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.

Finally, *Brock v. Viacom*, where the defendants are distributers of the popular cable series *Bullshit!* hosted by Penn and Teller, makes clear that expressions of even the most pointed opinions are constitutionally protected. (The relevant scene is on my website.)

■ *New York Times v. Sullivan*

376 U.S. 254 (1964)

Justice Brennan:

We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct. L. B. Sullivan is one of the three elected Commissioners of the City of Montgomery, Alabama. He brought this civil libel action against the four individual petitioners, who are Negroes and Alabama clergymen, and against petitioner the New York Times Company. A jury in the Circuit Court of Montgomery County awarded him damages of $500,000, the full amount claimed, against all the petitioners, and the Supreme Court of Alabama affirmed.

Respondent's complaint alleged that he had been libeled by statements in a full-page advertisement that was carried in the *New York Times* on March 29, 1960. Entitled "Heed Their Rising Voices," the advertisement began by stating that "As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights." It went on to charge that "in their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom. . . ." Succeeding paragraphs purported to illustrate the "wave of terror" by describing certain alleged events. The text concluded with an appeal for funds for three purposes: support of the student movement, "the struggle for the right-to-vote," and the legal defense of Dr. Martin Luther King, Jr., leader of the movement, against a perjury indictment then pending in Montgomery.

The text appeared over the names of 64 persons, many widely known for their activities in public affairs, religion, trade unions, and the performing arts. Below these names, and under a line reading "We in the south who are struggling daily for dignity and freedom warmly endorse this appeal," appeared the

names of the four individual petitioners and of 16 other persons, all but two of whom were identified as clergymen in various Southern cities. The advertisement was signed at the bottom of the page by the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South," and the officers of the Committee were listed.

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

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

The sixth paragraph read:

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

Although neither of these statements mentions respondent by name, respondent contended that the word "police" in the third paragraph referred to him as the Montgomery Commissioner who supervised the Police Department, so that he was being accused of "ringing" the campus with police. He further claimed that the paragraph would be read as imputing to the police, and hence to him, the padlocking of the dining hall in order to starve the students into submission. As to the sixth paragraph, he contended that it [accused] the Montgomery police, and hence him, of answering Dr. King's protests with "intimidation and violence," bombing his home, assaulting his person, and charging him with perjury.

It is uncontroverted that some of the statements contained in the two paragraphs were not accurate descriptions of events which occurred in Montgomery. Although nine students were expelled by the State Board of Education, this was not for leading the demonstration at the Capitol, but for demanding service at a lunch counter in the Montgomery County Courthouse on another day. Not the entire student body, but most of it, had protested the expulsion,

not by refusing to register, but by boycotting classes on a single day; virtually all the students did register for the ensuing semester. The campus dining hall was not padlocked on any occasion, and the only students who may have been barred from eating there were the few who had neither signed a preregistration application nor requested temporary meal tickets. Although the police were deployed near the campus in large numbers on three occasions, they did not at any time "ring" the campus, and they were not called to the campus in connection with the demonstration on the State Capitol steps, as the third paragraph implied. Dr. King had not been arrested seven times, but only four; and although he claimed to have been assaulted some years earlier in connection with his arrest for loitering outside a courtroom, one of the officers who made the arrest denied that there was such an assault.

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

Respondent relies heavily, as did the Alabama courts, on statements of this Court to the effect that the Constitution does not protect libelous publications. Those statements do not foreclose our inquiry here. None of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials.

The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent. Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and espe-

cially one that puts the burden of proving truth on the speaker. 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.

Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. This is true even though the utterance contains half-truths and misinformation. Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. If judges are to be treated as men of fortitude, able to thrive in a hardy climate, surely the same must be true of other government officials, such as elected city commissioners. Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.

If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate. This is the lesson to be drawn from the great controversy over the Sedition Act of 1798, which first crystallized a national awareness of the central meaning of the First Amendment. Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional. Jefferson, as President, pardoned those who had been convicted and sentenced under the Act and remitted their fines.

What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. Alabama, for example, has a criminal libel law. Presumably a person charged with violation of this statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action. The judgment awarded in this case—without the need for any proof of actual pecuniary loss—was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the Sedition Act. Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive.

The state rule of law is not saved by its allowance of the defense of truth. A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to self-censorship. Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. The rule thus dampens the vigor and limits the variety of public debate.

