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Libel: Common Law Elements

Libel law is designed to protect individuals' interest in their reputation, permitting aggrieved parties to sue those who make false and defamatory statements of fact about them. Generally, plaintiffs must prove four things to prevail:

- **Identification** (that the utterances in question are about the plaintiff)
- **Publication** (that at least one third party has heard or read the charges)
- **Defamation** (that the utterance would tend to damage reputation)
- **Fault** (that the speaker or publisher was guilty, minimally, of negligence in disseminating the charges)

The court cases in this chapter were selected because they exemplify key principles of common law applied to libel, long before the Supreme Court ever suggested that the First Amendment itself places important limitations on the use of libel suits to squelch political debate.

In *Greenbelt Cooperative Publishing Association v. Bresler*, the Supreme Court says that language is complex, and that utterances that seem to make false factual allegations may instead be expressions only of the speaker's opinion. What does it mean, the Court had to decide, to call someone a "blackmailer"? The answer, as you will see, is that "it depends . . . upon the context." Although the case was decided a few years after the Court had applied constitutional limitations to libel law, its holding is not dependent on First Amendment doctrine.

Next comes *Nichols v. Moore*, a case right out of the headlines, in which the brother of one of the Oklahoma City bombing conspirators sued film director Michael Moore, whose *Bowling for Columbine*, he alleges, suggests that he, too, was criminally involved. You can view the relevant scenes from the film on my website, www.paulsiegelcommlaw.com.

Sexual orientation is the issue in *Amrak Productions v. Morton*, a case involving rock star Madonna, and a photo whose caption introduced some confusion into who is who in her entourage. (The relevant photo that led to the suit is also on my website.)

Stanton v. Metro Corporation serves as a cautionary tale, reminding us that we might be guilty of libeling another even if we never mention her by name. The court here tells us that we must consider the visuals as well as the text, and even take into consideration the likelihood that reasonable readers will actually see an article's disclaimers, which, if read, would make clear that there is no defamation. The case involves an illustrated *Boston* magazine article about very sexually active teens. (Again, you can visit my website to see the article.)

Next we look at a case involving Kato Kaelin, who achieved fame of sorts by dint of his status as O. J. Simpson's houseguest at the time of Simpson's murder trial (*Kaelin v. Globe Communications Corporation*). Kaelin's suit against a tabloid newspaper emphasizes that a misleading headline can be defamatory even if the article it introduces is not. (The tabloid cover is also available on my website.)

Finally we examine *Diaz v. NBC*, a fascinating case involving the film *American Gangster* and the difficulty in establishing the libel element of identification when dealing with works that, although based on true events, are somewhat fictionalized.

▪ *Greenbelt Cooperative Publishing Association v. Bresler*

398 U.S. 6 (1970)
Justice Stewart:

The petitioners are the publishers of a small weekly newspaper, the *Greenbelt News Review*, in the city of Greenbelt, Maryland. The respondent Bresler is a prominent local real estate developer and builder in Greenbelt, and was, during the period in question, a member of the Maryland House of Delegates from a neighboring district. In the autumn of 1965 Bresler was engaged in negotiations with the Greenbelt City Council to obtain certain zoning variances that would allow the construction of high-density housing on land owned by him. At the same time the city was attempting to acquire another tract of land owned by Bresler for the construction of a new high school. Extensive litigation concerning compensation for the school site seemed imminent, unless there should be an agreement on its price between Bresler and the city authorities, and the concurrent negotiations obviously provided both parties considerable bargaining leverage.

These joint negotiations evoked substantial local controversy, and several tumultuous city council meetings were held at which many members of the community freely expressed their views. The meetings were reported at length in the news columns of the *Greenbelt News Review*. Two news articles in consecutive weekly editions of the paper stated that at the public meetings some people had characterized Bresler's negotiating position as "blackmail." The word appeared several times, both with and without quotation marks, and was used once as a subheading within a news story.

Bresler reacted to these news articles by filing the present lawsuit for libel, seeking both compensatory and punitive damages. The primary thrust of his complaint was that the articles, individually and along with other items published in the petitioners' newspaper, imputed to him the crime of blackmail. The case went to trial, and the jury awarded Bresler $5,000 in compensatory damages and $12,500 in punitive damages. The Maryland Court of Appeals affirmed the judgment.

It is not disputed that the articles published in the petitioners' newspaper were accurate and truthful reports of what had been said at the public hearings before the city council. The contention is, rather, that the speakers at the meeting, in using the word "blackmail," and the petitioners in reporting the use of that word in the newspaper articles, were charging Bresler with the crime of blackmail, and that since the petitioners knew that Bresler had committed no such crime, they could be held liable for the knowing use of falsehood. It was upon this theory that the case was submitted to the jury, and upon this theory that the judgment was affirmed by the Maryland Court of Appeals. For the reasons that follow, we hold that the word "blackmail" in these circumstances was not slander when spoken, and not libel when reported in the *Greenbelt News Review*.

There can be no question that the public debates at the sessions of the city council regarding Bresler's negotiations with the city were a subject of substantial concern to all who lived in the community. The debates themselves were heated, as debates about controversial issues usually are. During the course of the arguments Bresler's opponents characterized the position he had taken in his negotiations with the city officials as "blackmail." The *Greenbelt News Review* was performing its wholly legitimate function as a community newspaper when it published full reports of these public debates in its news columns. If the reports had been truncated or distorted in such a way as to extract the word "blackmail" from the context in which it was used at the public meet-

ings, this would be a different case. But the reports were accurate and full. Their headlines, "School Site Stirs Up Council—Rezoning Deal Offer Debated" and "Council Rejects By 4-1 High School Site Deal," made it clear to all readers that the paper was reporting the public debates on the pending land negotiations. Bresler's proposal was accurately and fully described in each article, along with the accurate statement that some people at the meetings had referred to the proposal as blackmail, and others had indicated they thought Bresler's position not unreasonable.

It is simply impossible to believe that a reader who reached the word "blackmail" in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable. Indeed, the record is completely devoid of evidence that anyone in the city of Greenbelt or anywhere else thought Bresler had been charged with a crime.

To permit the infliction of financial liability upon the petitioners for publishing these two news articles would subvert the most fundamental meaning of a free press. Accordingly, we reverse the judgment and remand the case to the Court of Appeals of Maryland for further proceedings not inconsistent with this opinion.

