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Panel I: Defamation in Sports

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PANEL I: Defamation in Sports

Moderator: Andrew Sims^{*}

Panelists: Gerald Eskenazi[†]
Stephen Heninger[‡]
Gary Huckaby[§]
Gary Belsky^{||}

MR. KLEIN:[#] Our first panel of the day will focus on defamation of sports figures. Over the past few months, there has been quite a bit of noise in this area of law.¹ Jim Herrick, the former men's basketball coach at the University of Georgia, is currently litigating a defamation claim against the University and the NCAA.² Also, current University of Texas El Paso men's head football coach Mike Price has sued Time Inc., the parent company of *Sports Illustrated*, for defamation of character.³ Price's claim is based on an article written by Don Yaeger that appeared in the May 12, 2003 issue of the magazine.⁴

Our moderator for this first panel is Professor Andrew Sims. Professor Sims received his undergraduate degree from Amherst College and continued his education at Harvard Law School. Professor Sims has been teaching here at Fordham Law School for

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¹ See, e.g., Associated Press, *Fighting Back: Don King Sues ESPN for Defamation, Seeks \$2.5 Billion* (Jan. 12, 2005), available at <http://sportsillustrated.cnn.com/2005/more/01/12/bc.box.king.lawsuit.ap>.

² See Associated Press, *Coach Gave Every Student an A* (Mar. 3, 2004), available at <http://sports.espn.go.com/ncb/news/story?id=1750279&print=true>.

³ Price v. Time, Inc., 304 F. Supp. 2d 1294 (N.D. Ala. 2004).

⁴ *Id.* at 1295, 1297.

the past twenty-five years. His principal subjects include constitutional law, entertainment law, and mass media law.

To kick off our first panel, I'm happy to introduce Professor Sims.

PROF. SIMS: Thank you all for coming today. I certainly want to thank our panelists. We really appreciate your being here today. And I want to thank Mike, as well as the whole Sports Law Forum, and the New York State Bar Association.

Today we deal with the very interesting topic of defamation in sports law. I'll just say a few words about First Amendment defamation law in this area before I turn it over to the panelists.

As you know, one of the major issues in this area is the question of malice, i.e. whether a defamation—a remark that is defamatory and false as well—is made with knowledge of the falsity or a reckless disregard of the truth.⁵

Since 1964, in the epic case of *New York Times Co. v. Sullivan*, public officials have been subject to the requirement of proving malice with convincing clarity as an element of the tort of defamation.⁶ That is, if they cannot prove malice—knowledge of the falsity, or reckless disregard of the truth—with convincing clarity, there is no defamation.⁷ And not only are no damages available, but they cannot even receive a declaratory judgment in their favor to vindicate their reputation.⁸

That principle was quickly extended within a few years, in 1967, to public figures, not just public officials,⁹ and they too are

⁵ See *Sullivan*, 376 U.S. at 279–80 (1964) (“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.”).

⁶ *Id.* at 285–86.

⁷ *Id.* at 280, 285–86.

⁸ See, e.g., *id.* at 281 (“[A]ny one claiming to be defamed by the communication must show actual malice, or go remediless.”) (quoting *Coleman v. MacLennan*, 98 P. 281, 285 (Kan. 1908)).

⁹ *Curtis Publ'g v. Butts*, 388 U.S. 130, 134 (1967).

under what we might describe as the “*Sullivan* disability,” the requirement of proof of malice as an element of the tort.¹⁰

Notably, one of these public figures, whose case did go up to the U.S. Supreme Court in 1967, was a noted sports figure, James Wallace “Wally” Butts Jr., who was the chief coach of the University of Georgia Bulldogs football team and who was falsely alleged to have shared game secrets with a rival coach.¹¹

Essentially, that is one major category, what I would describe as our “*Sullivan* category,” or “*Sullivan-Butts* category.”¹² Again, it’s public officials and public figures.

A second category of note is what we could describe as our *Gertz* category, after a case decided by the Supreme Court in 1974.¹³ This involves individuals who are not themselves public officials or public figures—that is, they are not *Sullivan*- or *Butts*-type plaintiffs—however, the defamation relates to an area that is of public concern.¹⁴

Notably, in this *Gertz* category malice is no longer an element of the tort.¹⁵ However, in order to recover very significant damages in certain critical categories, such as presumed general damages or punitive damages, the same malice must also be

¹⁰ *Sullivan*, 376 U.S. at 279–80.

¹¹ See generally *Curtis Publ’g*, 388 U.S. 130.

¹² See *Sullivan*, 376 U.S. at 256 (specifying that the court’s holding extends only to “public officials”); *Curtis Publ’g*, 388 U.S. at 134 (“consider[ing] the impact of [*Sullivan*] on libel actions instituted by persons who are not public officials, but who are ‘public figures’ and involved in issues in which the public has a justified and important interest.”).

¹³ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

¹⁴ See *id.* at 349 (“[W]e hold that the States may not permit recovery of presumed or punitive damages [for the defamation of a private individual], at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.”); see also *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 751 (1985) (“In *Gertz* . . . we held that the First Amendment restricted the damages that a private individual could obtain from a publisher for a libel that involved a matter of public concern. More specifically, we held that in these circumstances the First Amendment prohibited awards of presumed and punitive damages for false and defamatory statements unless the plaintiff shows ‘actual malice,’ that is, knowledge of falsity or reckless disregard for the truth.”).