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. Such a privilege for criticism of official conduct is appropriately analogous to the protection accorded a public official when he is sued for libel by a private citizen. The reason for the official privilege is said to be that the threat of damage suits would otherwise inhibit the fearless, vigorous, and effective administration of policies of government and dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer.

We have no occasion here to determine how far down into the lower ranks of government employees the "public official" designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. Nor need we here determine the boundaries of the "official conduct" concept. It is enough for the present case that respondent's position as an elected city commissioner clearly made him a public official, and that the allegations in the advertisement concerned what was allegedly his official conduct as Commissioner in charge of the Police Department.

We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action, the rule requiring proof of actual malice is applicable. While Alabama law apparently requires proof of actual malice for an award of punitive damages, where general damages are concerned malice is "presumed." Such a presumption is inconsistent with the federal rule.

We consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence that it

would not constitutionally sustain the judgment for respondent under the proper rule of law. The case of the individual petitioners requires little discussion. Even assuming that they could constitutionally be found to have authorized the use of their names on the advertisement, there was no evidence whatever that they were aware of any erroneous statements or were in any way reckless in that regard. The judgment against them is thus without constitutional support. As to the *Times*, we similarly conclude that the facts do not support a finding of actual malice.

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

We think the evidence against the *Times* supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice.

We also think the evidence was constitutionally defective in another respect: it was incapable of supporting the jury's finding that the allegedly libelous statements were made "of and concerning" respondent. There was no reference to respondent in the advertisement, either by name or official position. A number of the allegedly libelous statements—the charges that the dining hall was padlocked and that Dr. King's home was bombed, his person assaulted, and a perjury prosecution instituted against him—did not even concern the police.

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

POINTS FOR DISCUSSION

1. Since very few libel defendants will ever admit that they went to press knowing that they would be printing falsehoods, public officials will need

to prove that the defendant published with "reckless disregard of truth or falsity." What kinds of behaviors would or should constitute proof of such reckless disregard?

2. There is much talk these days about the importance of political candidates' "character." If the citizenry has a legitimate interest in their representatives' character, can there ever be criticisms of public officials that do *not* at least have important implications for their "official conduct"?

■ *Gertz v. Welch*

418 U.S. 323 (1974)

Justice Powell:

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. In March 1969 respondent published [an] article under the title "FRAME-UP: Richard 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. 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."

Petitioner claimed that the falsehoods published by respondent injured his reputation as a lawyer and a citizen. Respondent 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*, under [which] respondent would escape liability unless 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.

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.

We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in uninhibited, robust, and wide-open debate on public issues.

Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation. Such a rule would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation. The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose.

Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury. 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. For the reasons stated below, we conclude that the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them.

The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

More important than the likelihood that private individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. 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 special 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.

A private individual has not accepted public office or assumed an influential role in ordering society, has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus,

private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.

For these reasons we conclude that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual. 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.

The *New York Times* privilege [is not] wholly inapplicable to the context of private individuals. We hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth. The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.

It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. We need not define "actual injury," as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. 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. Punitive damages 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.

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. [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. Petitioner has long been active in community and professional affairs. He has served as an officer of local civic groups and of various professional organizations, and he has published several books and articles on legal subjects. Although petitioner was consequently well known in some circles, he had achieved no general fame or notoriety in the community. None of the prospective jurors called at the trial had ever heard of petitioner prior to this litigation, and respondent offered no proof that this response was atypical of the local population. We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes. Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation. In this context it is plain that petitioner was not a public figure. He played a minimal role at the coroner's inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution of Officer Nuccio. Moreover, he never discussed either the criminal or civil litigation with the press and was never

quoted as having done so. He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome. We therefore conclude that the *New York Times* standard is inapplicable to this case.

POINTS FOR DISCUSSION

1. Justice Powell provides two reasons in support of making it very hard for public officials and public figures to win libel suits. One reason is that people choose to be public officials and typically become public figures as a result of their own actions. Clearly one cannot become a public official involuntarily. But are instances of involuntary public figures as "exceedingly rare" as Justice Powell suggests?
2. The second reason Justice Powell offers for setting up obstacles to libel suits by public officials and public figures is that such persons have access to "self-help," that they can always call a press conference, and the press will come. From the viewers' perspective, however, is there not a world of difference between seeing a public official's self-serving response to an allegedly defamatory article, and learning that a neutral jury found that the article was libelous?