POINTS FOR DISCUSSION

1. Does Justice Stewart's analysis suggest that readers will always "get the joke" when newspapers engage in exaggeration, irony, or "rhetorical hyperbole"? How would such an assumption square with the many times that news outlets have felt the need to apologize to individuals or to whole groups who have felt maligned by a *failed* attempt at humor?
2. The *Greenbelt News Review* escaped liability because the larger context made clear that it was not really accusing Bresler of criminal activity. What should happen in situations where the allegedly libelous words are vague on their face, but highly inflammatory if a larger context is known? For example, suppose that a state governor is accused in the press of having fashioned a "final solution" for prison unrest. If the governor sues for libel, could the media plausibly claim that very few of its readers know enough about contemporary history to recognize the phrase as a reference to the Nazis' program of genocide, and that "final solution" could refer innocently to a solution that would not have to be revisited?

▪ *Nichols v. Moore*

477 F.3d 396 (6th Cir. 2007)

Judge Guy:

In 2002, documentary film producer Michael Moore released the movie *Bowling for Columbine*, which explored the topic of gun violence in America. As part of the movie, Moore interviewed James Nichols, the brother of convicted Oklahoma City bomber Terry Nichols and acquaintance of convicted Oklahoma City bomber Timothy McVeigh. Moore edited the three-hour interview with James Nichols and included ten minutes of this interview in the movie. Related to this interview, Moore also included a brief narration regarding the Oklahoma City bombing. James Nichols asserts that this narration was defamatory.[1]

Nichols asserts that the narration defamed him because it falsely stated that he made practice bombs before Oklahoma City and because the narration falsely implied that he was arrested and charged in connection to the Oklahoma City bombing. In contrast to Moore's narration, Nichols asserts that he did not make practice bombs and that he was never arrested or charged with a criminal offense in connection to the Oklahoma City bombing. Instead, Nichols asserts that, shortly after the Oklahoma City bombing, he was charged with an explosives offense which was not related to the Oklahoma City bombing and which was ultimately dismissed.

In October 2003, Nichols filed the present action in the Eastern District of Michigan against defendant Michael Moore; the district court granted summary judgment for defendant Michael Moore and entered a final judgment in Moore's favor. Nichols now appeals the district court's summary judgment ruling to this court.

In support of his summary judgment motion, defendant Michael Moore [asserted] that the statements regarding James Nichols in *Bowling for Columbine* were substantially true.

1. The relevant scenes are on my website, www.paulsiegelcommlaw.com. On the left side (*Communication Law in America*), click on "Video Clips," then "Chapter 3," then on "Bowling for Columbine."

1. *McVeigh and the Nichols brothers made practice bombs before Oklahoma City.*

Plaintiff James Nichols first argues that the district court did not draw all reasonable inferences in his favor in concluding that the "made practice bombs" statement was substantially true. Nichols asserts that the district court failed to accept as true his under-oath statements asserting that he had never experimented with explosive devices and that the only explosive device he ever made was a small pill-vial bomb made out of black powder to loosen soybeans lodged in his grain bin. Plaintiff misconstrues the appropriate legal standard.

In libel cases such as the present one, it is the plaintiff's burden to prove falsity. [Under Michigan law], "damages shall not be awarded in a libel action for the publication or broadcast of a fair and true report of matters of public record, a public and official proceeding, or of a governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body, or for a heading of the report which is a fair and true headnote of the report."

In its opinion, the district court reasoned that there was sufficient evidence in the public record to justify Moore's "made practice bombs" statement. The district court relied on an affidavit provided by FBI Agent Patrick W. Wease: "James Nichols further stated that he participated with McVeigh and Terry Nichols in making 'bottle bombs' in 1992, and that in 1994, he, James Nichols, has made small explosive devices using prescription vials, pyrodex, blasting caps, and safety fuse."

The district court next noted that the amended criminal complaint also referenced several sources which described plaintiff making bombs. Additionally, the district court referred to an order of detention pending trial that was entered by the magistrate against plaintiff, which found that there was clear and convincing evidence that plaintiff had experimented with explosive materials.

Nichols also argues that the second half of the "made practice bombs" statement is defamatory because there was no evidence that any practice bombs were made *in preparation for Oklahoma City*. Moore's statement merely stated, however, that "McVeigh and the Nichols brothers made practice bombs *before* Oklahoma City." There is no dispute that any practice bombs made on Nichols's property were made "before Oklahoma City." Accordingly, we agree with the district court's finding that the entire "made practice bombs before Oklahoma City" statement is substantially true.

2. *Terry and James were both arrested in connection to the bombing.*

The district court viewed the "arrested in connection to the bombing" statement as troubling because Nichols is correct in asserting that he was never arrested or charged for having committed any criminal act directly related to

the Oklahoma City bombing. Nichols is also correct in asserting that Michael Moore knew this fact to be true when he published *Bowling for Columbine.* Despite the troubling nature of Moore's statement, we nevertheless agree with the district court's finding that Moore's "arrested in connection to the bombing" statement is substantially true.

Though Nichols was neither charged nor arrested regarding the Oklahoma City bombing, we believe that Nichols's arrest was sufficiently in connection to the bombing for Moore's statement to be considered "substantially true." Nichols was arrested only days after the bombing and his arrest was brought about by the FBI's investigation into Timothy McVeigh's and Terry Nichols's roles in the bombing. Additionally, Nichols was held as a material witness in connection to the Oklahoma City bombing, and Nichols himself admitted that he did not know whether this constituted an arrest in connection to the bombing.

3. *Officials charged James, who was at the hearing, and Terry, who was not, with conspiring to make and possess small bombs.*

Nichols next argues that the district court erred in finding that the "officials charged James with conspiring to make and possess small bombs" statement was substantially true. We agree with the district court's finding. In the 1995 criminal prosecution of plaintiff, the federal grand jury indictment charged plaintiff with "Conspiracy to Possess Unregistered Firearms." The indictment alleged that "the co-conspirators would manufacture destructive devices on Nichols' farm in Decker, Michigan." The "overt acts" section asserted: "In approximately 1992, James Nichols, Terry Nichols and Timothy McVeigh experimented in the manufacture and detonation of destructive devices made up of readily available materials such as brake fluid and diesel fluid."

Based on the allegations of the indictment against James Nichols, we find that Moore's statement is substantially true.

4. *But the feds didn't have the goods on James, so the charges were dropped.*

We agree with the district court's finding that this statement is "literally and substantially true." It is undisputed that the charges against James Nichols *were* dropped due to a lack of evidence against him.