¹⁵ See *id.*

proven with “convincing clarity” by the plaintiff.¹⁶ Again, that’s our Gertz category.¹⁷

Finally, our third major category, developed in the case of *Dun & Bradstreet v. Greenmoss* in 1985, involves private individuals who are defamed in the context of matters that are not deemed to be of public concern.¹⁸ In this category malice is not a bar at all to recovery by the plaintiff.¹⁹ The only requirement, apparently, is that the states set their standard for recovery by the plaintiff on the basis of proof of at least negligence on the part of the defendant—that is, there can be no strict liability in this area.²⁰

Most sports figures are going to find themselves in the first of these categories—public figures—and subject to the malice disability rule, in the sense it must be proved as an element of the tort.²¹

This first category has developed a very interesting sub-category that is being refined at the circuit court level but which has not yet received the official endorsement of the U.S. Supreme Court, and that is the concept of a limited public figure.²² As opposed to general public figures, whose names are household words, this would be a public figure whose name is not a

¹⁶ *See id.*

¹⁷ *See id.*

¹⁸ *Dun & Bradstreet, Inc.*, 472 U.S. at 751.

¹⁹ *Id.* at 763.

²⁰ *Cf. id.* (“We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of ‘actual malice’ does not violate the First Amendment when the defamatory statements do not involve matters of public concern.”).

²¹ *See Curtis Publ’g v. Butts*, 388 U.S. 130, 134 (1967) (defining public figures as those “involved in issues in which the public has a justified and important interest.”).

²² For cases illustrating acceptance of the limited-purpose public figure doctrine, see, e.g., *Lohrenz v. Donnelly*, 250 F.3d 1272 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 2167 (2004), *Tipton v. Warshavsky*, 32 Fed. Appx. 293, 295 (9th Cir. 2002); *Gary v. St. Martin’s Press, Inc.* 221 F.3d 243 (1st Cir. 2000), *cert. denied* 531 U.S. 1075 (2001); *Little v. Breland*, 93 F.3d 755 (11th Cir. 1996). *Trotter v. Jack Anderson Enters., Inc.*, 818 F.2d 431 (5th Cir. 1987); *Waldbaum v. Fairchild Pub., Inc.*, 627 F.2d 1287 (D.C. Cir. 1980); *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568 (Tex. 1998), *cert. denied* 526 U.S. 1051 (1999). *See also* *Bartnicki v. Vopper*, 523 U.S. 514, 539–40 (2001) (Souter, J., concurring). *See generally* Tracy A. Bateman, Annotation, *Who Is “Public Figure” for Purposes of Defamation Action*, 19 A.L.R. 5th 1 (2004) (“Since the Gertz decision, literally hundreds of state and federal courts have addressed the issue [of who is a public figure for purposes of defamation claims].”).

household word, but who nevertheless is prominent, or has projected himself, into a specific area of public interest to which the defamation relates.²³ In this category of the limited public figure, an individual will be subject to the same disability, the malice disability of *Sullivan* and *Butts* plaintiffs, as our publicly figures and public officials, and will also have to prove “malice with convincing clarity.”²⁴

In addition, I might mention that those who are in these categories—the *Sullivan* and *Butts* category, or the limited public figure category of the publication now being carved out—they will also have to bear the burden of proof as to the falsity.²⁵ In the 1986 *Hepps* decision, the U.S. Supreme Court reversed the presumption in most states’ common laws and statutes that the truthfulness of these statements had to be proven by the defendant.²⁶ Historically, truth was an affirmative defense that had to be both pleaded and proved by the defendants.²⁷ Now it is the plaintiffs who, in addition to having to prove malice with convincing clarity, will also bear the burden of proof by a preponderance of the evidence on the subject of the falsity of the remark.²⁸

One of the interesting questions that our panelists will be dealing with is not only what is it to say something with malice, but also what do we mean by a reckless disregard of the truth?²⁹ We have some interesting tension between an early decision by the U.S. Supreme Court in this area, *St. Amant v. Thompson*, which suggested that media defendants did not as a general matter have a duty to investigate as a general matter the reliability of their sources,³⁰ and more recently, the *Connaughton* decision, which suggests that the media is not free to ignore evidence that is put

²³ See *Tipton*, 32 Fed. Appx. at 295.

²⁴ See *Sullivan*, 376 U.S. at 285–86; see, e.g., *Tipton*, 32 Fed. Appx. at 295.

²⁵ See, e.g., *Phila. Newspapers v. Hepps*, 475 U.S. 767 (1986).

²⁶ *Id.* at 770.

²⁷ *Id.*

²⁸ *Id.*

²⁹ See, e.g., *St. Amant v. Thompson*, 390 U.S. 727 (1968).

³⁰ *Id.* at 731.

directly under its nose.³¹ I think Mr. Heninger will be addressing that question in greater detail.

Another intersecting area of great interest here, and specifically with regard to the *Price* case, has to do with the question of shield laws that have been enacted by many of the states to shield the journalists and media with regard to disclosure to courts in civil or criminal cases of the identity of their sources.³² This is particularly interesting in the context of the *Price* case that will be discussed in detail by our panelists, because the media defendants in this case, *Sports Illustrated* and Time, Inc., will not only presumably have the benefit of the malice requirement but will also be arguing that they should have the benefit of a state shield law.³³ That's a very interesting question in and of itself.

If the media already has the protection of the malice requirement, should it also have the right to withhold the identity of anonymous sources on which it claims to be relying in making these statements when the First Amendment already places a significant burden on the plaintiff who alleges that he has been defamed?³⁴

Without much further ado, I turn to our panelists. Our panel includes, interestingly, two litigators on either side of the *Price* litigation: Steve Heninger, who is the plaintiffs' counsel for Mike Price, and Gary Huckaby, who is defending on behalf of *Sports Illustrated* and Time, Inc.

We also have with us two interesting sports journalists to give us their insights on how these legal principles and guidelines might operate in the specific context of sports reporting. Are they as reporters specifically instructed in these First Amendment matters? Do they have to keep constitutional defamation rules in mind when they are writing articles or when they are talking on TV? Are these concerns that they are conscious of, and how do these real-life aspects intersect with the legal principles that we are going to be talking about?

³¹ See *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989).

³² See *infra* notes 87–106 and accompanying text.

³³ *Price v. Time, Inc.*, 304 F. Supp. 2d 1294, 1295 (N.D. Ala. 2004).