■ *Philadelphia Newspapers, Inc. v. Hepps*

475 U.S. 767 (1986)

Justice O'Connor:

This case requires us once more to struggle to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment. In *Gertz v. Robert Welch, Inc.* the Court held that a private figure who brings a suit for defamation cannot recover without some showing that the media defendant was at fault in publishing the statements at issue. Here, we hold that, at least where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false.

Maurice S. Hepps is the principal stockholder of General Programming, Inc. (GPI), a corporation that franchises a chain of stores—known at the relevant time as "Thrifty" stores—selling beer, soft drinks, and snacks. Mr. Hepps, GPI, and a number of its franchisees are the appellees here. Appellant Philadelphia Newspapers, Inc., owns the *Philadelphia Inquirer*. The *Inquirer* published

a series of articles containing the statements at issue here. The general theme of the five articles, which appeared in the *Inquirer* between May 1975 and May 1976, was that appellees had links to organized crime and used some of those links to influence the State's governmental processes, both legislative and administrative. The articles discussed a state legislator, described as "a Pittsburgh Democrat and convicted felon," whose actions displayed "a clear pattern of interference in state government by [the legislator] on behalf of Hepps and Thrifty." The stories reported that federal "investigators have found connections between Thrifty and underworld figures," that "the Thrifty Beverage beer chain . . . had connections . . . with organized crime," and that Thrifty had "won a series of competitive advantages through rulings by the State Liquor Control Board." A grand jury was said to be investigating the "alleged relationship between the Thrifty chain and known Mafia figures," and "[whether] the chain received special treatment from the [state Governor's] administration and the Liquor Control Board."

Appellees brought suit for defamation against appellants in a Pennsylvania state court. Consistent with *Gertz*, Pennsylvania requires a private figure who brings a suit for defamation to bear the burden of proving negligence or malice by the defendant in publishing the statements at issue. As to falsity, Pennsylvania follows the common law's presumption that an individual's reputation is a good one. Statements defaming that person are therefore presumptively false, although a publisher who bears the burden of proving the truth of the statements has an absolute defense.

The parties first raised the issue of burden of proof as to falsity before trial, but the trial court reserved its ruling on the matter. Appellee Hepps testified at length that the statements at issue were false, and he extensively cross-examined the author of the stories as to the veracity of the statements at issue. After all the evidence had been presented by both sides, the trial court concluded that Pennsylvania's statute giving the defendant the burden of proving the truth of the statements violated the Federal Constitution. The trial court therefore instructed the jury that the plaintiffs bore the burden of proving falsity.

The Pennsylvania Supreme Court viewed *Gertz* as simply requiring the plaintiff to show fault in actions for defamation. It concluded that a showing of fault did not require a showing of falsity. We noted probable jurisdiction, and now reverse.

One can discern [from our prior decisions] two forces that may reshape the common-law landscape to conform to the First Amendment. The first is whether the plaintiff is a public official or figure, or is instead a private figure. The second is whether the speech at issue is of public concern. When the speech is of public concern and the plaintiff is a public official or public figure,

the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law. When the speech is of public concern but the plaintiff is a private figure, as in *Gertz*, the Constitution still supplants the standards of the common law, but the constitutional requirements are, in at least some of their range, less forbidding than when the plaintiff is a public figure and the speech is of public concern. When the speech is of exclusively private concern and the plaintiff is a private figure, the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape.

Here, as in *Gertz*, the plaintiff is a private figure and the newspaper articles are of public concern. In *Gertz*, as in *New York Times*, the common-law rule was superseded by a constitutional rule. We believe that the common law's rule on falsity—that the defendant must bear the burden of proving truth—must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages.

There will always be instances when the fact finding process will be unable to resolve conclusively whether the speech is true or false; it is in those cases that the burden of proof is dispositive. Under a rule forcing the plaintiff to bear the burden of showing falsity, there will be some cases in which plaintiffs cannot meet their burden despite the fact that the speech is in fact false. The plaintiff's suit will fail despite the fact that, in some abstract sense, the suit is meritorious. Similarly, under an alternative rule placing the burden of showing truth on defendants, there would be some cases in which defendants could not bear their burden despite the fact that the speech is in fact true. Those suits would succeed despite the fact that, in some abstract sense, those suits are unmeritorious. Under either rule, then, the outcome of the suit will sometimes be at variance with the outcome that we would desire if all speech were either demonstrably true or demonstrably false.