Lastly, we consider whether the district court correctly rejected plaintiff's defamation by implication claim. By this claim, Nichols argues that even if Moore's statements were literally true when read in isolation, when viewed in their entirety and in proper context, they defamed plaintiff by implying that he was involved in the Oklahoma City bombing. Under Michigan law, claims

of defamation by implication, which by nature present ambiguous evidence with respect to falsity, face a severe constitutional hurdle. [As Michigan] Chief Justice Cavanaugh [has written], "a defamation defendant cannot be held liable for the reader's possible inferences, speculations, or conclusions, where the defendant has not made or directly implied any provably false factual assertion, and has not, by selective omission of crucial relevant facts, misleadingly conveyed any false factual implication."

In the present case, each sentence of Moore's narration regarding James Nichols in *Bowling for Columbine* is substantially true. Though it is possible that a viewer of the movie could erroneously conclude that James Nichols made practice bombs in preparation for Oklahoma City, and was arrested and charged in the Oklahoma City bombing, the court finds that plaintiff's evidence cannot meet the high hurdle presented by a defamation by implication claim. Plaintiff has not presented any evidence indicating that Michael Moore intended to falsely implicate James Nichols in the Oklahoma City bombing. Plaintiff's claim for defamation by implication must fail.

POINTS FOR DISCUSSION

1. Moore clearly characterized Nichols's pre-Oklahoma City bomb making as "practice." Practice for what? Is not the most natural interpretation of Moore's narration that Nichols was practicing for the deadly bombing of the federal building?
2. In a similar vein, do you think the court was straining a bit in its interpretation of the assertion that Nichols had been arrested "in connection to" the bombing? Was not again the most natural interpretation that Nichols might have been as culpable as his brother and McVeigh?

▪ *Amrak Productions v. Morton*

410 F.3d 69 (1st Cir. 2005)
Judge Torruella:

James Albright, a former bodyguard and lover of Madonna, and his corporate agent, Amrak Productions, Inc. appeal from the dismissal of their defamation claim stemming from the publication of a tell-all book, *Madonna*. In a nutshell, defendants-appellees author and publishers allegedly portrayed Albright as a homosexual by miscaptioning a picture of a homosexual individual with

Albright's name in a book and magazines.[2] The district court dismissed appellants' claims, finding that for the "photograph to make any kind of statement regarding Albright's sexuality requires the Court to pile inference upon innuendo, innuendo upon stereotype." The court also applied recent Federal and State Supreme Court decisions on homosexuality to hold that a statement identifying an individual as homosexual is not defamatory per se under Massachusetts law. Appellants argue otherwise, stating that continued societal and governmental acceptance of various forms of discrimination against homosexuals should lead to a presumption of injury. We affirm the dismissals, albeit on more limited grounds than the district court's holding.

Amrak employed Albright—who has been involved in the personal and professional security business for over ten years—as a professional bodyguard. From January to July 1992, Albright served as Madonna's bodyguard, during which time he became romantically involved with the artist and remained so until 1994. In December 2000, Albright entered into a contract with O'Mara Books to sell information about Madonna for an upcoming biography. The book, entitled *Madonna*, was written by author Andrew Morton and published by O'Mara Books in the United Kingdom and by St. Martin's Press in the United States in 2001. Chapter 11 of the book details Albright's relationship with Madonna.

The book also contains forty-eight pages of photographs, including one in which Madonna is accompanied by two men. The man to the left is wearing black pants, a black and white shirt, a black leather jacket, tinted sunglasses, a string necklace, and an earring. The caption states:

> Madonna attends ex-lover Prince's concert with her secret lover and one-time bodyguard Jimmy Albright (left). Albright, who bears an uncanny resemblance to Carlos Leon, the father of Madonna's daughter, enjoyed a stormy three-year relationship with the star. They planned to marry, and had even chosen names for their children.

This photograph allegedly defamed Albright because the man pictured was, in fact, Jose Guitierez, an "outspoken homosexual" who "often dressed as a woman," and engaged in what appellants describe as "homosexual, sexually graphic, lewd, lascivious, offensive, and possibly illegal" conduct. Guitierez was employed as one of Madonna's dancers.

2. The photo can be seen at www.paulsiegelcommlaw.com, if you click on the left side (*Communication Law in America*) on "Images from Book," then "Chapter 3," then "Madonna."

On November 12, 2001, *People* magazine, a publication of Time Inc., published the same photograph along with the erroneous caption. *News of the World*, a publication of News Group Newspapers, Ltd., published the same on March 17, 2002.

Appellants subsequently brought suit in the District of Massachusetts. On May 28, 2004, the district court granted appellees' motion to dismiss on all counts. First, the court held that no reasonable view of the photograph and text would suggest that Albright is homosexual, and thus the publication cannot be construed as defamatory. Alternatively, the court held that imputing homosexuality cannot be considered defamatory per se in Massachusetts. Given appellants' failure to state a defamation claim, the court dismissed the derivative claims of commercial use, false light invasion of privacy, emotional distress, negligence, and unfair trade practices. This appeal follows.

Appellants first argue that they have met the pleading requirements necessary to survive a motion to dismiss a defamation claim. We disagree. To prevail in a defamation claim, plaintiffs must establish that defendants were at fault for the publication of a false statement regarding the plaintiff, capable of damaging the plaintiff's reputation in the community, which either caused economic loss or is actionable without proof of economic loss. A court may dismiss written defamation claims, i.e., libel claims, if the communication is incapable of a defamatory meaning. This threshold question, whether a communication is reasonably susceptible of a defamatory meaning, is a question of law for the court.

A communication is susceptible to defamatory meaning if it would tend to hold the plaintiff up to scorn, hatred, ridicule or contempt in the minds of any considerable and respectable segment in the community. The communication must be interpreted reasonably, leading a "reasonable reader" to conclude that it conveyed a defamatory meaning. Context matters in assessing such claims: Courts must consider all the words used, not merely a particular phrase or sentence.

The miscaptioned photograph in the instant case is not reasonably susceptible of a defamatory meaning. Nothing in Guitierez's appearance, particularly given the accompanying caption stressing Albright's heterosexuality (e.g., Madonna's "secret lover"), gives any indication that Albright is homosexual. To draw such an inference, the reader—who would have to view homosexuals with "scorn, hatred, ridicule or contempt," must follow Madonna and her cohort closely enough to recognize Guitierez as a gay man, but not closely enough to know Guitierez's name or what Albright looks like. Few, if any, readers would fall into this "considerable and respectable segment in the community."

The context of the text accompanying the photograph further deflates any argument that the photo conveys a defamatory meaning. When we consider all the words used in the accompanying text—including phrases such as Albright's "long-time girlfriend," his "hot and heavy" affair with Madonna, their sexual encounters, and Albright's "fling" with a "girl at a club"—we find that no reasonable reader could conclude that Albright is homosexual. This conclusion is supported by the caption, which states that Albright was Madonna's "secret lover," that they "enjoyed a stormy three-year relationship," and that they planned to marry and "had even chosen names for their children."

