregg Jr. tested, they did so to do the, “Oh, I’ll show you” that there were no issues.⁷²

The book was published in the late-summer or early-fall of 2013. Shortly after *Raising Boys By Design* was published, Dr. Jantz appeared on the radio show *Legacy Out Loud* to promote the book. Dr. Jantz began the show by recounting the difficulties Gregg Jr. was having: “And it was really tough and it wasn’t going well and I wasn’t connecting well with his teacher and there was a couple references, ‘well, maybe your son has some kind of attention issues and so forth,’ Dr. Jantz went on to describe how he asked his son to count how many boys in his class took a pill in front of the teacher each morning. Dr. Jantz said that six to eight boys would take a pill in front of the teacher each morning for “attention issues”.⁷³

In both the book and the radio interview, Dr. Jantz is clearly

⁷² CP 196-197.

⁷³ CP 196-197.

describing the dispute he and Mrs. Jantz had with Mrs. Tollefsen concerning Gregg Jr.'s behavioral issues and Mrs. Tollefsen's suggestion that he be tested for attention issues, a dispute that had been well-known with the King's Schools community. Dr. Jantz proceeded to distribute *Raising Boys By Design* to the King's Schools faculty and administrators. *Legacy Out Loud* is a program on radio station KCIS owned by King's Elementary's parent company, CRISTA Ministries, and is listened to by King's Schools parents, teachers, and administrators. A reasonable jury could determine that readers and listeners would identify Mrs. Tollefsen as the teacher Dr. Jantz referred to in his statements, which said that several of his son's sixth grade classmates were taking a pill in front of his son's teacher each morning.

Indeed, two of Mrs. Tollefsen's colleagues immediately identified Mrs. Tollefsen as the subject of Dr. Jantz's statements. The first heard Dr. Jantz's interview and informed Mrs. Tollefsen that she knew Dr. Jantz was talking about Mrs. Tollefsen. Similarly, when another colleague read Dr. Jantz's statement in the book she knew that the teacher Dr. Jantz was referring to was Mrs. Tollefsen. These colleagues now refuse to sign declarations.

The third statement, Dr. Jantz's recorded statement on *Legacy Out Loud*, does not mention Mrs. Tollefsen by name, but

does specifically reference this lawsuit. Thus, a reasonable jury could find that the “clarification” was of and concerning Mrs. Tollefsen.

b. Dr. Jantz’s statements are false.

A plaintiff in a defamation action must only demonstrate that the offending statement is “provably false”.⁷⁴ “Falsity in a classic defamation case is a false statement”.⁷⁵ A statement is provably false if “it expresses or implies provable facts, regardless of whether the statement is, in form, a statement of fact or a statement of opinion”.⁷⁶ “A statement may be provably false in at least the following ways: because it falsely represents the state of mind of the person making it, because it is falsely attributed to a person who did not make it, or because it falsely describes the act, condition or event that comprises its subject matter”.⁷⁷ Whether a statement is provably false in part or in whole, the statement will have satisfied the falsity element.⁷⁸

In this case, in three separate statements, Defendant Gregg Jantz informed readers and listeners that his son told him that several of his sixth grade male classmates took a pill in front

⁷⁴ Schmalenberg v. Tacoma News, 87 Wn. App. 579, 590-591 (1997).

⁷⁵ Mohr v. Grant, 153 Wn.2d 812, 823, 108 P.3d 768 (2005).

⁷⁶ Schmalenberg v. Tacoma News, 87 Wn. App. 579, 590-591 (1997).

⁷⁷ Schmalenberg v. Tacoma News, 87 Wn. App. 579, 590 (1997).

⁷⁸ Schmalenberg v. Tacoma News, 87 Wn. App. 579, 590 (1997).

of his teacher each morning, which Dr. Jantz said was for “attention issues”. As outlined above, the teacher Dr. Jantz is referring to is Mrs. Tollefsen. Dr. Jantz’s statements that Mrs. Tollefsen allowed students to take medication in front of her in her classroom are patently false.

King’s Schools, like all schools in Washington, has a strict policy regarding the administration of over-the-counter and prescription medications. At King’s Elementary, where Mrs. Tollefsen taught sixth grade for 15 years, all over-the-counter and prescription medications are administered by a trained person designated by the school. All students must go to the school office, where the designated person is stationed, to receive their medication. All medication is safely locked in the school office and access to the medication is restricted. At no point during her tenure with King’s Elementary was Mrs. Tollefsen the designated person authorized to administer medication at the school. Mrs. Tollefsen never administered medication to students or allowed students to take medication in her classroom.⁷⁹

On the issue of falsity, a reasonable jury could reach only one conclusion: Dr. Jantz’s statements that several of his son’s sixth grade classmates paraded up to Mrs. Tollefsen’s desk each

⁷⁹ CP 80 and 84-90.

morning to take a pill are false.

Additionally, with respect to Dr. Jantz's recorded statement on *Legacy Out Loud*, in that statement, Dr. Jantz does not deny he made the statement that several his son's classmates took a pill in the morning. However, he fails to correct the statement by informing the listeners that students were not taking a pill in the classroom each morning. Instead, Dr. Jantz merely makes self-serving, after-the-fact statements that he thought the information was true. This does not change the falsity of the statement. Dr. Jantz is still stating that it did happen. That statement is still false. Moreover, Dr. Jantz was well aware at the time that this particular statement was false because he had been served with this lawsuit which states that Mrs. Tollefsen was not the designated person authorized to distribute medication to students, but that is an issue for the element of fault.

- (1) **The "sting" inquiry is inapplicable because the falsity of the statements concerning Mrs. Tollefsen is total, not partial.**

In their motion for summary judgment, Defendants argued that any inaccuracies in Dr. Jantz's statements are immaterial because they do not alter the "sting" of the statement, which they maintain is "that a large number of young boys are being

medicated for attention disorders”.⁸⁰ Defendants assert that Dr. Jantz’s statement that several of his son’s sixth grade classmates paraded up to Mrs. Tollefsen’s desk each morning to take a pill has no different material effect than a statement that the students take the medication in front of the school’s designated person in another school room. However, the “sting” inquiry is inapplicable to this case because Dr. Jantz’s statements, as they relate to Mrs. Tollefsen, are false in whole. Even if applicable, Defendants misapply the “sting” inquiry to Dr. Jantz’s statements.

First, when applicable, the “sting” inquiry goes to the elements of causation and damages. It has no bearing on the element of falsity. Once the plaintiff has shown the existence of a false statement, whether false in whole or in part, the element of falsity has been met. The inquiry into falsity ends there.

Second, the “sting” inquiry is only applicable when a statement contains a mixture of true and false negative statements about the person that is the subject of the statement. This is evident from the test set forth in Mark v. Seattle Times: “Where a report contains a mixture of true and false statements, a false statement (or statements) affects the ‘sting’ of a report only when ‘significantly greater opprobrium’ results from the report containing

⁸⁰ CP 121:5-7.

the falsehood than would result from the report without the falsehood”.⁸¹ More precisely, “[t]he question is whether the false statement has resulted in damage which is distinct from that caused by true negative statements also contained in the same report”.⁸²

Unlike Mark and other Washington defamation cases applying the “sting” inquiry, the case at hand does not involve a story or report about Mrs. Tollefsen that contains true and false negative statements about her. Rather, Dr. Jantz’s communications each contain a single negative statement about Mrs. Tollefsen - that she allowed students to take medication in her classroom - and that statement is false. Absent any true negative statements about Mrs. Tollefsen, Dr. Jantz’s false statement necessarily provides the basis for any opprobrium towards Mrs. Tollefsen. Thus, there is no need to apply the “sting” inquiry.⁸³

If the Court finds the “sting” inquiry applicable, Dr. Jantz’s statement that several of his son’s sixth grade classmates paraded up to Mrs. Tollefsen’s desk each morning to take a pill

⁸¹ Herron v. King Broad. Co., 112 Wn.2d 762, 769 (1989) (citing Mark v. Seattle Times, 96 Wn.2d 473, 496 (1981)).

⁸² Herron v. King Broad. Co., 112 Wn.2d 762, 771 (1989).

⁸³ See Duc Tan v. Le, 177 Wn.2d 649, 667 (2013) (refusing to apply “sting” inquiry where statements included no true negative facts).

alters the “sting” of the statements. Dr. Jantz could have merely stated that several of his son’s male classmates were being medicated for attention issues. But he did not. He included the false statement that the boys took the medication each morning in front of the teacher in the classroom. This statement, if true, would mean that Mrs. Tollefsen was violating King’s Schools’ medication administration policy and would subject her to criminal charges. Clearly, the addition of this false statement alters the “sting” of the story as it relates to Mrs. Tollefsen, the subject of the false statement.

c. Dr. Jantz’s statements are capable of defamatory meaning.

“A communication is defamatory if it tends so to harm the reputation of another as to lower him [or her] in the estimation of the community or to deter third persons from associating or dealing with him [or her].”⁸⁴ “To be defamatory, it is not necessary that the communication actually cause harm to another’s reputation or deter third persons from associating or dealing with him. Its character depends on its general tendency to have such an effect”.⁸⁵ Courts determine whether a communication is

⁸⁴ Right-Price Recreation, LLC v. Connells Prairie Cmty. Council, 146 Wn.2d 370, 382, 46 P.3d 789 (2002) (quoting Restatement (Second) of Torts § 559 (1977)).

⁸⁵ Right Price Recreation v. Connells Prairie Council, 146 Wn.2d 370, 382, 46 P.3d 789, 795-96 (2002).

capable of defamatory meaning.⁸⁶ Whether or not the recipient of the communication understood the statement to be defamatory is a question for the jury.⁸⁷

Defendants argued that Dr. Jantz's statements do not directly accuse Mrs. Tollefsen of violating school policy, committing criminal acts, or any other wrongdoing; and, therefore, the statements are not defamatory. Defendants assert that the defamatory nature must be apparent from the language and that courts invest in words with their natural and obvious meaning.

However, that argument is irrelevant to the issue of whether or not the statements are capable of defamatory meaning. Defendants' analysis only applies when the alleged defamatory statement is actually true.⁸⁸ "[K]nowingly false statements and false statements made with reckless disregard for the truth" are not entitled to First Amendment protection.⁸⁹

Regardless of Dr. Jantz's motivations for including the false

⁸⁶ Crossman v. Brick Tavern, 33 Wn. App. 503, 505 (1982) (citing Purvis v. Bremer's, Inc., 54 Wn.2d 743, 753, 344 P.2d 705 (1959) (citing Restatement of Torts § 614, at 304 (1938))).

⁸⁷ *Id.*

⁸⁸ Lee v. Columbian, Inc., 64 Wn. App. 534, 540 (1991).

⁸⁹ This is because "[c]alculated falsehood[s] fall[] into that class 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...'" "Calculated falsehoods" include knowingly false statements and false statements made with reckless disregard for the truth. Garrison v. Louisiana, 379 U.S. 64, 74, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964).

statement, if the statements were true, Mrs. Tollefsen was violating King's Schools' medication administration policy and would be subject to criminal charges - clearly a statement tending to harm Mrs. Tollefsen's reputation. Simply omitting a direct accusation of wrongdoing does not eliminate the impact of the false statements upon Mrs. Tollefsen or their defamatory nature. The reason the false statement was made goes to the issue of fault, not the issue of whether or not the statement is defamatory. Ruling otherwise would provide individuals carte blanche to publish statements falsely attributing conduct to other and exposing those persons to reputational harm, but without any consequences to the publisher.

2. **Dr. Jantz's false and defamatory statements about Lane Tollefsen are not privileged communications.**
 - a. **The "clarification" issued by Dr. Jantz is not entitled to the litigation privilege.**

Absolute privilege does not apply in situations where there are no safeguards against abuse. Absolute privilege only applies in "situations in which authorities have the power to discipline as well as strike from the record statements which exceed the bounds of permissible conduct".⁹⁰ In judicial proceedings, the trial judge has the ability to strike statements from the record and impose perjury

⁹⁰ Twelker v. Shannon & Wilson, Inc., 88 Wn.2d 473, 476, 564 P.2d 1131 (1977).

and contempt sanctions.⁹¹ If the statement occurs off the record and out of the courtroom, the safeguard is unavailable.⁹²

In this case, Plaintiff's original complaint had been served, but the lawsuit had not been filed when Dr. Jantz issued his "clarification" on Defendant Abbott's radio show. Hence, there was no judicial proceeding. Because the "clarification" occurred out of the courtroom and off the record, there were no safeguards to prevent Dr. Jantz from abusing the litigation privilege - exactly what he is attempting to do now. Therefore, the absolute privilege does not apply to the "clarification" issued by Dr. Jantz.

b. The Fair Reporting Privilege does not apply to any of the statements.

Defamatory statements that originate in a "report of an official action, proceeding, or meeting open to the public that deals with a matter of public concern" are conditionally privileged.⁹³ Dr. Jantz was not reporting on an official action, proceeding, or public meeting, so his statements are not entitled to the fair reporting privilege.

c. The Common Interest Privilege does not apply to any of the statements.

Washington recognizes a "common interest privilege". The privilege applies to organizations, partnerships, and associations

⁹¹ Herron v. Tribune Pub'g Co., 108 Wn.2d 162, 177, 736 P.2d 249 (1987).

⁹² Demopolis v. Peoples Nat'l Bank, 59 Wn. App. 105, 112-113 (1990).

⁹³ Momah v. Bharti, 144 Wn. App. 731, 745 (2008).

and “arises when parties need to speak freely and openly about subjects of common organizational or pecuniary interest”.⁹⁴ There are no grounds for Defendants to assert a common interest privilege in this case.

3. Defendants are at fault.

The standard of liability for a publisher of a defamatory statement is determined by the class of persons to which the plaintiff belongs. A plaintiff in a defamation action may be considered: 1) a private individual; 2) a public official; or 3) a public figure.⁹⁵ If the plaintiff is a public official/figure, the applicable standard is actual malice.⁹⁶ If, however, the plaintiff is a private individual, the plaintiff needs only to prove negligence.⁹⁷

a. Mrs. Tollefsen is neither a public official nor a public figure.

“Public figures” are persons who assume roles of special prominence, occupy positions of such persuasive power and influence, or have thrust themselves to the forefront of public controversies.⁹⁸ Filing a lawsuit does not transform a private individual into a public figure.⁹⁹ The defendant in a defamation

⁹⁴ Momah v. Bharti, 144 Wn. App. 731, 747 (2008) (citing Moe v. Wise, 97 Wn. App. 950, 957-58 (1999)).

⁹⁵ See Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974).

⁹⁶ Clawson v. Longview Pub. Co., 91 Wn.2d 408, 414 (1979).

⁹⁷ Taskett v. King Broad. Co., 86 Wn.2d 439, 445 (1976).

⁹⁸ Gertz v. Robert Welch, Inc., 418 U.S. 323, 345, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974).

⁹⁹ Momah v. Bharti, 144 Wn. App. 731, 741 (2008).

lawsuit cannot, by their own conduct, transform the plaintiff into a public figure.¹⁰⁰

Mrs. Tollefsen was a sixth grade teacher at a private school in Seattle. When Dr. Jantz's son was having behavioral issues at school, Mrs. Tollefsen recommended that he be tested for "attention issues". That was a purely private matter between teacher and parents. Dr. Jantz cannot transform Mrs. Tollefsen into a public figure by publishing defamatory statements about her that arise from a purely private matter between them. Mrs. Tollefsen is a private individual and, therefore, the applicable standard of liability in this case is negligence.

b. Defendants negligently published defamatory statements about Mrs. Tollefsen.

"[A] private individual, who is neither a public figure nor official, may recover actual damages for a defamatory falsehood, concerning a subject of general or public interest, where the substance makes substantial dangers to reputation apparent, on a showing that in publishing the statement, the defendant knew or, in the exercise of reasonable care, should have known that the statement was false, or would create a false impression in some material respect."¹⁰¹

¹⁰⁰ Hutchinson v. Proxmire, 443 U.S. 111, 135, 99 S. Ct. 2675, 61 L. Ed. 2d 411 (1979).

¹⁰¹ Taskett v. King Broad. Co., 86 Wn.2d 439, 445 (1976).

As discussed below, Dr. Jantz knowingly made false and defamatory statements about Mrs. Tollefsen, which also satisfies the negligence test. Moreover, he failed to investigate his son's story, the veracity of which he now asks the Court to discount based on his son's age at the time.¹⁰² The remaining Defendants owed Mrs. Tollefsen a duty to exercise reasonable care in publishing the defamatory statements. As co-authors and as the publisher, Defendants Gurian, McMurray, and Random House should have exercised reasonable care to ensure that any statements referring to any actual individuals were true and accurate, not false and defamatory. It is clear that this did not occur because even the slightest investigation would reveal that the statements could not be true and, if true, would mean Mrs. Tollefsen was violating school policy and would be subject to criminal charges.

Defendant Abbott was aware that Dr. Jantz was airing a "clarification" on her show in response to a lawsuit that had been served. Defendant Abbott was aware of the allegations of the lawsuit, as the "clarification" had been pre-recorded.¹⁰³ Despite Dr. Jantz being accused of false and defamatory statements, Defendant Abbott did not exercise reasonable care and look into

¹⁰² CP 121:7-9.

¹⁰³ Declaration of Carrie Abbott (Dkt. No. 9).

the allegations. As with the other Defendants, the falsity of the statement would have been easily apparent with even minimal investigation. Instead, she published Dr. Jantz's false and defamatory "clarification" during four broadcasts of her show. Defendant Abbott's aired the falsehood with reckless disregard, as she was aware of the high degree of probable falsity.

c. Even if the applicable standard of fault is actual malice, Dr. Jantz maliciously published defamatory statements about Mrs. Tollefsen.

A defendant acts with malice when he publishes a falsehood with actual knowledge of its falsity or with reckless disregard for its truth or falsity.¹⁰⁴ A defendant acts with reckless disregard when he publishes a falsehood with a "high degree of awareness of ... probable falsity" or serious doubts as to the truth of the publication.¹⁰⁵

It is clear from the evidence that Defendant Jantz's story about his son telling him that several boys lined up at the teacher's desk to take a pill each morning is a total fabrication by Defendant Jantz. First, as discussed throughout this response, the statement is patently false - King's Schools designates a specific person to administer medication, which does not occur in the classroom, and

¹⁰⁴ Herron v. King Broad. Co., 112 Wn.2d 762, 775 (1989).

¹⁰⁵ Garrison v. Louisiana, 379 U.S. 64, 74, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964); Herron, 112 Wn.2d at 775.

Mrs. Tollefsen was never that designated person. Second, Dr. Jantz tells two completely different versions of his story in the book and on the radio.

According to Dr. Jantz's story in the book, Gregg Jr. simply came to him out of the blue one day and relayed that there was a "weird thing that had caught his attention" in the classroom. Gregg Jr. then purportedly told Dr. Jantz that each day several of his classmates paraded up to the teacher's desk to take a pill. But, in the radio interview, Dr. Jantz said that after Gregg Jr.'s teacher (Mrs. Tollefsen) had brought up his son's potential attention issues, he set out "on a little bit of a quest". Apparently, Dr. Jantz wanted to know how many boys were taking pills for "attention issues", so it was he who asked his son to count how many boys went forward to take a pill in front of the teacher each morning.

In each version, Dr. Jantz informs the reader and listener that the boys were being medicated for attention issues - in the book he says he believed the pills were for ADD or ADHD and in the interview he states, as a fact, that the pills are for "attention issues". Dr. Jantz wants his audience to know that a large number of boys are being medicated for "attention issues" and including a personal story regarding his son's purported observances was the vehicle to do that.

How Dr. Jantz knew what the pills will for also raises questions of fact. The pills could have been for any number of medical issues, but Dr. Jantz states they are for attention issues and he did not want his son being placed on medications, too. Unless he investigated the matter, Dr. Jantz could not have known what pills were purportedly being distributed in the classroom. Again, Dr. Jantz wanted his audience to believe that a large number of boys were being medicated for attention issues and relating a story about his son would give credence to the rest of his argument against medicating boys.

After Mrs. Tollefsen served a copy of the lawsuit on Defendants, Dr. Jantz aired his recorded “clarification” on *Legacy Out Loud*. This statement further demonstrates Dr. Jantz’s actual malice in making the false and defamatory statements about Mrs. Tollefsen. Instead of admitting that his statements were fabricated, or at a minimum that they were inaccurate, Dr. Jantz said, “I believed, and expected readers and listeners to believe, that the medication was legally prescribed and parents had authorized this conduct in school”. Dr. Jantz is still asserting that his son’s story was accurate and that each day several of his son’s classmates went forward and took a pill in of the teacher. This statement comes after he was apprised that the story was absolutely false. A

reasonable jury could find that this is simply a self-serving, after-the-fact statement by Dr. Jantz seeking to avoid acknowledging what his “anecdote” was - a knowingly fabricated story to support his position.

4. Lane Tollefsen has suffered damages.

Generally, a plaintiff must present evidence of special or actual damages resulting from a defamatory statement.¹⁰⁶ The exception to the rule is libel per se, which allows an award of substantial damages without proof of actual damage.¹⁰⁷ A statement is libelous per se if it "tends to expose a living person to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social intercourse, or to injure him in his business or occupation."¹⁰⁸

Dr. Jantz's statements are libelous per se because they are type of statements that, if true, "tend[] to expose a living person to hatred, contempt, ridicule or obloquy, or to deprive [her] of the benefit of public confidence or social intercourse, or to injure [her] in [her] business or occupation." Dr. Jantz falsely attributes conduct to Mrs. Tollefsen that, if true, would be a violation of school policy and would subject her to criminal charges, which

¹⁰⁶ Purvis v. Bremer's, Inc., 54 Wn.2d 743, 747, 344 P.2d 705 (1959).

¹⁰⁷ Michielli v. U.S. Mortgage Co., 58 Wn.2d 221, 227, 361 P.2d 758 (1961).

¹⁰⁸ Purvis, 54 Wn.2d at 751.

clearly tends to damage a teacher's image in the educational system.

As set forth above, Dr. Jantz maliciously published the defamatory statements about Mrs. Tollefsen. Because Dr. Jantz acted with malice and his statements are libelous per se, Mrs. Tollefsen has presumably been damaged.

In addition to presumed damages, Mrs. Tollefsen has suffered actual out-of-pocket damages. After learning of the statements, Mrs. Tollefsen suffered from depression, insomnia, headaches, elevated stress, and was placed on anti-depression medication.

C. Plaintiff has demonstrated the existence of genuine issues of material facts as to her claim of emotional distress.

The tort of outrage requires the proof of three elements: (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to plaintiff of severe emotional distress.¹⁰⁹ The first element is satisfied by actions that are "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."¹¹⁰

¹⁰⁹ Kloepfel v. Bokor, 149 Wn.2d 192, 195 (2003).

¹¹⁰ Grimsby v. Samson, 85 Wn.2d 52, 59-60, 530 P.2d 291 (1975).

In order to sell his book, Dr. Jantz included a fabricated story in the book that each day several of his son's male classmates went forward and took a pill for attention issues in of the teacher (Mrs. Tollefsen), which he then retold on the *Legacy Out Loud* radio show. Dr. Jantz's story is patently false and would subject Mrs. Tollefsen disciplinary measures from the school and potential to criminal charges, if true. Even if Dr. Jantz's son did tell him this story, Dr. Jantz did nothing to verify its truth, for if he did he would have discovered that students could not have been taking medication in Mrs. Tollefsen's classroom because of strict school policies required by Washington law. Instead, Dr. Jantz recklessly published the statements, regardless of the effects the false statements would have upon Mrs. Tollefsen.

As a result of Defendant Jantz's intentional and reckless actions, Mrs. Tollefsen has suffered from depression, insomnia, headaches, elevated stress, was placed on anti-depression medication, and has suffered extreme emotional distress.

VII. CONCLUSION

In considering Defendants' Motion for Summary Judgment, the Court is guided by the standards of proof applicable trial. With the exception of showing actual malice to recover damages to reputation, at trial Lane Tollefsen would need to prove the

elements of her defamation and intentional/negligent infliction of emotional distress claims by a preponderance of evidence. Mrs. Tollefsen has presented sufficient evidence on each of the elements of her claims to raise genuine issues of material facts. Therefore, the trial court's granting of summary judgment was improper and the Court should vacate the order and remand this matter back to the trial court for further proceedings.

DATED this 11th day of July, 2016,

TOLLEFSEN LAW PLLC

A handwritten signature in black ink, appearing to read "Chris Rosfjord", is written over a horizontal line.

Chris Rosfjord, WSBA #37668
John J. Tollefsen, WSBA #13214
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Tollefsen

APPENDIX

Appendix No.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-56, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) 1

Celotex Corp. v. Catrett, 477 U.S. 317, 323-325 (1986) 2

Garrison v. Louisiana, 379 U.S. 64, 74, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964) 3

Gertz v. Robert Welch, Inc., 418 U.S. 323, 345, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) 4

Hutchinson v. Proxmire, 443 U.S. 111, 135, 99 S. Ct. 2675, 61 L. Ed. 2d 411 (1979) 5

APPENDIX 1

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477 U.S. 242 (1986)

106 S.Ct. 2505, 91 L.Ed.2d 202, 54 U.S.L.W. 4755

Anderson

v.

Liberty Lobby, Inc.

No. 84-1602

United States Supreme Court

June 25, 1986

Argued December 3, 1985

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR

THE DISTRICT OF COLUMBIA CIRCUIT

Syllabus

In *New York Times Co. v. Sullivan*, 376 U.S. 254, it was held that, in a libel suit brought by a public official (extended by later cases to public figures), the First Amendment requires

[106 S.Ct. 2507] the plaintiff to show that, in publishing the alleged defamatory statement, the defendant acted with actual malice. It was further held that such actual malice must be shown with "convincing clarity." Respondents, a nonprofit corporation described as a "citizens' lobby" and its founder, filed a libel action in Federal District Court against petitioners, alleging that certain statements in a magazine published by petitioners were false and derogatory. Following discovery, petitioners moved for summary judgment pursuant to Federal Rule of Civil Procedure 56, asserting that, because respondents were public figures, they were required to prove their case under the *New York Times* standards, and that summary judgment was proper because actual malice was absent as a matter of law in view of an affidavit by the author of the articles in question that they had been thoroughly researched and that the facts were obtained from numerous sources. Opposing the motion, respondents claimed that an issue of actual malice was presented because the author had relied on patently unreliable sources in preparing the articles. After holding that *New York Times* applied because respondents

were limited-purpose public figures, the District Court entered summary judgment for petitioners on the ground that the author's investigation and research and his reliance on numerous sources precluded a finding of actual malice. Reversing as to certain of the allegedly defamatory statements, the Court of Appeals held that the requirement that actual malice be proved by clear and convincing evidence need not be considered at the summary judgment stage, and that, with respect to those statements, summary judgment had been improperly granted, because a jury could reasonably have concluded that the allegations were defamatory, false, and made with actual malice.

Held: The Court of Appeals did not apply the correct standard in reviewing the District Court's grant of summary judgment. Pp. 247-257.

(a) Summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. At the summary judgment stage, the trial judge's function is not himself to weigh the evidence and

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determine the truth of the matter, but to determine whether there is a genuine issue for trial. There is no such issue unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. In essence, the inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury, or whether it is so one-sided that one party must prevail as a matter of law. Pp. 247-252.

(b) A trial court ruling on a motion for summary judgment in a case such as this must be guided by the *New York Times* "clear and convincing" evidentiary standard in determining whether a genuine issue of actual malice exists, that is, whether the evidence is such that a reasonable jury might find that actual malice had been shown with convincing clarity. Pp. 252-256.

(c) A plaintiff may not defeat a defendant's properly supported motion for summary judgment in a libel case such as this one without offering any concrete evidence from which a reasonable jury could return a verdict in his favor, and by merely asserting that the jury might disbelieve the defendant's denial of actual malice. The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict. Pp. 256-257.

241 U.S.App.D.C. 246, 746 F.2d 1563, vacated and

remanded.

WHITE, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, post, p. 257. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C.J., joined, post, p. 268.

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WHITE, J., lead opinion

[106 S.Ct. 2508] JUSTICE WHITE delivered the opinion of the Court.

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964), we held that, in a libel suit brought by a public official, the First Amendment requires the plaintiff to show that, in publishing the defamatory statement, the defendant acted with actual malice -- "with knowledge that it was false, or with reckless disregard of whether it was false or not." We held further that such actual malice must be shown with "convincing clarity." *Id.* at 285-286. See also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). These New York Times requirements we have since extended to libel suits brought by public figures as well. See, e.g., *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

This case presents the question whether the clear-and-convincing-evidence requirement must be considered by a court ruling on a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure in a case to which New York Times applies. The United States Court of Appeals for the District of Columbia Circuit held that that requirement need not be considered at the summary judgment stage. 241 U.S.App.D.C. 246, 746 F.2d 1563 (1984). We granted certiorari, 471 U.S. 1134 (1985), because that holding was in conflict with decisions of several other Courts of Appeals, which had held that the New York Times requirement of clear and convincing evidence must be considered on a motion for summary judgment.[1] We now reverse.

I

Respondent Liberty Lobby, Inc., is a not-for-profit corporation and self-described "citizens' lobby." Respondent Willis Carto is its founder and treasurer. In October, 1981,

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The Investigator magazine published two articles: "The Private World of Willis Carto" and "Yockey: Profile of an American Hitler." These articles were introduced by a third, shorter article entitled "America's Neo-Nazi Underground: Did Mein Kampf Spawn Yockey's Imperium, a Book

Revived by Carto's Liberty Lobby?" These articles portrayed respondents as neo-Nazi, anti-Semitic, racist, and Fascist.

Respondents filed this diversity libel action in the United States District Court for the District of Columbia, alleging that some 28 statements and 2 illustrations in the 3 articles were false and derogatory. Named as defendants in the action were petitioner Jack Anderson, the publisher of *The Investigator*, petitioner Bill Adkins, president and chief executive officer of the Investigator Publishing Co., and petitioner Investigator Publishing Co. itself.

Following discovery, petitioners moved for summary judgment pursuant to Rule 56. In their motion, petitioners asserted that, because respondents are public figures, they were required to prove their case under the standards set forth in *New York Times*. Petitioners also asserted that summary judgment was proper because actual malice was absent as a matter of law. In support of this latter assertion, petitioners submitted the affidavit of Charles Bermant, an employee of petitioners and the author of the two longer articles.[2] In this affidavit, Bermant stated that he had spent a substantial amount of time researching [106 S.Ct. 2509] and writing the articles, and that his facts were obtained from a wide variety of sources. He also stated that he had at all times believed, and still believed, that the facts contained in the articles were truthful and accurate. Attached to this affidavit was an appendix in which Bermant detailed the sources for each of the statements alleged by respondents to be libelous.

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Respondents opposed the motion for summary judgment, asserting that there were numerous inaccuracies in the articles and claiming that an issue of actual malice was presented by virtue of the fact that, in preparing the articles, Bermant had relied on several sources that respondents asserted were patently unreliable. Generally, respondents charged that petitioners had failed adequately to verify their information before publishing. Respondents also presented evidence that William McGaw, an editor of *The Investigator*, had told petitioner Adkins before publication that the articles were "terrible" and "ridiculous."

In ruling on the motion for summary judgment, the District Court first held that respondents were limited-purpose public figures, and that *New York Times* therefore applied.[3] The District Court then held that Bermant's thorough investigation and research and his reliance on numerous sources precluded a finding of actual malice. Thus, the District Court granted the motion and entered judgment in favor of petitioners.

On appeal, the Court of Appeals affirmed as to 21 and

reversed as to 9 of the allegedly defamatory statements. Although it noted that respondents did not challenge the District Court's ruling that they were limited-purpose public

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figures, and that they were thus required to prove their case under *New York Times*, the Court of Appeals nevertheless held that, for the purposes of summary judgment, the requirement that actual malice be proved by clear and convincing evidence, rather than by a preponderance of the evidence, was irrelevant: to defeat summary judgment, respondents did not have to show that a jury could find actual malice with "convincing clarity." The court based this conclusion on a perception that to impose the greater evidentiary burden at summary judgment

would change the threshold summary judgment inquiry from a search for a minimum of facts supporting the plaintiff's case to an evaluation of the weight of those facts and (it would seem) of the weight of at least the defendant's uncontroverted facts as well.

241 U.S.App.D.C. at 253, 746 F.2d at 1570. The court then held, with respect to nine of the statements, that summary judgment had been improperly granted because "a jury could reasonably conclude that the . . . allegations were defamatory, false, and made with actual malice." *Id.* at 260, 746 F.2d at 1577.

II

A

Our inquiry is whether the Court of Appeals erred in holding that the heightened evidentiary requirements that apply to proof of actual malice in this *New York Times* case need not be considered for the purposes of a motion for summary judgment. Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment

shall be rendered forthwith if the pleadings, depositions, answers to interrogatories,

[106 S.Ct. 2510] and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported

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motion for summary judgment; the requirement is that

there be no genuine issue of material fact.

As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. See generally 10A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2725, pp. 93-95 (1983). This materiality inquiry is independent of and separate from the question of the incorporation of the evidentiary standard into the summary judgment determination. That is, while the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs. Any proof or evidentiary requirements imposed by the substantive law are not germane to this inquiry, since materiality is only a criterion for categorizing factual disputes in their relation to the legal elements of the claim, and not a criterion for evaluating the evidentiary underpinnings of those disputes.

More important for present purposes, summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. In *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968), we affirmed a grant of summary judgment for an antitrust defendant where the issue was whether there was a genuine factual dispute as to the existence of a conspiracy. We noted Rule 56(e)'s provision that a party opposing a properly supported motion for summary judgment

may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.

We observed further that

[i]t is true that the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to

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trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial.

391 U.S. at 288-289. We went on to hold that, in the face of the defendant's properly supported motion for summary judgment, the plaintiff could not rest on his allegations of a conspiracy to get to a jury without "any significant probative evidence tending to support the complaint." *Id.* at 290.

Again, in *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970), the Court emphasized that the availability of summary judgment turned on whether a proper jury question was presented. There, one of the issues was whether there was a conspiracy between private persons and law enforcement officers. The District Court granted summary judgment for the defendants, stating that there was no evidence from which reasonably minded jurors might draw an inference of conspiracy. We reversed, pointing out that the moving parties' submissions had not foreclosed the possibility of the existence of certain facts from which "it would be open to a jury . . . to infer from the circumstances" that there had been a meeting of the minds. *Id.* at 158-159.

Our prior decisions may not have uniformly recited the same language in describing genuine factual issues under Rule

[106 S.Ct. 2511] 56, but it is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. As *Adickes*, *supra*, and *Cities Service*, *supra*, indicate, there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Cities Service*, *supra*, at 288-289. If the evidence is merely colorable, *Dombrowski v. Eastland*, 387 U.S. 82 (1967) (*per curiam*), or is not significantly probative,

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Cities Service, *supra*, at 290, summary judgment may be granted.