³⁴ *Cervantes v. Time, Inc.*, 464 F.2d 986, 994 (8th Cir. 1972).

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So without further ado, I would like to introduce, first, Gary Huckaby, again who is defending *Sports Illustrated* in the *Price* case. Mr. Huckaby is a litigation partner in Bradley Arant Rose & White, practicing in Huntsville, Alabama. He has had some very distinguished clients in the area of First Amendment and media and defamation litigations, including the *New York Times*, the *Wall Street Journal*, and just about all the major TV stations. He is going to go into greater depth on some of the legal issues that I have just introduced.

Thank you.

MR. HUCKABY: Let me say what a pleasure it is to be at this great law school. I am delighted to be on the panel.

I think I might just, in light of what Professor Sims has just covered, go back a little bit before as to how we got a First Amendment.

I attended a media law conference just recently in London, talked with a lot of solicitors and barristers about the practice in England, where there is no such thing as a First Amendment, nothing even similar to a First Amendment.³⁵ To speak with them about the risk that the media takes every time it publishes on the standards they have, which are the regular standards of a lawsuit, a preponderance of the evidence, as opposed to any malice standard, it was remarkable to see what effect it has on the production of news articles in that country.³⁶ It is also interesting to see the kind of different legal opinions that are reached.³⁷

It would seemingly be negative not to say that this is really where the press must absolutely ensure itself against anything it says. The cost of defense is enormous, and if the likelihood of success is as good as it is in England, there is tremendous risk to the press.³⁸ It was startling to me the chilling effect that it had, in discussing articles that were not published because of the fact that

³⁵ See Joanne Armstrong Brandwood, *You Say "Fair Trial" and I Say "Free Press": British and American Approaches to Protecting Defendants' Rights in High Profile Trials*, 75 N.Y.U. L. REV. 1412, 1447-48 (2000).

³⁶ See Marlene Arnod Nicholson, *McLibel: A Case Study in English Defamation Law*, 18 WIS. INT'L L.J. 1, 45 (2000).

³⁷ See *id.*

³⁸ See *id.* at 7-8.

there is no such thing as a First Amendment privilege or *New York Times Co. v. Sullivan*.³⁹

Alabama seems to make a lot of law in this area. *New York Times Co. v. Sullivan* came out of Alabama.⁴⁰ Just to further expand a bit on what Professor Sims said, there was a Montgomery Safety Commissioner who was reported in an advertisement about civil rights matters, and he thought it was very disparaging, so he sued the *New York Times*.⁴¹

I represent the *New York Times* in Alabama. It's not always the most favorite paper of jurors in Alabama. While I love it, there are some jurors who don't seem to. But in any event, it was more unpopular in 1964 than it is today. It really was just how much—just get your case to the jury and determine how much.

Judge Friendly has said that *New York Times Co. v. Sullivan* would never have occurred outside of the societal conflict that existed on racial issues at that time, and that may well be true, because if the *New York Times* was going to be sued in every place that it wrote matters that were unfavorable to people and that offended the civil rights issue in particular, where jurors were not equally selected, and where jurors had tremendous amounts of age-old bias that went to the jury room with them in every deliberation—if the *New York Times* and other similar publications were going to be subjected to that, it may well be the extinction of the *New York Times*.⁴² I mean that's really what the court faced in that situation.⁴³

³⁹ See *id.* at 129–32.

⁴⁰ See generally *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁴¹ *Id.* at 256.

⁴² See, e.g., Pierre N. Leval, *Strangers on a Train*, 91 MICH. L. REV. 1138, 1139–40 (1993) (reviewing ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1991)) (Describing the use of libel suits by government officials as a weapon against the civil rights movement, Leval opines that “[i]f such judgments could stand, it would not take long for the Alabama courts to put the *New York Times* out of business altogether, or out of the business of reporting on the violent southern resistance to the lawful integration of the schools and public facilities.”).

⁴³ *Id.*

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The verdict was \$500,000, which you need to interpret that by today's standards.⁴⁴ That was probably one-fifth or one-sixth of what a verdict might be today.

But at the heart of that was really the question of whether the press can remain viable and economically resist the pressures that were existing across the South at that point.⁴⁵

We have a saying that bad facts make good law, or good facts make bad law, but that was an interesting background from whence that case came.

More relevant, however, in the academic and legally theoretical sense, was the acknowledgement that it does have a chilling effect on the press to have to prove what it says in its paper or in its broadcast is true.⁴⁶ Those of you who are lawyers surely know this, but those of you who are not lawyers may not: the truth is not always provable.⁴⁷ That is a very sad fact, but it is part of life. You cannot always prove your case. You may print something that may be true and you may be unable to prove it.⁴⁸

But the great thing about the *Sullivan* case was that it recognized the principle that it had a very chilling effect, and that's the most significant principle, not the economic conditions, because those conditions no longer exist.⁴⁹

I won a verdict after a three-week trial for the *New York Times* about ten years ago in one of the worst areas of Alabama, where

⁴⁴ *Sullivan*, 376 U.S. 256 (1964).

⁴⁵ See Margot S. Fell, *Agriculture Disparagement Statutes: Tainted Beef, Tainted Speech, and Tainted Law*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 981, 991-97; Anthony Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment"*, 83 COLUM. L. REV. 603, 605 (1983).

⁴⁶ Rebecca Hanner White, *The Statutory and Constitutional Limits of Using Protected Speech as Evidence of Unlawful Motive under the National Labor Relations Act*, 53 OHIO. ST. L.J. 1, 45 (1992); Thomas J. Tracy, "Thou Shalt Not Use His Name in Vain"—*The Misapplication of Milkovich v. Lorain Journal: Spence v. Flynt*, 26 CREIGHTON L. REV. 1221, 1237-38 (1993).

⁴⁷ See Steven J. Heyman, *Law and Culture Conflict: Ideological Conflict and the First Amendment*, 78 CHI.-KENT L. REV. 531, 552 (2003) (discussing James Madison's opposition to the Sedition Act).