Given appellants' failure to satisfy the threshold question of defamatory meaning, we affirm the court's dismissal of the defamation claim. Moreover, given the court's correct finding that the photograph and its caption make no imputation of homosexuality, we need not decide whether such an imputation constitutes defamation per se in Massachusetts.

The district court's judgments are affirmed.

POINTS FOR DISCUSSION

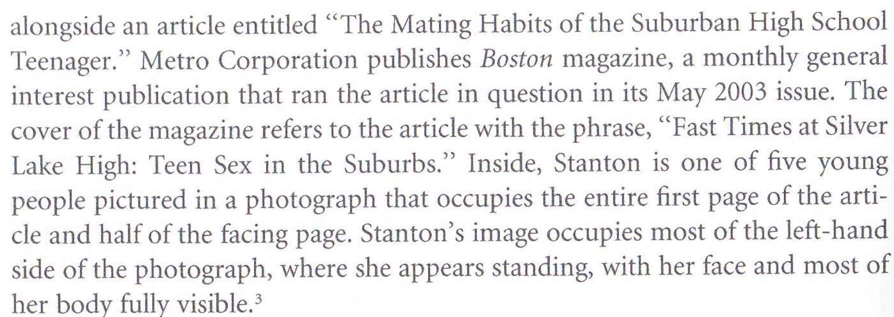
1. The court seems to assume that references to a person's heterosexual conduct (such as to a man's having been Madonna's secret lover, etc.) negate the possibility of that same person also engaging in homosexual behavior. Does bisexuality's being far more prevalent than a 100 percent homosexual orientation have any implications for the court's logic?
2. Unlike the district court, this appellate decision carefully sidesteps the question of whether it can ever be libelous to accuse someone of being gay. After all, the United States Supreme Court has said that sodomy laws are unconstitutional, and it is relevant, too, that the *Amrak* case was based on Massachusetts defamation law, and Massachusetts was, as of 2007, the only state in the union to recognize same-sex marriage (joined as of 2011 by Connecticut, Iowa, New Hampshire, and Vermont, as well as Washington, D.C.). Do you think, as a legal or logical matter or both, that being thought gay can diminish one's reputation in the eyes of large numbers of reasonable people?

▪ *Stanton v. Metro Corporation*

438 F.3d 119 (1st Cir. 2006)

Judge DiClerico:

Stacy Stanton has appealed the dismissal of her state-law defamation action against Metro Corp., which arises out of the publication of her photograph



alongside an article entitled "The Mating Habits of the Suburban High School Teenager." Metro Corporation publishes *Boston* magazine, a monthly general interest publication that ran the article in question in its May 2003 issue. The cover of the magazine refers to the article with the phrase, "Fast Times at Silver Lake High: Teen Sex in the Suburbs." Inside, Stanton is one of five young people pictured in a photograph that occupies the entire first page of the article and half of the facing page. Stanton's image occupies most of the left-hand side of the photograph, where she appears standing, with her face and most of her body fully visible.[3]

The other half of the facing page consists of a column of text of varying sizes, including the aforementioned headline, which appears in the largest font and takes up most of the column. A "superhead," appearing above the headline in a smaller font, reads: "They hook up online. They hook up in real life. With prom season looming, meet your kids—they might know more about sex than you do." Just above the byline, and just below the main article text, the following [disclaimer] appears in italicized type: "The photos on these pages are from an award-winning five-year project on teen sexuality taken by photojournalist Dan Habib. The individuals pictured are unrelated to the people or events described in this story. The names of the teenagers interviewed for this story have been changed." These words are rendered in the smallest font on the page.

The thrust of the story is that teenagers in the greater Boston area have become more sexually promiscuous over the span of the last decade. The article draws support for this thesis from both statistical and anecdotal evidence, including interviews with a number of local high school students. The story also declares that high school has replaced college as the time for sexual experimentation, describes a profound ignorance among teens about sexually transmitted diseases, and notes a related trend of increased sexual aggression among high school boys.

Stanton, who lives in Manchester, New Hampshire, responded to the appearance of her photograph with the article by filing suit against Metro, alleging that the publication was defamatory in that the juxtaposition of her photograph and the text describing suburban teenage promiscuity insinuated that she was engaged in the activity described in the article.

To succeed on a defamation claim under Massachusetts law, a plaintiff must show that the defendant was at fault for the publication of a false statement of

3. The most salient visual features from the article are on my website. Go to www.paulsiegelcommlaw.com, then, on the left side (*Communication Law in America*), click on "Images from the Book," then on "Chapter 3," and then on "Boston Magazine."

and concerning the plaintiff which was capable of damaging his or her reputation in the community and which either caused economic loss or is actionable without proof of economic loss.

The district court [granted the defendant's motion to dismiss], ruling that "the defamatory statements at issue are not 'of and concerning' [Stanton], and are not reasonably capable of a defamatory meaning." In reaching these conclusions, the district court relied heavily on the disclaimer appearing at the bottom of the first column of the article, i.e., "the individuals pictured are unrelated to the people or events described in this story."

We are not called upon to determine the ultimate issue of whether the article is defamatory, but to answer the threshold question of whether the communication is reasonably susceptible of a defamatory meaning. If the answer to this question is yes, then the ultimate issue of whether the article is defamatory is not the court's to decide. Where the communication is susceptible of both a defamatory and nondefamatory meaning, a question of fact exists for the jury.

The district court reasoned that, since the disclaimer *directly* contradicts the otherwise-defamatory connection between the photograph and the text, the article could be susceptible to a defamatory meaning only if a reasonable reader would overlook the disclaimer, misunderstand it, or fail to give it credence. According to the district court, no reasonable reader could do so because the disclaimer appears on the first page of the article and "certainly, the *reasonable* (or average) reader can be expected to read at least the first page of a six-page article." It was here that the district court erred.

We cannot assume, as the district court did, that placing a disclaimer on the first page of an article itself ensures that a reasonable reader will see it. Here, the disclaimer occupies the field between the body of the story and the byline, making it easy enough to overlook between the larger fonts of both. The disclaimer is also separated from the column of text by a horizontal line, accompanied by an arrow directing the reader to turn to the next page, where the story continues. We cannot say that no reasonable reader would follow this visual signal and simply flip to the next page after reading the entirety of the text on the first page, but before reaching the disclaimer.