This dilemma stems from the fact that the allocation of the burden of proof will determine liability for some speech that is true and some that is false, but all of such speech is unknowably true or false. Because the burden of proof is the deciding factor only when the evidence is ambiguous, we cannot know how much of the speech affected by the allocation of the burden of proof is true and how much is false. In a case presenting a configuration of speech and plaintiff like the one we face here, and where the scales are in such an uncertain balance, we believe that the Constitution requires us to tip them in favor of protecting true speech. To ensure that true speech on matters of public concern is not deterred, we hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern. We note that our decision adds

only marginally to the burdens that the plaintiff must already bear as a result of our earlier decisions in the law of defamation. The plaintiff must show fault. A jury is obviously more likely to accept a plaintiff's contention that the defendant was at fault in publishing the statements at issue if convinced that the relevant statements were false. As a practical matter, then, evidence offered by plaintiffs on the publisher's fault in adequately investigating the truth of the published statements will generally encompass evidence of the falsity of the matters asserted.

We have no occasion to consider the quantity of proof of falsity that a private-figure plaintiff must present to recover damages. Nor need we consider what standards would apply if the plaintiff sues a nonmedia defendant, or if a State were to provide a plaintiff with the opportunity to obtain a judgment that declared the speech at issue to be false but did not give rise to liability for damages.

For the reasons stated above, the judgment of the Pennsylvania Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

POINTS FOR DISCUSSION

1. The *Hepps* case tells us that three variables determine much of the First Amendment's impact on libel law: Who is the plaintiff (public official/figure or private citizen)? Who is the defendant (media or nonmedia)? And what was the topic of the allegedly libelous remark (a topic of public, or private, interest)? These variables create a 2 x 2 x 2 matrix of sorts, as if all libel scenarios can be sorted into eight "boxes." Which one of those eight boxes is most directly affected by the *Hepps* ruling itself?
2. Justice O'Connor suggests that libel plaintiffs who are already required to prove actual malice must thus surely also have proven falsity. After all, it makes no sense to publish the *truth* "with reckless disregard for truth or falsity." But can't the same be said of the lesser burden of proof demanded of private plaintiffs? Does it make sense to be punished for "negligently" publishing the truth?

■ *Peterson v. Grisham*

594 F.3d 723 (10th Cir. 2010)

Judge Lucero:

In 1988, Ronald Williamson and Dennis Fritz were wrongly convicted of the rape and murder of Debra Sue Carter. Both men were later exonerated after

spending over a decade in jail. Their painful story caught the attention of renowned legal-fiction author John Grisham, who wrote a book about Williamson appropriately titled *The Innocent Man*. Fritz also wrote a book, *Journey Toward Justice*, detailing the horror of his years of unjust confinement.

Each of the plaintiffs in this case—Oklahoma District Attorney William Peterson; former Shawnee police officer Gary Rogers; and former Oklahoma state criminologist Melvin Hett—played a role in the investigation or prosecution and conviction of Williamson and Fritz. Neither *The Innocent Man* nor *Journey Toward Justice* paints the plaintiffs in a positive light. Following the release of these books, plaintiffs filed suit in Oklahoma district court seeking relief for defamation. They named Grisham, Fritz, anti–death penalty advocate Barry Scheck, and author Robert Mayer—along with their respective publishers—as defendants. The district court dismissed the suit for failure to state a claim upon which relief can be granted. We affirm.

On the morning of December 8, 1982, Carter was found dead in her garage apartment in the small town of Ada, Oklahoma. She had been raped and suffocated by her assailant. Four years later, Rogers and his fellow officers arrested Williamson and Fritz for Carter's murder. Peterson prosecuted the case.

The evidence against Williamson and Fritz consisted of hair samples, Williamson's statement to police about a dream in which he had committed the murder, and the testimony of jailhouse informants. Hett testified that hairs recovered from the crime scene belonged to Williamson and Fritz. Based on this evidence, the jury convicted Williamson and Fritz of rape and murder. Williamson was sentenced to death, and Fritz received life in prison.

Following a grant of habeas relief by the Eastern District of Oklahoma, DNA testing was ordered in 1999. That testing revealed that hair and semen samples taken from the crime scene could not have come from Williamson and Fritz. Both men had been wrongfully convicted. Another man was eventually found guilty of Carter's murder.