⁴⁸ See, e.g., *Mangual v. Rotger-Sabat*, 317 F.3d 45, 67 (1st Cir. 2003); *Gertz v. Robert Welch, Jr.*, 418 U.S. 323, 366 (1974).

⁴⁹ See *Sullivan*, 376 U.S. at 279-80.

the jury that you would have thought would not have been very sympathetic nevertheless rendered a verdict in favor of the *New York Times*.⁵⁰

So the economic implications are not as serious, but the implications are very serious about the chilling effect on it.⁵¹ The *New York Times* is not a good example. Most of the newspapers that people read in this country do not have the resources of the *New York Times*, they do not have the prestige of the *Times*, they do not have the reporters and people who are able to act in such a highly professional way.⁵² Many of them are out beating the streets for stories and they are paying reporters \$15,000-\$20,000 a year to write very serious matters. And a libel suit to them, the cost of defense, may mean that they cannot survive.⁵³ The chilling effect at that level is very, very clear.

So here is where we have come. Some people are saying, "Well, the balance has been tilted, that *New York Times Co. v. Sullivan* has tilted it more in favor of the press and against the plaintiff."⁵⁴ You'll have to understand I speak from a background of defending the media, but nevertheless I think, looking at it strictly objectively, that has not occurred.⁵⁵

First of all, suits are still brought and suits are still won. I was just looking at a list recently of defamation verdicts in 2003. In the list of the top rating of one journal, there were twelve verdicts they reported and only two were for the defense.⁵⁶ So some defamation verdicts are still being rendered.

Now we enter the world of sports figures. We have progressed a very long way. There was an incident many years ago, when Babe Ruth supposedly went through a train and took off most of

⁵⁰ *Id.*

⁵¹ See Nicholson, *supra* note 36, at 129-32.

⁵² See John Hood, *Liberalism in the Major Media*, 3 NEXUS J. OP. 13, 16 (1998).

⁵³ See Nicholson, *supra* note 36, at 129-32.

⁵⁴ See Erica Frohman Plave, *Tavoulares v. Piro: An Extensive Exercise of Independent Judgment*, 56 GEO. WASH. L. REV. 854, 858 (1998).

⁵⁵ See, e.g., James C. Mitchell, *Rosenbloom's Ghost: How A Discredited Decision Lives on in Libel Law*, 40 IDAHO L. REV. 427, 428 (2004).

⁵⁶ See *Verdicts & Settlements*, NAT. L. REV., Dec. 15, 2003, at 25.

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his clothes after having too much to drink.⁵⁷ One reporter commented to the other, “We are not here as far as this story goes,” and nothing was ever printed.⁵⁸

We have moved from that to where almost every move, every personal aspect, every activity of sports figures are being reported.⁵⁹ And what is the reason for that?

I think, first of all, sports have reached a point in our society of extraordinary importance. It involves tremendous amounts of money.⁶⁰ And whether you like it or not, sports figures are really the idols of young people in this country. It’s not politicians, it’s not school teachers, but it is usually sports figures. They know them more, they emulate them more, they dress like them. So how can we possibly say this is not a very important societal issue, and how can we possibly say that it is not important for the press to report upon sports figures, and what they do and what they say and how they act? It’s not merely a sideline anymore; it is not merely an amusement of the country.⁶¹

Politics have always been given a sacrosanct area under the First Amendment interpretations, but things that go deeply to the core of society are equally entitled to such protection.⁶² Our society changes and the influences on it change, and I think that the attention that is given to sports in this country and the reporting of sports in this country is entirely appropriate to be subjected to

⁵⁷ See Jeff Klinkenberg, *Thanks Babe*, ST. PETERSBURG TIMES (Mar. 21, 2004), at http://www.sptimes.com/2004/03/21/Floridian/Thanks__Babe.shtml.

⁵⁸ See *id.*

⁵⁹ See Rosalind Silver, *Sports Reporting Reflects Each Passing Era*, Center for Media Literacy, at http://www.medialit.org/reading_room/article592.html#bio (last visited Jan. 28, 2005) (“[R]eaders already up on standings demand more than ever from sports journalists.”).

⁶⁰ See Jim Moore, *Money in Sports: The Chosen Ones*, SEATTLE POST-INTELLIGENCER, available at http://seattlepi.nwsource.com/othersports/75583_futuremain21.shtml (June 21, 2002) (“The ludicrous nature of money in sports has reached the point that a multimillion-dollar contract offered to a teenage athlete no longer warrants a big headline.”).

⁶¹ See *id.*

⁶² Cf. *Virginia v. Black* 358 U.S. 343, 355 (2003) (“[P]olitical speech [is] at the core of what the First Amendment is designed to protect.”).

the same scrutiny that the First Amendment gives to other types of societal concerns.⁶³

Now, as you well know, sports pages are often covered with opinions. This brings up an interesting aspect. Most people really sort of believe a sports page is an opinion page, that it's similar to the editorial page, it's what people think and say about a football team. If you live in a state like Steve and I live in, it is like smiting someone in the face about their religion to talk about their football teams.

I must point out that when you're talking about jurors in the *Butts v. Curtis Publishing Company*—that was the case in which Georgia's coach, Wally Butts, supposedly made a phone call to Bear Bryant at the University of Alabama and sought to supposedly fix the game, and the *Saturday Evening Post* reported that, relying upon a witness who claimed he had been accidentally plugged into the telephone call and heard the comments about the fixing of the game⁶⁴—

Butts in Georgia was at his prime and Bear Bryant was thought to walk on water in Alabama.⁶⁵ I have no way to express to you how the State of Alabama felt about Coach Bryant during that period of time. I was in school down there during the time this happened.