Nor can we say that any reasonable reader who notices the disclaimer would necessarily read the crucial second sentence, i.e., "the individuals pictured are unrelated to the people or events described in this story." It is at least conceivable that a reader might take the first sentence of the disclaimer, which states that "the photos on these pages are from an award-winning five-year project on teen sexuality by photojournalist Dan Habib," as a satisfactory explanation of the photographs and therefore stop reading the disclaimer before the second

sentence. Such a reader would thus remain under the impression that the teenagers depicted in the photograph have some connection to the accompanying story.

The district court appears to have reasoned that the percentage of casual readers who would disregard the disclaimer was not sizeable enough to represent what it called "the *reasonable* (or average) reader." But words may be actionable even if they do not tend to damage a plaintiff's reputation or hold him up to ridicule in the community at large or among all reasonable people; it is enough to do so among a considerable and respectable class of people.

Accordingly, in assessing whether a publication is susceptible to a defamatory meaning, it is not dispositive that a numerical majority of its audience would arrive at a non-defamatory interpretation. Metro rejoins that, given the "express disclaimer," any reading of the article as defamatory toward Stanton is necessarily incorrect, so "it does not matter whether a considerable number of people might unreasonably misunderstand the publication in such a way." But determining whether an allegedly defamatory statement can reasonably bear that construction as a matter of law should not be confused with a search for its meaning in the objective sense.

In deciding whether a statement is susceptible to a defamatory interpretation, the court must gauge the reasonableness of the interpretation based on what a considerable and respectable segment of the community would make of the statement.

Here, we cannot say as a matter of law that too few readers would overlook the disclaimer to constitute a considerable and respectable segment of the community. The article is thus reasonably susceptible to a defamatory meaning.

In reaching this conclusion, we do not mean to suggest that language in the nature of a disclaimer can never serve to render a statement incapable of conveying a defamatory meaning. We simply recognize that, given the placement of the disclaimer in the article and the nature of the publication in general, a reasonable reader could fail to notice it.

We also recognize that, as Metro argues, the article draws no literal connection between the subjects of the photograph and the subjects of its story. Under Massachusetts law, however, a statement need not explicitly refer to the plaintiff to constitute defamation. A plaintiff may establish that the defendant's words were of and concerning the plaintiff by proving at least that the defendant was negligent in publishing words which reasonably could be interpreted to refer to the plaintiff.

Defamation can arise from the publication of the plaintiff's photograph in

conjunction with a defamatory statement, even in the absence of any express textual connection between the statement and the photograph.

Like the question of whether a communication can reasonably be understood to be defamatory, whether a communication can reasonably be understood to be of and concerning the plaintiff depends on the circumstances. The presence of the disclaimer does not permit the conclusion, as a matter of law, that the article is not of and concerning Stanton.

As we have explained, a reasonable reader could ignore the disclaimer, leaving the article with the impression—incorrect, but not unreasonable—that Stanton is the subject of the unflattering statements set forth in its text. [Such a reader might wonder], "Why was *this* photograph used to illustrate *this* article about sexual misconduct, if there is no connection between the two?" Once again, we do not intimate that this interpretation is the only reasonable reading of the article. We say only that at this very preliminary stage, it does not appear beyond doubt that Stanton will be unable to prove a set of facts that would support a finding that Metro's statements were of and concerning her.

In a similar vein, Metro argues that the article makes no "articulably false statement" about Stanton and thus cannot support a defamation claim. [Admittedly], certain statements about a plaintiff, though pejorative, are too vague to be cognizable as the subject of a defamation action. [But] statements that are too vague to constitute defamation generally fall into the category of epithets, such as "communist," "barbarian," "lunkhead," "meathead," and "nut." Here, in contrast, Stanton has alleged that Metro defamed her by making a statement susceptible to the interpretation that she engages in sexually promiscuous behavior. That statement is clear enough to support a defamation claim.

Finally, Metro argues that Stanton's amended complaint should have been dismissed because she failed to "allege any facts that, if true, would demonstrate that Metro acted with negligent disregard for the truth by juxtaposing the photograph and the article." We disagree.

If the recipient reasonably understood the communication to be made concerning the plaintiff, it may be inferred that the defamer was negligent in failing to realize that the communication would be so understood, provided the plaintiff can prove that a reasonable understanding on the part of the recipient that the communication referred to the plaintiff was one that the defamer was negligent in failing to anticipate.

Stanton's allegations sufficiently state a defamation claim based on the theory that Metro negligently used [her] photograph to illustrate a story describing teenagers as sexually promiscuous without realizing that the publication

might therefore be reasonably understood to mean that she was sexually promiscuous.

A [libel] complaint should not be dismissed unless it is apparent beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.

Based on our review of the amended complaint and the article in question, we conclude that this standard has not been met. We reverse the order of the district court insofar as it dismissed Stanton's defamation claim arising out of the juxtaposition of her photograph and the text of the article.

POINTS FOR DISCUSSION

1. Here we have a case in which the plaintiff was not named in the article, and the printed disclaimer makes clear to anyone who bothers to read it that the photos in the article are not related to the debauchery described in the text. What more should the magazine have done? How important was the fact that the disclaimer was printed in the smallest font anywhere in the article?
2. Does the appellate court's assessment of what a "reasonable" reader may or may not do make sense to you? Do you believe that readers who do take note of the disclaimer's first sentence are unlikely to also read its second sentence?

■ *Kaelin v. Globe Communications Corporation*

162 F.3d 1036 (9th Cir. 1998)

Judge Silverman:

Brian "Kato" Kaelin became known to the public during the course of the criminal trial of O.J. Simpson as the houseguest at Simpson's estate. Kaelin testified to various events surrounding the killings of Nicole Brown Simpson and Ronald Goldman. Simpson was acquitted of the double murders on October 3, 1995. One week later, the *National Examiner*, a weekly newspaper published by Globe Communications Corporation, featured the following headline on its cover:[4]

4. The cover, including headline and photo, is on my website. Go to www.paulsiegelcommlaw.com, then, on the left side (*Communication Law in America*), click on "Images from Book," then "Chapter 3," and finally on "Kato Kaelin."

COPS THINK KATO DID IT!

He fears they want him for perjury, say pals

Inside the paper, on page 17, in large, boldface, capital letters, [an almost identical] headline appeared. The first four paragraphs of the article read as follows:

> Kato Kaelin is still a suspect in the murder of Nicole Brown Simpson and Ron Goldman, friends fear.
>
> They are worried that LAPD cops are desperately looking for a way to put Kato behind bars for perjury.
>
> "We're sure the cops have been trying to prove that Kato didn't tell them everything he knows, that somehow he spoiled their case against O.J.," says one pal. "It's not true, but we think they're out to get even with Kato.
>
> "I'm worried that Kato will get a persecution complex. He'll end up looking around every corner and thinking he sees a cop."