Grisham published *The Innocent Man* in 2006. It tells Williamson's life story and explores the circumstances leading to his wrongful conviction, imprisonment, and subsequent exoneration. Grisham depicts Peterson, Rogers, and Hett as particularly responsible for the plight of Williamson and Fritz. He also faults what he describes as a broken criminal justice system that condones "bad police work, junk science, faulty eyewitness identifications, bad defense lawyers, lazy prosecutors, and arrogant prosecutors." In *Journey Toward Justice*, Fritz speaks in equally harsh tones about the public officials who put him behind bars. As the title suggests, the book describes Fritz's agonizing trail from wrongful imprisonment to exoneration. Fritz recounts in vivid detail his

fears and frustrations as a wrongfully accused murder suspect and convict, and his eventual elation upon release.

Barry Scheck, Fritz's former attorney and a prominent anti–death penalty advocate, wrote the foreword to *Journey Toward Justice*. In that foreword, Scheck commends Fritz for having the courage to write his personal story, and praises Fritz for his recent work in the anti–death penalty movement. Both Fritz and Scheck were interviewed by Grisham for *The Innocent Man*. Scheck ultimately devoted a chapter of his 2003 book, *Actual Innocence*, to the wrongful convictions of Williamson and Fritz. Lastly, Robert Mayer's book, *The Dreams of Ada*, explores the 1985 convictions of Tommy Ward and Karl Fontenot for the death of Denice Haraway. The Haraway case shared many parallels with the Carter case, including minimal physical evidence, the use of "dream" confessions, and reliance on testimony by jailhouse informants. That case also involved a similar cast of characters: Peterson was the prosecutor and Rogers was the investigator. Grisham used *The Dreams of Ada*—and found it to be particularly helpful—in his research for *The Innocent Man*. Shortly after Grisham's book was published, Broadway Books reissued *The Dreams of Ada* with a new afterword written by Mayer.

With the exception of *Actual Innocence*, all these books were released (or, in the case of *The Dreams of Ada*, re-released) in October 2006. One year later, Peterson and Rogers filed suit.

After defendants filed motions to dismiss, the district court directed plaintiffs to file a second amended complaint specifying the alleged defamatory statements.

In their 116-page second amended complaint, plaintiffs claimed that defendants engaged in "a massive joint defamatory attack" against them. This attack was motivated in part by defendants' shared desire "to further efforts to abolish the death penalty." The district court dismissed the second amended complaint for failure to state a claim upon which relief can be granted. This appeal ensued.

Plaintiffs contend that the district court "failed to take into consideration any of the one-hundred and three pages of specific factual allegations" in their second amended complaint. According to plaintiffs, the court sweepingly concluded that statements by authors regarding government officials and public figures could never be considered defamatory or otherwise actionable. They further accuse the district court of neglecting to analyze each of the factual allegations in their complaint on the basis that the district court noted that such a task would be "boring" and "repetitive."

Plaintiffs mischaracterize the district court's statements. The court did not rule that defamation claims against authors writing about public officials are

never plausible. Instead, it dismissed plaintiffs' complaint only "after review of each of the statements alleged." Though we encourage district courts to more fully articulate their reasoning [in granting motions to dismiss], the court was not required to engage in a detailed written analysis of each of dozens of allegedly defamatory statements. The district court concluded the statements shared common characteristics that preclude relief, and the record on appeal provides this court with an adequate basis for reviewing each statement.

Turning to plaintiffs' individual claims, we agree with the district court that each cause of action fails to state a claim upon which relief can be granted. Taking as true the facts plaintiffs allege in their second amended complaint, we conclude that defendants are statutorily protected from suit. Oklahoma law defines libel as "a false or malicious unprivileged publication . . . which exposes any person to public hatred, contempt, ridicule or obloquy, or which tends to deprive him of public confidence, or to injure him in his occupation." To state a claim for libel, a plaintiff must allege that a defendant made: "(1) a false and defamatory statement concerning [plaintiff]; (2) an unprivileged publication to a third party; and (3) fault amounting to at least negligence on the part of the publisher." Unless a plaintiff demonstrates that a defendant committed libel per se, she must also plead and prove special damages caused by publication.

Because plaintiffs in this case concede that they alleged no special damages, they must prove libel per se, which requires a statement that is "clearly defamatory on its face." In contrast, statements that are reasonably susceptible of both a defamatory and innocent meaning are not libelous per se.

Given that plaintiffs are public officials, they face an especially heavy burden in attempting to demonstrate libel per se. Under the Oklahoma Statutes, "any and all criticisms upon the official acts of any and all public officers" are privileged and cannot be considered libelous, unless a defendant makes a false allegation that the official engaged in criminal behavior. The [publication] must obviously import the commission of crime punishable by indictment.