Coach Bryant brought a suit, and it's not reported because it ended up being settled.⁶⁶ The *Butts* case went up on appeal and made some law.⁶⁷

But to give you some idea of the difficulty the *Saturday Evening Post* had, the story is told that when the jury was trying the case—it got settled after the jury was trying the case—Coach Bryant was called to the witness stand, and there was a great deal of drama about his coming in. He was an extremely imposing

⁶³ *Cf. id.*

⁶⁴ *Curtis Publ'g. Co. v. Butts*, 388 U.S. 130, 135–37 (1967).

⁶⁵ *See id.* at 135–36 (describing Butts as a “well known and respected figure.”); Mike Puma, *Bear Bryant ‘Simply the Best There Ever Was,’* at http://espn.go.com/classic/biography/s/Bryant_Bear.html (last visited on Feb. 2, 2005).

⁶⁶ *Curtis Publ'g. Co.*, 388 U.S. at 168.

⁶⁷ *See generally id.*

figure with a tremendous reputation.⁶⁸ He came in and was asked to testify. He was asked to read some paper. He was fumbling around, looking for his glasses, and he apparently had left them elsewhere. One of the jurors leaned over and said, "Coach, you can borrow my glasses." When you have that happen, you know you've got a jury problem with a sports case.

So sports figures are immensely popular, and sometimes they are immensely vilified. But in any event, the question that is being asked, I think, by some, and particularly plaintiffs' lawyers and plaintiffs, is: Has the pendulum swung too far and are sports figures appropriately the subject of scrutiny that they are in the present press?

I think the answer is resoundingly yes. It is more so than ever before important that they be subject to scrutiny and that the public know who they are, because it is your children, it is our future generations, who are emulating these people.⁶⁹ It is the influence that they are making.⁷⁰ Not only that, but it helps to know what is happening with the sports world.⁷¹

There was a case brought against the Yankees' owner, George Steinbrenner.⁷² In a press release, he had called an umpire incompetent and alleged he made biased decisions, and he went on to recite some that he didn't like.⁷³ He got sued for that.⁷⁴ In ruling as a matter of law that he didn't have a defamation case, the question arose as to opinion.⁷⁵ This has become very important about opinion.⁷⁶

A case that come out of Ohio was decided, *Milkovich v. Lorrain Journal*, in which a wrestling coach brought a suit and the superintendent of schools brought a suit because the article said, in

⁶⁸ See Puma, *supra* note 65.

⁶⁹ Cf. Jean Nash Johnson, *Look Closer for Heroes*, THE DALLAS MORNING NEWS, Sept. 27, 2003, at 1E.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Parks v. Steinbrenner, 131 A.D.2d 60 (N.Y. App. Div. 1987).

⁷³ See *id.* at 61.

⁷⁴ See *id.*

⁷⁵ See *id.* at 62.

⁷⁶ See *id.*

effect, that the wrestling coach in the competition had lied about some information that related to his team.⁷⁷ That became an important decision because it dealt with whether or not you can sue someone for defamation for stating an opinion.⁷⁸

Normally, before that time, opinion was presumed to be protected absolutely, that if you are expressing something you thought about it, an idea, then it wasn't subject to any defamation claim.⁷⁹ In sports, so much of what is said is opinion.⁸⁰ You say the referee was lousy, as Steinbrenner did. Or you say that the player was incompetent, or that the coach made a stupid move, called the wrong play. So much of that is opinion.

In the situation of whether or not there was a lie on the part of the wrestling coach in *Milkovich*, that issue reached the United States Supreme Court.⁸¹ The Court, in an opinion that is very, very difficult to interpret, said that if it is a matter that is capable of being proven false, then it's not an opinion.⁸² So it opened that door wider, and that is still the status of the law, that if you express opinions, then if they are capable of being proven false, then you may be able to get your case to a jury if you are the plaintiff.⁸³

Now, let me say something about the *Price* case.⁸⁴ Mr. Heninger and I are litigating that case right now.⁸⁵

One of the issues that Professor Sims referred to deals with confidential sources, which is another controversial area of sports law, and the use of confidential sources.⁸⁶ The shield laws that the Professor referred to exist in probably about half of the states right now.⁸⁷ It is a great mystery to me, Alabama not being the leader in

⁷⁷ *Milkovich v. Lorrain Journal*, 497 U.S. 1, 3 (1990).

⁷⁸ *See id.* at 2.

⁷⁹ *See id.* at 19.

⁸⁰ *See id.* at 9.

⁸¹ *See generally Milkovich*, 497 U.S. 1.

⁸² *See id.* at 19.

⁸³ *See id.*

⁸⁴ *See Jay Reeves, Associated Press, Price Asks Court to Let Lawsuit Progress* (July 28, 2004), at <http://www.wtopnews.com/index.php?nid=171&sid=237005>.

⁸⁵ *See id.*

⁸⁶ *See Jennifer Elrod, Protecting Journalists from Compelled Disclosure: A Proposal for a Federal Statute*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 115 (2003–2004).

⁸⁷ *See id.* at 147.

most of these areas, that Alabama has had a shield law since 1935.⁸⁸ I hope to find out sometime how that happened. But it is surprising that it is one of the states that has a shield law.

A shield law virtually says that you cannot compel a newsperson to report what they have found out from a confidential source.⁸⁹ Confidentiality has been a very important basis for getting information.⁹⁰ But shield laws nonetheless are controversial.⁹¹

Plaintiffs' lawyers and plaintiffs say, "Why should we not be able to know who that person is? Why shouldn't we be able to examine them? Why shouldn't we be able to put them on the stand and determine their credibility?"⁹² Various states have dealt subsequently, when it is tried, with how you deal with those issues.⁹³

But this is an issue in the *Price* case because *Sports Illustrated* relied upon certain confidential sources for some of the information.⁹⁴ In most of these incidents with high-profile cases, you are not going to get a lot of information many times if you do not have confidential sources.⁹⁵ It is going to expand the area of

⁸⁸ ALA. CODE § 12-21-142 (2004); see also The Reporters Comm. for Freedom of the Press, *The First Amendment Handbook, Confidential Sources and Information: Legislative Protection of News Sources*, at <http://www.rcfp.org/handbook/c04p02.html> (last visited Feb. 02, 2005).