That this is the proper focus of the inquiry is strongly suggested by the Rule itself. Rule 56(e) provides that, when a properly supported motion for summary judgment is made,[4] the adverse party "must set forth specific facts showing that there is a genuine issue for trial." [5] And, as we noted above, Rule 56(c) provides that the trial judge shall then grant summary judgment if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law. There is no requirement that the trial judge make findings of fact.[6] The inquiry performed is the threshold inquiry of determining whether there is the need for a trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Petitioners suggest, and we agree, that this standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but

one reasonable conclusion as to the verdict. *Brady v. Southern R. Co.*, 320 U.S. 476, 479-480 (1943). If reasonable minds could differ as to the import of the evidence, however,

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a verdict should not be directed. *Wilkerson v. McCarthy*, 336 U.S. 53, 62 (1949). As the Court long ago said in *Improvement Co. v. Munson*, 14 Wall. 442, 448 (1872), and has several times repeated:

Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that, if there was what is called a scintilla of evidence in support of a case, the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.

(Footnotes omitted.) See also *Pleasants v. Fant*, 22 Wall. 116, 120-121 (1875); *Coughran v. Bigelow*, 164 U.S. 301, 307 (1896); *Pennsylvania R. Co. v. Chamberlain*, 288 U.S. 333, 343 (1933).

[106 S.Ct. 2512] The Court has said that summary judgment should be granted where the evidence is such that it "would require a directed verdict for the moving party." *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 624 (1944). And we have noted that the "genuine issue" summary judgment standard is "very close" to the "reasonable jury" directed verdict standard:

The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted.

Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 745, n. 11 (1983). In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission

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to a jury, or whether it is so one-sided that one party must prevail as a matter of law.

B

Progressing to the specific issue in this case, we are convinced that the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits. If the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other, but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict --

whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.

Munson, *supra*, at 448.

In terms of the nature of the inquiry, this is no different from the consideration of a motion for acquittal in a criminal case, where the beyond-a-reasonable-doubt standard applies and where the trial judge asks whether a reasonable jury could find guilt beyond a reasonable doubt. See *Jackson v. Virginia*, 443 U.S. 307, 318-319 (1979). Similarly, where the First Amendment mandates a "clear and convincing" standard, the trial judge, in disposing of a directed verdict motion, should consider whether a reasonable factfinder could conclude, for example, that the plaintiff had shown actual malice with convincing clarity.

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The case for the proposition that a higher burden of proof should have a corresponding effect on the judge when deciding whether to send the case to the jury was well made by the Court of Appeals for the Second Circuit in *United States v. Taylor*, 464 F.2d 240 (1972), which overruled *United States v. Feinberg*, 140 F.2d 592 (1944), a case holding that the standard of evidence necessary for a judge to send a case to the jury is the same in both civil and criminal cases, even though the standard that the jury must apply in a criminal case is more demanding than in civil proceedings. Speaking through Judge Friendly, the Second Circuit said:

It would seem at first blush -- and we think also at second -- that more "facts in evidence" are needed for the judge to allow [reasonable jurors to pass on a claim] when the

proponent is required to establish [the claim] not merely by a preponderance of the evidence but . . . beyond a reasonable doubt.

464 F.2d at 242. The court could not find a

satisfying explanation in the Feinberg opinion why the judge should not place this higher burden on the prosecution in criminal proceedings before sending the case to the jury.

Ibid. The Taylor court also pointed out that almost all [106 S.Ct. 2513] the Circuits had adopted something like Judge Prettyman's formulation in *Curley v. United States*, 160 F.2d 229, 232-233 (1947):

The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether, upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that, upon the evidence, there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. If he concludes that either of the

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two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter.

This view is equally applicable to a civil case to which the "clear and convincing" standard applies. Indeed, the Taylor court thought that it was implicit in this Court's adoption of the clear-and-convincing-evidence standard for certain kinds of cases that there was a "concomitant duty on the judge to consider the applicable burden when deciding whether to send a case to the jury." 464 F.2d at 243. Although the court thought that this higher standard would not produce different results in many cases, it could not say that it would never do so.

Just as the "convincing clarity" requirement is relevant in ruling on a motion for directed verdict, it is relevant in ruling on a motion for summary judgment. When determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under *New York Times*. For example, there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence.

Thus, in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden. This conclusion is mandated by the nature of this determination. The question here is whether a jury could reasonably find either that the plaintiff proved his case by the quality and quantity of evidence required by the governing law or that he did not. Whether a jury could reasonably find for either party, however, cannot be defined except by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant: it makes no sense to say that a jury could reasonably find for either party without some

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benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards.

Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Adickes*, 398 U.S. at 158-159. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment, or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948).

In sum, we conclude that the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. This is true at both the directed verdict and summary judgment stages. Consequently, where the *New York Times* "clear and convincing" evidence requirement applies, the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant. Thus, where the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding

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either that the plaintiff has shown actual malice by clear

and convincing evidence or that the plaintiff has not.[7]

III

Respondents argue, however, that, whatever may be true of the applicability of the "clear and convincing" standard at the summary judgment or directed verdict stage, the defendant should seldom, if ever, be granted summary judgment where his state of mind is at issue and the jury might disbelieve him or his witnesses as to this issue. They rely on *Poller v. Columbia Broadcasting Co.*, 368 U.S. 464 (1962), for this proposition. We do not understand *Poller*, however, to hold that a plaintiff may defeat a defendant's properly supported motion for summary judgment in a conspiracy or libel case, for example, without offering any concrete evidence from which a reasonable juror could return a verdict in his favor, and by merely asserting that the jury might, and legally could, disbelieve the defendant's denial of a conspiracy or of legal malice. The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing, in turn, evidence that would support a jury verdict. Rule 56(e) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. Based on that Rule, *Cities Service*, 391 U.S. at 290, held that the plaintiff could not defeat the properly supported summary judgment motion of a defendant charged with a conspiracy without offering "any significant probative evidence tending to support the complaint." As we have recently said, "discredited testimony

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is not [normally] considered a sufficient basis for drawing a contrary conclusion." *Bose Corp. v. Consumers Union of United States Inc.*, 466 U.S. 485, 512 (1984). Instead, the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery. We repeat, however, that the plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial.

IV

In sum, a court ruling on a motion for summary judgment must be guided by the *New York Times* "clear and convincing" evidentiary standard in determining whether a genuine issue of actual malice exists -- that is, whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity.

Because the Court of Appeals did not apply the correct standard in reviewing the District Court's grant of summary judgment, we vacate its decision and remand the case for further proceedings consistent with this opinion.

It is so ordered.

BRENNAN, J., dissenting

JUSTICE BRENNAN, dissenting.

The Court today holds that

whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case,

ante at 255.[1] In my view, the Court's analysis is deeply flawed,

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and rests on a shaky foundation of unconnected and unsupported observations, assertions, and conclusions. Moreover, I am unable to divine from the Court's opinion how these evidentiary standards are to be considered, or what a trial judge is actually supposed to do in ruling on a motion for summary judgment. Accordingly, I respectfully dissent.

To support its holding that, in ruling on a motion for summary judgment, a trial court must consider substantive evidentiary burdens, the Court appropriately begins with the language of Rule 56(c), which states that summary judgment shall be granted if it appears that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Court then purports to restate this Rule, and asserts that

summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.

Ante at 248. No direct authority is cited for the proposition that, in order to determine whether a dispute is "genuine" for Rule 56 purposes, a judge must ask if a "reasonable" jury could find for the nonmoving party. Instead, the Court quotes from *First National Bank of Arizona v. Cities Service Co.*, 391 U.S.

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253, 288-289 (1968), to the effect that a summary judgment motion will be defeated if

sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties'

differing versions of the truth at trial,

ante at 249, and that a plaintiff may not, in defending against a motion for summary judgment, rest on mere allegations or denials of his pleadings. After citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970), for the unstartling proposition that "the availability of summary judgment turn[s] on whether a proper jury question [is] presented," ante at 249, the Court then reasserts, again with no direct authority, that, in determining whether

[106 S.Ct. 2516] a jury question is presented, the inquiry is whether there are factual issues "that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Ante at 250. The Court maintains that this summary judgment inquiry "mirrors" that which applies in the context of a motion for directed verdict under Federal Rule of Civil Procedure 50(a):

whether the evidence presents a sufficient disagreement to require submission to a jury, or whether it is so one-sided that one party must prevail as a matter of law.

Ante at 251-252.

Having thus decided that a "genuine" dispute is one which is not "one-sided," and one which could "reasonably" be resolved by a "fair-minded" jury in favor of either party, *ibid.*, the Court then concludes:

Whether a jury could reasonably find for either party, however, cannot be defined except by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant: it makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are, in fact, provided by the applicable evidentiary standards.

Ante at 254-255.

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As far as I can discern, this conclusion, which is at the heart of the case, has been reached without the benefit of any support in the case law. Although, as noted above, the Court cites *Adickes* and *Cities Service*, those cases simply do not stand for the proposition that, in ruling on a summary judgment motion, the trial court is to inquire into the "one-sidedness" of the evidence presented by the parties. *Cities Service* involved the propriety of a grant of summary judgment in favor of a defendant alleged to have conspired to violate the antitrust laws. The issue in the case was whether, on the basis of the facts in the record, a jury could infer that the defendant had entered into a conspiracy

to boycott. No direct evidence of the conspiracy was produced. In agreeing with the lower courts that the circumstantial evidence presented by the plaintiff was insufficient to take the case to the jury, we observed that there was "one fact" that petitioner had produced to support the existence of the illegal agreement, and that that single fact could not support petitioner's theory of liability. Critically, we observed that

[t]he case at hand presents peculiar difficulties because the issue of fact crucial to petitioner's case is also an issue of law, namely the existence of a conspiracy.

391 U.S. at 289. In other words, *Cities Service* is, at heart, about whether certain facts can support inferences that are, as a matter of antitrust law, sufficient to support a particular theory of liability under the Sherman Act. Just this Term, in discussing summary judgment in the context of suits brought under the antitrust laws, we characterized both *Cities Service and Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), as cases in which "antitrust law limit[ed] the range of permissible inferences from ambiguous evidence. . . ." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (emphasis added). *Cities Service* thus provides no authority for the conclusion that Rule 56 requires a trial court to consider whether direct evidence produced by the parties is "one-sided." To the contrary, in *Matsushita*, the most recent

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case to cite and discuss *Cities Service*, we stated that the requirement that a dispute be "genuine" means simply that there must be more than "some metaphysical doubt as to the material facts." 475 U.S. at 586.[2]

[106 S.Ct. 2517] Nor does *Adickes*, also relied on by the Court, suggest in any way that the appropriate summary judgment inquiry is whether the evidence overwhelmingly supports one party. *Adickes*, like *Cities Service*, presented the question of whether a grant of summary judgment in favor of a defendant on a conspiracy count was appropriate. The plaintiff, a

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white schoolteacher, maintained that employees of defendant *Kress* conspired with the police to deny her rights protected by the Fourteenth Amendment by refusing to serve her in one of its lunchrooms simply because she was white and accompanied by a number of black schoolchildren. She maintained, among other things, that *Kress* arranged with the police to have her arrested for vagrancy when she left the defendant's premises. In support of its motion for summary judgment, *Kress* submitted statements from a deposition of one of its employees

asserting that he had not communicated or agreed with the police to deny plaintiff service or to have her arrested, and explaining that the store had taken the challenged action not because of the race of the plaintiff, but because it was fearful of the reaction of some of its customers if it served a racially mixed group. *Kress* also submitted affidavits from the Chief of Police and the arresting officers denying that the store manager had requested that petitioner be arrested, and noted that, in the plaintiff's own deposition, she conceded that she had no knowledge of any communication between the police and any *Kress* employee, and was relying on circumstantial evidence to support her allegations. In opposing defendant's motion for summary judgment, plaintiff stated that defendant, in its moving papers, failed to dispute an allegation in the complaint, a statement at her deposition, and an unsworn statement by a *Kress* employee, all to the effect that there was a policeman in the store at the time of the refusal to serve, and that it was this policeman who subsequently made the arrest. Plaintiff argued that this sequence of events "created a substantial enough possibility of a conspiracy to allow her to proceed to trial. . . ." 398 U.S. at 157.

We agreed, and therefore reversed the lower courts, reasoning that *Kress*

did not carry its burden because of its failure to foreclose the possibility that there was a policeman in the *Kress* store while petitioner was awaiting service, and that this policeman reached an understanding with some

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Kress employee that petitioner not be served.

Ibid. Despite the fact that none of the materials relied on by plaintiff met the requirements of Rule 56(e), we stated nonetheless that *Kress* failed to meet its initial burden of showing that there was no genuine dispute of a material fact. Specifically, we held that, because *Kress* failed to negate plaintiff's materials suggesting that a

[106 S.Ct. 2518] policeman was in fact in the store at the time of the refusal to serve,

it would be open to a jury . . . to infer from the circumstances that the policeman and a *Kress* employee had a "meeting of the minds," and thus reached an understanding that petitioner should be refused service.

Id. at 158.

In *Adickes*, we held that a jury might permissibly infer a conspiracy from the mere presence of a policeman in a restaurant. We never reached, and did not consider, whether the evidence was "one-sided," and, had we done so, we clearly would have had to affirm, rather than reverse, the

lower courts, since, in that case, there was no admissible evidence submitted by petitioner, and a significant amount of evidence presented by the defendant tending to rebut the existence of a conspiracy. The question we did reach was simply whether, as a matter of conspiracy law, a jury would be entitled, again, as a matter of law, to infer from the presence of a policeman in a restaurant the making of an agreement between that policeman and an employee. Because we held that a jury was entitled so to infer, and because the defendant had not carried its initial burden of production of demonstrating that there was no evidence that there was not a policeman in the lunchroom, we concluded that summary judgment was inappropriate.

Accordingly, it is surprising to find the case cited by the majority for the proposition that "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Ante at 249. There was, of course, no admissible evidence in Adickes favoring the nonmoving plaintiff; there was only an

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unrebutted assertion that a Kress employee and a policeman were in the same room at the time of the alleged constitutional violation. Like *Cities Service*, Adickes suggests that, on a defendant's motion for summary judgment, a trial court must consider whether, as a matter of the substantive law of the plaintiff's cause of action, a jury will be permitted to draw inferences supporting the plaintiff's legal theory. In *Cities Service*, we found, in effect, that the plaintiff had failed to make out a prima facie case; in Adickes, we held that the moving defendant had failed to rebut the plaintiff's prima facie case. In neither case is there any intimation that a trial court should inquire whether plaintiff's evidence is "significantly probative," as opposed to "merely colorable," or, again, "one-sided." Nor is there in either case any suggestion that, once a nonmoving plaintiff has made out a prima facie case based on evidence satisfying Rule 56(e) that there is any showing that a defendant can make to prevail on a motion for summary judgment. Yet this is what the Court appears to hold, relying, in part, on these two cases.[3]

As explained above, and as explained also by JUSTICE REHNQUIST in his dissent, see post at 271, I cannot agree that the authority cited by the Court supports its position. In my view, the Court's result is the product of an exercise

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akin to the child's game of "telephone," in which a message is repeated from one person to another and then another; after some time, the message bears little resemblance to what was originally spoken. In the present case, the Court

purports to restate the summary judgment test, but, with each repetition, the original understanding is increasingly distorted.

[106 S.Ct. 2519] But my concern is not only that the Court's decision is unsupported; after all, unsupported views may nonetheless be supportable. I am more troubled by the fact that the Court's opinion sends conflicting signals to trial courts and reviewing courts which must deal with summary judgment motions on a day-to-day basis. This case is about a trial court's responsibility when considering a motion for summary judgment, but in my view, the Court, while instructing the trial judge to "consider" heightened evidentiary standards, fails to explain what that means. In other words, how does a judge assess how one-sided evidence is, or what a "fair-minded" jury could "reasonably" decide? The Court provides conflicting clues to these mysteries, which I fear can lead only to increased confusion in the district and appellate courts.

The Court's opinion is replete with boilerplate language to the effect that trial courts are not to weigh evidence when deciding summary judgment motions:

[I]t is clear enough from our recent cases that, at the summary judgment stage, the judge's function is not himself to weigh the evidence and determine the truth of the matter. . . .

Ante at 249.

Our holding . . . does not denigrate the role of the jury. . . . Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.

Ante at 255.

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But the Court's opinion is also full of language which could surely be understood as an invitation -- if not an instruction -- to trial courts to assess and weigh evidence much as a juror would:

When determining if a genuine factual issue . . . exists . . . a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability. . . . For example, there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence.

Ante at 254 (emphasis added).

[T]he inquiry . . . [is] whether the evidence presents a sufficient disagreement to require submission to a jury, or whether it is so one-sided that one party must prevail as a matter of law.

Ante at 251-252 (emphasis added).

[T]he judge must ask himself . . . whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Ante at 252.

I simply cannot square the direction that the judge "is not himself to weigh the evidence" with the direction that the judge also bear in mind the "quantum" of proof required and consider whether the evidence is of sufficient "caliber or quantity" to meet that "quantum." I would have thought that a determination of the "caliber and quantity," i.e., the importance and value, of the evidence in light of the "quantum," i.e., amount "required," could only be performed by weighing the evidence.

If, in fact, this is what the Court would, under today's decision, require of district courts, then I am fearful that this new rule -- for this surely would be a brand new procedure -- will transform what is meant to provide an expedited "summary"

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procedure into a full-blown paper trial on the merits. It is hard for me to imagine that a responsible counsel, aware that the judge will be assessing the "quantum" of the evidence he is presenting, will risk either moving for or responding to a summary judgment motion without coming forth with all of the evidence he can muster in support of his client's case. Moreover, if the judge on motion for summary judgment really is to weigh the evidence, then, [106 S.Ct. 2520] in my view, grave concerns are raised concerning the constitutional right of civil litigants to a jury trial.

It may well be, as JUSTICE REHNQUIST suggests, see post at 270-271, that the Court's decision today will be of little practical effect. I, for one, cannot imagine a case in which a judge might plausibly hold that the evidence on motion for summary judgment was sufficient to enable a plaintiff bearing a mere preponderance burden to get to the jury -- i.e., that a prima facie case had been made out -- but insufficient for a plaintiff bearing a clear-and-convincing burden to withstand a defendant's summary judgment motion. Imagine a suit for breach of contract. If, for

example, the defendant moves for summary judgment and produces one purported eyewitness who states that he was present at the time the parties discussed the possibility of an agreement, and unequivocally denies that the parties ever agreed to enter into a contract, while the plaintiff produces one purported eyewitness who asserts that the parties did in fact come to terms, presumably that case would go to the jury. But if the defendant produced not one, but 100 eyewitnesses, while the plaintiff stuck with his single witness, would that case, under the Court's holding, still go to the jury? After all, although the plaintiff's burden in this hypothetical contract action is to prove his case by a mere preponderance of the evidence, the judge, so the Court tells us, is to "ask himself . . . whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." Ante at 252. Is there, in this hypothetical example, "a sufficient disagreement to require submission

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to a jury," or is the evidence "so one-sided that one party must prevail as a matter of law"? Ante at 251-252. Would the result change if the plaintiff's one witness were now shown to be a convicted perjurer? Would the result change if, instead of a garden variety contract claim, the plaintiff sued on a fraud theory, thus requiring him to prove his case by clear and convincing evidence?

It seems to me that the Court's decision today unpersuasively answers the question presented, and in doing so raises a host of difficult and troubling questions for which there may well be no adequate solutions. What is particularly unfair is that the mess we make is not, at least in the first instance, our own to deal with; it is the district courts and courts of appeals that must struggle to clean up after us.

In my view, if a plaintiff presents evidence which either directly or by permissible inference (and these inferences are a product of the substantive law of the underlying claim) supports all of the elements he needs to prove in order to prevail on his legal claim, the plaintiff has made out a prima facie case, and a defendant's motion for summary judgment must fail, regardless of the burden of proof that the plaintiff must meet. In other words, whether evidence is "clear and convincing," or proves a point by a mere preponderance, is for the factfinder to determine. As I read the case law, this is how it has been, and because of my concern that today's decision may erode the constitutionally enshrined role of the jury, and also undermine the usefulness of summary judgment procedure, this is how I believe it should remain.

REHNQUIST, J., dissenting

JUSTICE REHNQUIST, with whom THE CHIEF

JUSTICE joins, dissenting.

The Court, apparently moved by concerns for intellectual tidiness, mistakenly decides that the "clear and convincing evidence" standard governing finders of fact in libel cases must be applied by trial courts in deciding a motion for summary judgment in such a case. The Court refers to this as a "substantive standard," but I think it is actually a procedural

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requirement engrafted onto Rule 56, contrary to our statement in *Calder v. Jones*, 465 U.S. 783 (1984), that

[w]e have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws.

Id. at 790-791. The Court, I believe, makes an even greater mistake in failing to apply its newly announced rule to the facts of this case. Instead of thus illustrating how the rule works, it contents itself with abstractions and paraphrases of abstractions, so that its opinion sounds much like a treatise about cooking by someone who has never cooked before, and has no intention of starting now.

There is a large class of cases in which the higher standard imposed by the Court today would seem to have no effect at all. Suppose, for example, on motion for summary judgment in a hypothetical libel case, the plaintiff concedes that his only proof of malice is the testimony of witness A. Witness A testifies at his deposition that the reporter who wrote the story in question told him that she, the reporter, had done absolutely no checking on the story, and had real doubts about whether or not it was correct as to the plaintiff. The defendant's examination of witness A brings out that he has a prior conviction for perjury.

May the Court grant the defendant's motion for summary judgment on the ground that the plaintiff has failed to produce sufficient proof of malice? Surely not, if the Court means what it says when it states:

Credibility determinations . . . are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.

Ante at 255.

The case proceeds to trial, and, at the close of the plaintiff's evidence, the defendant moves for a directed verdict on the

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ground that the plaintiff has failed to produce sufficient evidence of malice. The only evidence of malice produced by the plaintiff is the same testimony of witness A, who is duly impeached by the defendant for the prior perjury conviction. In addition, the trial judge has now had an opportunity to observe the demeanor of witness A, and has noticed that he fidgets when answering critical questions, his eyes shift from the floor to the ceiling, and he manifests all other indicia traditionally attributed to perjurers.

May the trial court, at this stage, grant a directed verdict? Again, surely not; we are still dealing with "credibility determinations."

The defendant now puts on its testimony, and produces three witnesses who were present at the time when witness A alleges that the reporter said she had not checked the story and had grave doubts about its accuracy as to plaintiff. Witness A concedes that these three people were present at the meeting, and that the statement of the reporter took place in the presence of all these witnesses. Each witness categorically denies that the reporter made the claimed statement to witness A.

May the trial court now grant a directed verdict at the close of all the evidence? Certainly the plaintiff's case is appreciably weakened by the testimony of three disinterested witnesses, and one would hope that a properly charged jury would quickly return a verdict for the defendant. But as long as credibility is exclusively for the jury, it seems the Court's analysis would still require this case to be decided by that body.

Thus, in the case that I have posed, it would seem to make no difference whether the standard of proof which the plaintiff had to meet in order to prevail was the preponderance of the evidence, clear and convincing evidence, or proof beyond a reasonable doubt. But if the application of the standards makes no difference in the case that I hypothesize, one may fairly ask in what sort of case does the difference in standards

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make a difference in outcome? Cases may be posed dealing with evidence that is essentially documentary, rather than testimonial; but the Court has held in a related context involving Federal Rule of Civil Procedure 52(a) that inferences from documentary evidence are as much the prerogative

[106 S.Ct. 2522] of the finder of fact as inferences as to the credibility of witnesses. *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985). The Court affords the lower courts no guidance whatsoever as to what, if any, difference the

abstract standards that it propounds would make in a particular case.

There may be more merit than the Court is willing to admit to Judge Learned Hand's observation in *United States v. Feinberg*, 140 F.2d 592, 594 (CA2), cert. denied, 322 U.S. 726 (1944), that "[w]hile at times it may be practicable" to

distinguish between the evidence which should satisfy reasonable men and the evidence which should satisfy reasonable men beyond a reasonable doubt[,] . . . in the long run, the line between them is too thin for day-to-day use.

The Court apparently approves the overruling of the Feinberg case in the Court of Appeals by Judge Friendly's opinion in *United States v. Taylor*, 464 F.2d 240 (1972). But even if the Court is entirely correct in its judgment on this point, Judge Hand's statement seems applicable to this case, because the criminal case differs from the libel case in that the standard in the former is proof "beyond a reasonable doubt," which is presumably easier to distinguish from the normal "preponderance of the evidence" standard than is the intermediate standard of "clear and convincing evidence."

More important for purposes of analyzing the present case, there is no exact analog in the criminal process to the motion for summary judgment in a civil case. Perhaps the closest comparable device for screening out unmeritorious cases in the criminal area is the grand jury proceeding, though the comparison is obviously not on all fours. The standard for allowing a criminal case to proceed to trial is not whether the government has produced prima facie evidence of guilt beyond

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a reasonable doubt for every element of the offense, but only whether it has established probable cause. See *United States v. Mechanik*, 475 U.S. 66, 70 (1986). Thus, in a criminal case, the standard used prior to trial is much more lenient than the "clear beyond a reasonable doubt" standard which must be employed by the finder of fact.

The three differentiated burdens of proof in civil and criminal cases, vague and impressionistic though they necessarily are, probably do make some difference when considered by the finder of fact, whether it be a jury or a judge in a bench trial. Yet it is not a logical or analytical message that the terms convey, but instead almost a state of mind; we have previously said:

Candor suggests that, to a degree, efforts to analyze what lay jurors understand concerning the differences among these three tests . . . may well be largely an academic exercise. . . . Indeed, the ultimate truth as to how the standards of proof affect decisionmaking may well be

unknowable, given that factfinding is a process shared by countless thousands of individuals throughout the country. We probably can assume no more than that the difference between a preponderance of the evidence and proof beyond a reasonable doubt probably is better understood than either of them in relation to the intermediate standard of clear and convincing evidence.

Addington v. Texas, 441 U.S. 418, 424-425 (1979) (emphasis added).

The Court's decision to engraft the standard of proof applicable to a factfinder onto the law governing the procedural motion for a summary judgment (a motion that has always been regarded as raising a question of law, rather than a question of fact, see, e.g., *La Riviere v. EEOC*, 682 F.2d 1275, 1277-1278 (CA9 1982) (Wallace, J.)), will do great mischief, with little corresponding benefit. The primary effect of the Court's opinion today will likely be to cause the decisions of trial judges on summary judgment motions in libel cases to be

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more erratic and inconsistent than before. This is largely because the Court has

[106 S.Ct. 2523] created a standard that is different from the standard traditionally applied in summary judgment motions without even hinting as to how its new standard will be applied to particular cases.

Notes:

[1] See, e.g., *Rebozo v. Washington Post Co.*, 637 F.2d 375, 381 (CA5), cert. denied, 454 U.S. 964 (1981); *Yiamouyiannis v. Consumers Union of United States, Inc.*, 619 F.2d 932, 940 (CA2), cert. denied, 449 U.S. 839 (1980); *Carson v. Allied News Co.*, 529 F.2d 206, 210 (CA7 1976).

[2] The short, introductory article was written by petitioner Anderson, and relied exclusively on the information obtained by Bermant.

[3] In *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 351 (1974), this Court summarized who will be considered to be a public figure to whom the New York Times standards will apply:

[The public figure] 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.

The District Court found that respondents, as political lobbyists, are the second type of political figure described by the Gertz court -- a limited-purpose public figure. See also *Waldbaum v. Fairchild Publications Inc.*, 201 U.S.App.D.C. 301, 306, 627 F.2d 1287, 1292, cert. denied. 449 U.S. 898 (1980).

[4] Our analysis here does not address the question of the initial burden of production of evidence, placed by Rule 56 on the party moving for summary judgment. See *Celotex Corp. v. Catrett*, post, p. 317. Respondents have not raised this issue here, and, for the purposes of our discussion, we assume that the moving party has met initially the requisite evidentiary burden.

[5] This requirement in turn is qualified by Rule 56(f)'s provision that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition. In our analysis here, we assume that both parties have had ample opportunity for discovery.

[6] In many cases, however, findings are extremely helpful to a reviewing court.

[7] Our statement in *Hutchinson v. Proxmire*, 443 U.S. 111, 120, n. 9 (1979), that proof of actual malice "does not readily lend itself to summary disposition" was simply an acknowledgment of our general reluctance

to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws.

Calder v. Jones, 465 U.S. 783, 790-791 (1984).

[1] The Court's holding today is not, of course, confined in its application to First Amendment cases. Although this case arises in the context of litigation involving libel and the press, the Court's holding is that,

in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden.

Ante at 254. Accordingly, I simply do not understand why JUSTICE REHNQUIST, dissenting, feels it appropriate to cite *Calder v. Jones*, 465 U.S. 783 (1984), and to remind the Court that we have consistently refused to extend special procedural protections to defendants in libel and defamation suits. The Court today does nothing of the kind. It changes summary judgment procedure for all litigants, regardless of

the substantive nature of the underlying litigation.

Moreover, the Court's holding is not limited to those cases in which the evidentiary standard is "heightened," i.e., those in which a plaintiff must prove his case by more than a mere preponderance of the evidence. Presumably, if a district court ruling on a motion for summary judgment in a libel case is to consider the "quantum and quality" of proof necessary to support liability under *New York Times*, ante at 254, and then ask whether the evidence presented is of "sufficient caliber or quantity" to support that quantum and quality, the court must ask the same questions in a garden variety action where the plaintiff need prevail only by a mere preponderance of the evidence. In other words, today's decision, by its terms, applies to all summary judgment motions, irrespective of the burden of proof required and the subject matter of the suit.

[2] Writing in dissent in *Matsushita*, JUSTICE WHITE stated that he agreed with the summary judgment test employed by the Court, namely, that

[w]here the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial."

475 U.S. at 599. Whether the shift, announced today, from looking to a "reasonable," rather than a "rational," jury is intended to be of any significance, there are other aspects of the *Matsushita* dissent which I find difficult to square with the Court's holding in the present case. The *Matsushita* dissenters argued:

. . . [T]he Court summarizes *Monsanto Co. v. Spray-Rite Service Corp.*, supra, as holding that "courts should not permit factfinders to infer conspiracies when such inferences are implausible. . . ."

Ante at 593. Such language suggests that a judge hearing a defendant's motion for summary judgment in an antitrust case should go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the plaintiff. *Cities Service* and *Monsanto* do not stand for any such proposition. Each of those cases simply held that a particular piece of evidence, standing alone, was insufficiently probative to justify sending a case to the jury. These holdings in no way undermine the doctrine that all evidence must be construed in the light most favorable to the party opposing summary judgment.

If the Court intends to give every judge hearing a motion for summary judgment in an antitrust case the job of determining if the evidence makes the inference of conspiracy more probable than not, it is overturning settled law. If the Court does not intend such a pronouncement, it should refrain from using unnecessarily broad and

confusing language.

Id. at 600-601 (footnote omitted). In my view, these words are as applicable and relevant to the Court's opinion today as they were to the opinion of the Court in *Matsushita*.

[3] I am also baffled by the other cases cited by the majority to support its holding. For example, the Court asserts that

[i]f . . . evidence is merely colorable, *Dombrowski v. Eastland*, 387 U.S. 82 (1967) (per curiam), . . . summary judgment may be granted.

Ante at 249-250. In *Dombrowski*, we reversed a judgment granting summary judgment to the counsel to the Internal Security Subcommittee of the Judiciary Committee of the United States Senate because there was "controverted evidence in the record . . . which affords more than merely colorable substance" to the petitioners' allegations. 387 U.S. at 84. *Dombrowski* simply cannot be read to mean that summary judgment may be granted if evidence is merely colorable; what the case actually says is that summary judgment will be denied if evidence is "controverted," because when evidence is controverted, assertions become colorable for purposes of motions for summary judgment law.

APPENDIX 2

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477 U.S. 317 (1986)

106 S.Ct. 2548, 91 L.Ed.2d 265, 54 U.S.L.W. 4775

Celotex Corp.

v.

Catrett

No. 85-198

United States Supreme Court

June 25, 1986

Argued April 1, 1986

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR

THE DISTRICT OF COLUMBIA CIRCUIT

Syllabus

In September, 1980, respondent administratrix filed this wrongful death action in Federal District Court, alleging that her husband's death in 1979 resulted from his exposure to asbestos products manufactured or distributed by the defendants, who included petitioner corporation. In September, 1981, petitioner filed a motion for summary judgment, asserting that, during discovery, respondent failed to produce any evidence to support her allegation that the decedent had been exposed to petitioner's products. In response, respondent produced documents tending to show such exposure, but petitioner argued that the documents were inadmissible hearsay, and thus could not be considered in opposition to the summary judgment motion. In July, 1982, the court granted the motion because there was no showing of exposure to petitioner's products, but the Court of Appeals reversed, holding that summary judgment in petitioner's favor was precluded because of petitioner's failure to support its motion with evidence tending to negate such exposure, as required by Federal Rule of Civil Procedure 56(e) and the decision in *Adickes v. S. H. Kress & Co.*, 398 U.S. 144.

Held:

1. The Court of Appeals' position is inconsistent with the standard for summary

[106 S.Ct. 2550] judgment set forth in Rule 56(c), which provides that summary judgment is proper

if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Pp. 322-326.

(a) The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to

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make a sufficient showing on an essential element of its case with respect to which it has the burden of proof. Pp. 322-323.

(b) There is no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim. On the contrary, Rule 56(c), which refers to the affidavits, "if any," suggests the absence of such a requirement, and Rules 56(a) and (b) provide that claimants and defending parties may move for summary judgment "with or without supporting affidavits." Rule 56(e), which relates to the form and use of affidavits and other materials, does not require that the moving party's motion always be supported by affidavits to show initially the absence of a genuine issue for trial. *Adickes v. S. H. Kress & Co.*, supra, explained. Pp. 323-326.

(c) No serious claim can be made that respondent was "railroaded" by a premature motion for summary judgment, since the motion was not filed until one year after the action was commenced, and since the parties had conducted discovery. Moreover, any potential problem with such premature motions can be adequately dealt with under Rule 56(f). P. 326.

2. The questions whether an adequate showing of exposure to petitioner's products was in fact made by respondent in opposition to the motion, and whether such a showing, if

reduced to admissible evidence, would be sufficient to carry respondent's burden of proof at trial, should be determined by the Court of Appeals in the first instance. Pp. 326-327.