Plaintiffs have not carried their burden. Several of the statements included in plaintiffs' second amended complaint do not concern plaintiffs and therefore would not constitute libel against them regardless of their status as public officials or whether they had pled special damages. As to those that do, we agree with the district court that plaintiffs point to no statement in which defendants directly accuse any plaintiff of a crime.

Plaintiffs expect us to scale a mountain of inferences in order to reach the conclusion that defendants' statements impute criminal acts to plaintiffs and render the statutory privilege inapplicable. We decline to engage in such inferential analysis, or to take a myriad of other analytical leaps plaintiffs ask us to

make. Any connection between defendants' statements and an accusation of criminal activity is far too tenuous for us to declare them as unprivileged.

Because Oklahoma law is dispositive in this case, we need not engage in a constitutional analysis. But we note that, at a minimum, allowing the plaintiffs to recover would offend the spirit of the First Amendment. Defendants wrote about a miscarriage of justice and attempted to encourage political and social change. To the extent their perceptions of the affair were erroneous, we depend on the marketplace of ideas—not the whim of the bench—to correct insidious opinions.

Affirmed.

POINTS FOR DISCUSSION

1. Notice that in Oklahoma, public officials have a more difficult time winning libel suits than even *New York Times v. Sullivan* demands. Such plaintiffs, when suing about a publication on a matter of public concern, have to show not only actual malice, but also that they are being accused of criminal wrongdoing. Do you think this strikes the right balance?
2. At the federal district court level, Judge White suggests that courts should be especially forgiving of most factual errors from an author like Dennis Fritz, who "spent eleven years in prison falsely convicted of murder." Readers are or should be wise enough to expect a "tone of moral outrage, a biased account based on conjecture and passion." Is it proper for courts to take into account how justified a libel defendant's outrage might be?

▪ *Brock v. Viacom International, Inc.*

2005 U.S. Dist. LEXIS 12217 (N.D. Ga. 2005)

Judge Pannell:

On March 14, 2003, the premium television network Showtime exhibited an episode of the "*Penn & Teller: Bullshit!*" television series. The Episode, entitled "Creationism," concerned an ongoing public debate before the Cobb County, Georgia, School Board regarding creationism versus evolution and whether either or both should be taught in Cobb County's public schools. The debate before the Cobb County School Board received widespread local and national media attention.[1]

1. The relevant scene from the episode is on my website. Go to www.paulsiegelcommlaw.com; on the left side (*Communication Law in America*), click on "Video Clips," then on "Chapter 4," and finally on "Penn and Teller's B.S. on Creationism."

As the material for the Episode was being gathered, the plaintiffs were contacted and offered the opportunity to give an interview to explain their positions in favor of the teaching of creationism. One of the plaintiffs, Russ Brock, had already appeared before the School Board at its public hearing to advocate for the teaching of creationism. According to the plaintiffs, when they met with the defendants to discuss the television series and consider the interviews, the defendants represented that the series had not yet been named and that it was a program about topics that Americans are passionate about. After agreeing to sit for the interviews, the defendants asked the plaintiffs to sign releases. While reviewing the releases, the plaintiffs noticed language indicating that the taped interviews might be used for satirical or humorous purposes. The plaintiffs requested an explanation of this language from the defendants, and the defendants responded by saying that the releases were a standard form that is used for all types of television programs. The defendants then told the plaintiffs "not to worry" because the television program was "not that kind of show." The defendants assured the plaintiffs that the television series was not a satirical show and that the interviews would not be used for satirical or humorous purposes. Based on these representations, the plaintiffs agreed to sit for the taped interviews. Plaintiff Russ Brock was paid $300 for the interview, but none of the other plaintiffs were paid.

As it turned out, the show was already entitled "Bullshit!" and the content of the Episode was a combination of interviews and film clips from the media's coverage of the public hearings before the Cobb County School Board, together with acerbic commentary by Penn & Teller. Penn & Teller's commentary was highly critical of the plaintiffs' views on the teaching of creationism in public schools. Penn & Teller, in an often harsh and sarcastic manner, repeatedly voiced their opinion that the teaching of creationism in public schools would violate the United States Constitution's mandate of the separation of church and state. The plaintiffs complain that, instead of being a program about things that Americans are passionate about, as represented by the defendants, "the program was an aggressive, irreverent exposé of the beliefs of Christianity and Creationism, and a personal attack on Plaintiffs for their desire to have both Creationism and Evolution taught as alternate theories in the Public School System of Cobb County."