⁸⁹ See generally Douglas Lee, *Shield Laws Overview*, at http://www.firstamendmentcenter.org/Press/topic.aspx?topic=shield_laws (last visited Jan. 5, 2005).

⁹⁰ See Howard Kurtz, *In the Matt Cooper Case, Chilling Implications*, WASH. POST, Aug. 16, 2004, at C1 ("[J]ournalists often need to provide confidentiality to be assured of receiving information."); Felicity Barringer, *In a New Atmosphere, Press Is Silent on Subpoena Flurry*, N.Y. TIMES, Apr. 24, 1998, at A1 (supplying the following examples where confidentiality is most important for a source: teen-age drug users, accountants in crooked financial schemes, and police officers giving details of internal corruption).

⁹¹ See generally Barringer, *supra* note 90.

⁹² See David Shaw, *Reporters Serve Public Best on the Job—Not the Stand*, L.A. TIMES, June 27, 2004, at E18.

⁹³ See *Been There, Done Time*, WASH. POST, Aug. 26, 2001, at B3.

⁹⁴ See Don Yaeger, *How He Met His Destiny at a Strip Club*, SPORTS ILLUSTRATED, May 12, 2003, at 38; *Price v. Time, Inc.*, 304 F. Supp. 2d 1294, 1300 (N.D. Ala. 2004).

⁹⁵ See *Should a Journalist Go To Jail?*, CHI. TRIB., Aug. 22, 2004, at 8.

inquiry and it is going to mean more information to the public if you have confidential sources available.⁹⁶

In the particular instance of the *Price* case, however, we have an unusual statutory issue.⁹⁷ When the legislature passed this Act—and it was subsequently amended—when they passed it and when it was amended, it did not include the word “magazine.”⁹⁸ It was extended later to cover television, because we didn’t have television in 1935, but it has never had the word “magazine” in it.⁹⁹

So Mr. Heninger has convinced the trial judge, erroneously so, to say that the confidential source rule, the shield law, in the instance of the *Price* case does not apply to *Sports Illustrated*.¹⁰⁰ Now, just how ludicrous this is—I’m sure he’ll explain to you better—but how *Sports Illustrated* ought not to have it but the *Birmingham News* should have it, or some television station in Lookout Mountain, Alabama, ought to have it but *Sports Illustrated* shouldn’t have it—this is a mystery to me.¹⁰¹ And it’s a mystery to me why the Alabama legislature would not have specifically included it.¹⁰²

The United States District Judge who is hearing the *Price* case decided that the shield law does not apply and that *Sports Illustrated* must reveal its confidential sources.¹⁰³ Those of you who deal in sports law, or deal with any kind of law, can imagine the angst that that causes the press and the media, to have to be ordered to break the confidentiality they have promised.¹⁰⁴ That’s extraordinarily important in the press, and we believe it is extraordinarily important in getting the information to

⁹⁶ See *id.*; see also Karen Branch-Brioso, *Two Cases Stir Controversy over Use of Confidential Sources*, ST. LOUIS POST-DISPATCH, Aug. 22, 2004, at A7; Shaw, *supra* note 92.

⁹⁷ ALA. CODE § 12-21-142 (2004); see also *Price v. Time, Inc.*, 304 F. Supp. 2d 1294, 1295 (N.D. Ala. 2004).

⁹⁸ See *Price*, 304 F. Supp. 2d at 1296.

⁹⁹ See *id.*

¹⁰⁰ See *id.*

¹⁰¹ See *id.*

¹⁰² ALA. CODE § 12-21-142.

¹⁰³ *Price*, 304 F. Supp. 2d at 1309.

¹⁰⁴ See Barringer, *supra* note 90.

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individuals.¹⁰⁵ The judge, in a very long opinion, expresses his basis really primarily on the basis of statutory interpretation, that if the legislature had intended magazines, it would have said “magazines.”¹⁰⁶

The other aspect of it is that we believe, first, that you cannot select one medium, particularly with no rational basis to do so, and exclude them from the applicability of the shield law, and, second, that the correct decision is that it should be extended to *Sports Illustrated* in this case.

I had a lot more I was going to say, Professor Sims, but I think I am out of my time. I’m sure Mr. Heninger will stimulate me to say more as we go into this.

Thank you very much.

PROF. SIMS: Thank you, Gary. That was great.

Now we turn to the other side of the Mike Price litigation, a very distinguished trial counsel, a specialist in tort litigation, Mr. Stephen Heninger.

MR. HENINGER: Good morning.

I doubt that I will spur Gary to any enlightenment. I’ve been unsuccessful in the past and am not naïve when I say I don’t anticipate any success. But he’s a damn good lawyer.

Let me start with a place that probably will not shock any of you, since you know my predisposition is that of a plaintiffs’ attorney. Let me start with some facts, instead of just law and the difference that I perceive between facts and fact-finding. There is a big difference between those two things.

It’s like I tell the story about my daughter Jill. If I tell her to be home at midnight and she comes home at 2:00 and I’m sitting at the kitchen table waiting, and the door opens and there she is, the facts are clear: she knew the rule, she violated the rule, she’s going to get punished. But fact-finding is more difficult. What if when she opens the door and I’m about to scream at her, I notice that her mascara is running, she has been crying, she has been riding

¹⁰⁵ Karen Branch-Brioso, *supra* note 96.

¹⁰⁶ *See Price*, 304 F. Supp. 2d at 1309.

around in the neighborhood for two hours with her boyfriend, and he has just dumped her? Fact-finding to punish her is tough. Same facts, different occurrence.

What if she opens the door and she's so drunk she stumbles onto the kitchen floor and she is eighteen years old? It's a problem. But, you see, fact-finding is different.