The remainder of the article contained other comments supposedly made by Kaelin's friends regarding the Simpson case. It also contained several references to a book about Kaelin by author Marc Eliot.

In a letter dated October 12, 1995, Kaelin demanded a retraction. Globe refused. Kaelin then filed this libel action against Globe in the Superior Court of California, and Globe removed it to federal court on the basis of diversity of citizenship.

During discovery, John Garton, the news editor of the *National Examiner* and Globe's designated representative, testified at deposition as follows:

> Q. Okay. Did you have any concerns when you saw this headline of September 22nd [the deadline for the article] about the way this headline was framed?
> A. I wasn't mad about it.
> Q. What do you mean by that?
> A. Journalistically I didn't think it was the best headline in the world.
> Q. Were you concerned that it implied that Kato had committed the murders or played some role in them?
> A. No, I just didn't think it was very accurate to the story. It could have been better.
>
> ■ ■ ■
>
> Q. Other than what is actually written in Exhibit 2 [prior published articles], any of the things that are in those articles, did the National Examiner have

in its possession on September 22nd, 1995 any information that a police officer anywhere thought that Kato Kaelin was involved in Nicole Brown Simpson's and Ronald Goldman's murders?

A. No.

Q. What did you think, on September 22nd, 1995 about what the words "Cops Think He Did It" meant? What is the "it" to which this statement—

A. Perjury.

Q. Perjury?

A. Mm-hmm.

Q. Did you have any concern that a reader might connect the "Cops Think He Did It" with the other information in the article that refers to allegations that Mr. Kaelin was involved in the murders themselves?

A. I was a bit concerned about it, yes, but in fact I thought the second part of the headline coped with that. . . .

Globe filed a motion for summary judgment. Focusing its analysis on the text of the article rather than on the headline, which was the heart of Kaelin's claim, the district court ruled that Kaelin ". . . has not submitted any evidence which tends to show that Defendants actually doubted the truth of the story . . ." With respect to the headline, the district court stated, "While Globe employees might not have acted with the professionalism that would be expected at a more reputable journalistic institution before running the article about Plaintiff, the failure to act reasonably is not enough to establish malice." [The District Court granted defendant's motion for summary judgment.]

We must decide, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law.

We must draw all justifiable inferences in favor of Kaelin, including questions of credibility and of the weight to be accorded particular evidence. 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.

Although Kaelin complains about the first sentence of the article on page 17, we assume for the purposes of this appeal that the text of the story is not defamatory. This case is about the headlines, especially the one appearing on the cover. The first issue is whether the headlines alone are susceptible of a false and defamatory meaning and, if so, whether they can be the basis of a libel action even though the accompanying story is not defamatory.

As already seen, the front page headline consists of two sentences. The first—"COPS THINK KATO DID IT!"—states what the cops supposedly think. The second—"He fears they want him for perjury, say pals"—is what

Kato's pals supposedly said. These two sentences express two different thoughts and are not mutually exclusive. California courts in libel cases have emphasized that the publication is to be measured, not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average reader. Since the publication occurred just one week after O.J. Simpson's highly publicized acquittal for murder, we believe that a reasonable person, at that time, might well have concluded that the "it" in the first sentence of the cover and internal headlines referred to the murders. Such a reading of the first sentence is not negated by or inconsistent with the second sentence as a matter of logic, grammar, or otherwise. In our view, an ordinary reader reasonably could have read the headline to mean that the cops think that Kato committed the murders and that Kato fears that he is wanted for perjury.

Globe argues that the "it" refers to perjury. Even assuming that such a reading is reasonably possible, it is not the only reading that is reasonably possible as a matter of law. So long as the publication is reasonably susceptible of a defamatory meaning, a factual question for the jury exists.

Globe argues that even if the front page headline could be found to be false and defamatory, the totality of the publication is not. Globe's position is that because the text of the accompanying story is not defamatory, the headline by itself cannot be the basis of a libel action under California law.

It is true that a defamatory meaning must be found, if at all, in a reading of the publication as a whole. This is a rule of reason. Defamation actions cannot be based on snippets taken out of context. By the same token, not every word of an allegedly defamatory publication has to be false and defamatory to sustain a libel action. The test of libel is not quantitative; a single sentence may be the basis for an action in libel even though buried in a much longer text.

Although California courts have not had occasion to opine on whether a headline alone can be the basis of a libel action, it is certainly clear under California law that headlines are not irrelevant, extraneous, or liability-free zones. They are essential elements of a publication. In *Selleck v. Globe International* (1985), for example, Globe published headlines, a caption to a photograph, and the text of an article, all of which created the false impression that the father of actor Tom Selleck had granted an interview to Globe. While not addressing whether any one element of the publication alone would support a libel claim, the court explained that "headlines and captions of an allegedly libelous article are regarded as a part of the article." The court concluded that "the article, including the headline and caption and taking into account the circumstances of its publication, is reasonably susceptible of a defamatory meaning on its face and therefore is libelous per se." In *Davis v. Hearst* (1911),

the Supreme Court of California concerned itself with three headlines that read as follows:

MAYOR INVESTIGATES THE BOARD OF EDUCATION'S ACTS
EXPOSURES MADE BY 'EXAMINER' FOUND TO BE TRUE
PASADENA COUNCIL WILL ACT

Although the article explained that the mayor's investigation covered only one matter, the court found that the text did not negate the effect of the headlines, which implied that the mayor had discovered more than one impropriety. It stated that "the mere fact that in the body of the article the mayor's investigations are limited to a single charge is not controlling. The captions and headlines are themselves a part of the libel."

Globe argues that the entirety of the publication, including the story itself, clears up any false and defamatory meaning that could be found on the cover. Whether it does or not is a question of fact for the jury. The Kaelin story was located 17 pages away from the cover. In this respect, the *National Examiner*'s front page headline is unlike a conventional headline that immediately precedes a newspaper story, and nowhere does the cover headline reference the internal page where readers could locate the article. A reasonable juror could conclude that the Kaelin article was too far removed from the cover headline to have the salutary effect that Globe claims. In analyzing the totality of the circumstances of an allegedly defamatory publication, the effect of a front page headline is neither insignificant nor unprecedented. In any event, it is a fact question for a jury.

Viewing the facts in the light most favorable to Kaelin as we are required to do, we hold that Kaelin has come forward with clear and convincing evidence to get to a jury on the issue of whether the headlines are susceptible of a false and defamatory meaning.