244 U.S.App.D.C. 160, 756 F.2d 181, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which WHITE, MARSHALL, POWELL, and O'CONNOR, JJ., joined. WHITE, J., filed a concurring opinion, post, p. 328. BRENNAN, J., filed a dissenting opinion, in which BURGER, C.J., and BLACKMUN, J., joined, post, p. 329. STEVENS, J., filed a dissenting opinion, post, p. 337.

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REHNQUIST, J., lead opinion

JUSTICE REHNQUIST delivered the opinion of the Court.

The United States District Court for the District of Columbia granted the motion of petitioner Celotex Corporation for summary judgment against respondent Catrett because the latter was unable to produce evidence in support of her allegation in her wrongful death complaint that the decedent had been exposed to petitioner's asbestos products. A divided panel of the Court of Appeals for the District of Columbia Circuit reversed, however, holding that petitioner's failure to support its motion with evidence tending to negate such exposure precluded the entry of summary judgment in its favor. *Catrett v. Johns-Manville Sales Corp.*, 244 U.S.App.D.C. 160, 756 F.2d 181 (1985). This view conflicted with that of the Third Circuit in *In re Japanese Electronic Products*, 723 F.2d 238 (1983),

[106 S.Ct. 2551]rev'd on other grounds sub nom. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).[1] We granted certiorari to resolve the conflict, 474 U.S. 944 (1985), and now reverse the decision of the District of Columbia Circuit.

Respondent commenced this lawsuit in September, 1980, alleging that the death in 1979 of her husband, Louis H. Catrett, resulted from his exposure to products containing asbestos manufactured or distributed by 15 named corporations. Respondent's complaint sounded in negligence, breach of warranty, and strict liability. Two of the defendants filed motions challenging the District Court's in personam jurisdiction, and the remaining 13, including petitioner, filed motions for summary judgment. Petitioner's motion, which was first filed in September, 1981, argued that summary judgment was proper because respondent had

failed to produce evidence that any [Celotex] product . . . was the proximate cause of the injuries alleged within the jurisdictional

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limits of [the District] Court.

In particular, petitioner noted that respondent had failed to identify, in answering interrogatories specifically requesting such information, any witnesses who could testify about the decedent's exposure to petitioner's asbestos products. In response to petitioner's summary judgment motion, respondent then produced three documents which she claimed "demonstrate that there is a genuine material factual dispute" as to whether the decedent had ever been exposed to petitioner's asbestos products. The three documents included a transcript of a deposition of the decedent, a letter from an official of one of the decedent's former employers whom petitioner planned to call as a trial witness, and a letter from an insurance company to respondent's attorney, all tending to establish that the decedent had been exposed to petitioner's asbestos products in Chicago during 1970-1971. Petitioner, in turn, argued that the three documents were inadmissible hearsay, and thus could not be considered in opposition to the summary judgment motion.

In July, 1982, almost two years after the commencement of the lawsuit, the District Court granted all of the motions filed by the various defendants. The court explained that it was granting petitioner's summary judgment motion because

there [was] no showing that the plaintiff was exposed to the defendant Celotex's product in the District of Columbia or elsewhere within the statutory period.

App. 217.[2] Respondent

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appealed only the grant of summary judgment in favor of petitioner, and a divided panel of the District of Columbia Circuit reversed. The majority of the Court of Appeals held that petitioner's

[106 S.Ct. 2552] summary judgment motion was rendered "fatally defective" by the fact that petitioner "made no effort to adduce any evidence, in the form of affidavits or otherwise, to support its motion." 244 U.S.App.D.C. at 163, 756 F.2d at 184 (emphasis in original). According to the majority, Rule 56(e) of the Federal Rules of Civil Procedure,[3] and this Court's decision in *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 159 (1970), establish that

the party opposing the motion for summary judgment bears the burden of responding only after the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact.

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F.2d at 184 (emphasis in original; footnote omitted). The majority therefore declined to consider petitioner's argument that none of the evidence produced by respondent in opposition to the motion for summary judgment would have been admissible at trial. *Ibid.* The dissenting judge argued that

[t]he majority errs in supposing that a party seeking summary judgment must always make an affirmative evidentiary showing, even in cases where there is not a triable, factual dispute.

Id. at 167, 756 F.2d at 188 (Bork, J., dissenting). According to the dissenting judge, the majority's decision "undermines the traditional authority of trial judges to grant summary judgment in meritless cases." *Id.* at 166, 756 F.2d at 187.

We think that the position taken by the majority of the Court of Appeals is inconsistent with the standard for summary judgment set forth in Rule 56(c) of the Federal Rules of Civil Procedure.[4] Under Rule 56(c), summary judgment is proper

if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation,

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there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. "[T]he standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a). . . ." *Anderson v. Liberty Lobby, Inc.*, ante at 250.

Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of

the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. But unlike the Court of Appeals, we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim. On the contrary, Rule 56(c), which refers to "the affidavits, if any" (emphasis added), suggests the absence of such a requirement. And if there were any doubt about the meaning of Rule 56(c) in this regard, such doubt is clearly removed by Rules 56(a) and (b), which provide that claimants and defendants, respectively, may move for summary judgment "with or without supporting affidavits" (emphasis added). The import of these subsections is that, regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied. One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported

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claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose.[5]

Respondent argues, however, that Rule 56(e), by its terms, places on the nonmoving party the burden of coming forward with rebuttal affidavits, or other specified kinds of materials, only in response to a motion for summary judgment "made and supported as provided in this rule." According to respondent's argument, since petitioner did not "support" its motion with affidavits, summary judgment was improper in this case. But as we have already explained, a motion for summary judgment may be made pursuant to Rule 56 "with or without supporting affidavits." In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule," and Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses.

Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred.

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The Court of Appeals in this case felt itself constrained, however, by language in our decision in *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970). There we held that summary judgment had been improperly entered in favor of the defendant restaurant in an action brought under 42 U.S.C. § 1983. In the course of its opinion, the *Adickes* Court said that

both the commentary on and the background of the 1963 amendment conclusively

[106 S.Ct. 2554] show that it was not intended to modify the burden of the moving party . . . to show initially the absence of a genuine issue concerning any material fact.

Id. at 159. We think that this statement is accurate in a literal sense, since we fully agree with the *Adickes* Court that the 1963 amendment to Rule 56(e) was not designed to modify the burden of making the showing generally required by Rule 56(c). It also appears to us that, on the basis of the showing before the Court in *Adickes*, the motion for summary judgment in that case should have been denied. But we do not think the *Adickes* language quoted above should be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead, as we have explained, the burden on the moving party may be discharged by "showing" -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case.

The last two sentences of Rule 56(e) were added, as this Court indicated in *Adickes*, to disapprove a line of cases allowing a party opposing summary judgment to resist a properly made motion by reference only to its pleadings. While the *Adickes* Court was undoubtedly correct in concluding that these two sentences were not intended to reduce the burden of the moving party, it is also obvious that they were not adopted to add to that burden. Yet that is exactly the result which the reasoning of the Court of Appeals would produce; in effect, an amendment to Rule 56(e) designed to

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facilitate the granting of motions for summary judgment

would be interpreted to make it more difficult to grant such motions. Nothing in the two sentences themselves requires this result, for the reasons we have previously indicated, and we now put to rest any inference that they do so.

Our conclusion is bolstered by the fact that district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence. See 244 U.S.App.D.C. at 167-168, 756 F.2d at 189 (Bork, J., dissenting); 10A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2720, pp. 28-29 (1983). It would surely defy common sense to hold that the District Court could have entered summary judgment *sua sponte* in favor of petitioner in the instant case, but that petitioner's filing of a motion requesting such a disposition precluded the District Court from ordering it.

Respondent commenced this action in September, 1980, and petitioner's motion was filed in September, 1981. The parties had conducted discovery, and no serious claim can be made that respondent was in any sense "railroaded" by a premature motion for summary judgment. Any potential problem with such premature motions can be adequately dealt with under Rule 56(f),[6] which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery.

In this Court, respondent's brief and oral argument have been devoted as much to the proposition that an adequate showing of exposure to petitioner's asbestos products was

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made as to the proposition that no such showing should have been required. But the Court of Appeals declined to address either the adequacy of the showing made by respondent in opposition to petitioner's motion for summary judgment or the question whether such a showing, if

[106 S.Ct. 2555] reduced to admissible evidence, would be sufficient to carry respondent's burden of proof at trial. We think the Court of Appeals, with its superior knowledge of local law, is better suited than we are to make these determinations in the first instance.

The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." Fed.Rule Civ.Proc. 1; see Schwarzer, *Summary Judgment Under the Federal Rules:*

Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 467 (1984). Before the shift to "notice pleading" accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial, with the attendant unwarranted consumption of public and private resources. But with the advent of "notice pleading," the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment. Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

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The judgment of the Court of Appeals is accordingly reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

WHITE, J., concurring

JUSTICE WHITE, concurring.

I agree that the Court of Appeals was wrong in holding that the moving defendant must always support his motion with evidence or affidavits showing the absence of a genuine dispute about a material fact. I also agree that the movant may rely on depositions, answers to interrogatories, and the like, to demonstrate that the plaintiff has no evidence to prove his case, and hence that there can be no factual dispute. But the movant must discharge the burden the Rules place upon him: it is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case.

A plaintiff need not initiate any discovery or reveal his witnesses or evidence unless required to do so under the discovery Rules or by court order. Of course, he must respond if required to do so; but he need not also depose his witnesses or obtain their affidavits to defeat a summary judgment motion asserting only that he has failed to produce any support for his case. It is the defendant's task to negate, if he can, the claimed basis for the suit.

Petitioner Celotex does not dispute that, if respondent has named a witness to support her claim, summary judgment should not be granted without Celotex somehow showing that the named witness' possible testimony raises no genuine issue of material fact. Tr. of Oral Arg. 43, 45. It

asserts, however, that respondent has failed on request to produce any basis for her case. Respondent, on the other hand, does not contend that she was not obligated to reveal her witnesses and evidence, but insists that she has revealed enough to defeat the motion for summary judgment. Because the Court of Appeals found it unnecessary to address this aspect

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of the case, I agree that the case should be remanded for further proceedings.

BRENNAN, J., dissenting

JUSTICE BRENNAN, with whom THE CHIEF JUSTICE and JUSTICE BLACKMUN join, dissenting.

This case requires the Court to determine whether Celotex satisfied its initial

[106 S.Ct. 2556] burden of production in moving for summary judgment on the ground that the plaintiff lacked evidence to establish an essential element of her case at trial. I do not disagree with the Court's legal analysis. The Court clearly rejects the ruling of the Court of Appeals that the defendant must provide affirmative evidence disproving the plaintiff's case. Beyond this, however, the Court has not clearly explained what is required of a moving party seeking summary judgment on the ground that the nonmoving party cannot prove its case.[1] This lack of clarity is unfortunate: district courts must routinely decide summary judgment motions, and the Court's opinion will very likely create confusion. For this reason, even if I agreed with the Court's result, I would have written separately to explain more clearly the law in this area. However, because I believe that Celotex did not meet its burden of production under Federal Rule of Civil Procedure 56, I respectfully dissent from the Court's judgment.

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I

Summary judgment is appropriate where the court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.Rule Civ.Proc. 56(c). The burden of establishing the nonexistence of a "genuine issue" is on the party moving for summary judgment. 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2727, p. 121 (2d ed.1983) (hereinafter Wright) (citing cases); 6 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶ 56.15[3] (2d ed.1985) (hereinafter Moore) (citing cases). See also ante at 323; ante at 328 (WHITE, J., concurring). This burden has two distinct components: an initial burden of production, which shifts to the nonmoving party if

satisfied by the moving party; and an ultimate burden of persuasion, which always remains on the moving party. See 10A Wright § 2727. The court need not decide whether the moving party has satisfied its ultimate burden of persuasion[2] unless and until the court finds that the moving party has discharged its initial

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burden of production. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157-161 (1970); 1963 Advisory Committee's Notes on Fed.Rule Civ.Proc. 56(e), 28 U.S.C.App. p. 626.

[106 S.Ct. 2557] The burden of production imposed by Rule 56 requires the moving party to make a prima facie showing that it is entitled to summary judgment. 10A Wright § 2727. The manner in which this showing can be made depends upon which party will bear the burden of persuasion on the challenged claim at trial. If the moving party will bear the burden of persuasion at trial, that party must support its motion with credible evidence -- using any of the materials specified in Rule 56(c) -- that would entitle it to a directed verdict if not controverted at trial. *Ibid.* Such an affirmative showing shifts the burden of production to the party opposing the motion, and requires that party either to produce evidentiary materials that demonstrate the existence of a "genuine issue" for trial or to submit an affidavit requesting additional time for discovery. *Ibid.*; Fed.Rules Civ.Proc. 56(e), (f).

If the burden of persuasion at trial would be on the nonmoving party, the party moving for summary judgment may satisfy Rule 56's burden of production in either of two ways. First, the moving party may submit affirmative evidence that negates an essential element of the nonmoving party's claim. Second, the moving party may demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. See 10A Wright § 2727, pp. 130-131; *Louis, Federal Summary Judgment Doctrine: A Critical Analysis*, 83 Yale L.J. 745, 750 (1974) (hereinafter *Louis*). If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless, and the moving party is entitled to summary judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, ante at 249.

Where the moving party adopts this second option and seeks summary judgment on the ground that the nonmoving party -- who will bear the burden of persuasion at trial -- has

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no evidence, the mechanics of discharging Rule 56's burden of production are somewhat trickier. Plainly, a conclusory assertion that the nonmoving party has no

evidence is insufficient. See ante at 328 (*WHITE, J.*, concurring). Such a "burden" of production is no burden at all, and would simply permit summary judgment procedure to be converted into a tool for harassment. See *Louis* 750-751. Rather, as the Court confirms, a party who moves for summary judgment on the ground that the nonmoving party has no evidence must affirmatively show the absence of evidence in the record. Ante at 323. This may require the moving party to depose the nonmoving party's witnesses or to establish the inadequacy of documentary evidence. If there is literally no evidence in the record, the moving party may demonstrate this by reviewing for the court the admissions, interrogatories, and other exchanges between the parties that are in the record. Either way, however, the moving party must affirmatively demonstrate that there is no evidence in the record to support a judgment for the nonmoving party.

If the moving party has not fully discharged this initial burden of production, its motion for summary judgment must be denied, and the court need not consider whether the moving party has met its ultimate burden of persuasion. Accordingly, the nonmoving party may defeat a motion for summary judgment that asserts that the nonmoving party has no evidence by calling the court's attention to supporting evidence already in the record that was overlooked or ignored by the moving party. In that event, the moving party must respond by making an attempt to demonstrate the inadequacy of this evidence, for it is only by attacking all the record evidence allegedly supporting the nonmoving party that a party seeking summary judgment satisfies Rule 56's burden of production.[3] Thus, if the record disclosed that the

[106 S.Ct. 2558] moving

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party had overlooked a witness who would provide relevant testimony for the nonmoving party at trial, the court could not find that the moving party had discharged its initial burden of production unless the moving party sought to demonstrate the inadequacy of this witness' testimony. Absent such a demonstration, summary judgment would have to be denied on the ground that the moving party had failed to meet its burden of production under Rule 56.

The result in *Adickes v. S. H. Kress & Co.*, supra, is fully consistent with these principles. In that case, petitioner was refused service in respondent's lunchroom, and then was arrested for vagrancy by a local policeman as she left. Petitioner brought an action under 42 U.S.C. § 1983, claiming that the refusal of service and subsequent arrest were the product of a conspiracy between respondent and the police; as proof of this conspiracy, petitioner's

complaint alleged that the arresting officer was in respondent's store at the time service was refused. Respondent subsequently moved for summary judgment on the ground that there was no actual evidence in the record from which a jury could draw an inference of conspiracy. In response, petitioner pointed to a statement from her own deposition and an unsworn statement by a Kress employee, both already in the record and both ignored by respondent, that the policeman who arrested petitioner was in the store at the time she was refused service. We agreed that

[i]f a policeman were present, . . . it would be open to a jury, in light of the sequence that fol

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lowed, to infer from the circumstances that the policeman and Kress employee had a "meeting of the minds," and thus reached an understanding that petitioner should be refused service.

398 U.S. at 158. Consequently, we held that it was error to grant summary judgment "on the basis of this record," because respondent had "failed to fulfill its initial burden" of demonstrating that there was no evidence that there was a policeman in the store. Id. at 157-158.

The opinion in *Adickes* has sometimes been read to hold that summary judgment was inappropriate because the respondent had not submitted affirmative evidence to negate the possibility that there was a policeman in the store. See Brief for Respondent 20, n. 30 (citing cases). The Court of Appeals apparently read *Adickes* this way, and therefore required Celotex to submit evidence establishing that plaintiff's decedent had not been exposed to Celotex asbestos. I agree with the Court that this reading of *Adickes* was erroneous, and that Celotex could seek summary judgment on the ground that plaintiff could not prove exposure to Celotex asbestos at trial. However, Celotex was still required to satisfy its initial burden of production.

II

I do not read the Court's opinion to say anything inconsistent with or different than the preceding discussion. My disagreement with the Court concerns the application of these principles to the facts of this case.

Defendant Celotex sought summary judgment on the ground that plaintiff had "failed to produce" any evidence that her [106 S.Ct. 2559] decedent had ever been exposed to Celotex asbestos.[4] App. 170. Celotex supported this motion with a

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two-page "Statement of Material Facts as to Which There

is No Genuine Issue" and a three-page "Memorandum of Points and Authorities" which asserted that the plaintiff had failed to identify any evidence in responding to two sets of interrogatories propounded by Celotex, and that therefore the record was "totally devoid" of evidence to support plaintiff's claim. See id. at 171-176.

Approximately three months earlier, Celotex had filed an essentially identical motion. Plaintiff responded to this earlier motion by producing three pieces of evidence which she claimed "[a]t the very least . . . demonstrate that there is a genuine factual dispute for trial," id. at 143: (1) a letter from an insurance representative of another defendant describing asbestos products to which plaintiff's decedent had been exposed, id. at 160; (2) a letter from T. R. Hoff, a former supervisor of decedent, describing asbestos products to which decedent had been exposed, id. at 162; and (3) a copy of decedent's deposition from earlier workmen's compensation proceedings, id. at 164. Plaintiff also apparently indicated

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at that time that she intended to call Mr. Hoff as a witness at trial. Tr. of Oral Arg. 6-7, 27-29.

Celotex subsequently withdrew its first motion for summary judgment. See App. 167.[5] However, as a result of this motion, when Celotex filed its second summary judgment motion, the record did contain evidence -- including at least one witness -- supporting plaintiff's claim. Indeed, counsel for Celotex admitted to this Court at oral argument that Celotex was aware of this evidence and of plaintiff's intention to call Mr. Hoff as a witness at trial when the second summary judgment motion was filed. Tr. of Oral Arg. 5-7. Moreover, plaintiff's response to Celotex' second motion pointed to this evidence -- noting that it had already been provided to counsel for Celotex in connection with the first motion -- and argued that Celotex had failed to "meet its burden of proving that there is no genuine factual dispute for trial." App. 188.

On these facts, there is simply no question that Celotex failed to discharge its initial burden of production. Having chosen to base its motion on the argument that there was no evidence in the record to support plaintiff's claim, Celotex was not free to ignore supporting evidence that the record clearly contained. Rather, Celotex was required, as an initial matter, to attack the adequacy of this evidence. Celotex' failure to fulfill this simple requirement constituted a failure to discharge its initial

[106 S.Ct. 2560] burden of production under Rule 56, and thereby rendered summary judgment improper.[6]

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This case is indistinguishable from *Adickes*. Here, as there, the defendant moved for summary judgment on the ground that the record contained no evidence to support an essential element of the plaintiff's claim. Here, as there, the plaintiff responded by drawing the court's attention to evidence that was already in the record and that had been ignored by the moving party. Consequently, here, as there, summary judgment should be denied on the ground that the moving party failed to satisfy its initial burden of production.[7]

STEVENS, J., dissenting

JUSTICE STEVENS, dissenting.

As the Court points out, ante at 319-320, petitioner's motion for summary judgment was based on the proposition that respondent could not prevail unless she proved that her deceased husband had been exposed to petitioner's products "within the jurisdictional limits" of the District of Columbia.[1]

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Respondent made an adequate showing -- albeit possibly not in admissible form[2] -- that her husband had been exposed to petitioner's product in Illinois.[3] Although the basis of the motion and the argument had been the lack of exposure in the District of Columbia, the District Court stated at the end of the argument:

The Court will grant the defendant Celotex's motion for summary judgment, there being no showing that the plaintiff was exposed to the defendant Celotex's product in the District of Columbia or elsewhere within the statutory period. App. 217 (emphasis added). The District Court offered no additional explanation and no written [106 S.Ct. 2561] opinion. The Court of Appeals reversed on the basis that Celotex had not met its burden; the court noted the incongruity of the District Court's opinion in the context of the motion and argument, but did not rest on that basis because of the "or elsewhere" language.[4]

Taken in the context of the motion for summary judgment on the basis of no exposure in the District of Columbia, the

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District Court's decision to grant summary judgment was palpably erroneous. The court's bench reference to "or elsewhere" neither validated that decision nor raised the complex question addressed by this Court today. In light of the District Court's plain error, therefore, it is perfectly clear that, even after this Court's abstract exercise in Rule construction, we should nonetheless affirm the reversal of summary judgment on that narrow ground.[5]

I respectfully dissent.

Notes:

[1] Since our grant of certiorari in this case, the Fifth Circuit has rendered a decision squarely rejecting the position adopted here by the District of Columbia Circuit. See *Fontenot v. Upjohn Co.*, 780 F.2d 1190 (1986).

[2] JUSTICE STEVENS, in dissent, argues that the District Court granted summary judgment only because respondent presented no evidence that the decedent was exposed to Celotex asbestos products in the District of Columbia. See post at 338-339. According to JUSTICE STEVENS, we should affirm the decision of the Court of Appeals, reversing the District Court, on the "narrower ground" that respondent "made an adequate showing" that the decedent was exposed to Celotex asbestos products in Chicago during 1970-1971. See *ibid.*

JUSTICE STEVENS' position is factually incorrect. The District Court expressly stated that respondent had made no showing of exposure to Celotex asbestos products "in the District of Columbia or elsewhere." App. 217 (emphasis added). Unlike JUSTICE STEVENS, we assume that the District Court meant what it said. The majority of the Court of Appeals addressed the very issue raised by JUSTICE STEVENS, and decided that

[t]he District Court's grant of summary judgment must therefore have been based on its conclusion that there was "no showing that the plaintiff was exposed to defendant Celotex's product in the District of Columbia or elsewhere within the statutory period."

Catrett v. Johns-Manville Sales Corp., 244 U.S.App.D.C. 160, 162, n. 3, 756 F.2d 181, 183, n. 3 (1985) (emphasis in original). In other words, no judge involved in this case to date shares JUSTICE STEVENS' view of the District Court's decision.

[3] Rule 56(e) provides:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by

affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

[4] Rule 56(c) provides:

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

[5] See Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 *Yale L.J.* 745, 752 (1974); Currie, *Thoughts on Directed Verdicts and Summary Judgments*, 45 *U.Chi.L.Rev.* 72, 79 (1977).

[6] Rule 56(f) provides:

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

[1] It is also unclear what the Court of Appeals is supposed to do in this case on remand. JUSTICE WHITE -- who has provided the Court's fifth vote -- plainly believes that the Court of Appeals should reevaluate whether the defendant met its initial burden of production. However, the decision to reverse, rather than to vacate the judgment below, implies that the Court of Appeals should assume that Celotex has met its initial burden of production and ask only whether the plaintiff responded adequately, and, if so, whether the defendant has met its ultimate burden of persuasion that no genuine issue exists for trial. Absent some clearer expression from the Court to the contrary, JUSTICE WHITE's understanding would seem to be controlling. Cf. *Marks v. United States*, 430 U.S. 188, 193 (1977).

[2] The burden of persuasion imposed on a moving party by Rule 56 is a stringent one. 6 *Moore ¶56.15*[3], p. 56-466; 10A *Wright § 2727*, p. 124. Summary judgment should not be granted unless it is clear that a trial is unnecessary, *Anderson v. Liberty Lobby, Inc.*, ante at 255, and any doubt as to the existence of a genuine issue for trial should be resolved against the moving party, *Adickes v. S.*

H. Kress & Co., 398 U.S. 144, 158-159 (1970). In determining whether a moving party has met its burden of persuasion, the court is obliged to take account of the entire setting of the case, and must consider all papers of record as well as any materials prepared for the motion. 10A *Wright § 2721*, p. 44; see, e.g., *Stepanischen v. Merchants Despatch Transportation Corp.*, 722 F.2d 922, 930 (CA1 1983); *Higgenbotham v. Ochsner Foundation Hospital*, 607 F.2d 653, 656 (CA5 1979). As explained by the Court of Appeals for the Third Circuit in *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238 (1983), rev'd on other grounds sub nom. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986),

[i]f . . . there is any evidence in the record from any source from which a reasonable inference in the [nonmoving party's] favor may be drawn, the moving party simply cannot obtain a summary judgment. . . .

723 F.2d at 258.

[3] Once the moving party has attacked whatever record evidence -- if any -- the nonmoving party purports to rely upon, the burden of production shifts to the nonmoving party, who must either (1) rehabilitate the evidence attacked in the moving party's papers, (2) produce additional evidence showing the existence of a genuine issue for trial as provided in Rule 56(e), or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f). See 10A *Wright § 2727*, pp. 138-143. Summary judgment should be granted if the nonmoving party fails to respond in one or more of these ways, or if, after the nonmoving party responds, the court determines that the moving party has met its ultimate burden of persuading the court that there is no genuine issue of material fact for trial. See, e.g., *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968).

[4] JUSTICE STEVENS asserts that the District Court granted summary judgment on the ground that the plaintiff had failed to show exposure in the District of Columbia. He contends that the judgment of the Court of Appeals reversing the District Court's judgment should be affirmed on the "narrow ground" that it was "palpably erroneous" to grant summary judgment on this basis. Post at 339 (dissenting). The Court replies that what the District Court said was that plaintiff had failed to show exposure in the District of Columbia "or elsewhere." Ante at 320, n. 2. In my view, it does not really matter which reading is correct in this case. For, contrary to JUSTICE STEVENS' claim, deciding this case on the ground that Celotex failed to meet its burden of production under Rule 56 does not involve an "abstract exercise in Rule construction." Post at 339 (STEVENS, J., dissenting). To the contrary, the principles governing a movant's burden of proof are straightforward and well established, and deciding the case on this basis

does not require a new construction of Rule 56 at all; it simply entails applying established law to the particular facts of this case. The choice to reverse because of "palpable erro[r]" with respect to the burden of a moving party under Rule 56 is thus no more "abstract" than the choice to reverse because of such error with respect to the elements of a tort claim. Indeed, given that the issue of the moving party's burden under Rule 56 was the basis of the Court of Appeals' decision, the question upon which certiorari was granted, and the issue briefed by the parties and argued to the Court, it would seem to be the preferable ground for deciding the case.

[5] Celotex apparently withdrew this motion because, contrary to the assertion made in the first summary judgment motion, its second set of interrogatories had not been served on the plaintiff.

[6] If the plaintiff had answered Celotex' second set of interrogatories with the evidence in her response to the first summary judgment motion, and Celotex had ignored those interrogatories and based its second summary judgment motion on the first set of interrogatories only, Celotex obviously could not claim to have discharged its Rule 56 burden of production. This result should not be different simply because the evidence plaintiff relied upon to support her claim was acquired by Celotex other than in plaintiff's answers to interrogatories.

[7] Although JUSTICE WHITE agrees that,

if [plaintiff] has named a witness to support her claim, summary judgment should not be granted without Celotex somehow showing that the named witness' possible testimony raises no genuine issue of material fact,

he would remand "[b]ecause the Court of Appeals found it unnecessary to address this aspect of the case." Ante at 328-329 (concurring). However, Celotex has admitted that plaintiff had disclosed her intent to call Mr. Hoff as a witness at trial before Celotex filed its second motion for summary judgment. Tr. of Oral Arg. 6-7. Under the circumstances, then, remanding is a waste of time.

[1] See Motion of Defendant Celotex Corporation for Summary Judgment, App. 170 ("Defendant Celotex Corporation, pursuant to Rule 56 (b) of the Federal Rules of Civil Procedure, moves this Court for an Order granting Summary Judgment on the ground that plaintiff has failed to produce evidence that any product designed, manufactured or distributed by Celotex Corporation was the proximate cause of the injuries alleged within the jurisdictional limits of this Court") (emphasis added); Memorandum of Points and Authorities in Support of Motion of Defendant Celotex Corporation for Summary Judgment, id. at 175 (Plaintiff "must demonstrate some link

between a Celotex Corporation product claimed to be the cause of the decedent's illness and the decedent himself. The record is totally devoid of any such evidence within the jurisdictional confines of this Court") (emphasis added); Transcript of Argument in Support of Motion of Defendant Celotex Corporation for Summary Judgment, id. at 211 ("Our position is . . . there has been no product identification of any Celotex products . . . that have been used in the District of Columbia to which the decedent was exposed") (emphasis added).

[2] But cf. ante at 324 ("We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment").

[3] See App. 160 (letter from Aetna Life Insurance Co.) (referring to the "asbestos that Mr. Catrett came into contact with while working for Anning-Johnson Company" and noting that the "manufacturer of this product" was purchased by Celotex); id. at 162 (letter from Anning-Johnson Co.) (confirming that Catrett worked for the company and supervised the installation of asbestos produced by the company that Celotex ultimately purchased); id. at 164, 164c (deposition of Catrett) (description of his work with asbestos "in Chicago").

[4] See *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181, 185, n. 14 (1985) ("[T]he discussion at the time the motion was granted actually spoke to venue. It was only the phrase 'or elsewhere,' appearing with no prior discussion, in the judge's oral ruling at the close of argument that made the grant of summary judgment even conceivably proper").

[5] Cf. n. 2, supra. The Court's statement that the case should be remanded because the Court of Appeals has a "superior knowledge of local law," ante at 327, is bewildering because there is no question of local law to be decided. Cf. *Bishop v. Wood*, 426 U.S. 341, 345-347 (1976).

The Court's decision to remand when a sufficient ground for affirmance is available does reveal, however, the Court's increasing tendency to adopt a presumption of reversal. See, e.g., *New York v. P. J. Video, Inc.*, 475 U.S. 868, 884 (1986) (MARSHALL, J., dissenting); *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 715 (1986) (STEVENS, J., dissenting); *City of Los Angeles v. Heller*, 475 U.S. 796, 800 (1986) (STEVENS, J., dissenting); *Pennsylvania v. Goldhammer*, 474 U.S. 28, 81 (1985) (STEVENS, J., dissenting). As a matter of efficient judicial administration and of respect for the state and federal courts, I believe the presumption should be precisely the opposite.

APPENDIX 3

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379 U.S. 64 (1964)

85 S.Ct. 209, 13 L.Ed.2d 125

Garrison

v.

Louisiana

No. 4

United States Supreme Court

Nov. 23, 1964

Argued April 22, 1964

Restored to the calendar for reargument June 22, 1964

Reargued October 19, 1964

APPEAL FROM THE SUPREME COURT OF LOUISIANA

Syllabus

Appellant, a District Attorney in Louisiana, during a dispute with certain state court judges of his parish, accused them at a press conference of laziness and inefficiency and of hampering his efforts to enforce the vice laws. A state court convicted him of violating the Louisiana Criminal Defamation Statute, which, in the context of criticism of official conduct, includes punishment for true statements made with "actual malice" in the sense of ill-will, as well as false statements if made with ill-will or without reasonable belief that they were true. The state supreme court affirmed the conviction, holding that the statute did not unconstitutionally abridge appellant's rights of free expression.

Held:

1. The Constitution limits state power to impose sanctions for criticism of the official conduct of public officials, in criminal cases as in civil cases, to false statements concerning official conduct made with knowledge of their falsity or with reckless disregard of whether they were false or not. *New York Times Co. v. Sullivan*, 376 U.S. 254, followed. Pp. 67-75.

2. Appellant's accusations concerned the judges' official

conduct and, did not become private defamation because they might also have reflected on the judges' private character. Pp. 76-77.

244 La. 787, 154 So.2d 400, reversed.

BRENNAN, J., lead opinion

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellant is the District Attorney of Orleans Parish, Louisiana. During a dispute with the eight judges of

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the Criminal District Court of the Parish, he held a press conference at which he issued a statement disparaging their judicial conduct. As a result, he was tried

[85 S.Ct. 211] without a jury before a judge from another parish and convicted of criminal defamation under the Louisiana Criminal Defamation Statute.[1] The principal charges alleged to

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be defamatory were his attribution of a large backlog of pending criminal cases to the inefficiency, laziness, and excessive vacations of the judges, and his accusation that, by refusing to authorize disbursements to cover the expenses of undercover investigations of vice in New Orleans, the judges had hampered his efforts to enforce the vice laws. In impugning their motives, he said:

The judges have now made it eloquently clear where their sympathies lie in regard to aggressive vice investigations by refusing to authorize use of the DA's funds to pay for the cost of closing down the Canal Street clip joints. . . .

. . . This raises interesting questions about the racketeer influences on our eight vacation-minded judges.[2]

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[85 S.Ct. 212] The Supreme Court of Louisiana affirmed the conviction, 244 La. 787, 154 So.2d 400. The trial court and the State Supreme Court both rejected appellant's contention that the statute unconstitutionally abridged his freedom of expression. We noted probable jurisdiction of the appeal. 375 U.S. 900. Argument was first heard in the 1963 Term, and the case was ordered restored to the calendar for reargument, 377 U.S. 986. We reverse.

I

In *New York Times Co. v. Sullivan*, 376 U.S. 254, we held that the Constitution limits state power, in a civil action brought by a public official for criticism of his official conduct, to an award of damages for a false statement "made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-280. At the outset, we must decide whether, in view of the differing history and purposes of criminal libel, the *New York Times* rule also limits state power to impose criminal sanctions for criticism of the official conduct of public officials. We hold that it does.

Where criticism of public officials is concerned, we see no merit in the argument that criminal libel statutes serve interests distinct from those secured by civil libel laws, and therefore should not be subject to the same limitations.^[3] At common law, truth was no defense to criminal

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libel. Although the victim of a true but defamatory publication might not have been unjustly damaged in reputation by the libel, the speaker was still punishable, since the remedy was designed to avert the possibility that the utterance would provoke an enraged victim to a breach of peace. That argument is well stated in Edward Livingston's explanation of the defamation provisions of his proposed penal code for Louisiana:

In most cases, the connexion between cause and effect exists between the subject of this chapter and that of a subsequent one -- Of Duels. Defamation, either real or supposed, is the cause of most of those combats, which no laws have yet been able to suppress. If lawgivers had originally condescended to pay some attention to the passions and feelings of those for whom they were to legislate, these appeals to arms would never have usurped a power superior to the laws; but by affording no satisfaction for the wounded feelings of honour, they drove individuals to avenge all wrongs of that description, denied a place in the code of criminal law. Insults formed a title in that of honour, which claimed exclusive jurisdiction of this offence.