I am reminded of a book called *Abe Lincoln Laughing*, which presumably has been established not to be apocryphal.¹⁰⁷ Lincoln, as you know, was a lawyer in central Illinois and was hired by some barge owners on the Mississippi River who had inadvertently bumped into a railroad trestle and caused considerable damage.¹⁰⁸ The railroad, not having a sense of humor, sued the barge company.¹⁰⁹ The barge company hired Abe Lincoln, P.C., to defend them in East St. Louis Circuit Court, while the railroad hired the best firm from New York City they could find—and there are so many.¹¹⁰

The case went to trial.¹¹¹ During closing arguments, Abe Lincoln stood up and strode to the jury railing and said, “Gentlemen of the jury”—no women served at that time—“you have just heard a very fine, eloquently, and absolutely correct statement from my brethren at the bar, but their conclusions are all wrong.” And he sat down.¹¹²

The jury was just howling.¹¹³ Jurors were leaning back in their seats, laughing, hitting each other on the back.¹¹⁴ The judge gaveled them to order, charged them, sent them out to deliberate.¹¹⁵ Ten minutes later, they came back with a verdict exonerating Lincoln's client.¹¹⁶

¹⁰⁷ See Lewis Lord, *Looking for Lincoln*, U.S. NEWS AND WORLD REP., Feb. 17, 1997, at 62 (relating anecdote from P.M. ZALL, *ABE LINCOLN LAUGHING: HUMOROUS ANECDOTES FROM ORIGINAL SOURCES BY AND ABOUT ABRAHAM LINCOLN* (1995)).

¹⁰⁸ *See id.*

¹⁰⁹ *See id.*

¹¹⁰ *See id.*

¹¹¹ *See id.*

¹¹² *See id.*

¹¹³ *See id.*

¹¹⁴ *See id.*

¹¹⁵ *See id.*

¹¹⁶ *See id.*

Well, the railroad lawyers were just shocked.¹¹⁷ They had all this evidence, all these paralegals, all these PowerPoint presentations, or the equivalent of it back in those days. The staff was putting things back in boxes, while Lincoln shuffled a few pages into his well-worn briefcase.

They couldn't believe this. So the defense attorneys went over to Lincoln and said, "How could this happen? You yourself admitted we had our facts absolutely correct. You said only our conclusion was wrong. How could we lose this case?"¹¹⁸

Lincoln said, "Well, let me tell you. During the lunch hour preceding final argument, I had occasion to dine with some of the jury members"—in those days, I guess it was okay—"and I told them a story of my youth, about a farmer who was walking across a hayfield and his son came running up to him and said, 'Dad, Dad, you've got to come quick. Sis is up in the hayloft with the hired hand and she's a-raisin' her skirt and he's a-lowerin' his britches, and I think they're fixing to piss all over our hay.' At which point the father looked down at his son and said, 'Son, I'm sure you have your facts absolutely correct, but your conclusion is all wrong.'"¹¹⁹

So there is a difference in how we perceive things and what the actual facts are. When Gary said sometimes the truth is not provable, I have to echo that that may be right.

I would like to talk to you this morning about putting flesh on this vague concept "reckless" in defamation, because there will come a point when my client and I are seated in front of a jury instead of a group of interested scholars in constitutional law and face the onerous burden of reckless disregard of truth or falsity.¹²⁰

In *Sullivan*, which came from Alabama, the court said: Bad investigation is not enough. Unreasonable, negligent, wanton investigation is not enough. You've got to prove the defendant either knew what he was publishing was false or published it with

¹¹⁷ See *id.*

¹¹⁸ See *id.*

¹¹⁹ See *id.*

¹²⁰ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964) (articulating the burden of proof for defamation).

reckless disregard of the truth or falsity of the material—and it has to be false, obviously.¹²¹

A few years later, the *Butts* case came down.¹²² *Butts* had been decided by a jury before *New York Times Co. v. Sullivan* had been handed down.¹²³ In that case, in a confusing way, the Supreme Court said that the investigation was so bad in *Butts*—this man said he had inadvertently overheard a telephone conversation between Paul “Bear” Bryant and Wally Butts, where Butts was saying “this is what we knew in the game and this is what you need to look for,” and that it was a fix, so to speak.¹²⁴

At any rate, there were notes taken by the eavesdropper—never reviewed by the reporter.¹²⁵ There was a witness with the eavesdropper—never interviewed by the reporter.¹²⁶ The reporter simply interviewed the eavesdropper, the inadvertent eavesdropper, and the story was published.¹²⁷ *Saturday Evening Post* admitted at that time that they were engaged in what they called a plan of “sophisticated muckraking” so they could get a successful exposé.¹²⁸ They were getting their butt beat in the market—that is another way of putting it—and they needed to increase sales.¹²⁹

So in *Butts* the Supreme Court said, “This investigation is so bad and so unreasonable, that even if they had used the law of *New York Times*, it would have been affirmed,” and so the case was affirmed.¹³⁰

¹²¹ *Id.* at 279–83 (finding that factual error, content defamation of official reputation, or both, are insufficient to warrant an award of damages for false statements unless “actual malice”—knowledge that statements are false or in reckless disregard of the truth—is alleged and proved.).

¹²² *Curtis Publ’g Co. v. Butts*, 388 U.S. 130 (1967).

¹²³ *Butts v. Curtis Publ’g Co.*, 225 F. Supp. 916 (N.D. Ga. 1964).

¹²⁴ *Curtis Publ’g Co.*, 388 U.S. at 135–37.

¹²⁵ *Id.* at 157–58.

¹²⁶ *Id.* at 157.

¹²⁷ *Id.*

¹²⁸ *Id.* at 158.

¹²⁹ *See id.* (stating that the *Saturday Evening Post* was anxious to change its image to produce a successful expose since they were already deeply involved in another libel action based on a different article).

¹³⁰ *Cf. id.* at 138–39.