A year after the Episode initially aired, the plaintiffs brought this action, complaining that the broadcast placed the plaintiffs in an unfavorable light and that the plaintiffs were misled as to the content of the Episode at the time that they agreed to be interviewed. The plaintiffs' nine-count complaint asserts a variety of claims including libel. The plaintiffs particularly bemoan Penn & Teller's comments ridiculing plaintiff Myrna Feldman's wig and the fact that

it was on in a crooked manner, as well as Penn & Teller's comments claiming, according to the plaintiffs, that the plaintiffs were "un-American" and "mentally unsound, infirm and/or unwise." The plaintiffs further claim that, as a result of the airing of the Episode, the plaintiffs "have each been embarrassed and suffered public ridicule and humiliation."

Though they couch their claims in terms of, among other things, fraud in the inducement, breach of contract, and promissory estoppel, the gravamen of the plaintiffs' cause of action is defamation.

In paragraph 36 of their complaint, the plaintiffs state, "As a result of the broadcast of episode 8 of the 'Bullshit' series, Plaintiffs have each been embarrassed and suffered public ridicule and humiliation. Additionally, each Plaintiff has endured emotional distress and damage to their personal relationships as a result of the broadcast." This paragraph makes it clear that the plaintiffs are seeking damages due to the harm that the broadcast of the Episode caused to their respective reputations and states of mind. In each of their claims, the plaintiffs incorporate paragraph 36 and then merely state, "Plaintiffs have each been damaged." Finally, in paragraph 70, the plaintiffs state that they "have been injured as a proximate result of Defendants' actions and are entitled to recover money damages from them." Other than these paragraphs, the plaintiffs make no other mention of any damages they have suffered. At no point in their complaint do the plaintiffs allege that they suffered any non-reputational economic damages, such as those associated with lost wages or lost employment opportunities. Clearly, then, the plaintiffs are complaining of what amounts to damages to reputation or state of mind, and, therefore, they must meet the constitutional requirements of a defamation claim in order to survive the defendants' motion to dismiss.

In *New York Times Co. v. Sullivan*, the Supreme Court held that the First Amendment prohibits a public official from recovering damages for defamatory statements regarding matters of public concern unless he shows that the statements were false and that they were made with actual malice, that is, with knowledge that the statements were false or with reckless disregard of whether they were false or not. Three years later, the Court extended the *New York Times* rule to plaintiffs who are not public officials but are nevertheless public figures.

The court notes that the defendants argue that the plaintiffs are public figures because they injected themselves into the public controversy concerning the place of creationism and evolution in public school curriculum. Without ruling on this issue, the court will assume for the purposes of this order that the plaintiffs are private-figure citizens and will apply the less forbidding standard regarding what the plaintiffs must demonstrate in order to make a defamation-type claim for damages to reputation and state of mind.

As an initial matter, the court finds that the speech at issue is clearly of public concern. The debate regarding the teaching of creationism alongside evolution in public schools implicates the Establishment Clause of the First Amendment's requirement of the separation of church and state, a fact demonstrated by the recent litigation of the Cobb County School Board's placement of stickers commenting on evolution in certain science textbooks. This debate concerns the boundaries of the federal, state, and local governments' power and the rights of all citizens of the United States, and, therefore, it is an issue that affects each citizen of this country. It is hard for this court to imagine a subject matter that would be of more public concern than the one at issue in this case. Thus, the court finds that the speech at issue, i.e., the opinions expressed regarding the teaching of creationism alongside evolution in public schools, to be of public concern.

When the speech at issue is of public concern, it is a constitutional requirement that the private citizen plaintiff bear the burden of showing falsity, as well as fault, before recovering damages. The determination of whether a defendant was at fault in publishing the statements at issue is closely connected to demonstrating that the statements were false: The crucial burden on a plaintiff in making a defamation or defamation-type claim is to show the falsity of the statements made.

In this case, the plaintiffs have failed to state a claim upon which relief can be granted because they have failed to allege in their complaint that any of the statements pertaining to the plaintiffs made during the episode were false. Even liberally construing their complaint in the best possible light for purposes of the defendants' motion to dismiss, the court can find no set of facts that the plaintiffs could prove that would demonstrate that the statements made during the Episode were false.