Livingston, *A System of Penal Law for the*

[85 S.Ct. 213] *State of Louisiana*, at 177 (1833).^[4]

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Even in Livingston's day, however, preference for the civil remedy, which enabled the frustrated victim to trade chivalrous satisfaction for damages, had substantially eroded the breach of the peace justification for criminal libel laws. In fact, in earlier, more violent, times, the civil

remedy had virtually preempted the field of defamation; except as a weapon against seditious libel, the criminal prosecution fell into virtual desuetude.^[5] Changing mores and the virtual disappearance of criminal libel prosecutions lend support to the observation that,

. . . under modern conditions, when the rule of law is generally accepted as a substitute for private physical measures, it can hardly be urged that the maintenance of peace requires a criminal prosecution for private defamation.

Emerson, *Toward a General Theory of the First Amendment*, 72 *Yale L.J.* 877, 924 (1963).^[6] The absence in the Proposed Official Draft of the Model Penal Code of the American Law Institute of any criminal libel statute on the Louisiana pattern reflects this modern consensus. The ALI Reporters, in explaining the omission, gave cogent evidence of the obsolescence of Livingston's justification:

It goes without saying that penal sanctions cannot be justified merely by the fact that defamation is evil

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or damaging to a person in ways that entitle him to maintain a civil suit. Usually we reserve the criminal law for harmful behavior which exceptionally disturbs the community's sense of security. . . . It seems evident that personal calumny falls in neither of these classes in the U.S.A., that it is therefore inappropriate for penal control, and that this probably accounts for the paucity of prosecutions and the near desuetude of private criminal libel legislation in this country. . . .

Model Penal Code, Tent. Draft No. 13, 1961, § 250.7, Comments, at 44.

The Reporters therefore recommended only narrowly drawn statutes designed to reach words tending to cause a breach of the peace, such as the statute sustained in *Chaplinsky v. New Hampshire*, 315 U.S. 568, or designed to reach speech, such as group vilification, "especially likely to lead to public disorders," such as the statute sustained in *Beauharnais v. Illinois*, 343 U.S. 250. Model Penal Code, *supra*, at 45. But Louisiana's rejection of the "clear and present danger" standard as irrelevant to the application of its statute, 244 La. at 833, 154 So.2d at 416, coupled with the absence of any limitation in the statute itself to speech calculated to cause breaches of the peace, leads us to conclude that the Louisiana statute is not this sort of narrowly drawn statute.

We next consider whether the historical limitation of the defense of truth in criminal libel to utterances published "with good motives and for justifiable

[85 S.Ct. 214] ends"[7]

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should be incorporated into the New York Times rule as it applies to criminal libel statutes; in particular, we must ask whether this history permits negating the truth defense, as the Louisiana statute does, on a showing of

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malice in the sense of ill-will. The "good motives" restriction incorporated in many state constitutions and statutes to reflect Alexander Hamilton's unsuccessfully urged formula in *People v. Croswell*, 3 Johns.Cas. 337, 352 (N.Y.Supreme Court 1804), liberalized the common law rule denying any defense for truth. See Ray, *Truth: A Defense to Libel*, 16 Minn.L.Rev. 43, 46-49 (1931); Kelly, *Criminal Libel and Free Speech*, 6 Kan.L.Rev. 295, 326-328 (1958). We need not be concerned whether this limitation serves a legitimate state interest to the extent that it reflects abhorrence that

a man's forgotten misconduct, or the misconduct

[85 S.Ct. 215] of a relation, in which the public had no interest, should be wantonly raked up, and published to the world, on the ground of its being true.?

9 Hansard, *Parliamentary Debates Hist. Eng.* 1230 (3d series) (H.L. June 1, 1843) (Report of Lord Campbell) (emphasis supplied).[8] In any event, where the criticism is of

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public officials and their conduct of public business, the interest in private reputation is overcome by the larger public interest, secured by the Constitution, in the dissemination of truth.[9] In short, we agree with the New Hampshire court in *State v. Burnham*, 9 N.H. 34, 42-43, 31 Am.Dec. 217, 221 (1837):

If, upon a lawful occasion for making a publication, he has published the truth, and no more, there is no sound principle which can make him liable, even if he was actuated by express malice. . . .

It has been said that it is lawful to publish truth from good motives, and for justifiable ends. But this rule is too narrow. If there is a lawful occasion -- a legal right to make a publication -- and the matter true, the end is justifiable, and that, in such case, must be sufficient.

Moreover, even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse

consequences to any except the knowing or reckless falsehood. Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth. Under a rule like the Louisiana rule, permitting a finding of malice based on an intent merely to inflict harm, rather than an intent to inflict harm through falsehood,

it becomes a hazardous matter to speak out against a popular politician, with the result that the dishonest and incompetent will be shielded.

Noel, *Defamation*

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of Public Officers and Candidates, 49 Col.L.Rev. 875, 893 (1949). Moreover,

[i]n the case of charges against a popular political figure . . . , it may be almost impossible to show freedom from ill-will or selfish political motives.

Id. at 893, n. 90. Similar considerations supported our holdings that federal officers enjoy an absolute privilege for defamatory publication within the scope of official duty, regardless of the existence of malice in the sense of ill-will. *Barr v. Matteo*, 360 U.S. 564; *Howard v. Lyons*, 360 U.S. 593; cf. *Gregoire v. Biddle*, 177 F.2d 579 (C.A.2d Cir. 1949). What we said of Alabama's civil libel law in *New York Times*, 376 U.S. at 282-283, applies equally to the Louisiana criminal libel rule:

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 held in *New York Times* that a public official might be allowed the civil remedy only if he establishes that the utterance was false, and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true. The reasons which led us so to hold in *New York Times*, 376 U.S. at 279-280, apply with no less force merely because the remedy

[85 S.Ct. 216] is criminal. The constitutional guarantees of freedom of expression compel application of the same standard to the criminal remedy. Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned. And since

. . . erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive" . . .

376 U.S. at 271-272, only those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions. For speech concerning public affairs is

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more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our

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.

New York Times Co. v. Sullivan, 376 U.S. at 270.

The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration. Cf. Riesman, Democracy and Defamation: Fair Game and Fair Comment I, 42 Col.L.Rev. 1085, 1088-1111 (1942). That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class 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 U.S. 568, 572. Hence, the knowingly false statement and the false statement made with reckless disregard of the truth do not enjoy constitutional protection.

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II

We find no difficulty in bringing the appellant's statement within the purview of criticism of the official conduct of public officials, entitled to the benefit of the New York Times rule. As the Louisiana Supreme Court viewed the statement, it constituted an attack upon the personal integrity of the judges, rather than on official conduct. In sustaining the finding of the trial court that the appellant's statement was defamatory, the Louisiana Supreme Court held that

. . . the use of the words "racketeer influences," when applied to anyone, suggests and imputes that he has been influenced to practice fraud, deceit, trickery, cheating, and dishonesty;

that

The expression that the judges have enjoyed 300 days vacation out of 19 months suggests and connotes a violation of the "Deadhead" statute, LSA-R.S. 14:138, Public Payroll Fraud;

that "Other expressions set out in the Bill of Information connote malfeasance in office. LSA-R.S. 14:134; Art. IX, Sec. 1, La.Const. of 1921." The court concluded that

Defendant's expressions . . . are not criticisms of a court trial or of the manner in which any one of the eight

[85 S.Ct. 217] judges conducted his court when in session. The expressions charged contain personal attacks upon the integrity and honesty of the eight judges. . . .

244 La. at 834-835, 154 So.2d at 417-418.

We do not think, however, that appellant's statement may be considered as one constituting only a purely private defamation. The accusation concerned the judges' conduct of the business of the Criminal District Court.[10]

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Of course, any criticism of the manner in which a public official performs his duties will tend to affect his private, as well as his public, reputation. The New York Times rule is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed. The public official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant. 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.[11] As the Kansas Supreme Court said in Coleman v. MacLennan, speaking of

candidates:

Manifestly, a candidate must surrender to public scrutiny and discussion so much of his private character as affects his fitness for office, and the liberal rule requires no more. But, in measuring the extent of a candidate's profert of character, it should always be remembered that the people have good authority for believing that grapes do not grow on thorns, nor figs on thistles.

78 Kan. 711, 739, 98 P. 281, 291 (1908).

III

Applying the principles of the New York Times case, we hold that the Louisiana statute, as authoritatively interpreted by the Supreme Court of Louisiana, incorporates constitutionally invalid standards in the context of criticism of the official conduct of public officials.

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For, contrary to the New York Times rule, which absolutely prohibits punishment of truthful criticism, the statute directs punishment for true statements made with "actual malice," see LSA-R.S. § 14:48; *State v. Cox*, 246 La. 748, 756, 167 So.2d 352, 355 (1964), handed down after the New York Times decision; *Bennett*, *The Louisiana Criminal Code*, 5 La.L.Rev. 6, 34 (1942). And "actual malice" is defined in the decisions below to mean "hatred, ill will or enmity or a wanton desire to injure. . . ." 244 La. at 851, 154 So.2d at 423. The statute is also unconstitutional as interpreted to cover false statements against public officials. The New York Times standard forbids the punishment of false statements, unless made with knowledge of their falsity or in reckless disregard of whether they are true or false. But the Louisiana statute punishes false statements without regard to that test if made with ill-will; even if ill-will is not established, a false statement concerning public officials can be punished if not made in the reasonable belief of its truth. The Louisiana Supreme [85 S.Ct. 218] Court affirmed the conviction solely on the ground that the evidence sufficed to support the trial court's finding of ill-will, enmity, or a wanton desire to injure. But the trial court also rested the conviction on additional findings that the statement was false, and not made in the reasonable belief of its truth. The judge said:

It is inconceivable to me that the Defendant could have had a reasonable belief, which could be defined as an honest belief, that not one, but all eight, of these Judges of the Criminal District Court were guilty of what he charged them with in the defamatory statement. These men have been honored . . . with very high offices. . . . It is inconceivable to me that all of them could have been guilty of all of the accusations made against them. Therefore, I do

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not believe that the qualified privilege under LSA-R.S., Title 14, Section 49, is applicable. . . .

This is not a holding applying the New York Times test. The "reasonable belief" standard applied by the trial judge is not the same as the "reckless disregard of truth" standard. According to the trial court's opinion, a reasonable belief is one which "an ordinarily prudent man might be able to assign a just and fair reason for"; the suggestion is that, under this test, the immunity from criminal responsibility in the absence of ill-will disappears on proof that the exercise of ordinary care would have revealed that the statement was false. The test which we laid down in *New York Times* is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth.

Reversed.

BLACK, J., concurring

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring.

For reasons stated at greater length in my opinions concurring in *New York Times Co. v. Sullivan*, 376 U.S. 254, 293, and dissenting in *Beauharnais v. Illinois*, 343 U.S. 250, 267, as well as in the opinion of MR. JUSTICE DOUGLAS in this case, *infra*, p. 80, I concur in reversing the conviction of appellant Garrison, based as it is purely on his public discussion and criticism of public officials. I believe that the First Amendment, made applicable to the States by the Fourteenth, protects every person from having a State or the Federal Government fine, imprison or assess damages against him when he has been guilty of no conduct, see *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498, other than expressing an opinion, even though others may believe that his views are unwholesome, unpatriotic, stupid or dangerous. I believe that the Court is mistaken if it thinks that requiring proof that

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statements were "malicious" or "defamatory" will really create any substantial hurdle to block public officials from punishing those who criticize the way they conduct their office. Indeed, "malicious," "seditious," and other such evil-sounding words often have been invoked to punish people for expressing their views on public affairs. Fining men or sending them to jail for criticizing public officials not only jeopardizes the free, open public discussion which our Constitution guarantees, but can wholly stifle it. I would hold now, and not wait to hold later, compare *Betts v. Brady*, 316 U.S. 455, overruled in *Gideon v. Wainwright*, 372 U.S. 335, that, under our Constitution, there is

absolutely no place in this country for the old, discredited English Star Chamber law of seditious criminal libel.

DOUGLAS, J., concurring

MR. JUSTICE DOUGLAS, whom MR. JUSTICE BLACK joins, concurring.

I am in hearty agreement with the conclusion of the Court that this prosecution for a seditious libel was unconstitutional. Yet I feel that the gloss which the Court

[85 S.Ct. 219] has put on "the freedom of speech" in the First Amendment to reach that result (and like results in other cases) makes that basic guarantee almost unrecognizable.[1]

Recently, in *New York Times Co. v. Sullivan*, 376 U.S. 254, a majority of the Court held that criticism of an

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official for official conduct was protected from state civil libel laws by the First and Fourteenth Amendments, unless there was proof of actual malice. *Id.* at 279. We now hold that proof of actual malice is relevant to seditious libel -- that seditious libel will lie for a knowingly false statement, or one made with reckless disregard of the truth.

If malice is all that is needed, inferences from facts as found by the jury will easily oblige. How can we sit in review on a cold record and find no evidence of malice (cf. *New York Times Co. v. Sullivan*, 376 U.S. at 285-288) when it is the commonplace of life that heat and passion subtly turn to malice in actual fact? If "reckless disregard of the truth" is the basis of seditious libel, that nebulous standard could be easily met. The presence of "actual malice" is made critical in seditious libel, as well as in civil actions involving charges against public officials, when in truth there is nothing in the Constitution about it, any more than there is about "clear and present danger."

While the First Amendment remains the same, the gloss which the Court has written on it in this field of the discussion of public issues robs it of much vitality.

Why does "the freedom of speech" that the Court is willing to protect turn out to be so pale and tame?

It is because, as my Brother BLACK has said,[2] the Bill of Rights is constantly watered down through judicial

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"balancing" of what the Constitution says and what judges think is needed for a well ordered society.

As Irving Brant recently said:

The balancing test developed in recent years by our Supreme Court does not disarm the Government of power to trench upon the field in which the Constitution says "Congress shall make no law." The balancing test does exactly what is

[85 S.Ct. 220] done by its spiritual parent, the British "common law of seditious libel," under which (to repeat the words of May), "Every one was a libeler who outraged the sentiments of the dominant party."

Seditious Libel: Myth and Reality, 39 N.Y.U.L.Rev. 1, 18-19 (1964).

Beauharnais v. Illinois, 343 U.S. 250, a case decided by the narrowest of margins, should be overruled as a misfit in our constitutional system and as out of line with the dictates of the First Amendment. I think it is time to face the fact that the only line drawn by the Constitution is between "speech," on the one side, and conduct or overt acts, on the other. The two often do blend. I have expressed the idea before:

Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it.

Roth v. United States, 354 U.S. at 514 (dissenting opinion). Unless speech is so brigaded with overt acts of that kind, there is nothing that may be punished, and no semblance of such a case is made out here.

I think little need be added to what Mr. Justice Holmes said nearly a half century ago:

I wholly disagree with the argument of the Government that the First Amendment left the common

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law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798 . . . ,[3] by repaying fines that it imposed.

Abrams v. United States, 250 U.S. 616, 630 (dissenting opinion).

The philosophy of the Sedition Act of 1798, which punished "false, scandalous and malicious" writings (1 Stat. 596), is today allowed to be applied by the States. Yet Irving Brant has shown that seditious libel was "entirely the creation of the Star Chamber." [4] It is disquieting to know that one of its instruments of destruction is abroad in the

land today.

APPENDIX TO OPINION OF MR. JUSTICE DOUGLAS,
CONCURRING.

Excerpt from Madison's Address, January 23, 1799:

The sedition act presents a scene which was never expected by the early friends of the Constitution. It was then admitted that the State sovereignties were only diminished by powers specifically enumerated, or necessary to carry the specified powers into effect. Now, Federal authority is deduced from implication; and, from the

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existence of State law, it is inferred that Congress possess a similar power of legislation whence Congress will be endowed with a power of legislation in all cases whatsoever, and the States will be stripped of every right reserved, by the concurrent claims of a paramount Legislature.

The sedition act is the offspring of these tremendous pretensions, which inflict a death-wound on the sovereignty of the States.

For the honor of American understanding, we will not believe that the

[85 S.Ct. 221] people have been allured into the adoption of the Constitution by an affectation of defining powers, whilst the preamble would admit a construction which would erect the will of Congress into a power paramount in all cases, and therefore limited in none. On the contrary, it is evident that the objects for which the Constitution was formed were deemed attainable only by a particular enumeration and specification of each power granted to the Federal Government, reserving all others to the people, or to the States. And yet it is in vain we search for any specified power embracing the right of legislation against the freedom of the press.

Had the States been despoiled of their sovereignty by the generality of the preamble, and had the Federal Government been endowed with whatever they should judge to be instrumental towards union, justice, tranquillity, common defence, general welfare, and the preservation of liberty, nothing could have been more frivolous than an enumeration of powers.

It is vicious in the extreme to calumniate meritorious public servants; but it is both artful and vicious to arouse the public indignation against calumny in order to conceal usurpation. Calumny is forbidden by the laws, usurpation by the Constitution. Calumny injures individuals,

usurpation, States. Calumny may be redressed

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by the common judicatures; usurpation can only be controlled by the act of society. Ought usurpation, which is most mischievous, to be rendered less hateful by calumny, which, though injurious, is in a degree less pernicious? But the laws for the correction of calumny were not defective. Every libelous writing or expression might receive its punishment in the State courts, from juries summoned by an officer, who does not receive his appointment from the President, and is under no influence to court the pleasure of Government, whether it injured public officers or private citizens. Nor is there any distinction in the Constitution empowering Congress exclusively to punish calumny directed against an officer of the General Government; so that a construction assuming the power of protecting the reputation of a citizen officer will extend to the case of any other citizen, and open to Congress a right of legislation in every conceivable case which can arise between individuals.

In answer to this, it is urged that every Government possesses an inherent power of self-preservation, entitling it to do whatever it shall judge necessary for that purpose.

This is a repetition of the doctrine of implication and expediency in different language, and admits of a similar and decisive answer, namely, that as the powers of Congress are defined, powers inherent, implied, or expedient are obviously the creatures of ambition; because the care expended in defining powers would otherwise have been superfluous. Powers extracted from such sources will be indefinitely multiplied by the aid of armies and patronage which, with the impossibility of controlling them by any demarcation, would presently terminate reasoning, and ultimately swallow up the State sovereignties.

So insatiable is a love of power that it has resorted to a distinction between the freedom and licentiousness of

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the press for the purpose of converting the third amendment * of the Constitution, which was dictated by the most lively anxiety to preserve that freedom, into an instrument for abridging it. Thus, usurpation even justifies itself by a precaution against usurpation; and thus an amendment universally designed to quiet every fear is adduced as the source of an act which has produced general terror and alarm.

The distinction between liberty and licentiousness is still a repetition of the

[85 S.Ct. 222] Protean doctrine of implication, which is

ever ready to work its ends by varying its shape. By its help, the judge as to what is licentious may escape through any constitutional restriction. Under it, men of a particular religious opinion might be excluded from office, because such exclusion would not amount to an establishment of religion, and because it might be said that their opinions are licentious. And under it, Congress might denominate a religion to be heretical and licentious, and proceed to its suppression. Remember that precedents, once established, are so much positive power; and that the nation which reposes on the pillow of political confidence will sooner or later end its political existence in a deadly lethargy. Remember also that it is to the press mankind are indebted for having dispelled the clouds which long encompassed religion, for disclosing her genuine lustre, and disseminating her salutary doctrines.

The sophistry of a distinction between the liberty and the licentiousness of the press is so forcibly exposed in a late memorial from our late envoys to the Minister of the French Republic, that we here present it to you in their own words:

The genius of the Constitution, and the opinion of the people of the United States, cannot be overruled by

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those who administer the Government. Among those principles deemed sacred in America, among those sacred rights considered as forming the bulwark of their liberty, which the Government contemplates with awful reverence and would approach only with the most cautious circumspection, there is no one of which the importance is more deeply impressed on the public mind than the liberty of the press. That this liberty is often carried to excess, that it has sometimes degenerated into licentiousness, is seen and lamented; but the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good with which it is allied; perhaps it is a shoot which cannot be stripped from the stalk without wounding vitally the plant from which it is torn. However desirable those measures might be which might correct without enslaving the press, they have never yet been devised in America. No regulations exist which enable the Government to suppress whatever calumnies or invectives any individual may choose to offer to the public eye, or to punish such calumnies and invectives otherwise than by a legal prosecution in courts which are alike open to all who consider themselves as injured.

As if we were bound to look for security from the personal probity of Congress amidst the frailties of man, and not from the barriers of the Constitution, it has been urged that the accused under the sedition act is allowed to prove the truth of the charge. This argument will not for a moment disguise the unconstitutionality of the act if it be recollected that opinions, as well as facts, are made punishable, and that

the truth of an opinion is not susceptible of proof. By subjecting the truth of opinion to the regulation, fine, and imprisonment to be inflicted by those who are of a different opinion, the free range of the human mind is injuriously restrained. The sacred obligations of religion flow from the due exercise of opinion, in the solemn discharge of which man is accountable to

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his God alone; yet, under this precedent, the truth of religion itself may be ascertained, and its pretended licentiousness punished by a jury of a different creed from that held by the person accused. This law, then, commits the double sacrilege of arresting reason in her progress towards perfection, and of placing in a state of danger the free exercise of religious opinions. But where does the Constitution allow Congress to create crimes and inflict punishment, provided they allow the accused to exhibit evidence in his defense? This doctrine, united with the assertion, that sedition is a common law offence, and therefore within the correcting power of Congress, opens at once the hideous

[85 S.Ct. 223] volumes of penal law and turns loose upon us the utmost invention of insatiable malice and ambition which, in all ages, have debauched morals, depressed liberty, shackled religion, supported despotism, and deluged the scaffold with blood.

VI Writings of James Madison, 1790-1802, pp. 333-337 (Hunt ed. 1906).

GOLDBERG, J., concurring

MR. JUSTICE GOLDBERG, concurring.

I agree with the Court that there is "no difficulty in bringing the appellant's statement within the purview of criticism of the official conduct of public officials. . . ." Ante at 76. In *New York Times Co. v. Sullivan*, 376 U.S. 254, 297, I expressed my conviction "that the Constitution accords citizens and press an unconditional freedom to criticize official conduct." Id. at 305. *New York Times* was a civil libel case; this is a criminal libel prosecution. In my view,

[i]f the rule that libel on government has no place in our Constitution is to have real meaning, then libel [criminal or civil] on the official conduct of the governors likewise can have no place in our Constitution.

Id. at 299.

Notes:

[1] La.Rev.Stat.1950, Tit. 14:

§ 47. Defamation

Defamation is the malicious publication or expression in any manner, to anyone other than the party defamed, of anything which tends:

(1) To expose any person to hatred, contempt, or ridicule, or to deprive him of the benefit of public confidence or social intercourse; or

(2) To expose the memory of one deceased to hatred, contempt, or ridicule; or

(3) To injure any person, corporation, or association of persons in his or their business or occupation.

Whoever commits the crime of defamation shall be fined not more than three thousand dollars, or imprisoned for not more than one year, or both.

§ 48. Presumption of malice

Where a nonprivileged defamatory publication or expression is false it is presumed to be malicious unless a justifiable motive for making it is shown.

Where such a publication or expression is true, actual malice must be proved in order to convict the offender.

§ 49. Qualified privilege

A qualified privilege exists and actual malice must be proved, regardless of whether the publication is true or false, in the following situations:

(1) Where the publication or expression is a fair and true report of any judicial, legislative, or other public or official proceeding, or of any statement, speech, argument, or debate in the course of the same.

(2) Where the publication or expression is a comment made in the reasonable belief of its truth, upon,

(a) The conduct of a person in respect to public affairs; or

(b) A thing which the proprietor thereof offers or explains to the public.

(3) Where the publication or expression is made to a person interested in the communication, by one who is also interested or who stands in such a relation to the former as to afford a reasonable ground for supposing his motive innocent.

(4) Where the publication or expression is made by an attorney or party in a judicial proceeding.

La.Rev.Stat.1962 Cum.Supp., Tit. 14:

50. Absolute privilege. . . .

[2] The dispute between appellant and the judges arose over disbursements from a Fines and Fees Fund, which was to be used to defray expenses of the District Attorney's office; disbursements could be made only on motion of the District Attorney and approval by a judge of the Criminal District Court. After appellant took office, one of the incumbent judges refused to approve a disbursement from the Fund for furnishings for appellant's office. When the judge went on vacation prior to his retirement in September, 1962, appellant obtained the approval of another judge, allegedly by misrepresenting that the first judge had withdrawn his objection. Thereupon, the eight judges, on October 5, 1962, adopted a rule that no further disbursements of the District Attorney from the Fund would be approved except with the concurrence of five of the eight judges. On October 26, 1962, the judges ruled that disbursements to pay appellant's undercover agents to conduct investigations of commercial vice in the Bourbon and Canal Street districts of New Orleans would not be approved, and expressed doubt as to the legality of such a use of the Fund under the State Constitution. A few days later, on November 1, 1962, the judge, now retired, who had turned down the original motion issued a public statement criticizing appellant's conduct of the office of District Attorney. The next day, appellant held the press conference at which he made the statement for which he was prosecuted.

[3] In affirming appellant's conviction, before New York Times was handed down, the Supreme Court of Louisiana relied on statements in *Roth v. United States*, 354 U.S. 476, 486-487, and *Beauharnais v. Illinois*, 343 U.S. 250, 266, to the effect that libelous utterances are not within the protection of the First and Fourteenth Amendments, and hence can be punished without a showing of clear and present danger. 244 La. at 833-834, 154 So.2d at 416-417. For the reasons stated in *New York Times*, 376 U.S. at 268-269, nothing in *Roth* or *Beauharnais* forecloses inquiry into whether the use of libel laws, civil or criminal, to impose sanctions upon criticism of the official conduct of public officials transgresses constitutional limitations protecting freedom of expression. Whether the libel law be civil or criminal, it must satisfy relevant constitutional standards.

[4] *Livingston's Code* was not adopted, and is not reflected in the current Louisiana statute. His suggested provisions for defamation appear at pp. 421-425. Of particular interest are Art. 369, exculpating true statements of fact or incorrect

opinions as to the qualifications of any person for public office, and Art. 386(2), exculpating even mistaken observations on the tendencies or motives of official acts of public officers, but not exculpating false allegations of such motives as would be criminal.

[5] 5 Holdsworth, *History of English Law*, 207-208 (2d ed. 1937); Kelly, *Criminal Libel and Free Speech*, 6 *Kan.L.Rev.* 295, 296-303 (1958).

[6] See the letter of Mr. Justice Jackson, when Attorney General of the United States, dated June 11, 1940, and addressed to Senator Millard E. Tydings, 87 *Cong.Rec.* 5836-5837, in which he stated that the policy of the Attorneys General of the United States was not to prosecute for criticism of public officials.

[7] The following jurisdictions have constitutional or statutory provisions which make truth a defense if published with good motives and for justifiable ends, or some variant thereof:

Alaska Stat.1962, § 11.15.320; Ariz.Rev.Stat.Ann.1956, § 13-353; Cal.Const.1879, Art. 1, § 9; Cal.Pen.Code 1955, § 251; D.C.Code Ann.1961, § 22-2303; Fla.Const.1885, Declaration of Rights, § 13; Hawaii Rev.Laws 1955, § 294-6; Idaho Code 1948, § 18-4803; Ill.Const.1870, Art. 2, § 4; Ill.Rev.Stat.1963, c. 38, § 27-2; Iowa Const.1846, Art. I, § 7; Iowa Code 1962, § 737.4; Kan.Bill of Rights, Const., 1859, § 11; Kan.Gen.Stat.Ann.1949, § 21-2403; Mass.Gen.Laws Ann.1959, c. 278, § 8 (without "actual malice"); Mich.Const.1963, Art. I, § 19; Minn.Stat.1961, § 634.05; Miss.Const.1890, Art. 3, § 13; Miss.Code 1942 (recompiled 1956), § 2269; Mont.Const.1889, Art. III, § 10; Mont.Rev.Codes Ann. 1947, § 94-2804; Nev.Const.1864, Art. I, § 9; Nev.Rev.Stat.1961, § 200.510, subd. 3; N.J.Const.1947, Art. 1, 6; N.Y.Const.1938, Art. I, § 8; N.Y. Penal Law, McKinney's Consol.Laws, c. 40, § 1342; N.D.Const.1889, Art. I, § 9; N.D.Cent.Code 1960, § 12-28-04; Ohio Const.1851, Art. I, § 11; Okla.Const.1907, Art. 2, § 22; Okla.Stat.1951, Tit. 21, § 774; Ore.Rev.Stat.1953, § 163.420; R.I.Const.1843, Art. I, § 20; R.I.Gen.Laws Ann.1956, § 9-6-9; S.D.Const.1889, Art. VI, § 5; S.D.Code 1939, § 13.3406; Utah Const.1895, Art. I, § 15; Utah Code Ann.1953, § 77-31-30; Wash.Rev.Code 1951, § 9.58.020; Wis.Const.1848, Art. I, § 3; Wis.Stat.1961, § 942.01(3); Wyo.Const.1890, Art. 1, § 20. Cf. England, Lord Campbell's Act, 6 & 7 Vict., c. 96, § 6 (1843) (for the public benefit).

In the following jurisdictions, truth does operate as a complete defense:

Colo.Const.1876, Art. II, § 10; Colo.Rev.Stat.Ann.1953, § 40-8-13; *Bearman v. People*, 91 Colo. 486, 493, 16 P.2d 425, 427 (1932); Ind.Const.1851, Art. 1, § 10; *State v.*

Bush, 122 Ind. 42, 23 N.E. 677 (1890); Mo.Const.1945, Art. I, § 8; Mo.Rev.Stat., 1959, § 559.440; Nev.Const.1875, Art. I, § 5; Neb.Rev.Stat., 1943 (1956 reissue), § 28-440; *Razee v. State*, 73 Neb. 732, 103 N.W. 438 (1905); N.M.Const.1911, Art. II, § 17; N.M.Stat.Ann.1953 (1964 replacement), § 40A-11-1 (false and malicious statement); N.C.Gen.Stat.1953, § 15-168; S.C.Const.1895, Art. I, § 21; S.C.Code 1962, § 16-161; Vt.Stat.Ann.1958, Tit. 13, § 6560.

The following jurisdictions allow greater scope for the defense of truth where criticism of the official conduct of public officials is concerned:

Ala.Const.1901, Art. 1, § 12 (but Ala. Code 1940, Tit. 14, § 350 makes truth a defense); Del.Const.1897, Art. 1, § 5; Del.Code Ann.1953, Tit. 11, § 3506; Ky.Const.1891, § 9; Me.Const.1820, Art. I, § 4; Me.Rev.Stat.1954, c. 130, § 34; *State v. Burnham*, 9 N.H. 34, 31 *Am.Dec.* 217 (1837); Pa.Const.1874, Art. 1, § 7; Tenn.Const.1870, Art. 1, § 19; Tenn.Code Ann.1955, §§ 39-2704, 23-2603; Tex.Const.1876, Art. 1, § 8; Vernon's Tex.Code Crim.Proc.Ann.1954, Art. 13; Vernon's Tex.Pen.Code Ann., 1953, Arts. 1290(1), 1290(4).

The following jurisdictions have constitutional or statutory provisions under which evidence of the truth may be introduced, but it is unclear whether this operates as a complete defense:

Ark.Const.1874, Art. 2, § 6; Ark.Stat.1947 (1964 replacement), Tit. 41, § 2403; Conn.Const.1818, Art. First, § 7; Ga.Const.1877, § 2-201, art. 1, § 2, par. 1; Ga.Code Ann.1953, § 26-2103; Md.Code Ann., 1957, Art. 75, § 5; Va.Code Ann.1950 (1960 replacement), §§ 18.1-255, 18.1-256.

In one jurisdiction there is no authority in point. See *State v. Payne*, 87 W.Va. 102, 104 S.E. 288, 19 A.L.R. 1465 (1920).

[8] We recognize that different interests may be involved where purely private libels, totally unrelated to public affairs, are concerned; therefore, nothing we say today is to be taken as intimating any views as to the impact of the constitutional guarantees in the discrete area of purely private libels.

[9] Even the law of privacy, which evolved to meet Lord Campbell's reservations, recognizes severe limitations where public figures or newsworthy facts are concerned. See *Sidis v. F-R Pub. Corp.*, 113 F.2d 806, 809-810 (C.A.2d Cir. 1940).

[10] In view of our result, we do not decide whether appellant's statement was factual or merely comment, or whether a State may provide any remedy, civil or criminal,

if defamatory comment alone, however vituperative, is directed at public officials. The Louisiana courts held that the privilege for fair comment was excluded in the present case by malice or lack of reasonable care, and not by the addition of factual assertions. For different formulations of comment, in the context of the common law fair-comment rule, see 1 Harper and James, *The Law of Torts*, § 5.28, at 458 (1956); Note, *Fair Comment*, 62 *Harv.L.Rev.* 1207, 1213 (1949); Restatement, *Torts*, § 606, Comment b, § 567 (1938).

[11] See, e.g., *Vernon's Tex.Pen.Code Ann.*, 1953, Art. 1290(2).

[1] The Constitution says in the First Amendment that "Congress shall make no law . . . abridging the freedom of speech", and the Due Process Clause of the Fourteenth Amendment puts the States under the same restraint. There is one school of thought, so far in the minority, which holds that the due process freedom of speech honored by the Fourteenth Amendment is a watered-down version of the First Amendment freedom of speech. See my Brother HARLAN in *Roth v. United States*, 354 U.S. 476, 500-503. While that view has never obtained, the construction which the majority has given the First Amendment has been burdened with somewhat the same kind of qualifications and conditions.

[2] *The Bill of Rights and the Federal Government*, in *The Great Rights*, p. 60 (Cahn ed. 1963):

In reality, this [balancing] approach returns us to the state of legislative supremacy which existed in England and which the Framers were so determined to change once and for all. On the one hand, it denies the judiciary its constitutional power to measure acts of Congress by the standards set down in the Bill of Rights. On the other hand, though apparently reducing judicial powers by saying that acts of Congress may be held unconstitutional only when they are found to have no rational legislative basis, this approach really gives the Court, along with Congress, a greater power, that of overriding the plain commands of the Bill of Rights on a finding of weighty public interest. In effect, it changes the direction of our form of government from a government of limited powers to a government in which Congress may do anything that courts believe to be "reasonable."

[3] Madison's views on the Sedition Act -- a federal enactment -- are relevant here, now that the First Amendment is applicable to the States. I have therefore appended his views as an Appendix.

[4] 39 *N.Y.U.L.Rev.* 1, 11.