Globe editor John Garton testified at his deposition that he saw the headline before it ran and did not think that it "was very accurate to the story." He stated that he was "a bit concerned" that readers might connect the "it" in the headline with the murders. This is direct evidence from which a reasonable juror could find that Globe knew that the headline was factually inaccurate or that Globe acted with reckless disregard for the truth. It is for a jury to decide whether, as Globe argues, it intended to clarify the sentence "COPS THINK KATO DID IT!" with the sentence that followed, ". . . he fears they want him for perjury, say pals." The editors' statements of their subjective intention are matters of credibility for a jury.

It is [also] undisputed that Globe ran the headline "COPS THINK KATO DID IT!" knowing that it had no reason to believe that Kaelin was a murder suspect. This is not a case where Globe relied in good faith on information that turned out to be false. It is undisputed that Globe never believed Kaelin to be a suspect in the murders.

Garton testified at his deposition that "the front page of the tabloid paper is what we sell the paper on, not what's inside it." That testimony permits a reasonable juror to draw the inference that Globe had a pecuniary motive for running a headline that, in Garton's words, was not "very accurate to the story."

Because the issue at this stage of the case is only whether Kaelin has come forward with evidence adequate to survive summary judgment, we analyze the facts and draw the inferences in the light most favorable to him. We hold today that a reasonable juror could find, by clear and convincing evidence, that the headlines are defamatory, and that Globe's editors acted with actual malice[5] in their decision to run a headline from which a reasonable juror could conclude that Kaelin was a murder suspect. Globe's motion for summary judgment should have been denied.

POINTS FOR DISCUSSION

1. John Garton, one of the *National Examiner*'s editors, admitted at trial that the headline at issue here was not "the best in the world," and that it may not have been 100 percent accurate. Does the way in which his words were used against the newspaper suggest that editors should be very careful about ever expressing doubts about their work product?
2. The court here makes much of the fact that the non-defamatory explanation of the headline does not show up until page 17 of the newspaper. What if the explanation appeared on the front page, but the plaintiff produced experts to show that most of these tabloids' "readers" never see much of anything beyond the headlines, because they are only glancing at the papers while standing in line at the supermarket? Could such tabloids thus be less protected from libel suits than more "serious" newspapers, not because of the papers' contents, but because of the different ways that readers consume that content?

5. See the excerpts from *New York Times v. Sullivan*, beginning on page 72, for an explanation of "actual malice."

■ *Diaz v. NBC Universal, Inc.*

536 F. Supp. 2d 337 (S.D.N.Y. 2008)[6]
Judge McMahon:

The feature film *American Gangster* (the "Film"), which was produced by Universal Pictures (a division of Universal City Studios, LLP) is "based on" a true story involving a notorious heroin dealer, Frank Lucas. Lucas was a key figure in the New York City drug trade in the late 1960s and early 1970s. Eventually, Lucas joined "Team America" and cooperated in the prosecution of some high level drug dealers in New York City.

Plaintiffs Louis Diaz, Gregory Korniloff and Jack Toal have sued on behalf of themselves and as representatives of a class of "approximately 400 present and former Special Agents of the New York office of the United States Drug Enforcement Administration" (the "USDEA" or "DEA") who were employed at some time during the period from 1973 through 1985. The Complaint alleges that the three named plaintiffs and every New York City–based DEA agent during that 12-year period were defamed by an allegedly false legend that appears on screen at the end of the film. The legend says that Frank Lucas' "collaboration [with law enforcement] led to the conviction of three quarters of New York City's Drug Enforcement Agency." The statement about Lucas' cooperation leading to these convictions is not true. Nonetheless, the Complaint must be dismissed.

The Film depicts the life of Frank Lucas (played by Denzel Washington), an African American drug kingpin in New York City who was arrested in 1975 and subsequently convicted of drug trafficking. The film also includes a character identified as Richie Roberts (played by Russell Crowe), a law enforcement official in Essex County, New Jersey. As is common with motion pictures inspired by true events, the Film ends with a standard disclaimer noting that a number of the incidents are "fictionalized," and that "some of the characters have been composited or invented. . . ."

Throughout the film, there are references to corruption among some members of the local police forces in New York City and New Jersey. Several characters depict corrupt narcotics detectives employed by the New York City Police Department (NYPD)—including Josh Brolin, who plays a character identified as Detective Trupo of the NYPD's Special Investigations Narcotics Unit. At no point in the Film is any character identified as a DEA agent; neither is there any suggestion that any federal agent is corrupt.

6. The decision was later affirmed in a very terse opinion at 337 Fed. Appx. 94 (2nd Cir. 2009).

At one point in the film, law enforcement personnel search Lucas' home. During this scene, Lucas' wife is assaulted, his dog is shot in a vicious manner, and hundreds of thousands of dollars are stolen by corrupt law enforcement officials. The film does not identify the people who do these despicable things as DEA agents. The officer who steals the money, however, says that the Feds are going to arrive later and "take everything . . ."[7]

After the Lucas character has been arrested by Roberts and his team, the film ends with a series of vignettes that purport to show how everything worked out: Lucas meets with Roberts; photographs of the actors who portray corrupt New York City narcotics officers are tacked to a bulletin board; and those same New York City police officers are arrested (or, in the case of the Brolin character, commit suicide). Voiceovers accompanying these scenes include "news" reports describing the arrests and prosecution of local police officers by federal authorities. There follow shots with text at the bottom. One of those texts (the "legend") refers to Lucas' cooperation with authorities, and notes that Lucas' cooperation led to "the convictions of three quarters of New York City's Drug Enforcement Agency."

[In reality], Lucas cooperated with the United States Attorney's Office and the DEA and assisted in the apprehension and convictions of numerous other narcotics traffickers. Lucas' cooperation, however, did not lead to the conviction of a single agent of the New York City office of the USDEA or any member of the NYPD, or any other law enforcement official in New York or elsewhere. There was and is no federal, state or local agency called the "New York City Drug Enforcement Agency." The federal agency is and always has been the Drug Enforcement *Administration.* NYPD has at various times had special units devoted to narcotics (e.g., the Special Investigations Narcotics Unit), none of which was called the Drug Enforcement Agency.

A former Special Agent from the New York City office of the USDEA is currently stationed in Iraq and is a member of the putative plaintiff class. Approximately 20 soldiers stationed in Iraq who saw *American Gangster* questioned him about the legend. The soldiers all thought the legend referred to Special Agents of DEA, and they asked the former DEA agent how three quarters of the USDEA agents based in New York City could be convicted criminals. Although [he] told these soldiers that no such thing happened, he felt "deeply hurt and embarrassed by the questions, even though he knew the legend was false."