The episode consists of essentially two kinds of statements. The first type are those made by the plaintiffs themselves during the Episode. The second type are those statements made by the people, including Mr. Jillette, criticizing the plaintiffs' views. As to the first type, the statements made by the plaintiffs during the Episode cannot form the basis of a defamation claim because the plaintiffs actually made those statements. The Episode shows a portion of Mr. Brock's speech made during the Cobb County School Board's public hearings on whether it should permit the teaching of creationism. There is no dispute that Mr. Brock made these statements during the hearing. The Episode also shows portions of interviews with the plaintiffs in which the plaintiffs stated their support for the teaching of creationism alongside the teaching of biology in public schools. There is no dispute that the plaintiffs made these statements during their interviews. Furthermore, the plaintiffs do not allege that the de-

pictions of their statements were in any way inaccurate or false. Thus, the plaintiffs' claims cannot be premised upon the statements that they made since these statements reflect their own opinion.

As to the second type, the nonverbal gestures of Mr. Teller and the statements by Mr. Jillette and the others featured on the show who oppose the teaching of creationism are opinions, which constitute the core of the type of speech that is to be protected under the First Amendment. Furthermore, opinions cannot be proven false for purposes of defamation. In order for an alleged defamatory statement to be actionable, it must express or imply a statement of fact that is capable of being proven false.

In this case, Mr. Jillette and the others on the show simply expressed their opinions regarding the views of the plaintiffs, though the court recognizes that these opinions were sometimes harsh. But just as the plaintiffs are entitled to express their beliefs regarding Christianity and their opinion that creationism should be taught in public schools, Mr. Jillette, Mr. Teller, and the others on the Episode are entitled to express their beliefs that the plaintiffs' views are wrong. The emphatic and often mocking manner in which Mr. Jillette and the others criticized the plaintiffs' views did not transform these protected opinions into actionable defamation.

The plaintiffs' primary complaint is not that any of the statements made in the Episode were false, but that the show advocated a viewpoint different from theirs and, in doing so, criticized their position in an "aggressive" and "irreverent" manner. But the Supreme Court has rejected the notion that harsh criticism of a viewpoint can constitute actionable defamation.

Because the plaintiffs have failed to allege that any of the statements contained in the Episode are false and because the plaintiffs cannot prove the falsity of the complained of statements given that those statements are opinions, the plaintiffs' defamation-type claims fail as a matter of law, and their complaint fails to state a claim for which relief can be granted. For all of these reasons, the court grants the defendants' motion to dismiss.

POINTS FOR DISCUSSION

1. If plaintiffs' assertion that Penn and Teller's producers misled them about the nature of the program is credible, should that deception count in consideration of the libel claim?
2. After viewing the relevant scene from the episode on my website, consider whether the show treats creationism as an important political issue, or as merely a vehicle for making a personal attack on the plaintiff. Should your answer make a difference on the libel claim?

5

Invasion of Privacy

Compared with libel, invasion of privacy cases are relative newcomers to the American scene. Their birth is often attributed to an 1890 *Harvard Law Review* article written by Boston attorney Samuel Warren and his law partner Louis Brandeis (later to achieve fame as a U.S. Supreme Court justice). Seventy years later, Dean William Prosser of the University of California Law School reviewed the development of privacy law, and determined that it had grown into four distinct civil actions, or torts.

- The **false light** tort is highly similar to libel, except that the revelation about the plaintiff need not be defamatory. The first case in this chapter—*Time v. Hill*, a 1967 Supreme Court decision—emphasizes this feature of the tort. And *Solano v. Playgirl* offers an unusual variation on the theme.
- The **public disclosure** tort is distinguishable from libel, in that the revelations are true (although embarrassing). The plaintiff in *Neff v. Time, Inc.* complains of being "revealed" not through prose but through a candid photograph of him in a state of partial undress. The case also involves elements of the misappropriation tort, described below.
- The **intrusion** tort is the only one of the four that does not require publication to be actionable. The action, similar to trespass, typically alleges that the defendant has intruded on the plaintiff's personal space, her zone of privacy (such as in following her around incessantly, camera in hand). The radio news reporter in *Holman v. Central Arkansas Broadcasting Company* did not use a roving microphone. He did not need to, because his subject, being held in jail on a DUI charge, could not escape. And *Boring v. Google* seems to combine intrusion and public disclosure elements, as the plaintiffs alleged that the folks compiling Google Maps might not only be publicizing their private goings-on but also may have trespassed in the production of their images.