What is called today the common law doctrine of seditious

libel is, in fact, the creation of the Court of Star Chamber, the most iniquitous tribunal in English history. It has been injected into the common law solely by the fiat of Coke, and by subsequent decisions and opinions of English judges who perpetuated the vicious procedures by which the Star Chamber stifled criticism of the government and freedom of political opinion. If seditious libel has any genuine common law affiliation, it is by illegitimate descent from constructive treason and heresy, both of which are totally repugnant to the Constitution of the United States.

Brant, *supra*, at 5.

[*] The First Amendment was Article Third in those submitted by Congress to the States on September 25, 1789.

APPENDIX 4

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418 U.S. 323 (1974)

94 S.Ct. 2997, 41 L.Ed.2d 789

Gertz

v.

Robert Welch, Inc.

No. 72-617

United States Supreme Court

June 25, 1974

Argued November 14, 1973

CERTIORARI TO THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Syllabus

A Chicago policeman named Nuccio was convicted of murder. The victim's family retained petitioner, a reputable attorney, to represent them in civil litigation against Nuccio. An article appearing in respondent's magazine alleged that Nuccio's murder trial was part of a Communist conspiracy to discredit the local police, and it falsely stated that petitioner had arranged Nuccio's "frameup," implied that petitioner had a criminal

[94 S.Ct. 2999] record, and labeled him a "Communist-fronter." Petitioner brought this diversity libel action against respondent. After the jury returned a verdict for petitioner, the District Court decided that the standard enunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254, which bars media liability for defamation of a public official absent proof that the defamatory statements were published with knowledge of their falsity or in reckless disregard of the truth, should apply to this suit. The court concluded that that standard protects media discussion of a public issue without regard to whether the person defamed is a public official as in *New York Times Co. v. Sullivan*, supra, or a public figure, as in *Curtis Publishing Co. v. Butts*, 388 U.S. 130. The court found that petitioner had failed to prove knowledge of falsity or reckless disregard for the truth, and therefore entered judgment n.o.v. for

respondent. The Court of Appeals affirmed.

Held:

1. A publisher or broadcaster of defamatory falsehoods about an individual who is neither a public official nor a public figure may not claim the *New York Times* protection against liability for defamation on the ground that the defamatory statements concern an issue of public or general interest. Pp. 339-348.

(a) Because private individuals characteristically have less effective opportunities for rebuttal than do public officials and public figures, they are more vulnerable to injury from defamation. Because they have not voluntarily exposed themselves to increased risk of injury from defamatory falsehoods, they are also more deserving of recovery. The state interest in compensating

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injury to the reputation of private individuals is therefore greater than for public officials and public figures. Pp. 343-345.

(b) To extend the *New York Times* standard to media defamation of private persons whenever an issue of general or public interest is involved would abridge to an unacceptable degree the legitimate state interest in compensating private individuals for injury to reputation and would occasion the additional difficulty of forcing courts to decide on an ad hoc basis which publications and broadcasts address issues of general or public interest and which do not. Pp. 345-346.

(c) 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 which injures a private individual and whose substance makes substantial danger to reputation apparent. Pp. 347-348.

2. The States, however, may not permit recovery of presumed or punitive damages when liability is not based on knowledge of falsity or reckless disregard for the truth, and the private defamation plaintiff who establishes liability under a less demanding standard than the *New York Times* test may recover compensation only for actual injury. Pp. 348-350.

3. Petitioner was neither a public official nor a public figure. Pp. 351-352.

(a) Neither petitioner's past service on certain city committees nor his appearance as an attorney at the

coroner's inquest into the death of the murder victim made him a public official. P. 351.

(b) Petitioner was also not a public figure. Absent clear evidence of general fame or notoriety in the community and pervasive involvement in ordering the affairs of society, an individual should not be deemed a public figure for all aspects of his life. Rather, the public figure question should be determined by reference to the individual's participation in the particular controversy giving

[94 S.Ct. 3000] rise to the defamation. Petitioner's role in the Nuccio affair did not make him a public figure. Pp. 351-352.

471 F.2d 801, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a concurring opinion, post, p. 353. BURGER, C.J., post, p. 354, DOUGLAS, J., post, p. 355, BRENNAN, J., post, p. 361, and WHITE, J., post, p. 369, filed dissenting opinions.

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POWELL, J., lead opinion

MR. JUSTICE POWELL delivered the opinion of the Court.

This Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment. With this decision we return to that effort. We granted certiorari to reconsider the extent of a publisher's constitutional privilege against liability for defamation of a private citizen. 410 U.S. 925 (1973).

I

In 1968, a Chicago policeman named Nuccio shot and killed a youth named Nelson. The state authorities prosecuted Nuccio for the homicide and ultimately obtained a conviction for murder in the second degree. The Nelson family retained petitioner Elmer Gertz, a reputable attorney, to represent them in civil litigation against Nuccio.

Respondent publishes American Opinion, a monthly outlet for the views of the John Birch Society. Early in the 1960's, the magazine began to warn of a nationwide conspiracy to discredit local law enforcement agencies and create in their stead a national police force capable of supporting a Communist dictatorship. As part of the continuing effort to alert the public to this assumed danger, the managing editor of American Opinion commissioned an article on the murder trial of Officer Nuccio. For this purpose, he engaged

a regular contributor to the magazine. In March, 1969, respondent published the resulting article under the title "FRAME-UP: Richard

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Nuccio And The War On Police." The article purports to demonstrate that the testimony against Nuccio at his criminal trial was false, and that his prosecution was part of the Communist campaign against the police.

In his capacity as counsel for the Nelson family in the civil litigation, petitioner attended the coroner's inquest into the boy's death and initiated actions for damages, but he neither discussed Officer Nuccio with the press nor played any part in the criminal proceeding. Notwithstanding petitioner's remote connection with the prosecution of Nuccio, respondent's magazine portrayed him as an architect of the "frame-up." According to the article, the police file on petitioner took "a big, Irish cop to lift." The article stated that petitioner had been an official of the

Marxist League for Industrial Democracy, originally known as the Intercollegiate Socialist Society, which has advocated the violent seizure of our government.

It labeled Gertz a "Leninist" and a "Communist-fronter." It also stated that Gertz had been an officer of the National Lawyers Guild, described as a Communist organization that "probably did more than any other outfit to plan the Communist attack on the Chicago police during the 1968 Democratic Convention."

These statements contained serious inaccuracies. The implication that petitioner had a criminal record was false. Petitioner had been a member and officer of the National Lawyers Guild some 15 years earlier, but there was no evidence that he or that organization had taken any part in planning the 1968 demonstrations in Chicago. There was also no basis for the charge that petitioner was a "Leninist" or a "Communist-fronter." And he had never been a member of the "Marxist League for Industrial Democracy" or the "Intercollegiate Socialist Society."

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The managing editor of American Opinion made no effort to verify or substantiate the charges against petitioner. Instead, he appended an editorial introduction

[94 S.Ct. 3001] stating that the author had "conducted extensive research into the Richard Nuccio Case." And he included in the article a photograph of petitioner and wrote the caption that appeared under it: "Elmer Gertz of Red Guild harasses Nuccio." Respondent placed the issue of American Opinion containing the article on sale at newsstands throughout the country and distributed reprints

of the article on the streets of Chicago.

Petitioner filed a diversity action for libel in the United States District Court for the Northern District of Illinois. He claimed that the falsehoods published by respondent injured his reputation as a lawyer and a citizen. Before filing an answer, respondent moved to dismiss the complaint for failure to state a claim upon which relief could be granted, apparently on the ground that petitioner failed to allege special damages. But the court ruled that statements contained in the article constituted libel per se under Illinois law, and that, consequently, petitioner need not plead special damages. 306 F.Supp. 310 (1969).

After answering the complaint, respondent filed a pretrial motion for summary judgment, claiming a constitutional privilege against liability for defamation.[1] It asserted that petitioner was a public official or a public figure, and that the article concerned an issue of public interest and concern. For these reasons, respondent argued, it was entitled to invoke the privilege enunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Under this rule, respondent would escape liability unless

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petitioner could prove publication of defamatory falsehood "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. Respondent claimed that petitioner could not make such a showing, and submitted a supporting affidavit by the magazine's managing editor. The editor denied any knowledge of the falsity of the statements concerning petitioner, and stated that he had relied on the author's reputation and on his prior experience with the accuracy and authenticity of the author's contributions to *American Opinion*.

The District Court denied respondent's motion for summary judgment in a memorandum opinion of September 16, 1970. The court did not dispute respondent's claim to the protection of the *New York Times* standard. Rather, it concluded that petitioner might overcome the constitutional privilege by making a factual showing sufficient to prove publication of defamatory falsehood in reckless disregard of the truth. During the course of the trial, however, it became clear that the trial court had not accepted all of respondent's asserted grounds for applying the *New York Times* rule to this case. It thought that respondent's claim to the protection of the constitutional privilege depended on the contention that petitioner was either a public official under the *New York Times* decision or a public figure under *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), apparently discounting the argument that a privilege would arise from the presence of a public issue. After all the evidence had been presented but before

submission of the case to the jury, the court ruled, in effect, that petitioner was neither a public official nor a public figure. It added that, if he were, the resulting application of the *New York Times* standard would require a directed verdict for respondent. Because some statements in the article constituted libel per se

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under Illinois law, the court submitted the case to the jury under instructions that withdrew from its consideration all issues save the measure of damages. The jury awarded \$50,000 to petitioner.

[94 S.Ct. 3002] Following the jury verdict and on further reflection, the District Court concluded that the *New York Times* standard should govern this case even though petitioner was not a public official or public figure. It accepted respondent's contention that that privilege protected discussion of any public issue without regard to the status of a person defamed therein. Accordingly, the court entered judgment for respondent notwithstanding the jury's verdict.[2] This conclusion anticipated the reasoning

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of a plurality of this Court in *Rosenbloom v. Metromedia Inc.*, 403 U.S. 29 (1971).

Petitioner appealed to contest the applicability of the *New York Times* standard to this case. Although the Court of Appeals for the Seventh Circuit doubted the correctness of the District Court's determination that petitioner was not a public figure, it did not overturn that finding.[3] It agreed with the District Court that respondent could assert the constitutional privilege because the article concerned a matter of public interest, citing this Court's intervening decision in *Rosenbloom v. Metromedia, Inc.*, *supra*. The Court of Appeals read *Rosenbloom* to require application of the *New York Times* standard to any publication or broadcast about an issue of significant public interest, without regard to the position, fame, or anonymity of the person defamed, and it concluded that respondent's statements

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concerned such an issue.[4] After reviewing the record, the Court of Appeals endorsed

[94 S.Ct. 3003] the District Court's conclusion that petitioner had failed to show by clear and

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convincing evidence that respondent had acted with "actual malice" as defined by *New York Times*. There was no

evidence that the managing editor of American Opinion knew of the falsity of the accusations made in the article. In fact, he knew nothing about petitioner except what he learned from the article. The court correctly noted that mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth. Rather, the publisher must act with a "high degree of awareness of . . . probable falsity." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); accord, *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 84-85 (1967); *Garrison v. Louisiana*, 379 U.S. 64, 75-76 (1964). The evidence in this case did not reveal that respondent had cause for such an awareness. The Court of Appeals therefore affirmed, 471 F.2d 801 (1972). For the reasons stated below, we reverse.

II

The principal issue in this case is whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements. The Court considered this question on the rather different set of facts presented in *Rosenbloom v. Metromedia Inc.*, 403 U.S. 29 (1971). *Rosenbloom*, a distributor of nudist magazines, was arrested for selling allegedly obscene material while making

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a delivery to a retail dealer. The police obtained a warrant and seized his entire inventory of 3,000 books and magazines. He sought and obtained an injunction prohibiting further police interference with his business. He then sued a local radio station for failing to note in two of its newscasts that the 3,000 items seized were only "reportedly" or "allegedly" obscene and

[94 S.Ct. 3004] for broadcasting references to "the smut literature racket" and to "girlie book peddlers" in its coverage of the court proceeding for injunctive relief. He obtained a judgment against the radio station, but the Court of Appeals for the Third Circuit held the New York Times privilege applicable to the broadcast, and reversed. 415 F.2d 892 (1969).

This Court affirmed the decision below, but no majority could agree on a controlling rationale. The eight Justices[5] who participated in *Rosenbloom* announced their views in five separate opinions, none of which commanded more than three votes. The several statements not only reveal disagreement about the appropriate result in that case, they also reflect divergent traditions of thought about the general problem of reconciling the law of defamation with the First Amendment. One approach has been to extend the New York Times test to an expanding variety of situations. Another has been to vary the level of constitutional

privilege for defamatory falsehood with the status of the person defamed. And a third view would grant to the press and broadcast media absolute immunity from liability for defamation. To place our holding in the proper context, we preface our discussion of this case with a review of the several *Rosenbloom* opinions and their antecedents.

In affirming the trial court's judgment in the instant case, the Court of Appeals relied on MR. JUSTICE BRENNAN'S

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conclusion for the *Rosenbloom* plurality that "all discussion and communication involving matters of public or general concern," 403 U.S. at 44, warrant the protection from liability for defamation accorded by the rule originally enunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). There, this Court defined a constitutional privilege intended to free criticism of public officials from the restraints imposed by the common law of defamation. The Times ran a political advertisement endorsing civil rights demonstrations by black students in Alabama and impliedly condemning the performance of local law enforcement officials. A police commissioner established in state court that certain misstatements in the advertisement referred to him, and that they constituted libel per se under Alabama law. This showing left the Times with the single defense of truth, for, under Alabama law, neither good faith nor reasonable care would protect the newspaper from liability. This Court concluded that a "rule compelling the critic of official conduct to guarantee the truth of all his factual assertions" would deter protected speech, *id.* at 279, and announced the constitutional privilege designed to counter that effect:

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.

Id. at 279-280.[6]

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Three years after *New York Times*, a majority of the Court agreed to extend the constitutional privilege to defamatory criticism of "public figures." This extension

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was announced in *Curtis Publishing Co. v. Butts* and its companion, *Associated Press v. Walker*, 388 U.S. 130, 162 (1967). The first case involved the Saturday Evening Post's charge that Coach Wally Butts of the University of Georgia had conspired with Coach "Bear" Bryant of the University

of Alabama to fix a football game between their respective schools. Walker involved an erroneous Associated Press account of former Major General Edwin Walker's participation in a University of Mississippi campus riot. Because Butts was paid by a private alumni association and Walker had resigned from the Army, neither could be classified as a "public official" under New York Times. Although Mr. Justice Harlan announced the result in both cases, a majority of the Court agreed with Mr. Chief Justice Warren's conclusion that the New York Times test should apply to criticism of "public figures" as well as "public officials." [7] The Court extended the constitutional

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privilege announced in that case to protect defamatory criticism of nonpublic persons who

are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.

Id. at 164 (Warren, C.J., concurring in result).

In his opinion for the plurality in *Rosenbloom v. Metromedia Inc.*, 403 U.S. 29 (1971),

[94 S.Ct. 3006] MR. JUSTICE BRENNAN took the New York Times privilege one step further. He concluded that its protection should extend to defamatory falsehoods relating to private persons if the statements concerned matters of general or public interest. He abjured the suggested distinction between public officials and public figures, on the one hand, and private individuals, on the other. He focused instead on society's interest in learning about certain issues:

If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not "voluntarily" choose to become involved.

Id. at 43. Thus, under the plurality opinion, a private citizen involuntarily associated with a matter of general interest has no recourse for injury to his reputation unless he can satisfy the demanding requirements of the New York Times test.

Two Members of the Court concurred in the result in *Rosenbloom*, but departed from the reasoning of the plurality. Mr. Justice Black restated his view, long shared by MR. JUSTICE DOUGLAS, that the First Amendment cloaks the news media with an absolute and indefeasible immunity from liability for defamation. Id. at 57. MR. JUSTICE WHITE concurred on a narrower ground. Ibid. He concluded that

the First Amendment gives the press and the broadcast

media a privilege to report and comment upon the official actions of public

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servants in full detail, with no requirement that the reputation or the privacy of an individual involved in or affected by the official action be spared from public view.

Id. at 62. He therefore declined to reach the broader questions addressed by the other Justices.

Mr. Justice Harlan dissented. Although he had joined the opinion of the Court in *New York Times v. Curtis Publishing Co.*, he had contested the extension of the privilege to public figures. There, he had argued that a public figure who held no governmental office should be allowed to recover damages for defamation

on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.

388 U.S. at 155. In his *Curtis Publishing Co.* opinion, Mr. Justice Harlan had distinguished *New York Times* primarily on the ground that defamation actions by public officials "lay close to seditious libel. . . ." Id. at 153. Recovery of damages by one who held no public office, however, could not "be viewed as a vindication of governmental policy." Id. at 154. Additionally, he had intimated that, because most public officials enjoyed absolute immunity from liability for their own defamatory utterances under *Barr v. Matteo*, 360 U.S. 564 (1959), they lacked a strong claim to the protection of the courts.

In *Rosenbloom*, Mr. Justice Harlan modified these views. He acquiesced in the application of the privilege to defamation of public figures, but argued that a different rule should obtain where defamatory falsehood harmed a private individual. He noted that a private person has less likelihood "of securing access to channels of communication sufficient to rebut falsehoods concerning him" than do public officials and public figures, 403 U.S. at 70, and has not voluntarily placed himself in the

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public spotlight. Mr. Justice Harlan concluded that the States could constitutionally allow private individuals to recover damages for defamation on the basis of any standard of care except liability without fault.

MR. JUSTICE MARSHALL dissented in *Rosenbloom* in an opinion joined by MR. JUSTICE STEWART. Id. at 78. He thought that the plurality's "public or general interest" test for determining the applicability of the New York

Times privilege would involve the courts in the dangerous business of deciding "what information is relevant to

[94 S.Ct. 3007] self-government." *Id.* at 79. He also contended that the plurality's position inadequately served "society's interest in protecting private individuals from being thrust into the public eye by the distorting light of defamation." *Ibid.* MR. JUSTICE MARSHALL therefore reached the conclusion, also reached by Mr. Justice Harlan, that the States should be "essentially free to continue the evolution of the common law of defamation and to articulate whatever fault standard best suits the State's need," so long as the States did not impose liability without fault. *Id.* at 86. The principal point of disagreement among the three dissenters concerned punitive damages. Whereas Mr. Justice Harlan thought that the States could allow punitive damages in amounts bearing "a reasonable and purposeful relationship to the actual harm done . . .," *id.* at 75, MR. JUSTICE MARSHALL concluded that the size and unpredictability of jury awards of exemplary damages unnecessarily exacerbated the problems of media self-censorship, and that such damages should therefore be forbidden.

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

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on the competition of other ideas.[8] 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. 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 U.S. 568, 572 (1942).

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

guaranteed 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*, at 279:

Allowance of the defense of truth,

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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 infeasible immunity from liability for defamation. See *New York Times Co. v. Sullivan*, *supra*, at 293 (Black, J., concurring); *Garrison v. Louisiana*, 379 U.S. at 80 (DOUGLAS, J., concurring); *Curtis Publishing Co. v. Butts*, 388 U.S. at 170 (opinion of Black, J.). Such a rule would, [94 S.Ct. 3008] 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 (1966) (concurring opinion).

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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, at 152. 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 (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

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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

[94 S.Ct. 3009] 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 (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

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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.[9] 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, the public's interest extends to

anything

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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 particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

[94 S.Ct. 3010] 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 (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

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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. 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.

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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.[10] This approach provides a

[94 S.Ct. 3011] more equitable

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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." [11] 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 (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.

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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

[94 S.Ct. 3012] 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

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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 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.

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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 recognize 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

[94 S.Ct. 3013] 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

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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.

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BLACKMUN, J., concurring

MR. JUSTICE BLACKMUN, concurring.

I joined MR. JUSTICE BRENNAN's opinion for the plurality in *Rosenbloom v. Metromedia Inc.*, 403 U.S. 29 (1971). I did so because I concluded that, given *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny (noted by the Court, ante at 334-336, n. 6), as well as *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, 388 U.S. 130 (1967), the step taken in *Rosenbloom*, extending the New York Times doctrine to an event of public or general interest, was logical and inevitable. A majority of the Court evidently thought otherwise, as is particularly evidenced by MR. JUSTICE WHITE's separate concurring opinion there and by the respective dissenting opinions of Mr. Justice Harlan and of MR. JUSTICE MARSHALL joined by MR. JUSTICE STEWART.

The Court today refuses to apply New York Times to the private individual, as contrasted with the public official and the public figure. It thus withdraws to the factual limits of the pre-*Rosenbloom* cases. It thereby fixes the outer boundary of the New York Times doctrine, and says that, beyond that boundary, a

[94 S.Ct. 3014] State is free to define for itself the appropriate standard of media liability so long as it does not impose liability without fault. As my joinder in *Rosenbloom's* plurality opinion would intimate, I sense some illogic in this.

The Court, however, seeks today to strike a balance between competing values where necessarily uncertain assumptions about human behavior color the result. Although the Court's opinion in the present case departs from the rationale of the *Rosenbloom* plurality, in that the Court now conditions a libel action by a private person upon a showing of negligence, as contrasted with a showing of willful or reckless disregard, I am willing to

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join, and do join, the Court's opinion and its judgment for two reasons:

1. By removing the specters of presumed and punitive damages in the absence of New York Times malice, the Court eliminates significant and powerful motives for self-censorship that otherwise are present in the traditional libel action. By so doing, the Court leaves what should

prove to be sufficient and adequate breathing space for a vigorous press. What the Court has done, I believe, will have little, if any, practical effect on the functioning of responsible journalism.

2. The Court was sadly fractionated in *Rosenbloom*. A result of that kind inevitably leads to uncertainty. I feel that it is of profound importance for the Court to come to rest in the defamation area and to have a clearly defined majority position that eliminates the unsureness engendered by *Rosenbloom's* diversity. If my vote were not needed to create a majority, I would adhere to my prior view. A definitive ruling, however, is paramount. See *Curtis Publishing Co. v. Butts*, 388 U.S. at 170 (Black, J., concurring); *Time, Inc. v. Hill*, 385 U.S. 374, 398 (1967) (Black, J., concurring); *United States v. Vuitch*, 402 U.S. 62, 97 (1971) (separate statement).

For these reasons, I join the opinion and the judgment of the Court.

BURGER, J., dissenting

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 (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

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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,

[94 S.Ct. 3015] 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.

DOUGLAS, J., dissenting

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

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quagmire" in which the Court "is now helplessly struggling in the field of obscenity." *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 171 (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 proscription seems clear. I have stated before my view that the First Amendment would bar Congress from passing any libel law.[1] This was the view held by Thomas Jefferson,[2] 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 -- 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.[3] The general

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consensus was that the Act constituted a regrettable legislative exercise plainly in violation of the First

Amendment.[4]

With the First Amendment made applicable to the States through the Fourteenth,[5] 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 means of a criminal statute is likewise beyond the reach of its civil law of libel." *New York Times Co. v. Sullivan*, 376 U.S. 254, 277. Like Congress, States are without power "to use a civil libel law or any other law to impose damages for merely

[94 S.Ct. 3016] discussing public affairs." *Id.* at 295 (Black, J., concurring).[6]

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Continued recognition of the possibility of state libel suits for public discussion of public issues leaves the freedom of speech honored by the Fourteenth Amendment a diluted version of First Amendment protection. This view is only possible if one accepts the position that the First Amendment is applicable to the States only through the Due Process Clause of the Fourteenth, due process freedom of speech being only that freedom which this Court might deem to be "implicit in the concept of ordered liberty." [7] But the Court frequently has rested

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state free speech and free press decisions on the Fourteenth Amendment generally,[8] rather than on the Due Process Clause alone. The Fourteenth Amendment speaks not only of due process, but also of "privileges and immunities" of United States citizenship. I can conceive of no privilege or immunity with a higher claim to recognition

[94 S.Ct. 3017] against state abridgment than the freedoms of speech and of the press. In our federal system, we are all subject to two governmental regimes, and freedoms of speech and of the press protected against the infringement of only one are quite illusory. The identity of the oppressor is, I would think, a matter of relative indifference to the oppressed.

There can be no doubt that a State impinges upon free and open discussion when it sanctions the imposition of damages for such discussion through its civil libel laws. Discussion of public affairs is often marked by highly charged emotions, and jurymen, not unlike us all, are subject to those emotions. It is indeed this very type of speech which is the reason for the First Amendment, since speech which arouses little emotion is little in need of protection. The vehicle for publication in this case was the *American Opinion*, a most controversial periodical which disseminates the views of the John Birch Society, an

organization which many deem to be

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quite offensive. The subject matter involved "Communist plots," "conspiracies against law enforcement agencies," and the killing of a private citizen by the police. With any such amalgam of controversial elements pressing upon the jury, a jury determination, unpredictable in the most neutral circumstances, becomes for those who venture to discuss heated issues, a virtual roll of the dice separating them from liability for often massive claims of damage.

It is only the hardy publisher who will engage in discussion in the face of such risk, and the Court's preoccupation with proliferating standards in the area of libel increases the risks. It matters little whether the standard be articulated as "malice" or "reckless disregard of the truth" or "negligence," for jury determinations by any of those criteria are virtually unreviewable. This Court, in its continuing delineation of variegated mantles of First Amendment protection, is, like the potential publisher, left with only speculation on how jury findings were influenced by the effect the subject matter of the publication had upon the minds and viscera of the jury. The standard announced today leaves the States free to "define for themselves the appropriate standard of liability for a publisher or broadcaster" in the circumstances of this case. This, of course, leaves the simple negligence standard as an option, with the jury free to impose damages upon a finding that the publisher failed to act as "a reasonable man." With such continued erosion of First Amendment protection, I fear that it may well be the reasonable man who refrains from speaking.

Since, in my view, the First and Fourteenth Amendments prohibit the imposition of damages upon respondent for this discussion of public affairs, I would affirm the judgment below.

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BRENNAN, J., dissenting

MR. JUSTICE BRENNAN, dissenting.

I agree with the conclusion, expressed in Part V of the Court's opinion, that, at the time of publication of respondent's article, petitioner could not properly have been viewed as either a "public official" or "public figure"; instead, respondent's article, dealing with an alleged conspiracy to discredit local police forces, concerned petitioner's purported involvement in "an event of public or general interest." *Roosenbloom v. Metromedia Inc.*, 403 U.S. 29, 31-32 (1971); see ante at 331-332, n. 4. I cannot agree, however, that free and robust debate-- so essential to the proper functioning of our system of government -- is

permitted adequate "breathing space," *NAACP v. Button*, 371 U.S. 415, 433 (1963), when, as the Court holds, the States may impose all but strict liability for defamation if the defamed party is a private person and "the substance of the defamatory statement `makes substantial danger to reputation apparent.'" Ante at 348.[1] I adhere to my view expressed [94 S.Ct. 3018] in *Rosenbloom v. Metromedia, Inc.*, supra, that we strike the proper accommodation between avoidance of media self-censorship and protection of individual reputations only when we require States to apply the *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), "knowing or reckless falsity" standard in civil libel actions concerning media reports of the involvement of private individuals in events of public or general interest.

The Court does not hold that First Amendment guarantees do not extend to speech concerning private persons' involvement in events of public or general interest. It recognizes that self-governance in this country perseveres because of our "profound national commitment

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to the principle that debate on public issues should be uninhibited, robust, and wide-open." Id. at 270 (emphasis added). Thus, guarantees of free speech and press necessarily reach "far more than knowledge and debate about the strictly official activities of various levels of government," *Rosenbloom v. Metromedia, Inc.*, supra, at 41; for

[f]reedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

Thornhill v. Alabama, 310 U.S. 88, 102 (1940).

The teaching to be distilled from our prior cases is that, while public interest in events may at times be influenced by the notoriety of the individuals involved, "[t]he public's primary interest is, in the event[,] . . . the conduct of the participant and the content, effect, and significance of the conduct. . . ." *Rosenbloom*, supra, at 43. Matters of public or general interest do not "suddenly become less so merely because a private individual is involved, or because, in some sense, the individual did not `voluntarily' choose to become involved." *Ibid.* See *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967).

Although acknowledging that First Amendment values are of no less significance when media reports concern private persons' involvement in matters of public concern, the Court refuses to provide, in such cases, the same level of constitutional protection that has been afforded the media in the context of defamation of public persons. The

accommodation that this Court has established between free speech and libel laws in cases involving public officials and public figures -- that defamatory falsehood be shown by clear and convincing evidence to have been published with knowledge of falsity or with reckless disregard of truth -- is not apt, the Court holds because

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the private individual does not have the same degree of access to the media to rebut defamatory comments as does the public person, and he has not voluntarily exposed himself to public scrutiny.

While these arguments are forcefully and eloquently presented, I cannot accept them, for the reasons I stated in *Rosenbloom*:

The *New York Times* standard was applied to libel of a public official or public figure to give effect to the [First] Amendment's function to encourage ventilation of public issues, not because the public official has any less interest in protecting his reputation than an individual in private life. While the argument that public figures need less protection because they can command media attention to counter criticism may be true for some very prominent people, even then it is the rare case where the denial overtakes the original charge. Denials, retractions, and corrections are not "hot" news, and rarely receive the prominence of the original story. When the public official or public figure is a minor functionary, or has left the position that put him in the public

[94 S.Ct. 3019] eye . . . , the argument loses all of its force. In the vast majority of libels involving public officials or public figures, the ability to respond through the media will depend on the same complex factor on which the ability of a private individual depends: the unpredictable event of the media's continuing interest in the story. Thus, the unproved, and highly improbable, generalization that an as-yet [not fully defined] class of "public figures" involved in matters of public concern will be better able to respond through the media than private individuals also involved in such matters seems too insubstantial

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a reed on which to rest a constitutional distinction.

403 U.S. at 46-47. Moreover, the argument that private persons should not be required to prove *New York Times* "knowing or reckless falsity" because they do not assume the risk of defamation by freely entering the public arena "bears little relationship either to the values protected by the First Amendment or to the nature of our society." Id. at 47. Social interaction exposes all of us to some degree of public view. This Court has observed that "[t]he risk of this

exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press." *Time, Inc. v. Hill*, 385 U.S. at 388. Therefore,

[v]oluntarily or not, we are all "public" men to some degree. Conversely, some aspects of the lives of even the most public men fall outside the area of matters of public or general concern. See . . . *Griswold v. Connecticut*, 381 U.S. 479 (1965). Thus, the idea that certain "public" figures have voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view is, at best, a legal fiction. In any event, such a distinction could easily produce the paradoxical result of dampening discussion of issues of public or general concern because they happen to involve private citizens while extending constitutional encouragement to discussion of aspects of the lives of "public figures" that are not in the area of public or general concern.

Rosenbloom, *supra*, at 48 (footnote omitted).

To be sure, no one commends publications which defame the good name and reputation of any person: "In an ideal world, the responsibility of the press would match the freedom and public trust given it." *Id.* at

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51.[2] Rather, as the Court agrees, some abuse of First Amendment freedoms is tolerated only to insure that would-be commentators on events of public or general interest are not

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

[94 S.Ct. 3020] so.

New York Times Co. v. Sullivan, 376 U.S. at 279. The Court's holding and a fortiori my Brother WHITE's views, see n. 1, *supra*, simply deny free expression its needed "breathing space." Today's decision will exacerbate the rule of self-censorship of legitimate utterance as publishers "steer far wider of the unlawful zone," *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

We recognized in *New York Times Co. v. Sullivan*, *supra*, at 279, that a rule requiring a critic of official conduct to guarantee the truth of all of his factual contentions would inevitably lead to self-censorship when

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publishers, fearful of being unable to prove truth or unable

to bear the expense of attempting to do so, simply eschewed printing controversial articles. Adoption, by many States, of a reasonable care standard in cases where private individuals are involved in matters of public interest -- the probable result of today's decision -- will likewise lead to self-censorship, since publishers will be required carefully to weigh a myriad of uncertain factors before publication. The reasonable care standard is "elusive," *Time, Inc. v. Hill*, *supra*, at 389; it saddles the press with

the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait.

Ibid. Under a reasonable care regime, publishers and broadcasters will have to make pre-publication judgments about juror assessment of such diverse considerations as the size, operating procedures, and financial condition of the newsgathering system, as well as the relative costs and benefits of instituting less frequent and more costly reporting at a higher level of accuracy. See *The Supreme Court*, 1970 Term, 85 *Harv.L.Rev.* 3, 228 (1971). Moreover, in contrast to proof by clear and convincing evidence required under the *New York Times* test, the burden of proof for reasonable care will doubtless be the preponderance of the evidence.

In the normal civil suit, where [the preponderance of the evidence] standard is employed, "we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor." *In re Winship*, 397 U.S. 358, 371 (1970) (HARLAN, J., concurring). In libel cases, however, we view an erroneous verdict for the plaintiff as most serious. Not only does it mulct the defendant for an innocent misstatement . . . but the

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possibility of such error, even beyond the vagueness of the negligence standard itself, would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate.

Rosenbloom, 403 U.S. at 50. And, most hazardous, the flexibility which inheres in the reasonable care standard will create the danger that a jury will convert it into

an instrument for the suppression of those "vehement, caustic, and sometimes unpleasantly sharp attacks" . . . which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail.

Monitor Patriot Co. v. Roy, 401 U.S. 265, 277 (1971).

The Court does not discount altogether the danger that jurors will punish for the expression of unpopular opinions.

This probability accounts for the Court's limitation 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.

Ante at 349. But plainly a jury's latitude to impose liability for want of due care poses a far greater threat of suppressing unpopular views than does a possible recovery of presumed or punitive damages. Moreover, the Court's broad-ranging examples of "actual injury," including

[94 S.Ct. 3021] impairment of reputation and standing in the community, as well as personal humiliation, and mental anguish and suffering, inevitably allow a jury bent on punishing expression of unpopular views a formidable weapon for doing so. Finally, even a limitation of recovery to "actual injury" -- however much it reduces the size or frequency of recoveries -- will not provide the necessary elbowroom for First Amendment expression.

It is not simply the possibility of a judgment for damages that results in self-censorship. The very

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possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and debate to "steer far wider of the unlawful zone," thereby keeping protected discussion from public cognizance. . . . Too, a small newspaper suffers equally from a substantial damage award, whether the label of the award be "actual" or "punitive."

Rosenbloom, *supra*, at 52-53.

On the other hand, the uncertainties which the media face under today's decision are largely avoided by the New York Times standard. I reject the argument that my Rosenbloom view improperly commits to judges the task of determining what is and what is not an issue of "general or public interest." [3] I noted in Rosenbloom

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that performance of this task would not always be easy. *Id.* at 49 n. 17. But surely the courts, the ultimate arbiters of all disputes concerning clashes of constitutional values, would only be performing one of their traditional functions in undertaking this duty. Also, the difficulty of this task has been substantially lessened by that

sizable body of cases, decided both before and after Rosenbloom, that have employed the concept of a matter of public concern to reach decisions in . . . cases dealing with an alleged libel of a private individual that employed a public interest standard . . . and . . . cases that applied Butts

to the alleged libel of a public figure.