Some members of the putative plaintiff class are currently employed as pri-

7. You can see the relevant scene at www.paulsiegelcommlaw.com, by clicking on "Video Clips," then "Chapter 3," and then on "American Gangster."

vate investigators, and many members are currently employed in law enforcement agencies (including the USDEA) and security companies. Plaintiffs contend that the erroneous legend harms their reputation and damages them in their trade and profession.

On November 23, 2007, counsel for plaintiff Gregory Korniloff wrote to Universal Studios, owned by defendant, demanding that the allegedly false legend be removed from further distribution of *American Gangster.* On December 7, 2007, David L. Burg, Senior Vice President of NBC Universal, wrote to Mr. Korniloff's counsel, rejecting this demand.

Although the Complaint contains a lengthy description of the many items in the Film with which plaintiffs are dissatisfied, the Complaint identifies only one allegedly defamatory statement: the legend that appears for a few seconds at the end of the Film, stating that Lucas' cooperation with authorities after his arrest "led to the conviction of three quarters of New York City's Drug Enforcement Agency." Plaintiffs' libel claim is barred under constitutional and common law principles, because plaintiffs cannot demonstrate that the allegedly defamatory statement is "of and concerning" any particular person.

Under the group libel doctrine, when a reference is made to a large group of people, no individual within that group can fairly say that the statement is about him, nor can the "group" as a whole state a claim for defamation. The New York Courts have not set a particular group number above which defamation of a group member is not possible. However, [there is an] absence of any cases where individual members of groups larger than sixty have been permitted to go forward with a libel claim [in this jurisdiction]. [Here,] the putative class contains approximately four hundred former and current special agents of the USDEA. Plaintiffs concede that neither the legend, nor the movie more generally, ever specifically identifies any of the named plaintiffs, or any other putative class member, by name. Thus, under New York law, they would appear to be out of court. The same results pertain if the governing law is the law of California (where Universal produced the film) or Nevada or Florida (where two named plaintiffs reside), since the law in all four states is identical.

Nonetheless, plaintiffs allege that each of them can be identified by an average viewer because the film depicts as corrupt virtually the entire New York City narcotics law enforcement community. Therefore, plaintiffs argue that the legend need not reference the plaintiffs by name.

At a minimum, plaintiffs argue that the claims of the nine DEA agents who took part in the search of Lucas' home should be permitted to go forward, because (1) that subset of the entire group is small enough to fall within the exception to the group libel doctrine, and (2) the searching officers in the Film engage in particularly despicable conduct that never happened. To support

their position, plaintiffs argue that the article on which the Film is based, "Return of the Superfly," by Mark Jacobson, contains a contention by Lucas that Agent Korniloff and his DEA colleagues took nine or ten million dollars from him during this search. During the search scene in the film, a character portraying a corrupt NYPD officer tells Lucas' wife that the "Feds are going to come in and take everything, take it all, but not before I get my gratuity." (He then steals money.) Plaintiffs contend that these statements allegedly defame "the Feds" (i.e., the DEA), and so need not reference these plaintiffs by name, since an average viewer who was aware that DEA searched the house would view these DEA agents as having stolen nine or ten million dollars ("take[n] it all"). The same viewer would then assume that DEA agents were later convicted for these crimes.

The first thing to note is that the Complaint does not mention the Jacobson article, so it is of no moment what it does or does not say. Moreover, it would be improper to "bootstrap" an erroneous statement in the Jacobson article onto the movie (which does not track the article), and then to find that the movie (not the article) libels Korniloff and his companions. In the film, the nine DEA agents who participated in the search are not identifiable. The film never names the DEA agents who searched Lucas' home. Nor does the film mention that DEA agents (or anyone else) stole "nine or ten million dollars" from Lucas' home. The movie does not show a single person who is identifiable as a DEA agent. The person who steals the money is an NYPD officer. (In fact, the line quoted by plaintiffs could just as easily mean that the "Feds" would seize "all" of Lucas' money *legally,* and that the corrupt NYPD officer wanted to get his "gratuity" before the "Feds" got there.) A viewer must go beyond the movie (i.e., have read the Jacobson article) to know that Lucas alleged the theft of a much greater sum by the DEA agents ("Feds") who searched his house. Korniloff may have been libeled by Lucas' statement in the "Superfly" article (as to which the statute of limitations has long run). However, he and the eight other DEA agents were not libeled by the legend that appears onscreen at the end of *American Gangster.*

The cause of action for libel is dismissed as barred by the group libel doctrine. I need not reach defendant's alternative argument that no reasonable person could interpret the legend as referring to federal DEA agents, rather than New York City police officers.

It would behoove a major corporation like Universal (which is owned by a major news organization, NBC) not to put inaccurate statements at the end of popular films. However, nothing in this particular untrue statement is actionable. The Complaint is dismissed.

POINTS FOR DISCUSSION

1. After viewing the scene from *American Gangster* on my website, consider whether you think the court's suggestion that the line about the Feds' impending visit could reasonably be interpreted to mean that they would only engage in quite legal behavior when they show up.
2. How important to the decision do you think it is that there is no "Drug Enforcement *Agency*."

4

Libel: Constitutional Considerations

For most of this country's history, the existence of libel law was not seen as at all inconsistent with the First Amendment's promise that "no law" should abridge freedom of the press. A dramatic change came in 1964, in *New York Times v. Sullivan*, when the U.S. Supreme Court concluded that to permit public officials to sue citizens who criticize their performance in office is hauntingly reminiscent of sedition laws that criminalized antigovernment speech. The Supreme Court's *New York Times* ruling, which begins this chapter, did not prohibit public officials from bringing suit for libel, but it did make such suits far more difficult to prove.

Ten years later, in *Gertz v. Welch*, the Supreme Court fine-tunes its evolving libel doctrine, and creates important new law. No longer would libel plaintiffs be able to prevail without proving that they were harmed in some way by a defendant's utterance; moreover, any plaintiff seeking punitive damages—those designed to punish the press more than to compensate for reputational harm—would have to overcome the same obstacles constitutionally mandated for public officials.

In the traditional common law of libel, plaintiffs did not have to prove that the defamations hurled against them were false. They were presumed false, in that citizens' reputations were presumed unsullied until proven otherwise. In *Philadelphia Newspapers, Inc. v. Hepps*, the Court considers whether this tradition rule can survive the application of First Amendment principles to libel law.

Next, *Peterson v. Grisham* is a ringing endorsement of the public policy reasoning behind making it very difficult for public officials to win libel suits. I admit I chose the case in part because of the celebrity of defendant John Grisham.