Comment, *The Expanding Constitutional Protection for the News Media from Liability for Defamation: Predictability and the New Synthesis*, 70 Mich.L.Rev. 1547, 1560 (1972). The public interest is necessarily broad; any residual self-censorship that may result from the uncertain contours of the "general or public interest" concept should be of far less concern to publishers and broadcasters than that occasioned by state laws imposing liability for negligent falsehood.

Since petitioner failed, after having been given a full and fair opportunity, to prove that respondent published the

[94 S.Ct. 3022] disputed article with knowledge of its falsity or with reckless disregard of the truth, see ante at 329-330, n. 2, I would affirm the judgment of the Court of Appeals.

WHITE, J., dissenting

MR. JUSTICE WHITE, dissenting.

For some 200 years -- from the very founding of the Nation -- the law of defamation and right of the ordinary citizen to recover for false publication injurious to his reputation have been almost exclusively the business of

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state courts and legislatures. Under typical state defamation law, the defamed private citizen had to prove only a false publication that would subject him to hatred, contempt, or ridicule. Given such publication, general damage to reputation was presumed, while punitive damages required proof of additional facts. The law governing the defamation of private citizens remained untouched by the First Amendment, because, until relatively recently, the consistent view of the Court was that libelous words constitute a class of speech wholly unprotected by the First Amendment, subject only to limited exceptions carved out since 1964.

But now, using that Amendment as the chosen instrument, the Court, in a few printed pages, has federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 States. That result is accomplished by requiring the plaintiff in each and every defamation action to prove not only the defendant's culpability beyond his act of publishing defamatory material, but also actual damage to reputation resulting from the publication. Moreover, punitive damages may not be recovered by showing malice in the traditional sense of ill will; knowing falsehood or reckless disregard of the truth will now be required.

I assume these sweeping changes will be popular with the press, but this is not the road to salvation for a court of law. As I see it, there are wholly insufficient grounds for scuttling the libel laws of the States in such wholesale fashion, to say nothing of deprecating the reputation interest of ordinary citizens and rendering them powerless to protect themselves. I do not suggest that the decision is illegitimate or beyond the bounds of judicial review, but it is an ill-considered exercise of the power entrusted to this Court, particularly when the

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Court has not had the benefit of briefs and argument addressed to most of the major issues which the Court now decides. I respectfully dissent.

I

Lest there be any mistake about it, the changes wrought by the Court's decision cut very deeply. In 1938, the Restatement of Torts reflected the historic rule that publication in written form of defamatory material -- material tending

so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him[1]

-- subjected the publisher to liability although no special harm to reputation was actually proved.[2] Restatement

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of Torts

[94 S.Ct. 3023] § 569 (1938).[3] Truth was a defense, and some libels were privileged; but, given a false circulation, general damage to reputation was presumed, and damages could be awarded by the jury, along with any special damages such as pecuniary loss and emotional distress. At the very least, the rule allowed the recovery of nominal damages for any defamatory publication actionable per se, and thus 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 permit 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.

If the defamation was not libel, but slander, it was actionable per se only if it imputed a criminal offense; a venereal or loathsome and communicable disease; improper

conduct of a lawful business; or unchastity by a woman. Id. § 570. To be actionable, all other types of slanderous statements required proof of special damage other than actual loss of reputation or emotional distress, that special damage almost always being in the form of material or pecuniary loss of some kind. Id. § 575 and comment b, pp. 185-187.

Damages for libel or slander per se included

harm caused thereby to the reputation of the person defamed or, in the absence of proof of such harm, for the harm which normally results from such a defamation.

Id., § 621. At the heart of the libel and slander per se

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damage scheme lay the award of general damages for loss of reputation. They were granted without special proof because the judgment of history was that the content of the publication itself was so likely to cause injury and because,

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.

Id. § 621, comment a, p. 314.[4] Proof of actual injury to reputation was itself insufficient proof of that special damage necessary to support liability for slander not actionable per se. But if special damage in the form of material or pecuniary loss were proved, general damages for injury to reputation could be had without further proof. "The plaintiff may recover not only for the special harm so caused, but also for general loss of reputation." Id. § 575, comment a, p. 185.[5] The right to recover for emotional distress depended upon the defendant's

[94 S.Ct. 3024] otherwise being liable for either libel or slander. Id. § 623. Punitive damages were recoverable upon proof of special facts amounting to express malice. Id. § 908 and comment b, p. 555.

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Preparations in the mid-1960's for Restatement (Second) of Torts reflected what were deemed to be substantial changes in the law of defamation, primarily a trend toward limiting per se libels to those where the defamatory nature of the publication is apparent on its face, i.e., where the "defamatory innuendo is apparent from the publication itself, without reference to extrinsic facts by way of inducement." Restatement (Second) of Torts § 569, p. 29 (Tent. Draft No. 12, Apr. 27, 1966). Libels of this sort and slanders per se continued to be recognized as actionable without proof of special damage or injury to reputation.[6] All other defamations would require proof of special injury

in the form of material or pecuniary loss. Whether this asserted change reflected the prevailing law was heavily debated,[7] but it was unquestioned at the time that there are recurring situations in which libel and slander are and should be actionable per se.

In surveying the current state of the law, the proposed Restatement (Second) observed that "[a]ll courts except Virginia agree that any libel which is defamatory upon its face is actionable without proof of damage. . . ." Restatement (Second) of Torts § 569, p. 84 (Tent. Draft No. 11, Apr. 15, 1965). Ten jurisdictions continued to support the old rule that libel not defamatory on its face and whose innuendo depends on extrinsic facts is actionable without proof of damage, although slander would not be. Twenty-four jurisdictions were said to hold that libel not defamatory on its face is to be treated like slander, and thus not actionable without proof of damage where

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slander would not be. Id. § 569, p. 86. The law in six jurisdictions was found to be in an unsettled state, but most likely consistent with the Restatement (Second). Id. § 569, p. 88. The law in Virginia was thought to consider libel actionable without proof of special damage only where slander would be, regardless of whether the libel is defamatory on its face. Id. § 569, p. 89. All States, therefore, were at that time thought to recognize important categories of defamation that were actionable per se.[8] Nor was any question apparently raised at that time that, upon proof of special damage in the form of material or pecuniary loss, general damages to reputation could be recovered without further proof.

Unquestionably, state law continued to recognize some absolute, as well as some conditional, privileges to publish defamatory materials, including the privilege of fair comment in defined situations. But it remained true that, in a wide range of situations, the ordinary citizen could make out a prima facie case without proving more than a defamatory publication, and could recover general damages for injury to his reputation unless defeated by the defense of truth.[9]

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

[94 S.Ct. 3025] 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

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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

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at least be shown to be required by the First Amendment or necessitated by our present circumstances. Neither has been demonstrated.

Of course, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Rosenblatt v. Baer*, 383 U.S. 75 (1966), and *Curtis Publishing Co. v. Butts and Associated Press v. Walker*, 388 U.S. 130 (1967), have themselves worked major changes in defamation law. Public officials and public figures, if they are to recover general damages for injury to reputation, must prove knowing falsehood or reckless disregard for the truth. The States were required to conform to these decisions. Thereafter in *Rosenbloom v. Metromedia Inc.*, 403 U.S. 29 (1971), three Members of the Court urged that the same standard be applied whenever the publication concerned an event of public or general concern. But none of these cases purported to foreclose in all circumstances recovery by the ordinary citizen on traditional standards of liability, and, until today, a majority

of the Court had not supported the proposition that, given liability, a court or jury may not award general damages in a reasonable amount without further proof of injury.

In the brief period since *Rosenbloom* was decided, at least 17 States and several federal courts of appeals have felt obliged to consider the *New York Times* constitutional privilege for liability as extending to, in the words of the *Rosenbloom* plurality, "all discussion and communication involving matters of public or general concern." *Id.* at 44.[10] Apparently, however, general

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damages still remain recoverable once that standard of liability is satisfied. Except where public officials and public figures are concerned, the Court now repudiates

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the plurality opinion in *Rosenbloom* and appears to espouse the liability standard set forth by three other Justices in that case. The States must now struggle to

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discern the meaning of such ill-defined concepts as "liability without fault" and to fashion novel rules for the recovery of damages. These matters have not been briefed or argued by the parties, and their workability has not been seriously explored. Nevertheless, yielding to the apparently irresistible impulse to announce a new and different interpretation of the First Amendment, the Court discards history and precedent in its rush to refashion defamation law in accordance with the inclinations of a perhaps evanescent majority of the Justices.

II

The Court does not contend, and it could hardly do so, that those who wrote the First Amendment intended to prohibit the Federal Government, within its sphere of influence in the Territories and the District of Columbia, from providing the private citizen a peaceful remedy for damaging falsehood. At the time of the adoption of the First Amendment, many of the consequences of libel law already described had developed, particularly the rule that libels and some slanders were so inherently injurious that they were actionable without special proof of damage to reputation. As the Court pointed out in *Roth v. United States*, 354 U.S. 476, 482 (1957), 10 of the 14 States that had ratified the Constitution by 1792 had themselves provided constitutional guarantees for free

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expression, and 13 of the 14 nevertheless provided for the

prosecution of libels. Prior to the Revolution, the American Colonies had adopted the common law of libel.[11] Contrary to some popular notions, freedom of the press was sharply curtailed in colonial America.[12] Seditious libel was punished as a contempt by the colonial legislatures and as a criminal offense in the colonial courts.[13]

Scant, if any, evidence exists that the First Amendment was intended to abolish the common law of libel, at least to the extent of depriving ordinary citizens of meaningful redress against their defamers. On the contrary,

[i]t is conceded on all sides that the common law rules that subjected the libeler to responsibility for the private injury, or the public scandal or disorder occasioned by his conduct, are not abolished by the protection extended to the press in our constitutions.

2 T. Cooley, *Constitutional Limitations* 883 (8th ed.1927). Moreover, consistent with the Blackstone formula,[14] these

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common law actions did not abridge freedom of the press. See generally L. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* 247-248 (1960); Merin, *Libel and the Supreme Court*, 11 *Wm. & Mary L.Rev.* 371, 376 (1969); Hallen, *Fair Comment*,

[94 S.Ct. 3028] 8 *Tex.L.Rev.* 41, 56 (1929). Alexander Meiklejohn, who accorded generous reach to the First Amendment, nevertheless acknowledged:

No one can doubt that, in any well governed society, the legislature has both the right and the duty to prohibit certain forms of speech. Libelous assertions may be, and must be, forbidden and punished. So too must slander. . . . All these necessities that speech be limited are recognized and provided for under the Constitution. They were not unknown to the writers of the First Amendment. That amendment, then, we may take it for granted, does not forbid the abridging of speech. But, at the same time, it does forbid the abridging of the freedom of speech. It is to the solving of that paradox, that apparent self-contradiction, that we are summoned if, as free men, we wish to know what the right of freedom of speech is.

Political Freedom, The Constitutional Powers of the People 21 (1965). See also Leflar, *The Free-ness of Free Speech*, 15 *Vand.L.Rev.* 1073, 1080-1081 (1962).

Professor Zechariah Chafee, a noted First Amendment scholar, has persuasively argued that conditions in 1791 "do not arbitrarily fix the division between lawful and unlawful speech for all time." *Free Speech in the United States* 14

(1954).[15] At the same time, however,

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he notes that, while the Framers may have intended to abolish seditious libels and to prevent any prosecutions by the Federal Government for criticism of the Government,[16] "the free speech clauses do not wipe out the common law as to obscenity, profanity, and defamation of individuals." [17]

The debates in Congress and the States over the Bill of Rights are unclear and inconclusive on any articulated intention of the Framers as to the free press guarantee.[18] We know that Benjamin Franklin, John Adams, and William Cushing favored limiting freedom of the press to truthful statements, while others such as James Wilson suggested a restatement of the Blackstone standard.[19]

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Jefferson endorsed Madison's formula that "Congress shall make no law . . . abridging the freedom of speech or the press" only after he suggested:

[94 S.Ct. 3029]

The people shall not be deprived of their right to speak, to write, or otherwise to publish anything but false facts affecting injuriously the life, liberty, or reputation of others.

...

F. Mott, *Jefferson and the Press* 14 (1943).[20] Doubt has been expressed that the Members of Congress envisioned the First Amendment as reaching even this far. Merin, *Libel and the Supreme Court*, 11 *Wm. & Mary L.Rev.* 371, § 379-380 (1969).

This Court, in bygone years, has repeatedly dealt with libel and slander actions from the District of Columbia and from the Territories. Although in these cases First Amendment considerations were not expressly discussed, the opinions of the Court unmistakably revealed that the classic law of libel was firmly in place in those areas where federal law controlled. See, e.g., *Washington Post Co. v. Chaloner*, 250 U.S. 290 (1919); *Baker v. Warner*, 231 U.S. 588 (1913); *Nalle v. Oyster*, 230 U.S. 165 (1913); *Dorr v. United States*, 195 U.S. 138 (1904); *Pollard v. Lyon*, 91 U.S. 225 (1876); *White v. Nicholls*, 3 How. 266 (1845).

The Court's consistent view prior to *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), was that defamatory

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utterances were wholly unprotected by the First Amendment. In *Patterson v. Colorado ex rel. Attorney*

General, 205 U.S. 454, 462 (1907), for example, the Court said that, although freedom of speech and press is protected from abridgment by the Constitution, these provisions "do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare." This statement was repeated in *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 714 (1931), the Court adding:

But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions.

Id. at 715. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942) (footnotes omitted), reflected the same view:

There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words -- those which by their very utterance, inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances 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.

Beauharnais v. Illinois, 343 U.S. 250, 254-257 (1952) (footnotes omitted), repeated the *Chaplinsky* statement, noting also that nowhere at the time of the adoption of

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the Constitution "was there any suggestion that the crime of libel be abolished." And in *Roth v. United States*, 354 U.S. at 483 (footnote omitted), the Court further examined the meaning of the First Amendment:

In light of this history, it is apparent that the unconditional phrasing of

[94 S.Ct. 3030] the First Amendment was not intended to protect every utterance. This phrasing did not prevent this Court from concluding that libelous utterances are not within the area of constitutionally protected speech. *Beauharnais v. Illinois*, 343 U.S. 250, 266. At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press.[21]

The Court could not accept the generality of this historic view in *New York Times Co. v. Sullivan*, *supra*. There, the

Court held that the First Amendment was intended to forbid actions for seditious libel and that defamation actions by public officials were therefore not subject to the traditional law of libel and slander. If these officials (and, later, public figures occupying semiofficial or influential, although private, positions) were to recover, they were required to prove not only that the publication was false, but also that it was knowingly false or published with reckless disregard for its truth or falsity. This view that the First Amendment was written to forbid

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seditious libel reflected one side of the dispute that raged at the turn of the nineteenth century[22] and also mirrored the views of some later scholars.[23]

The central meaning of New York Times, and, for me, the First Amendment as it relates to libel laws, is that seditious libel -- criticism of government and public officials -- falls beyond the police power of the State. 376 U.S. at 273-276.[24] In a democratic society such as ours, the citizen has the privilege of criticizing his government and its officials. But neither New York Times nor its progeny suggest that the First Amendment intended in all circumstances to deprive the private citizen of his historic recourse to redress published falsehoods damaging to reputation or that, contrary to history and precedent, the Amendment should now be so interpreted. Simply put, the First Amendment did not confer a "license to defame the citizen." W. Douglas, *The Right of the People* 36 (1958).

I do not labor the foregoing matters to contend that the Court is foreclosed from reconsidering prior interpretations of the First Amendment.[25] But the Court apparently finds a clean slate where, in fact, we have instructive historical experience dating from long before

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the first settlers, with their notions of democratic government and human freedom, journeyed to this land. Given this rich background of history and precedent, and because we deal with fundamentals when we construe the First Amendment, we should proceed with

[94 S.Ct. 3031] care, and be presented with more compelling reasons before we jettison the settled law of the States to an even more radical extent.[26]

III

The Court concedes that the dangers of self-censorship are insufficient to override the state interest in protecting the reputation of private individuals who are both more helpless and more deserving of state concern than public persons with more access to the media to defend themselves. It

therefore refuses to condition the private plaintiff's recovery on a showing of intentional or reckless falsehood as required by New York Times. But the Court nevertheless extends the reach of the First Amendment to all defamation actions by requiring that the ordinary

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citizen, when libeled by a publication defamatory on its face, must prove some degree of culpability on the part of the publisher beyond the circulation to the public of a damaging falsehood. A rule at least as strict would be called for where the defamatory character of the publication is not apparent from its face. Ante at 348.[27] Furthermore, if this major hurdle to establish liability is surmounted, the Court requires proof of actual injury to reputation before any damages for such injury may be awarded.

The Court proceeds as though it were writing on tabula rasa, and suggests that it must mediate between two unacceptable choices -- on the one hand, the rigors of the New York Times rule, which the Court thinks would give insufficient recognition to the interest of the private plaintiff, and, on the other hand, the prospect of imposing "liability without fault" on the press and others who are charged with defamatory utterances. Totally ignoring history and settled First Amendment law, the Court purports to arrive at an "equitable compromise," rejecting both what it considers faultless liability and New York Times malice, but insisting on some intermediate degree of fault. Of course, the Court necessarily discards the contrary judgment arrived at in the 50 States that the reputation interest of the private citizen is deserving of considerably more protection.

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

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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

[94 S.Ct. 3032] 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.[28] Neither the industry as a whole nor

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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.

In any event, if the Court's principal concern is to protect the communications industry from large libel judgments, it would appear that its new requirements with respect to general and punitive damages would be ample protection. Why it also feels compelled to escalate the threshold standard of liability I cannot fathom,

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particularly when this will eliminate, in many instances, the plaintiff's possibility of securing a judicial determination that the damaging publication was indeed false, whether or not he is entitled to recover money damages. Under the Court's new rules, the plaintiff must prove not only the defamatory statement, but also some degree of fault accompanying it. The publication may be wholly false, and the wrong to him

[94 S.Ct. 3033] unjustified, but his case will nevertheless be dismissed for failure to prove negligence or other fault on the part of the publisher. I find it unacceptable to distribute the risk in this manner and force the wholly innocent victim to bear the injury; for, as between the two, the defamer is the only culpable party. It is he who circulated a falsehood that he was not required to publish.

It is difficult for me to understand why the ordinary citizen should himself carry the risk of damage and suffer the

injury in order to vindicate First Amendment values by protecting the press and others from liability for circulating false information. This is particularly true because such statements serve no purpose whatsoever in furthering the public interest or the search for truth, but, on the contrary, may frustrate that search, and, at the same time, inflict great injury on the defenseless individual. The owners of the press and the stockholders of the communications enterprises can much better bear the burden. And if they cannot, the public at large should somehow pay for what is essentially a public benefit derived at private expense.

IV

A

Not content with escalating the threshold requirements of establishing liability, the Court abolishes the ordinary damages rule, undisturbed by *New York Times*

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and later cases, that, as to libels or slanders defamatory on their face, injury to reputation is presumed, and general damages may be awarded along with whatever special damages may be sought. Apparently because the Court feels that, in some unspecified and unknown number of cases, plaintiffs recover where they have suffered no injury or recover more than they deserve, it dismisses this rule as an "oddy of tort law." The Court thereby refuses in any case to accept the fact of wide dissemination of a per se libel as prima facie proof of injury sufficient to survive a motion to dismiss at the close of plaintiff's case.

I have said before, but it bears repeating, that, even if the plaintiff should recover no monetary damages, he should be able to prevail and have a judgment that the publication is false. But beyond that, courts and legislatures literally for centuries have thought that, in the generality of cases, libeled plaintiffs will be seriously shortchanged if they must prove the extent of the injury to their reputations. Even where libels or slanders are not, on their face, defamatory, and special damage must be shown, when that showing is made, general damages for reputation injury are recoverable without specific proof.[29]

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The Court is clearly right when at one point it states that "the law of defamation is rooted in our experience that the truth rarely catches up with a lie." Ante at 344 n. 9. But it ignores what that experience teaches, viz., that damage to reputation is recurrently difficult to prove, and that requiring actual proof would repeatedly destroy any chance for

[94 S.Ct. 3034] adequate compensation. Eminent authority

has warned that

it is clear 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).[30]

The Court fears uncontrolled awards of damages by juries, but that not only denigrates the good sense of most jurors -- it fails to consider the role of trial and appellate courts in limiting excessive jury verdicts where no reasonable relationship exists between the amount awarded and the injury sustained.[31] Available information

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tends to confirm that American courts have ably discharged this responsibility.[32]

The new rule with respect to general damages appears to apply to all libels or slanders, whether defamatory on their face or not, except, I gather, when the plaintiff proves intentional falsehood or reckless disregard. Although the impact of the publication on the victim is the same, in such circumstances, the injury to reputation may apparently be presumed in accordance with the traditional rule. Why a defamatory statement is more apt to cause injury if the lie is intentional than when it is only negligent, I fail to understand. I suggest that judges and juries who must live by these rules will find them equally incomprehensible.

B

With a flourish of the pen, the Court also discards the prevailing rule in libel and slander actions that punitive damages may be awarded on the classic grounds of common law malice, that is, "[a]ctual malice' in the sense of ill will or fraud or reckless indifference to consequences."

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C. McCormick, *Law of Damages* § 118, p. 431 (1935); see also W. Prosser, *supra*, § 113, p. 772; 1 A. Hanson, *Libel and Related Torts* ¶ 163, p. 133 (1969); Note, *Developments in the Law -- Defamation*, 69 *Harv.L.Rev.* 875, 938 (1956); *Cal.Civ.Code* § 48a(4)(d) (1954). In its stead, the Court requires defamation plaintiffs to show intentional falsehood or reckless disregard for the truth or falsity of the publication. The Court again complains about substantial verdicts and the possibility of press self-censorship, saying that punitive damages are merely "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." Ante at 350. But I see no constitutional difference between publishing with

reckless disregard for the truth, where punitive damages will be permitted, and negligent publication, where they will not be allowed. It is difficult to understand what is constitutionally

[94 S.Ct. 3035] wrong with assessing punitive damages to deter a publisher from departing from those standards of care ordinarily followed in the publishing industry, particularly if common law malice is also shown.

I note also the questionable premise that "juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Ibid.* This represents an inaccurate view of established practice,

another of those situations in which judges, largely unfamiliar with the relatively rare actions for defamation, rely on words without really going behind them. . . .[33]

While a jury award in any type of civil case may certainly be unpredictable, trial and appellate courts have been increasingly vigilant in ensuring that the jury's result is "based upon a rational consideration of the evidence and the proper application of the

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law." *Reynolds v. Pegler*, 123 F.Supp. 36, 39 (SDNY 1954), *aff'd*, 223 F.2d 429 (CA2), *cert. denied*, 350 U.S. 846 (1955). See *supra*, nn. 31-32. Moreover, some courts require that punitive damages bear a reasonable relation to the compensatory damages award.[34] Still others bar common law punitive damages or condition their award on a refusal to print a retraction.[35]

The danger . . . of immoderate verdicts is certainly a real one, and the criterion to be applied by the judge in setting or reducing the amount is concededly a vague and subjective one. Nevertheless, the verdict may be twice submitted by the complaining defendant to the common sense of trained judicial minds, once on motion for new trial and again on appeal, and it must be a rare instance when an unjustifiable award escapes correction.

C. McCormick, *supra*, § 77, p. 278.

The Court points to absolutely no empirical evidence to substantiate its premise. For my part, I would require something more substantial than an undifferentiated fear of unduly burdensome punitive damages awards before retooling the established common law rule and depriving the States of the opportunity to experiment with different methods for guarding against abuses.

Even assuming the possibility that some verdicts will be "excessive," I cannot subscribe to the Court's remedy. On its face, it is a classic example of judicial overkill.

Apparently abandoning the salutary New York Times policy of case-by-case

"independent examination of the whole record" . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on

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the field of free expression,[36]

the Court substitutes an inflexible rule barring recovery of punitive damages absent proof of constitutional malice. The First Amendment is a majestic statement of a free people's dedication to "uninhibited, robust, and wide-open" debate on public issues,[37] but we do it a grave disservice when we needlessly spend its force.[38] For almost 200 years, punitive damages and the First Amendment have peacefully coexisted. There has been no demonstration that state libel laws as they relate to punitive damages necessitate the majority's extreme response. I fear that those who read the Court's decision will find its words inaudible, for the Court speaks "only [with] a voice of power, not of reason."

[94 S.Ct. 3036] *Mapp v. Ohio*, 367 U.S. 643, 686 (1961) (Harlan, J., dissenting).

V

In disagreeing with the Court on the First Amendment's reach in the area of state libel laws protecting nonpublic persons, I do not repudiate the principle that the First Amendment

rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.

Associated Press v. United States, 326 U.S. 1, 20 (1945); see also *Miami Herald Publishing Co. v. Tornillo*, ante at 260 (WHITE, J., concurring). I continue to subscribe to the New York Times decision and those decisions extending its protection to defamatory falsehoods about public persons. My quarrel with the Court stems

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from its willingness "to sacrifice good sense to a syllogism"[39] -- to find in the New York Times doctrine an infinite elasticity. Unfortunately, this expansion is the latest manifestation of the destructive potential of any good idea carried out to its logical extreme.

Recovery under common law standards for defamatory falsehoods about a private individual, who enjoys no "general fame or notoriety in the community," who is not

"pervasive[ly] involve[d] in the affairs of society," and who does not "thrust himself into the vortex of [a given] public issue . . . in an attempt to influence its outcome,"[40] is simply not forbidden by the First Amendment. A distinguished private study group put it this way:

Accountability, like subjection to law, is not necessarily a net subtraction from liberty. . . . The First Amendment was intended to guarantee free expression, not to create a privileged industry.

Commission on Freedom of the Press, *A Free and Responsible Press* 130, 81 (1947).

I fail to see how the quality or quantity of public debate will be promoted by further emasculation of state libel laws for the benefit of the news media.[41] If anything,

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this trend may provoke a new and radical imbalance in the communications process. Cf. Barron, *Access to the Press -- A New First Amendment Right*, 80 *Harv.L.Rev.* 1641, 1657 (1967). It is not at all inconceivable that virtually unrestrained defamatory remarks about private citizens will discourage them from speaking out and concerning themselves with social problems. This would turn the First Amendment on its head. Note, *The Scope of First Amendment Protection for Good-Faith Defamatory Error*, 75 *Yale L.J.* 642, 649 (1966); Merin, 11 *Wm. & Mary L.Rev.* at 418. David Riesman, writing in the midst of World War II on the fascists' effective use of defamatory attacks on their opponents, commented:

Thus it is that the law of libel, with its ecclesiastic background and domestic character, its aura of heart-balm suits and crusading nineteenth-century editors, becomes suddenly important for modern democratic survival.

Democracy and Defamation: Fair Game and Fair Comment I,

[94 S.Ct. 3037] 42 *Col.L.Rev.* 1085, 1088 (1942).

This case ultimately comes down to the importance the Court attaches to society's "pervasive and strong interest in preventing and redressing attacks upon reputation." *Rosenblatt v. Baer*, 383 U.S. at 86. From all that I have seen, the Court has miscalculated and denigrates that interest at a time when escalating assaults on individuality and personal dignity counsel otherwise.[42]

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At the very least, the issue is highly debatable, and the Court has not carried its heavy burden of proof to justify

tampering with state libel laws.[43]

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While some risk of exposure "is a concomitant of life in a civilized community," *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967), the private citizen does not bargain for defamatory falsehoods. Nor is society powerless to vindicate unfair injury to his reputation.

It is a fallacy . . . to assume that the First Amendment is the only guidepost in the area of state defamation laws. It is not. . . .

The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt 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

[94 S.Ct. 3038] 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, supra, at 92 (STEWART, J., concurring).

The case against razing state libel laws is compelling when considered in light of the increasingly prominent role of mass media in our society and the awesome power it has placed in the hands of a select few.[44] Surely, our political "system cannot flourish if regimentation takes hold." *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 469 (1952) (DOUGLAS, J., dissenting). Nor can it survive if our people are deprived of an effective method

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of vindicating . . . their legitimate interest in their good names.[45]

Freedom and human dignity and decency are not antithetical. Indeed, they cannot survive without each other. Both exist side-by-side in precarious balance, one always threatening to overwhelm the other. Our experience as a Nation testifies to the ability of our democratic institutions to harness this dynamic tension. One of the mechanisms seized upon by the common law to accommodate these forces was the civil libel action tried before a jury of average citizens. And it has essentially fulfilled its role. Not because it is necessarily the best or only answer, but because

the juristic philosophy of the common law is, at bottom, the

philosophy of pragmatism. Its truth is relative, not absolute. The rule that functions well produces a title deed to recognition.

B. Cardozo, *Selected Writings* 149 (Hall ed.1947).

In our federal system, there must be room for allowing the States to take diverse approaches to these vexing questions. We should

continue to forbear from fettering the States with an adamant rule which may embarrass them in coping with their own peculiar problems. . . .

Mapp v. Ohio, 367 U.S. at 681 (Harlan, J., dissenting); see also Murnaghan, *From Figment to Fiction to Philosophy -- The Requirement of Proof of Damages in Libel Actions*, 22 *Cath.U.L.Rev.* 1, 38 (1972).

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Cf. *Younger v. Harris*, 401 U.S. 37, 44-45 (1971). Whether or not the course followed by the majority is wise, and I have indicated my doubts that it is, our constitutional scheme compels a proper respect for the role of the States in acquitting their duty to obey the Constitution. Finding no evidence that they have shirked this responsibility, particularly when the law of defamation is even now in transition, I would await some demonstration of the diminution of freedom of expression before acting.

For the foregoing reasons, I would reverse the judgment of the Court of Appeals and reinstate the jury's verdict.

Notes:

[1] Petitioner filed a cross-motion for summary judgment on grounds not specified in the record. The court denied petitioner's cross-motion without discussion in a memorandum opinion of September 16, 1970.

[2] 322 F.Supp. 997 (1970). Petitioner asserts that the entry of judgment n.o.v. on the basis of his failure to show knowledge of falsity or reckless disregard for the truth constituted unfair surprise and deprived him of a full and fair opportunity to prove "actual malice" on the part of respondent. This contention is not supported by the record. It is clear that the trial court gave petitioner no reason to assume that the New York Times privilege would not be available to respondent. The court's memorandum opinion denying respondent's pretrial motion for summary judgment does not state that the New York Times standard was inapplicable to this case. Rather, it reveals that the trial judge thought it possible for petitioner to make a factual showing sufficient to overcome respondent's claim of

constitutional privilege. It states in part:

When there is a factual dispute as to the existence of actual malice, summary judgment is improper.

* * * *

In the instant case, a jury might infer from the evidence that [respondent's] failure to investigate the truth of the allegations, coupled with its receipt of communications challenging the factual accuracy of this author in the past, amounted to actual malice, that is, "reckless disregard" of whether the allegations were true or not. *New York Times [Co.] v. Sullivan*, [376 U.S. 254.] 279-280 [(1964)].

Mem.Op., Sept. 16, 1970. Thus, petitioner knew or should have known that the outcome of the trial might hinge on his ability to show by clear and convincing evidence that respondent acted with reckless disregard for the truth. And this question remained open throughout the trial. Although the court initially concluded that the applicability of the *New York Times* rule depended on petitioner's status as a public figure, the court did not decide that petitioner was not a public figure until all the evidence had been presented. Thus, petitioner had every opportunity, indeed incentive, to prove "reckless disregard" if he could, and he, in fact, attempted to do so. The record supports the observation by the Court of Appeals that petitioner

did present evidence of malice (both the "constitutional" and the "ill will" type) to support his damage claim and no such evidence was excluded. . . .

471 F.2d 801, 807 n. 15 (1972).

[3] The court stated:

[Petitioner's] considerable stature as a lawyer, author, lecturer, and participant in matters of public import undermine[s] the validity of the assumption that he is not a "public figure" as that term has been used by the progeny of *New York Times*. Nevertheless, for purposes of decision, we make that assumption and test the availability of the claim of privilege by the subject matter of the article.

Id. at 805.

[4] In the Court of Appeals petitioner made an ingenious but unavailing attempt to show that respondent's defamatory charge against him concerned no issue of public or general interest. He asserted that the subject matter of the article was the murder trial of Officer Nuccio, and that he did not participate in that proceeding. Therefore, he argued, even if the subject matter of the article generally were protected by the *New York Times* privilege, under the opinion of the *Rosenbloom* plurality, the defamatory statements about him were not. The Court of Appeals rejected this argument. It

noted that the accusations against petitioner played an integral part in respondent's general thesis of a nationwide conspiracy to harass the police:

[W]e may also assume that the article's basic thesis is false. Nevertheless, under the reasoning of *New York Times Co. v. Sullivan*, even a false statement of fact made in support of a false thesis is protected unless made with knowledge of its falsity or with reckless disregard of its truth or falsity. It would undermine the rule of that case to permit the actual falsity of a statement to determine whether or not its publisher is entitled to the benefit of the rule.

If, therefore, we put to one side the false character of the article and treat it as though its contents were entirely true, it cannot be denied that the comments about [petitioner] were integral to its central thesis. They must be tested under the *New York Times* standard.

471 F.2d at 806.

We think that the Court of Appeals correctly rejected petitioner's argument. Its acceptance might lead to arbitrary imposition of liability on the basis of an unwise differentiation among kinds of factual misstatements. The present case illustrates the point. Respondent falsely portrayed petitioner as an architect of the criminal prosecution against Nuccio. On its face, this inaccuracy does not appear defamatory. Respondent also falsely labeled petitioner a "Leninist" and a "Communist-fronter." These accusations are generally considered defamatory. Under petitioner's interpretation of the "public or general interest" test, respondent would have enjoyed a constitutional privilege to publish defamatory falsehood if petitioner had, in fact, been associated with the criminal prosecution. But this would mean that the seemingly innocuous mistake of confusing petitioner's role in the litigation against Officer Nuccio would destroy the privilege otherwise available for calling petitioner a Communist-fronter. Thus, respondent's privilege to publish statements whose content should have alerted it to the danger of injury to reputation would hinge on the accuracy of statements that carried with them no such warning. Assuming that none of these statements was published with knowledge of falsity or with reckless disregard for the truth, we see no reason to distinguish among the inaccuracies.

[5] MR. JUSTICE DOUGLAS did not participate in the consideration or decision of *Rosenbloom*.

[6] *New York Times* and later cases explicated the meaning of the new standard. In *New York Times*, the Court held that, under the circumstances, the newspaper's failure to check the accuracy of the advertisement against news stories in its own files did not establish reckless disregard for the truth. 376 U.S. at 287-288. In *St. Amant v.*

Thompson, 390 U.S. 727, 731 (1968), the Court equated reckless disregard of the truth with subjective awareness of probable falsity: "There must be sufficient evidence to permit the conclusion that the defendant, in fact, entertained serious doubts as to the truth of his publication." In *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967), the Court emphasized the distinction between the New York Times test of knowledge of falsity or reckless disregard of the truth and "actual malice" in the traditional sense of ill will. *Garrison v. Louisiana*, 379 U.S. 64 (1964), made plain that the new standard applied to criminal libel laws as well as to civil actions, and that it governed criticism directed at "anything which might touch on an official's fitness for office." *Id.* at 77. Finally, in *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966), the Court stated that

the "public official" designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.

In *Time, Inc. v. Hill*, 385 U.S. 374 (1967), the Court applied the New York Times standard to actions under an unusual state statute. The statute did not create a cause of action for libel. Rather, it provided a remedy for unwanted publicity. Although the law allowed recovery of damages for harm caused by exposure to public attention, rather than by factual inaccuracies, it recognized truth as a complete defense. Thus, nondefamatory factual errors could render a publisher liable for something akin to invasion of privacy. The Court ruled that the defendant in such an action could invoke the New York Times privilege regardless of the fame or anonymity of the plaintiff. Speaking for the Court, MR. JUSTICE BRENNAN declared that this holding was not an extension of New York Times, but rather a parallel line of reasoning applying that standard to this discrete context:

This is neither a libel action by a private individual nor a statutory action by a public official. Therefore, although the First Amendment principles pronounced in New York Times guide our conclusion, we reach that conclusion only by applying these principles in this discrete context. It therefore serves no purpose to distinguish the facts here from those in New York Times. Were this a libel action, the distinction which has been suggested between the relative opportunities of the public official and the private individual to rebut defamatory charges might be germane. And the additional state interest in the protection of the individual against damage to his reputation would be involved. Cf. *Rosenblatt v. Baer*, 383 U.S. 75, 91 (STEWART, J., concurring).

385 U.S. at 390-391.

[7] Professor Kalven once introduced a discussion of these cases with the apt heading, "You Can't Tell the Players without a Score Card." Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 Sup.Ct.Rev. 267, 275. Only three other Justices joined Mr. Justice Harlan's analysis of the issues involved. In his concurring opinion, Mr. Chief Justice Warren stated the principle for which these cases stand -- that the New York Times test reaches both public figures and public officials. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE agreed with the Chief Justice on that question. Mr. Justice Black and MR. JUSTICE DOUGLAS reiterated their view that publishers should have an absolute immunity from liability for defamation, but they acquiesced in the Chief Justice's reasoning in order to enable a majority of the Justices to agree on the question of the appropriate constitutional privilege for defamation of public figures.

[8] 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.

[9] 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.

[10] 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. Post at 388-392. 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 392 (emphasis added).

MR. JUSTICE WHITE characterizes *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), as simply a case of seditious libel. Post at 387. But that rationale is certainly inapplicable to *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (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 398, 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 (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, 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*, ante, at 262 (concurring opinion), that it "scuttle[s] the libel laws of the States in . . . wholesale fashion" and renders ordinary citizens "powerless to protect themselves." Post at 370. 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.

[11] *Curtis Publishing Co. v. Butts*, supra, at 155.

[1] See, e.g., *Rosenblatt v. Baer*, 383 U.S. 75, 90 (concurring).

[2] 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).

[3] See, e.g., Act of July 4, 1840, c. 45, 6 Stat. 802, accompanied by H.R.Rep. No. 86, 26th Cong., 1st Sess. (1840).

[4] Senator Calhoun, in reporting to Congress, assumed the invalidity of the Act to be a matter "which no one now doubts." Report with Senate Bill No. 122, S.Doc. No. 118, 24th Cong., 1st Sess., 3 (1836).

[5] See *Stromberg v. California*, 283 U.S. 359, 368-369.

[6] Since this case involves a discussion of public affairs, I need not decide at this point whether the First Amendment prohibits all libel actions. "An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment." *New York Times Co. v. Sullivan*, 376 U.S. 254, 297 (Black, J., concurring) (emphasis added). But "public affairs" includes a great deal more than merely political affairs. Matters of science, economics, business, art, literature, etc., are all matters of interest to the general public. Indeed, any matter of sufficient general interest to prompt media coverage may be said to be a public affair. Certainly police killings, "Communist conspiracies," and the like qualify.

A more regressive view of free speech has surfaced, but it has thus far gained no judicial acceptance. Solicitor General Bork has stated:

Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic. Moreover, within that category of speech we ordinarily call political, there should be no constitutional obstruction to laws making criminal any speech that advocates forcible overthrow of the government or the violation of any law.

Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind.L.J.* 1, 20 (1971).

According to this view, Congress, upon finding a painting aesthetically displeasing or a novel poorly written or a revolutionary new scientific theory unsound could constitutionally prohibit exhibition of the painting, distribution of the book or discussion of the theory. Congress might also proscribe the advocacy of the violation of any law, apparently without regard to the law's constitutionality. Thus, were Congress to pass a blatantly invalid law such as one prohibiting newspaper editorials critical of the Government, a publisher might be punished for advocating its violation. Similarly, the late Dr. Martin Luther King, Jr., could have been punished for advising blacks to peacefully sit in the front of buses or to ask for service in restaurants segregated by law.

[7] See *Palko v. Connecticut*, 302 U.S. 319, 325. As Mr. Justice Black has noted, by this view, the test becomes

whether the government has an interest in abridging the right involved, and, if so, whether that interest is of sufficient importance, in the opinion of a majority of the Supreme Court, to justify the government's action in doing so. Such a doctrine can be used to justify almost any government suppression of First Amendment freedoms. As I have stated many times before, I cannot subscribe to this

doctrine, because I believe that the First Amendment's unequivocal command that there shall be no abridgement of the rights of free speech shows that the men who drafted our Bill of Rights did all the "balancing" that was to be done in this field.

H. Black, *A Constitutional Faith* 52 (1969).

[8] See, e.g., *Bridges v. California*, 314 U.S. 252, 263 n. 6 (Black, J.); *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (DOUGLAS, J.); *Saia v. New York*, 334 U.S. 558, 560 (DOUGLAS, J.); *Talley v. California*, 362 U.S. 60, 62 (Black, J.); *DeGregory v. Attorney General of New Hampshire*, 383 U.S. 825, 828 (DOUGLAS, J.); *Elfbrant v. Russell*, 384 U.S. 11, 18 (DOUGLAS, J.); *Mills v. Alabama*, 384 U.S. 214, 218 (Black, J.); *Mine Workers v. Illinois Bar Assn.*, 389 U.S. 217, 221-222, and n. 4 (Black, J.).

[1] A fortiori, I disagree with in Brother WHITE's view that the States should have free rein to impose strict liability for defamation in cases not involving public persons.

[2] A respected commentator has observed that factors other than purely legal constraints operate to control the press:

Traditions, attitudes, and general rules of political conduct are far more important controls. The fear of opening a credibility gap, and thereby lessening one's influence, holds some participants in check. Institutional pressures in large organizations, including some of the press, have a similar effect; it is difficult for an organization to have an open policy of making intentionally false accusations.

T. Emerson, *The System of Freedom of Expression* 538 (1970). Typical of the press' own ongoing self-evaluation is a proposal to establish a national news council, composed of members drawn from the public and the journalism profession, to examine and report on complaints concerning the accuracy and fairness of news reporting by the largest newsgathering sources. Twentieth Century Fund Task Force Report for a National News Council, *A Free and Responsive Press* (1973). See also Comment, *The Expanding Constitutional Protection for the News Media from Liability for Defamation: Predictability and the New Synthesis*, 70 Mich.L.Rev. 1547, 1569-1570 (1972).

[3] The Court, taking a novel step, would not limit application of First Amendment protection to private libels involving issues of general or public interest, but would forbid the States from imposing liability without fault in any case where the substance of the defamatory statement made substantial danger to reputation apparent. As in *Rosenbloom v. Metromedia Inc.*, 403 U.S. 29, 44 n. 12, 48-49, n. 17 (1971), I would leave open the question of

what constitutional standard, if any, applies when defamatory falsehoods are published or broadcast concerning either a private or public person's activities not within the scope of the general or public interest.

Parenthetically, my Brother WHITE argues that the Court's view and mine will prevent a plaintiff -- unable to demonstrate some degree of fault -- from vindicating his reputation by securing a judgment that the publication was false. This argument overlooks the possible enactment of statutes, not requiring proof of fault, which provide for an action for retraction or for publication of a court's determination of falsity if the plaintiff is able to demonstrate that false statements have been published concerning his activities. Cf. Note, *Vindication of the Reputation of a Public Official*, 80 Harv.L.Rev. 1730, 1739-1747 (1967). Although it may be that questions could be raised concerning the constitutionality of such statutes, certainly nothing I have said today (and, as I read the Court's opinion, nothing said there) should be read to imply that a private plaintiff, unable to prove fault, must inevitably be denied the opportunity to secure a judgment upon the truth or falsity of statements published about him. Cf. *Rosenbloom v. Metromedia, Inc.*, supra, at 47, and n. 15.

[1] *Restatement of Torts* § 559 (1938); see also W. Prosser, *Law of Torts* § 111, p. 739 (4th ed.1971); 1 A. Hanson, *Libel and Related Torts* 14, pp. 21-22 (1969); 1 F. Harper & F. James, *The Law of Torts* § 5.1, pp. 349-350 (1956).

[2] The observations in Part I of this opinion as to the current state of the law of defamation in the various States are partially based upon the *Restatement of Torts*, first published in 1938, and Tentative Drafts Nos. 11 and 12 of *Restatement of Torts (Second)*, released in 1965 and 1966, respectively. The recent transmittal of Tentative Draft No. 20, dated April 25, 1974, to the American Law Institute for its consideration has resulted in the elimination of much of the discussion of the prevailing defamation rules and the suggested changes in many of the rules themselves previously found in the earlier Tentative Drafts. This development appears to have been largely influenced by the draftsmen's "sense for where the law of this important subject should be thought to stand." *Restatement (Second) of Torts*, p. vii (Tent.Draft No. 20, Apr. 25, 1974). It is evident that, to a large extent, these latest views are colored by the plurality opinion in *Rosenbloom v. Metromedia Inc.*, 403 U.S. 29 (1971). See, e.g., *Restatement (Second) of Torts*, supra at xiii, §§ 569, 580, 581A, 581B, 621. There is no indication in the latest draft, however, that the conclusions reached in Tentative Drafts Nos. 11 and 12 are not an accurate reflection of the case law in the States in the mid-1960's, prior to the developments occasioned by the plurality opinion in *Rosenbloom*. See *infra* at 374-375.

[3] See also W. Prosser, *supra*, n. 1, § 112, p. 752 and n. 85; Murnaghan, *From Figment to Fiction to Philosophy -- The Requirement of Proof of Damages in Libel Actions*, 22 *Cath.U.L.Rev.* 1, 11-13 (1972).

[4] Proof of the defamation itself established the fact of injury and the existence of some damage to the right of reputation, and the jury was permitted, even without any other evidence, to assess damages that were considered to be the natural or probable consequences of the defamatory words. *Restatement of Torts* § 621, comment a, p. 314 (1938); see also C. Gately, *Libel and Slander* 1004 (6th ed.1967); M. Newell, *Slander and Libel* § 721, p. 810 (4th ed.1924); see generally C. McCormick, *Law of Damages* § 116, pp. 422-430 (1935). In this respect, therefore, the damages were presumed because of the impossibility of affixing an exact monetary amount for present and future injury to the plaintiff's reputation, wounded feelings and humiliation, loss of business, and any consequential physical illness or pain. *Ibid*.

[5] See also Prosser, *supra*, n. 1, § 112, p. 761; Harper & James, *supra*, n. 1, § 5.14, p. 388; Note, *Developments in the Law -- Defamation*, 69 *Harv.L.Rev.* 875, 939-940 (1956).

[6] Also actionable *per se* were those libels where the imputation, although not apparent from the material itself, would have been slander *per se* if spoken, rather than written.

[7] *Restatement (Second) of Torts* § 569, pp. 29-45, 47-48 (Tent.Draft No. 12, Apr. 27, 1966); see also Murnaghan, *supra*, n. 3.

[8] Applying settled Illinois law, the District Court in this case held that it is libel *per se* to label someone a Communist. 306 F.Supp. 310 (ND Ill.1969).

[9] This appears to have been the law in Illinois at the time Gertz brought his libel suit. See, e.g., *Brewer v. Hearst Publishing Co.*, 185 F.2d 846 (CA7 1950); *Hotz v. Alton Telegraph Printing Co.*, 324 Ill.App. 1, 57 N.E.2d 137 (1944); *Cooper v. Illinois Publishing & Printing Co.*, 218 Ill.App. 95 (1920).

[10] See, e.g., *West v. Northern Publishing Co.*, 487 P.2d 1304, 1305-1306 (Alaska 1971) (article linking owners of taxicab companies to illegal liquor sales to minors); *Gallman v. Carnes*, 254 Ark. 987, 992, 497 S.W.2d 47, 50 (1973) (matter concerning state law school professor and assistant dean); *Belli v. Curtis Publishing Co.*, 25 Cal.App.3d 384, 102 Cal.Rptr. 122 (1972) (article concerning attorney with national reputation); *Moriarty v. Lippe*, 162 Conn.371, 378379, 294 A.2d 326, 330-331 (1972) (publication about certain police officers); *Firestone*

v. Time, Inc., 271 So.2d 745, 750-751 (Fla.1972) (divorce of prominent citizen not a matter of legitimate public concern); *State v. Snyder*, 277 So.2d 660, 666-668 (La.1973) (criminal defamation prosecution of a defeated mayoral candidate for statements made about another candidate); *Twohi v. Boston Herald-Traveler Corp.*, ___ Mass. ___, 291 N.E.2d 398, 400-401 (1973) (article concerning a candidate's votes in the legislature); *Priestley v. Hastings & Sons Publishing Co. of Lynn*, 360 Mass. 118, 271 N.E.2d 628 (1971) (article about an architect commissioned by a town to build a school); *Harnish v. Herald-Mail Co., Inc.*, 264 Md. 326, 334-336, 286 A.2d 146, 151 (1972) (article concerning substandard rental property owned by a member of a city housing authority); *Standke v. B. E. Darby & Sons, Inc.*, 291 Minn. 468, 476-477, 193 N.W.2d 139, 145 (1971) (newspaper editorial concerning performance of grand jurors); *Whitmore v. Kansas City Star Co.*, 499 S.W.2d 45, 49 (Mo.Ct.App. 1973) (article concerning a juvenile officer, the operation of a detention home, and a grand jury investigation); *Trails West, Inc. v. Wolff*, 32 N.Y.2d 207, 214-218, 298 N.E.2d 52, 55-58 (1973) (suit against a Congressman for an investigation into the death of schoolchildren in a bus accident); *Twenty-five East 40th Street Restaurant Corp. v. Forbes, Inc.*, 30 N.Y.2d 595, 282 N.E.2d 118 (1972) (magazine article concerning a restaurant's food); *Kent v. City of Buffalo*, 29 N.Y.2d 818, 277 N.E.2d 669 (1971) (television station film of plaintiff as a captured robber); *Frink v. McEldowney*, 29 N.Y.2d 720, 275 N.E.2d 337 (1971) (article concerning an attorney representing a town); *Mead v. Horvitz Publishing Co.* (9th Dist. Ohio Ct.App. June 13, 1973) (unpublished), cert. denied, 416 U.S. 985 (1974) (financial condition of participants in the development of a large apartment complex involving numerous local contractors); *Washington v. World Publishing Co.*, 506 P.2d 913 (Okla.1973) (article about contract dispute between a candidate for United States Senate and his party's county chairman); *Matus v. Triangle Publications, Inc.*, 445 Pa. 384, 395-399, 286 A.2d 357, 363-365 (1971) (radio "talk show" host's discussion of gross overcharging for snowplowing a driveway not considered an event of public or general concern); *Autobuses Internacionales S. De R.L., Ltd. v. El Continental Publishing Co.*, 483 S.W.2d 506 (Tex.Ct. Civ.App. 1972) (newspaper article concerning a bus company's raising of fares without notice and in violation of law); *Sanders v. Harris*, 213 Va. 369, 372-373, 192 S.E.2d 754, 757-758 (1972) (article concerning English professor at a community college); *Old Dominion Branch No. 496 v. Austin*, 213 Va. 377, 192 S.E.2d 737 (1972), rev'd, ante, p. 264 (plaintiff's failure to join a labor union considered not an issue of public or general concern); *Chase v. Daily Record, Inc.*, 83 Wash.2d 37, 41, 515 P.2d 154, 156 (1973) (article concerning port district commissioner); *Miller v. Argus Publishing Co.*, 79 Wash.2d 816, 827, 490 P.2d 101,

109 (1971) (article concerning the backer of political candidates); *Polzing v. Helmbrecht*, 54 Wis.2d 578, 586, 196 N.W.2d 685, 690 (1972) (letter to editor of newspaper concerning a reporter and the financing of pollution control measures).

The following United States Courts of Appeals have adopted the plurality opinion in *Rosenbloom*: *Cantrell v. Forest City Publishing Co.*, 484 F.2d 150 (CA6 1973), cert. pending, No. 73-5520 (article concerning family members of the victim of a highly publicized bridge disaster not actionable absent proof of actual malice); *Porter v. Guam Publications, Inc.*, 475 F.2d 744, 745 (CA9 1973) (article concerning citizen's arrest for theft of a cash box considered an event of general or public interest); *Cervantes v. Time, Inc.*, 464 F.2d 986, 991 (CA8 1972) (article concerning mayor and alleged organized crime connections conceded to be a matter of public or general concern); *Firestone v. Time, Inc.*, 460 F.2d 712 (CA5 1972) (magazine article concerning prominent citizen's use of detectives and electronic surveillance in connection with a divorce); *Davis v. National Broadcasting Co.*, 447 F.2d 981 (CA5 1971), aff'g 320 F.Supp. 1070 (ED La.1970) (television report about a person caught up in the events surrounding the assassination of President Kennedy considered a matter of public interest). However, at least one Court of Appeals, faced with an appeal from summary judgment in favor of a publisher in a diversity libel suit brought by a Philadelphia retailer, has expressed "discomfort in accepting the *Rosenbloom* plurality opinion as a definitive statement of the appropriate law. . . ." *Gordon v. Random House, Inc.*, 486 F.2d 1356, 1359 (CA3 1973).

As previously discussed in n. 2, *supra*, the latest proposed draft of Restatement (Second) of Torts substantially reflects the views of the *Rosenbloom* plurality. It also anticipates "that the Supreme Court will hold that strict liability for defamation is inconsistent with the free speech provision of the First Amendment . . .," Restatement (Second) of Torts § 569, p. 59 (Tent.Draft No. 20, Apr. 25, 1974), as well as the demise of pre-*Rosenbloom* damages rules. See *id.* § 621, pp. 285-288.

[11] Merin, *Libel and the Supreme Court*, 11 Wm. & Mary L.Rev. 371, 373 (1969).

[12] A. Sutherland, *Constitutionalism in America: Origin and Evolution of Its Fundamental Ideas* 118-119 (1965).

[13] See generally L. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* (1960).

[14] The men who wrote and adopted the First Amendment were steeped in the common law tradition of England. They read Blackstone, "a classic tradition of the bar in the United

States" and "the oracle of the common law in the minds of the American Framers. . . ." J. Hurst, *The Growth of American Law: The Law Makers* 257 (1950); Levy, *supra*, n. 13, at 13; see also Sutherland, *supra*, n. 12, at 124-125; *Schick v. United States*, 195 U.S. 65, 69 (1904). From him they learned that the major means of accomplishing free speech and press was to prevent prior restraints, the publisher later being subject to legal action if his publication was injurious. 4 W. Blackstone, *Commentaries* *150-153.

[15] See also Meiklejohn, *The First Amendment Is An Absolute*, 1961 Sup.Ct.Rev. 245, 264:

First, the Framers initiated a political revolution whose development is still in process throughout the world. Second, like most revolutionaries, the Framers could not foresee the specific issues which would arise as their "novel idea" exercised its domination over the governing activities of a rapidly developing nation in a rapidly and fundamentally changing world. In that sense, the Framers did not know what they were doing. And in the same sense, it is still true that, after two centuries of experience, we do not know what they were doing, or what we ourselves are now doing.

In a more abstract and more significant sense, however, both they and we have been aware that the adoption of the principle of self-government by "The People" of this nation set loose upon us and upon the world at large an idea which is still transforming men's conceptions of what they are and how they may best be governed.

[16] See *Beauharnais v. Illinois*, 343 U.S. 250, 272 (1952) (Black, J., dissenting). Brant, who interprets the Framers' intention more liberally than Chafee, nevertheless saw the free speech protection as bearing upon criticism of government and other political speech. I. Brant, *The Bill of Rights* 236 (1965).

[17] Z. Chafee, *Free Speech in the United States* 14 (1954).

[18] See 1 *Annals of Cong.* 729-789 (1789). See also Brant, *supra*, n. 16, at 224; Levy, *supra*, n. 13, at 214, 224.

[19] Merin, *supra*, n. 11, at 377. Franklin, for example, observed:

If by the Liberty of the Press were understood merely the Liberty of discussing the Propriety of Public Measures and political opinions, let us have as much of it as you please; but if it means the Liberty of affronting, calumniating, and defaming one another, I, for my part, own myself willing to part with my Share of it when our Legislators shall please so to alter the Law, and shall cheerfully consent to exchange my Liberty of Abusing others for the Privilege of

not being abused myself.

10 B. Franklin, Writings 38 (Smyth ed.1907).

[20] Jefferson's noted opposition to public prosecutions for libel of government figures did not extend to depriving them of private libel actions. Mott, *supra*, at 43. There is even a strong suggestion that he favored state prosecutions. E.g., Hudon, *Freedom of Speech and Press in America* 47-48 (1963).

[21] For further expressions of the general proposition that libels are not protected by the First Amendment, see *Konigsberg v. State Bar of California*, 366 U.S. 36, 49-50 and n. 10 (1961); *Time Film Corp. v. City of Chicago*, 365 U.S. 43, 48 (1961); *Pennekamp v. Florida*, 328 U.S. 331, 348-349 (1946); cf. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973); *Stanley v. Georgia*, 394 U.S. 557, 561 in 5 (1969)

[22] See Levy, *supra*, n. 13, at 247-248.

[23] See, e.g., *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[24] Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 *Sup.Ct.Rev.*191, 208-209.

[25]

The language of the First Amendment is to be read not as barren words found in a dictionary, but as symbols of historic experience illumined by the presuppositions of those who employed them. . . . As in the case of every other provision of the Constitution that is not crystallized by the nature of its technical concepts, the fact that the First Amendment is not self-defining and self-enforcing neither impairs its usefulness nor compels its paralysis as a living instrument.

Dennis v. United States, 341 U.S. 494, 523 (1951) (Frankfurter, J., concurring).

[26]

[T]he law of defamation has been an integral part of the laws of England, the colonies and the states since time immemorial. So many actions have been maintained and judgments recovered under the various laws of libel that the Constitutional validity of libel actions could be denied only by a Court willing to hold all of its predecessors were wrong in their interpretation of the First Amendment, and that two hundred years of precedents should be overruled.

Rutledge, *The Law of Defamation: Recent Developments*,

32 *Alabama Lawyer* 409, 410 (1971).

The prevailing common law libel rules in this country have remained in England and the Commonwealth nations. Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 *Cornell L.Q.* 581, 583-584 (1964). After many years of reviewing the English law of defamation, the Porter Committee concluded that, "though the law as to defamation requires some modification, the basic principles upon which it is founded are not amiss." Report of the Committee on the Law of Defamation, *Cmd. No. 7536*, ¶ 222, p. 48 (1948).

[27] If I read the Court correctly, it clearly implies that, for those publications that do not make "substantial danger to reputation apparent," the New York Times actual malice standard will apply. Apparently this would be true even where the imputation concerned conduct or a condition that would be per se slander.

[28] 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 cities had competing dailies. Today, in only 42 of the cities served by one of the 1,748 American 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 intermediate 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).

[29] Having held that the defamation plaintiff is limited to recovering for "actual injury," the Court hastens to add:

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.

Ante at 350. It should be pointed out that, under the prevailing law, where the defamation is not actionable per se and proof of "special damage" is required, a showing of actual injury to reputation is insufficient; but if pecuniary loss is shown, general reputation damages are recoverable. The Court changes the latter, but not the former, rule. Also under present law, pain and suffering, although shown, do not warrant damages in any defamation action unless the plaintiff is otherwise entitled to at least nominal damages. By imposing a more difficult standard of liability and requiring proof of actual damage to reputation, recovery for pain and suffering, though real, becomes a much more remote possibility.

[30]

The harm resulting from an injury to reputation is difficult to demonstrate both because it may involve subtle differences in the conduct of the recipients toward the plaintiff and because the recipients, the only witnesses able to establish the necessary causal connection, may be reluctant to testify that the publication affected their relationships with the plaintiff. Thus, some presumptions are necessary if the plaintiff is to be adequately compensated.

Note, Developments in the Law -- Defamation, 69 Harv.L.Rev. 875, 891-892 (1956).

[31]

On questions of damages, the judge plays an important role. It is, of course, for him to determine and instruct the jury as to what matters may be taken into consideration by them in arriving at a verdict, since such questions are clearly matters of substantive law. But the judge also may and frequently does exercise a judgment as to the amount of damages the plaintiff may recover. His function here is primarily to keep the jury within bounds of reason and common sense, to guard against excessive verdicts dictated by passion and prejudice and to see to it that the amount of the verdict has some reasonable relation to the plaintiff's

evidence as to his loss or the probability of loss. Thus, the trial judge may grant a new trial, or the appellate court may reverse and remand the case for a new trial, because of excessive damages or, as is more frequently the case, a remittitur may be ordered, the effect of which is that the plaintiff must accept a specified reduction of his damages or submit to a new trial on the issue of liability as well as damages.

1 F. Harper & F. James, *The Law of Torts* § 5.29, p. 467 (1956) (footnote omitted).

[32] See Pedrick, *supra*, n. 26, at 587 n. 23.

[33] Murnaghan, *supra*, n. 3, at 29.

[34] Note, *Developments in the Law -- Defamation*, 69 Harv.L.Rev., *supra*, at 875, 938 and n. 443.

[35] Id. at 939, 941-942. See, e.g., Cal.Civ.Code § 48a(2) (1954).

[36] 376 U.S. at 285.

[37] Id. at 270.

[38] Judicial review of jury libel awards for excessiveness should be influenced by First Amendment considerations, but it makes little sense to discard an otherwise useful and time-tested rule because it might be misapplied in a few cases.

[39] O. Holmes, *The Common Law* 36 (1881).

[40] Ante at 351, 352.

[41] Cf. Pedrick, *supra*, n. 26, at 601-602:

A great many forces in our society operate to determine the extent to which men are free, in fact, to express their ideas. Whether there is a privilege for good faith defamatory misstatements on matters of public concern or whether there is strict liability for such statements may not greatly affect the course of public discussion. How different has life been in those states which heretofore followed the majority rule imposing strict liability for misstatements of fact defaming public figures from life in the minority states where the good faith privilege held sway?

See also T. Emerson, *The System of Freedom of Expression* 519 (1970) (footnote omitted):

[O]n the whole the role of libel law in the system of freedom of expression has been relatively minor and essentially erratic.

[42]

The man who is compelled to live every minute of his life among others, and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity. Such an individual merges with the mass. His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones; his feelings, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of every man. Such a being, although sentient, is fungible; he is not an individual.

Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L.Rev. 962, 1003 (1964).

[43] With the evisceration of the common law libel remedy for the private citizen, the Court removes from his legal arsenal the most effective weapon to combat assault on personal reputation by the press establishment. The David and Goliath nature of this relationship is all the more accentuated by the Court's holding today in *Miami Herald Publishing Co. v. Tornillo*, ante p. 241, which I have joined, that an individual criticized by a newspaper's editorial is precluded by the First Amendment from requiring that newspaper to print his reply to that attack. While that case involves an announced candidate for public office, the Court's finding of a First Amendment barrier to government "intrusion into the function of editors," ante at 258, does not rest on any distinction between private citizens or public officials. In fact, the Court observes that the First Amendment clearly protects from governmental restraint "the exercise of editorial control and judgment," i.e.,

[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials -- whether fair or unfair. . . .

Ibid. (Emphasis added.)

We must, therefore, assume that the hapless ordinary citizen libeled by the press (a) may not enjoin in advance of publication a story about him, regardless of how libelous it may be, *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931); (b) may not compel the newspaper to print his reply; and (c) may not force the newspaper to print a retraction, because a judicially compelled retraction, like a "remedy such as an enforceable right of access," entails "governmental coercion" as to content, which

at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years.

Miami Herald Publishing Co. v. Tornillo, ante at 254; but

cf. this case, ante at 368 n. 3 (BRENNAN, J., dissenting).

My Brother BRENNAN also suggests that there may constitutionally be room for

the possible enactment of statutes, not requiring proof of fault, which provide . . . for publication of a court's determination of falsity if the plaintiff is able to demonstrate that false statements have been published concerning his activities.

Ibid. The Court, however, does not even consider this less drastic alternative to its new "some fault" libel standards.

[44] See n. 28, *supra*.

[45]

No democracy, . . . certainly not the American democracy, will indefinitely tolerate concentrations of private power irresponsible and strong enough to thwart the aspirations of the people. Eventually governmental power will be used to break up private power, or governmental power will be used to regulate private power -- if private power is at once great and irresponsible.

Commission on Freedom of the Press, *A Free and Responsible Press* 80 (1947).

APPENDIX 5

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443 U.S. 111 (1979)

99 S.Ct. 2675, 61 L.Ed.2d 411

Hutchinson

v.

Proxmire

No. 78-680

United States Supreme Court

June 26, 1979

Argued April 17, 1979

CERTIORARI TO THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Syllabus

Respondent United States Senator publicizes examples of wasteful governmental spending by awarding his "Golden Fleece of the Month Award." One such award was given to federal agencies that had funded petitioner scientist's study of emotional behavior in which he sought an objective measure of aggression, concentrating upon the behavior patterns of certain animals. The award was announced in a speech prepared with the help of respondent legislative assistant, the text of which was incorporated in a widely distributed press release. Subsequently, the award was also referred to in newsletters sent out by the Senator, in a television interview program on which he appeared, and in telephone calls made by the legislative assistant to the sponsoring federal agencies. Petitioner sued respondents in Federal District Court for defamation, alleging, inter alia, that in making the award and publicizing it nationwide, respondents had damaged him in his professional and academic standing. The District Court granted summary judgment for respondents, holding that the Speech or Debate Clause afforded absolute immunity for investigating the funding of petitioner's research, for the speech in the Senate, and for the press release, since it fell within the "informing function" of Congress. The court further held that petitioner was a "public figure" for purposes of determining respondents' liability; that respondents were protected by the First Amendment, thereby requiring

petitioner to prove "actual malice"; and that, based on the depositions, affidavits, and pleadings, there was no genuine issue of material fact on the issue of actual malice, neither respondents' failure to investigate nor unfair editing and summarizing being sufficient to establish "actual malice." Finally, the court held that, even if petitioner were found to be a "private person," relevant state law required a summary judgment for respondents. The Court of Appeals affirmed, holding that the Speech or Debate Clause protected the statements made in the press release and newsletters and that, although the followup telephone calls and the statements made on television were not protected by that Clause, they were protected by the First Amendment, since petitioner was a "public figure," and that on the record there was no showing of "actual malice."

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Held:

1. While this Court's practice is to avoid reaching constitutional questions if a dispositive nonconstitutional ground is available, special considerations in this case mandate that the constitutional questions first be resolved. If respondents have immunity under the Speech or Debate Clause, no other questions need be considered. And where it appears that the Court of Appeals would not affirm the District Court's state law holding, so that the appeal could not be decided without reaching the First Amendment issue, that issue will also be reached here. Pp. 122-123.

2. The Speech or Debate Clause does not protect transmittal of information by individual Members of Congress by press releases and newsletters. Pp. 123-133.

(a) There is nothing in the history of the Clause or its language suggesting any intent to create an absolute privilege from liability or suit for defamatory statements made outside the legislative Chambers; precedents support the conclusion that a Member may be held liable for republishing defamatory statements originally made in the Chamber. Pp. 127-130.

(b) Neither the newsletters nor the press release here was "essential to the deliberation of the Senate," and neither was part of the deliberative process. *Gravel v. United States*, 408 U.S. 606; *Doe v. McMillan*, 412 U.S. 306. P. 130.

(c)

[99 S.Ct. 2677] The newsletters and press release were not privileged as part of the "informing function" of Members of Congress to tell the public about their activities. Individual Members' transmittal of information about their

activities by press releases and newsletters is not part of the legislative function or the deliberations that make up the legislative process; in contrast to voting and preparing committee reports, which are part of Congress' function to inform itself, newsletters and press releases are primarily means of informing those outside the legislative forum, and represent the views and will of a single Member. *Doe v. McMillan*, supra, distinguished. Pp. 132-133.

3. Petitioner is not a "public figure" so as to make the "actual malice" standard of proof of *New York Times Co. v. Sullivan*, 376 U.S. 254, applicable. Neither the fact that local newspapers reported the federal grants to petitioner for his research nor the fact that he had access to the news media as shown by reports of his response to the announcement of the Golden Fleece Award demonstrates that he was a public figure prior to the controversy engendered by that award. His access, such as it was, came after the alleged libel, and was limited to responding to the announcement of the award. Those charged with alleged defamation cannot, by their own conduct, create their own defense by making

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the claimant a public figure. Nor is the concern about public expenditures sufficient to make petitioner a public figure, petitioner at no time having assumed any role of public prominence in the broad question of such concern. Pp. 133-136.

579 F.2d 1027, reversed and remanded.

BURGER, C.J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined, and in all but n. 10 of which STEWART, J., joined. STEWART, J., filed a statement concurring in part and dissenting in part, post, p. 136. BRENNAN, J., filed a dissenting opinion, post, p. 136.

BURGER, J., lead opinion

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari, 439 U.S. 1066 (1979), to resolve three issues: (1) Whether a Member of Congress is protected by the Speech or Debate Clause of the Constitution, Art. I, § 6, against suits for allegedly defamatory statements made by the Member in press releases and newsletters; (2) whether petitioner Hutchinson is either a "public figure" or a "public official," thereby making applicable the "actual malice" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); and (3) whether respondents were entitled to summary judgment.

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Ronald Hutchinson, a research behavioral scientist, sued respondents, William Proxmire, a United States Senator, and his legislative assistant, Morton Schwartz, for defamation arising out of Proxmire's giving what he called his "Golden Fleece" award. The "award" went to federal agencies that had sponsored Hutchinson's research. Hutchinson alleged that, in making the award and publicizing it nationwide, respondents had libeled him, damaging him in his professional and academic standing, and had interfered with his contractual relations. The District Court granted summary judgment for respondents, and the Court of Appeals affirmed.

We reverse and remand to the Court of Appeals for further proceedings consistent with this opinion.

I

Respondent Proxmire is a United States Senator from Wisconsin. In March, 1975, he initiated the "Golden Fleece of the Month Award" to publicize what he perceived to be the most egregious examples of wasteful governmental spending. The second such award, in April, 1975, went to the National Science Foundation, the National Aeronautics and Space Administration, and the Office of Naval Research, for spending almost

[99 S.Ct. 2678] half a million dollars during the preceding seven years to fund Hutchinson's research.[1]

At the time of the award, Hutchinson was director of research at the Kalamazoo State Mental Hospital. Before that, he had held a similar position at the Ft. Custer State Home. Both the hospital and the home are operated by the Michigan State Department of Mental Health; he was therefore a state employee in both positions. During most of the period in question he was also an adjunct professor at Western Michigan University. When the research department at Kalamazoo

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State Mental Hospital was closed in June, 1975, Hutchinson became research director of the Foundation for Behavioral Research, a nonprofit organization. The research funding was transferred from the hospital to the foundation.

The bulk of Hutchinson's research was devoted to the study of emotional behavior. In particular, he sought an objective measure of aggression, concentrating upon the behavior patterns of certain animals, such as the clenching of jaws when they were exposed to various aggravating stressful stimuli.[2] The National Aeronautics and Space Agency and the Navy were interested in the potential of this research for resolving problems associated with confining

humans in close quarters for extended periods of time in space and undersea exploration.

The Golden Fleece Award to the agencies that had sponsored Hutchinson's research was based upon research done for Proxmire by Schwartz. While seeking evidence of wasteful governmental spending, Schwartz read copies of reports that Hutchinson had prepared under grants from NASA. Those reports revealed that Hutchinson had received grants from the Office of Naval Research, the National Science Foundation, and the Michigan State Department of Mental Health. Schwartz also learned that other federal agencies had funded Hutchinson's research. After contacting a number of federal and state agencies, Schwartz helped to prepare a speech for Proxmire to present in the Senate on April 18, 1975; the text was then incorporated into an advance press release, with only

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the addition of introductory and concluding sentences. Copies were sent to a mailing list of 275 members of the news media throughout the United States and abroad.

Schwartz telephoned Hutchinson before releasing the speech to tell him of the award; Hutchinson protested that the release contained an inaccurate and incomplete summary of his research. Schwartz replied that he thought the summary was fair.

In the speech, Proxmire described the federal grants for Hutchinson's research, concluding with the following comment:[3]

The funding of this nonsense makes me almost angry enough to scream and kick or even clench my jaw. It seems to me it is outrageous.

Dr.

[99 S.Ct. 2679] Hutchinson's studies should make the taxpayers as well as his monkeys grind their teeth. In fact, the good doctor has made a fortune from his monkeys, and, in the process, made a monkey out of the American taxpayer.

It is time for the Federal Government to get out of this "monkey business." In view of the transparent worthlessness of Hutchinson's study of jaw-grinding and biting by angry or hard-drinking monkeys, it is time we put a stop to the bite Hutchinson and the bureaucrats who fund him have been taking of the taxpayer.

121 Cong.Rec. 10803 (1975).

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In May 1975, Proxmire referred to his Golden Fleece Awards in a newsletter sent to about 100,000 people whose names were on a mailing list that included constituents in Wisconsin as well as persons in other states. The newsletter repeated the essence of the speech and the press release. Later in 1975, Proxmire appeared on a television interview program where he referred to Hutchinson's research, though he did not mention Hutchinson by name.[4]

The final reference to the research came in a newsletter in February, 1976. In that letter, Proxmire summarized his Golden Fleece Awards of 1975. The letter did not mention Hutchinson's name, but it did report:

-- The NSF, the Space Agency, and the Office of Naval Research won the "Golden Fleece" for spending jointly \$500,000 to determine why monkeys clench their jaws.

* * * *

All the studies on why monkeys clench their jaws were dropped. No more monkey business.

App. 168-171.

After the award was announced, Schwartz, acting on behalf of Proxmire, contacted a number of the federal agencies that had sponsored the research. In his deposition he stated that he did not attempt to dissuade them from continuing to fund the research, but merely discussed the subject.[5] Hutchinson, by contrast, contends that these calls were intended to persuade the agencies to terminate his grants and contracts.

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II

On April 16, 1976, Hutchinson filed this suit in United States District Court in Wisconsin.[6] In Count I, he alleges that, as a result of the actions of Proxmire and Schwartz, he has "suffered a loss of respect in his profession, has suffered injury to his feelings, has been humiliated, held up to public scorn, suffered extreme mental anguish and physical illness and pain to his person. Further, he has suffered a loss of income and ability to earn income in the future." Count II alleges that the respondents' conduct has interfered with Hutchinson's contractual relationships with supporters of his research. He later amended the complaint to add an allegation that his rights of privacy and peace and tranquility have been infringed.

Respondents moved for a change of venue and for summary judgment. In their motion for summary judgment, they asserted that all of their acts and utterances were protected by the Speech or Debate Clause. In addition, they asserted that their criticism of the spending of public funds

was privileged under the Free Speech Clause of the First Amendment. They argued that Hutchinson was both a public figure and a public official, and therefore would be

[99 S.Ct. 2680] obliged to prove the existence of "actual malice." Respondents contended that the facts of this case would not support a finding of actual malice.

Without ruling on venue, the District Court granted respondents' motion for summary judgment. 431 F.Supp. 1311 (WD Wis.1977). In so ruling, the District Court relied on both grounds urged by respondents. It reasoned that the Speech or Debate Clause afforded absolute immunity for respondents' activities in investigating the funding of Hutchinson's research, for Proxmire's speech in the Senate, and for the press release covering the speech. The court concluded that the investigations and the speech were clearly within the

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ambit of the Clause. The press release was said to be protected because it fell within the "informing function" of Congress. To support its conclusion, the District Court relied upon cases interpreting the franking privilege granted to Members by statute. See 39 U.S.C. § 3210.

Although the District Court referred to the "informing function" of Congress and to the franking privilege, it did not base its conclusion concerning the press release on those analogies. Instead, the District Court held that the "press release, in a constitutional sense, was no different than would have been a television or radio broadcast of his speech from the Senate floor." [7] 431 F.Supp. at 1325. That the District Court did not rely upon the "informing function" is clear from its implicit holding that the newsletters were not protected.

The District Court then turned to the First Amendment to explain the grant of summary judgment on the claims arising from the newsletters and interviews. It concluded that Hutchinson was a public figure for purposes of determining respondents' liability:

Given Dr. Hutchinson's long involvement with publicly funded research, his active solicitation of federal and state grants, the local press coverage of his research, and the public interest in the expenditure of public funds on the precise activities in which he voluntarily participated, the court concludes that he is a public figure for the purpose of this suit. As he acknowledged in his deposition, "Certainly, any expenditure of public funds is a matter of public interest."

Id. at 1327.[8]

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Having reached that conclusion, the District Court relied upon the depositions, affidavits, and pleadings before it to evaluate Hutchinson's claim that respondents had acted with "actual malice." The District Court found that there was no genuine issue of material fact on that issue. It held that neither a failure to investigate nor unfair editing and summarizing could establish "actual malice." It also held that there was nothing in the affidavits or depositions of either Proxmire or Schwartz to indicate that they ever entertained any doubt about the truth of their statements. Relying upon cases from other courts, the District Court said that, in determining whether a plaintiff had made an adequate showing of "actual malice," summary judgment might well be the rule, rather than the exception. Id. at 1330.[9]

Finally,

[99 S.Ct. 2681] the District Court concluded:

But even if, for the purpose of this suit, it is found that Dr. Hutchinson is a private person so that First Amendment protections do not extend to [respondents], relevant state law dictates the grant of summary judgment.

Ibid. The District Court held that the controlling state law was either that of Michigan or that of the District of Columbia. Without deciding which law would govern under Wisconsin's choice of law principles, the District Court concluded that Hutchinson would not be able to recover in either jurisdiction.

The Court of Appeals affirmed, holding that the Speech or Debate Clause protected the statements made in the press release

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and in the newsletters. 579 F.2d 1027 (CA7 1978). It interpreted *Doe v. McMillan*, 412 U.S. 306 (1973), as recognizing a limited protection for the "informing function" of Congress, and concluded that distribution of both the press release and the newsletters did not exceed what was required for legislative purposes. 579 F.2d at 1033. The followup telephone calls and the statements made by Proxmire on television and radio were not protected by the Speech or Debate Clause; they were, however, held by the Court of Appeals to be protected by the First Amendment.[10] It reached that conclusion after first finding that, based on the affidavits and pleadings of record, Hutchinson was a "public figure." Id. at 1034-1035. The court then examined the record to determine whether there had been a showing by Hutchinson of "actual malice." It agreed with the District Court

that, upon this record, there is no question that [respondents] did not have knowledge of the actual or probable "falsity" of their statements.

Id. at 1035. The Court of Appeals also rejected Hutchinson's argument that the District Court had erred in granting summary judgment on the claimed wrongs other than defamation -- interference with

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contractual relations, intentional infliction of emotional anguish, and invasion of privacy:

We view these additional allegations of harm as merely the results of the statements made by the defendants. If the alleged defamatory falsehoods themselves are privileged, it would defeat the privilege to allow recovery for the specified damages which they cause.

Id. at 1036 (footnote omitted).[11] The Court of Appeals did not review the District Court's holding that state law also justified summary judgment for respondents.

III

The petition for certiorari raises three questions. One involves the scope of the Speech or Debate Clause; another involves First Amendment claims; a third concerns the appropriateness of summary judgment, embracing both a constitutional issue and a state law issue. The constitutional issue arose from the District Court's view

[99 S.Ct. 2682] that solicitude for the First Amendment required a more hospitable judicial attitude toward granting summary judgment in a libel case. See n. 9, supra. The state law issue arose because the District Court concluded that, as a matter of local law, Hutchinson could not recover.

Our practice is to avoid reaching constitutional questions if a dispositive nonconstitutional ground is available. See, e.g., *Siler v. Louisville & Nashville R. Co.*, 213 U.S. 175, 193 (1909). Were we to follow that course here, we would remand to the Court of Appeals to review the state law question which it did not consider. If the District Court correctly decided the state law question, resolution of the First Amendment issue would be unnecessary. We conclude, however, that special considerations in this case mandate that we first resolve the constitutional questions.

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The purpose of the Speech or Debate Clause is to protect Members of Congress "not only from the consequences of litigation's results, but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). See also *Eastland v. United States Servicemen's*

Fund, 421 U.S. 491, 503 (1975). If the respondents have immunity under the Clause, no other questions need be considered, for they may "not be questioned in any other Place."

Ordinarily, consideration of the constitutional issue would end with resolution of the Speech or Debate Clause question. We would then remand for the Court of Appeals to consider the issue of state law. Here, however, there is an indication that the Court of Appeals would not affirm the state law holding. We surmise this because, in explaining its conclusion that the press release and the newsletters were protected by the Speech or Debate Clause, the Court of Appeals stated:

[T]he statements in the press release intimating that Dr. Hutchinson had made a personal fortune and that the research was "perhaps duplicative" may be defamatory falsehoods.

579 F.2d at 1035 n. 15. In light of that surmise, what we said in *Wolston v. Reader's Digest Assn., Inc.*, post at 161 n. 2, is also appropriate here:

We assume that the Court of Appeals is as familiar as we are with the general principle that dispositive issues of statutory and local law are to be treated before reaching constitutional issues. . . . We interpret the footnote to the Court of Appeals opinion in this case, where jurisdiction is based upon diversity of citizenship, to indicate its view that . . . the appeal could not be decided without reaching the constitutional question.

In light of the necessity to do so, we therefore reach the First Amendment issue as well as the Speech or Debate Clause question.

IV

In support of the Court of Appeals holding that newsletters and press releases are protected by the Speech or Debate Clause, respondents rely upon both historical precedent and

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present-day congressional practices. They contend that impetus for the Speech or Debate Clause privilege in our Constitution came from the history of parliamentary efforts to protect the right of members to criticize the spending of the Crown and from the prosecution of a Speaker of the House of Commons for publication of a report outside of Parliament. Respondents also contend that, in the modern day, very little speech or debate occurs on the floor of either House; from this they argue that press releases and newsletters are necessary for Members of Congress to communicate with other Members. For example, in his

deposition, Proxmire testified:

I have found in 19 years in the Senate that, very often, a statement on the floor of the Senate or something that appears in the Congressional Record misses the attention of most members of the Senate, and virtually all members of the House, because they don't read the Congressional Record. If they are handed a news release,

[99 S.Ct. 2683] or something, that is going to call it to their attention. . . .

App. 220. Respondents also argue that an essential part of the duties of a Member of Congress is to inform constituents, as well as other Members, of the issues being considered.

The Speech or Debate Clause has been directly passed on by this Court relatively few times in 190 years. *Eastland v. United States Servicemen's Fund*, supra; *Doe v. McMillan*, 412 U.S. 306 (1973); *Gravel v. United States*, 408 U.S. 606 (1972); *United States v. Brewster*, 408 U.S. 501 (1972); *Dombrowski v. Eastland*, supra; *United States v. Johnson*, 383 U.S. 169 (1966); *Kilbourn v. Thompson*, 103 U.S. 168 (1881). Literal reading of the Clause would, of course, confine its protection narrowly to a "Speech or Debate in either House." But the Court has given the Clause a practical, rather than a strictly literal, reading which would limit the protection to utterances made within the four walls of either Chamber. Thus, we have held that committee hearings are protected, even if held outside the Chambers; committee reports are also protected.

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Doe v. McMillan, supra; *Gravel v. United States*, supra. Cf. *Coffin v. Coffin*, 4 Mass. *1, *27-*28 (1808).

The gloss going beyond a strictly literal reading of the Clause has not, however, departed from the objective of protecting only legislative activities. In Thomas Jefferson's view:

[The privilege] is restrained to things done in the House in a Parliamentary course. . . . For [the Member] is not to have privilege contra morem parliamentarium, to exceed the bounds and limits of his place and duty.

T. Jefferson, *A Manual of Parliamentary Practice* 20 (1854), reprinted in *The Complete Jefferson* 704 (S. Padover ed. 1943).

One of the draftsmen of the Constitution, James Wilson, expressed a similar thought in lectures delivered between 1790 and 1792 while he was a Justice of this Court. He rejected Blackstone's statement, 1 W. Blackstone, *Commentaries* *164, that Parliament's privileges were

preserved by keeping them indefinite:

Very different is the case with regard to the legislature of the United States. . . . The great maxims, upon which our law of parliament is founded, are defined and ascertained in our constitutions. The arcana of privilege, and the arcana of prerogative, are equally unknown to our system of jurisprudence.

2 J. Wilson, *Works* 35 (J. Andrews ed. 1896).[12] In this respect, Wilson was underscoring the very purpose of our Constitution -- inter alia, to provide written definitions of the powers, privileges, and immunities granted, rather than rely on evolving constitutional concepts identified from diverse sources, as in English law. Like thoughts were expressed

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by Joseph Story, writing in the first edition of his *Commentaries on the Constitution* in 1833:

But this privilege is strictly confined to things done in the course of parliamentary proceedings, and does not cover things done beyond the place and limits of duty.

Id., § 863, at 329. Cf. *Coffin v. Coffin*, supra at *34.

In *United States v. Brewster*, supra, we acknowledged the historical roots of the Clause going back to the long struggle between the English House of Commons and the Tudor and Stuart monarchs when both criminal and civil processes were employed by Crown authority to intimidate legislators. Yet we cautioned that the Clause

must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government, rather than the English parliamentary system. . . . [T]heir Parliament is the supreme authority, not

[99 S.Ct. 2684] a coordinate branch. Our speech or debate privilege was designed to preserve legislative independence, not supremacy.

408 U.S. at 508.

Nearly a century ago, in *Kilbourn v. Thompson*, supra at 204, this Court held that the Clause extended "to things generally done in a session of the House by one of its members in relation to the business before it." (Emphasis added.) More recently, we expressed a similar definition of the scope of the Clause:

Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative

processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. As the

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Court of Appeals put it, the courts have extended the privilege to matters beyond pure speech or debate in either House, but "only when necessary to prevent indirect impairment of such deliberations."

Gravel v. United States, 408 U.S. at 625 (quoting *United States v. Doe*, 455 F.2d 753, 760 (CA1 1972)) (emphasis added). Cf. *Doe v. McMillan*, 412 U.S. at 313-314, 317; *United States v. Brewster*, 408 U.S. at 512, 515-516, 517-518; *Long v. Ansell*, 293 U.S. 76, 82 (1934).

Whatever imprecision there may be in the term "legislative activities," it is clear that nothing in history or in the explicit language of the Clause suggests any intention to create an absolute privilege from liability or suit for defamatory statements made outside the Chamber. In *Brewster*, supra at 507, we observed:

The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators.

Claims under the Clause going beyond what is needed to protect legislative independence are to be closely scrutinized. In *Brewster*, we took note of this:

The authors of our Constitution were well aware of the history of both the need for the privilege and the abuses that could flow from too sweeping safeguards. In order to preserve other values, they wrote the privilege so that it tolerates and protects behavior on the part of Members not tolerated and protected when done by other citizens, but the shield does not extend beyond what is necessary to preserve the integrity of the legislative process.

408 U.S. at 517 (emphasis added). Indeed, the precedents abundantly support the conclusion that a Member may be held liable for republishing defamatory

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statements originally made in either House. We perceive no basis for departing from that long-established rule.

Mr. Justice Story, in his Commentaries, for example, explained that there was no immunity for republication of a

speech first delivered in Congress:

Therefore, although a speech delivered in the house of commons is privileged, and the member cannot be questioned respecting it elsewhere, yet, if he publishes his speech, and it contains libelous matter, he is liable to an action and prosecution therefor, as in common cases of libel. And the same principles seem applicable to the privilege of debate and speech in congress. No man ought to have a right to defame others under colour of a performance of the duties of his office. And if he does so in the actual discharge of his duties in congress, that furnishes no reason why he should be enabled, through the medium of the

[99 S.Ct. 2685]press, to destroy the reputation, and invade the repose of other citizens. It is neither within the scope of his duty nor in furtherance of public rights or public policy. Every citizen has as good a right to be protected by the laws from malignant scandal, and false charges, and defamatory imputations, as a member of congress has to utter them in his seat.[13]

2 J. Story, Commentaries

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on the Constitution § 863, p. 329 (1833) (emphasis added). See also L. Cushing, *Elements of the Law and Practice of Legislative Assemblies in the United States of America* ¶ 604, p. 244 (1st ed. reprint 1971).

Story summarized the state of the common law at the time the Constitution was drafted, recalling that Parliament had by then succeeded in its struggle to secure freedom of debate. But the privilege did not extend to republication of libelous remarks even though first made in Parliament. Thus, in *King v. Lord Abingdon*, 1 Esp. 225, 170 Eng.Rep. 337 (N.P. 1794), Lord Chief Justice Kenyon rejected Lord Abingdon's argument that parliamentary privilege protected him from suit for republication of a speech first made in the House of Lords:

[A]s to the words in question, had they been spoken in the House of Lords, and confined to its walls, [the] Court would have had no jurisdiction to call his Lordship before them, to answer for them as an offence; but . . . in the present case, the offence was the publication under his authority and sanction, and at his expense: . . . a member of Parliament had certainly a right to publish his speech, but that speech should not be made the vehicle of slander against any individual; if it was, it was a libel. . . .

Id. at 228, 170 Eng.Rep. at 338. A similar result was reached in *King v. Creevey*, 1 M. & S. 273, 105 Eng.Rep. 102 (K.B. 1813).

In *Gravel v. United States*, 408 U.S. at 622-626, we recognized that the doctrine denying immunity for republication had been accepted in the United States:

[P]rivate publication by Senator Gravel . . . was in no way essential to the deliberations of the Senate; nor does questioning as to private publication threaten the integrity or independence of the Senate by impermissibly exposing its deliberations to executive influence.

Id. at 625. We reaffirmed that principle in *Doe v. McMillan*, 412 U.S. at 314-315:

A Member of Congress may not with impunity publish a libel from the speaker's stand in his home district, and clearly the Speech or Debate Clause would not protect such an act even though the libel

[**99 S.Ct. 2686**] was read from an official committee report. The reason is that republishing a libel under such circumstances is not an essential part of the legislative process, and is not part of that deliberative process "by which Members participate in committee and House proceedings."

(Footnote omitted; quoting from *Gravel v. United States*, *supra*, at 625.)[14]

We reach a similar conclusion here. A speech by Proxmire in the Senate would be wholly immune, and would be available to other Members of Congress and the public in the Congressional Record. But neither the newsletters nor the press release was "essential to the deliberations of the Senate," and neither was part of the deliberative process.

Respondents, however, argue that newsletters and press releases are essential to the functioning of the Senate; without

them, they assert, a Senator cannot have a significant impact on the other Senators. We may assume that a Member's published statements exert some influence on other votes in the Congress, and therefore have a relationship to the legislative and deliberative process. But in *Brewster*, 408 U.S. at 512, we rejected respondents' expansive reading of the Clause:

It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause. These include . . . preparing so-called "news letters" to constituents, news releases, and speeches delivered outside

the Congress.

There we went on to note that *United States v. Johnson*, 383 U.S. 169 (1966), had carefully distinguished between what is only "related to the due functioning of the legislative process" and what constitutes the legislative process entitled to immunity under the Clause:

In stating that those things [Johnson's attempts to influence the Department of Justice] "in no wise related to the due functioning of the legislative process" were not covered by the privilege, the Court did not in any sense imply as a corollary that everything that "related" to the office of a Member was shielded by the Clause. Quite the contrary, in *Johnson* we held, citing *Kilbourn v. Thompson*, *supra*, that only acts generally done in the course of the process of enacting legislation were protected.

* * * *

In no case has this Court ever treated the Clause as protecting all conduct relating to the legislative process.

* * * *

. . . In its narrowest scope, the Clause is a very large, albeit essential, grant of privilege. It has enabled reckless men to slander [by speech or debate] and even destroy

others with impunity, but that was the conscious choice of the Framers.

408 U.S. at 513-516. (Emphasis in original.) We are unable to discern any "conscious choice" to grant immunity for defamatory statements scattered far and wide by mail, press, and the electronic media.

Respondents also argue that newsletters and press releases are privileged as part of the "informing function" of Congress. Advocates of a broad reading of the "informing function" sometimes tend to confuse two uses of the term "informing." In one sense, Congress informs itself collectively by way of hearings of its committees. It was in that sense that Woodrow Wilson used "informing" in a statement quoted by respondents. In reality, Wilson's statement related to congressional efforts to learn of the activities of the Executive Branch and administrative agencies; he did not include wide-ranging inquiries by individual Members on subjects of their choice. Moreover, Wilson's statement itself clearly implies a

[**99 S.Ct. 2687**] distinction between the informing function and the legislative function:

Unless Congress have and use every means of acquainting

itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function. . . . [T]he only really self-governing people is that people which discusses and interrogates its administration.

W. Wilson, *Congressional Government* 303 (1885). It is in this narrower Wilsonian sense that this Court has employed "informing" in previous cases holding that congressional

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efforts to inform itself through committee hearings are part of the legislative function.

The other sense of the term, and the one relied upon by respondents, perceives it to be the duty of Members to tell the public about their activities. Valuable and desirable as it may be in broad terms, the transmittal of such information by individual Members in order to inform the public and other Members is not a part of the legislative function or the deliberations that make up the legislative process.[15] As a result, transmittal of such information by press releases and newsletters is not protected by the Speech or Debate Clause.

Doe v. McMillan, 412 U.S. 306 (1973), is not to the contrary. It dealt only with reports from congressional committees, and held that Members of Congress could not be held liable for voting to publish a report. Voting and preparing committee reports are the individual and collective expressions of opinion within the legislative process. As such, they are protected by the Speech or Debate Clause. Newsletters and press releases, by contrast, are primarily means of informing those outside the legislative forum; they represent the views and will of a single Member. It does not disparage either their value or their importance to hold that they are not entitled to the protection of the Speech or Debate Clause.

V

Since *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964),[16] this Court has sought to define the accommodation

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required to assure the vigorous debate on the public issues that the First Amendment was designed to protect, while at the same time affording protection to the reputations of

individuals. E.g., *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Gertz v. Robert Welch Inc.*, 418 U.S. 323 (1974); *Rosenbloom v. Metromedia Inc.*, 403 U.S. 29 (1971); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Rosenblatt v. Baer*, 383 U.S. 75 (1966). In *Gertz v. Robert Welch, Inc.*, the Court offered a general definition of "public figures":

For the most part, those who attain this status [of public figure] have assumed

[99 S.Ct. 2688] roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

418 U.S. at 345.

It is not contended that Hutchinson attained such prominence that he is a public figure for all purposes. Instead, respondents have argued that the District Court and the Court of Appeals were correct in holding that Hutchinson is a public figure for the limited purpose of comment on his receipt of federal funds for research projects. That conclusion was based upon two factors: first, Hutchinson's successful application for federal funds and the reports in local newspapers of the federal grants; second, Hutchinson's access to the media, as demonstrated by the fact that some newspapers and wire services reported his response to the announcement of the Golden Fleece Award. Neither of those factors demonstrates

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that Hutchinson was a public figure prior to the controversy engendered by the Golden Fleece Award; his access, such as it was, came after the alleged libel.

On this record, Hutchinson's activities and public profile are much like those of countless members of his profession. His published writings reach a relatively small category of professionals concerned with research in human behavior. To the extent the subject of his published writings became a matter of controversy, it was a consequence of the Golden Fleece Award. Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure. See *Wolston v. Reader's Digest Assn., Inc.*, post at 167-168.

Hutchinson did not thrust himself or his views into public controversy to influence others. Respondents have not identified such a particular controversy; at most, they point to concern about general public expenditures. But that

concern is shared by most, and relates to most public expenditures; it is not sufficient to make Hutchinson a public figure. If it were, everyone who received or benefited from the myriad public grants for research could be classified as a public figure -- a conclusion that our previous opinions have rejected. The

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.

Time, Inc. v. Firestone, supra, at 456.

Moreover, Hutchinson at no time assumed any role of public prominence in the broad question of concern about expenditures. Neither his applications for federal grants nor his publications in professional journals can be said to have invited that degree of public attention and comment on his receipt of federal grants essential to meet the public figure level. The petitioner in *Gertz v. Robert Welch, Inc.*, had published books and articles on legal issues; he had been

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active in local community affairs. Nevertheless, the Court concluded that his activities did not make him a public figure.

Finally, we cannot agree that Hutchinson had such access to the media that he should be classified as a public figure. Hutchinson's access was limited to responding to the announcement of the Golden Fleece Award. He did not have the regular and continuing access to the media that is one of the accouterments of having become a public figure.

We therefore reverse the judgment of the Court of Appeals and remand the case to the Court of Appeals for further proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE STEWART joins in all but footnote 10 of the Court's opinion. He cannot agree that the question whether a communication by a Congressman or a member

[99 S.Ct. 2689] of his staff with a federal agency is entitled to Speech or Debate Clause immunity depends upon whether the communication is defamatory. Because telephone calls to federal agency officials are a routine and essential part of the congressional oversight function, he believes such activity is protected by the Speech or Debate Clause.

BRENNAN, J., dissenting

MR. JUSTICE BRENNAN, dissenting.

I disagree with the Court's conclusion that Senator Proxmire's newsletters and press releases fall outside the protection of the speech or debate immunity. In my view, public criticism by legislators of unnecessary governmental expenditures, whatever its form, is a legislative act shielded by the Speech or Debate Clause. I would affirm the judgment below for the reasons expressed in my dissent in *Gravel v. United States*, 408 U.S. 606, 648 (1972).

Notes:

[1] There is disagreement over the actual total. The speech said the total was "over \$500,000." In preparation for trial, both sides have offered higher estimates of the total amount.

[2] Reports of Hutchinson's research were published in scientific journals. The research is not unlike the studies of primates reported in less technical periodicals such as the *National Geographic*. E.g. Fossey, *More Years with Mountain Gorillas*, 140 *National Geographic* 574 (1971); Galdikassrindamour, *Orangutans, Indonesia's "People of the Forest"*, 148 *National Geographic* 444 (1975); Goodall, *Life and Death at Gombe*, 155 *National Geographic* 592 (1979); Goodall, *My Life Among Wild Chimpanzees*, 124 *National Geographic* 272 (1963); Strum, *Life With the "Pumphouse Gang": New Insights into Baboon Behavior*, 147 *National Geographic* 672 (1975).

[3] Proxmire is not certain that he actually delivered the speech on the Senate floor. He said that he might have merely inserted it into the *Congressional Record*. App. 220-221. In light of that uncertainty, the question arises whether a nondelivered speech printed in the *Congressional Record* is covered by the Speech or Debate Clause. This Court has never passed on that question, and neither the District Court nor the Court of Appeals seemed to think it was important. Nevertheless, we assume, without deciding, that a speech printed in the *Congressional Record* carries immunity under the Speech or Debate Clause as though delivered on the floor.

[4] The parties agree that Proxmire referred to research like Hutchinson's on at least one television show. They do not agree whether there were other appearances on either radio or television. Hutchinson has suggested that there were others, and has produced affidavits to support his suggestion. Proxmire cannot recall any others.

[5] Senate Resolution 543, 94th Cong., 2d Sess. (1976), authorized respondents and an additional member of Proxmire's staff to give deposition testimony. 122 *Cong. Rec.* 29876 (1976).

[6] On April 13, 1976, Hutchinson had written to Proxmire requesting that he retract certain erroneous statements made in the 1975 press release.

[7] Of course, in light of Proxmire's uncertainty, see n. 3, supra, there is no assurance that there even was speech on the Senate floor.

[8] The District Court also concluded that Hutchinson was a "public official." 431 F.Supp. at 1327-1328. The Court of Appeals did not decide whether that conclusion was correct. 579 F.2d 1027, 1035 n. 14 (CA7 1978). We therefore express no opinion on the issue. The Court has not provided precise boundaries for the category of "public official"; it cannot be thought to include all public employees, however.

[9] Considering the nuances of the issues raised here, we are constrained to express some doubt about the so-called "rule." The proof of "actual malice" calls a defendant's state of mind into question, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and does not readily lend itself to summary disposition. See 10 C. Wright & A. Miller, *Federal Practice and Procedure* § 2730, pp. 590-592 (1973). Cf. *Herbert v. Lando*, 441 U.S. 153 (1979). In the present posture of the case, however, the propriety of dealing with such complex issues by summary judgment is not before us.

[10] Respondents did not cross-petition; neither did they argue that the Speech or Debate Clause protected the followup telephone calls made by Schwartz to governmental agencies or the television and radio interviews of Proxmire. Instead, respondents relied only upon the protection afforded by the First Amendment. In light of our conclusion, infra, that Hutchinson is not a public figure, respondents would nevertheless be entitled to raise the Speech or Debate Clause as an alternative ground for supporting the judgment. From our conclusion, infra, that the Speech or Debate Clause does not protect the republication of libelous remarks, it follows that libelous remarks in the followup telephone calls to executive agencies and in the television and radio interviews are not protected. Regardless of whether and to what extent the Speech or Debate Clause may protect calls to federal agencies seeking information, it does not protect attempts to influence the conduct of executive agencies or libelous comments made during the conversations. Cf. *United States v. Johnson*, 383 U.S. 169, 172 (1966); *United States v. Brewster*, 408 U.S. 501, 512-513 (1972).

[11] Petitioner has not sought review of this conclusion; we express no opinion as to its correctness.

[12] But see T. Jefferson, *A Manual of Parliamentary Practice* 15-16 (1854), reprinted in *The Complete Jefferson* 702 (S. Padover ed.1943) (quoting Blackstone with

approval).

[13] Story acknowledged the arguments to the contrary:

It is proper, however, to apprise the learned reader that it has been recently denied in congress by very distinguished lawyers that the privilege of speech and debate in congress does not extend to publication of his speech. And they ground themselves upon an important distinction arising from the actual differences between English and American legislation. In the former, the publication of the debates is not strictly lawful, except by license of the house. In the latter, it is a common right, exercised and supported by the direct encouragement of the body. This reasoning deserves a very attentive examination.

2 J. Story, *Commentaries on the Constitution* § 863, pp. 329-330 (1833).

At oral argument, counsel for respondents referred to a note in the fifth edition of the *Commentaries* saying that the Speech or Debate Clause protected the circulation to constituents of copies of speeches made in Congress. Tr. of Oral Arg. 43. In attributing the note to Story, counsel made an understandable mistake. As explained in the preface to the fifth edition, that note was added by the editor, Melville Bigelow. The note does not appear in Story's first edition. Moreover, it is clear from the text of the note and the sources cited that Bigelow did not mean that there was an absolute privilege for defamatory remarks contained in a speech mailed to constituents as there would be if the mailing was protected by the Speech or Debate Clause. Instead, he suggested that there was a qualified privilege, akin to that for accurate newspaper reports of legislative proceedings.

[14] It is worth noting that the Rules of the Senate forbid disparagement of other Members on the floor. Senate Rule XIX (Apr.1979). See also T. Jefferson, *A Manual of Parliamentary Practice* 40-41 (1854), reprinted in *The Complete Jefferson* 714-715 (S. Padover ed.1943).

[15] Provision for the use of the frank, 39 U.S.C. § 3210, does not alter our conclusion. Congress, by granting franking privileges, stationery allowances, and facilities to record speeches and statements for radio broadcast, cannot expand the scope of the Speech or Debate Clause to render immune all that emanates via such helpful facilities.

[16] Neither the District Court nor the Court of Appeals considered whether the *New York Times* standard can apply to an individual defendant, rather than to a media defendant. At oral argument, counsel for Hutchinson stated that he had not conceded that the *New York Times* standard applied. Tr. of Oral Arg. 18. This Court has never decided the question; our conclusion that Hutchinson is not a public

figure makes it unnecessary to do so in this case.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION 1

LANE ELLEN TOLLEFSEN, a Washington
resident,

Appellant,

v.

GREGORY L. JANTZ, *et al*,

Respondents.

Div. I Case No. 75117-4-I

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2016 I caused a true and correct copy of
Opening Brief of Appellant Lane Tollefsen to be served via hand delivery on the
following:

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Signed this 11th day of July, 2016, under penalty of perjury under the laws of the
State of Washington, in Lynnwood, Washington.

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