Then we come to the *St. Amant* case that Professor Sims mentioned, where the Supreme Court said: “This is a subjective test that we are going to apply for recklessness. It is not the traditional malice of a reasonable man. It is a subjective test.”—at which point Mr. Huckaby and his side would say, “Yes!”¹³¹

However, the Supreme Court said that it will do little good for the defendant to simply take the stand and say, subjectively, “I believe Sally Sue. When she gave me this confidential information, I believed her. I have no further statements to make.”—in hopes that this would satisfy the subjective test and prove good faith.¹³² Who could rebut this person whose intent and state of mind is being questioned?¹³³

So the Supreme Court in *St. Amant* said: “Just testifying that you believed in what you said is not enough. Now, the plaintiff can’t just prove that you did a poor investigation or no investigation either. There must be some proof that there was a high degree of awareness of probable falsity.”¹³⁴

Well, what does that mean, “a high degree of awareness?”¹³⁵ Degrees—Fahrenheit or Centigrade? I feel a high degree of heat in this room, not only because of the light but because of your presence and my lack of knowledge in this area, which will show itself quite soon.

So how do you maintain or how do you evaluate these degrees? How do jurors evaluate degrees of awareness? If you have one eye closed, are you aware? If you have both eyes closed but ears open, is the degree high? If you have your mouth open and speaking but

¹³¹ *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (stating that reckless conduct is not measured by whether a reasonably prudent man would have investigated before publishing, but whether the defendant in fact had serious doubts about the truth of the publication). Gary Huckaby is a litigation partner in Bradley Arant Rose & White LLP and defended Sports Illustrated against a defamation suit brought by Mike Price.

¹³² *See id.* at 732.

¹³³ *See id.* at 731 (citing *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (emphasizing the necessity for a showing that a false publication was made with a high degree of awareness of probable falsity)).

¹³⁴ *Id.* (Defendant cannot automatically ensure a favorable verdict by testifying that he published with a belief the statements were true; instead the finder of fact must determine whether the publication was indeed made in good faith.).

¹³⁵ *Id.* at 731.

eyes closed and ears closed, is there a high degree of awareness? Beats the stew out of me.

My position is, as a plaintiffs' attorney, having studied this to some degree on behalf of Mike Price, that the subjective test is not totally subjective.¹³⁶ It cannot be totally subjective, and the court has said it cannot be.¹³⁷

So where does that leave us? If it's not a reasonable man, what would the ordinary reasonable reporter do, and it's not just Gerry Eskenazi, where is it? It's got to be in between.

There have been some cases that have been announced that have given us some optimism.¹³⁸ In the *St. Amant* case, the Court said: "Reckless disregard, it is true, cannot be fully encompassed in one infallible definition."¹³⁹ What a rarity for the Supreme Court to admit infallibility, or fallibility. And yet, they were saying: "We can't just say, 'This is it, y'all, these are the bright-line boundaries.' Each case is going to have to be decided on its own merits."¹⁴⁰

They also went on to state that: "Inherent improbability may provide the inference of actual malice."¹⁴¹ Then they said: "When a story is not hot news, actual malice may be inferred when the investigation was grossly inadequate."¹⁴² Well, it wasn't. That wasn't the law before. And yet, now they're saying when it's not hot news, a grossly inadequate failure to investigate may be enough for malice.¹⁴³

They have also stated, which will not surprise you as students of tort law, that when state of mind is the issue, it is rarely, rarely

¹³⁶ See *id.* at 732.

¹³⁷ *Id.*

¹³⁸ See *id.* at 731 (holding that reckless conduct is not measured by the reasonable man and there is no set standard for what is reasonable).

¹³⁹ *Id.* at 730.

¹⁴⁰ *Id.* (stating that the limits of what constitutes "reckless disregard" will be marked out through case-by-case adjudication).

¹⁴¹ *Id.* at 732 (stating that a defendant in a defamation action will be unlikely to prevail when the allegations are so "inherently improbable" that only a reckless man would have published them).

¹⁴² See generally *id.* at 731 (stating that publishing with serious doubt about the truth of the statement and absent proper investigation demonstrates actual malice).

¹⁴³ See generally *id.*

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to be disposed of summarily, it's a jury question, and state of mind in a malice case for recklessness has got to be determined by the jury.¹⁴⁴

In the *Connaughton* case, which Professor Sims talked about, there was a tape recording that had been made of a discussion, and this candidate for a municipal judgeship in Ohio was being accused of having attempted bribery, and he had a tape recording of a discussion with a confidential source—she wasn't really confidential, but she and her sister were supposed to have evidence about this attempted bribe.¹⁴⁵ She goes forward.¹⁴⁶ The sister does not, remains in the shadows.¹⁴⁷

The reporter goes with what the sister says and says, "Will your sister verify what you said?"¹⁴⁸

She said, "Well, she's kind of meek and mild. She's not strong like I am. She doesn't work out, doesn't eat the right foods. So I think you should rely on me."¹⁴⁹

So he doesn't go talk to the sister to see if she would confirm it, nor does he listen to the actual tape that was given to him by the defendant.¹⁵⁰

The Supreme Court affirmed a verdict for the plaintiff, on the basis of reckless disregard. It said that there was in essence, willful blindness, where you don't want to find out the truth because you know it will affect the salaciousness of your story.¹⁵¹

In that case, in Justice Scalia's concurring opinion, he said that one of the reasons they granted *cert.*—and there were only two—was to decide whether highly unreasonable conduct

¹⁴⁴ See *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 700 (1989) (denying petitioner's motion for summary judgment and explaining proper instruction for juries regarding state-of-mind, malice, and recklessness).

¹⁴⁵ *Id.* at 668–82.

¹⁴⁶ *Id.* at 670–76.

¹⁴⁷ *Id.* at 674–75.

¹⁴⁸ See *id.* at 675 n.23.

¹⁴⁹ See *id.* at 675 n.22.

¹⁵⁰ *Id.* at 682–83.

¹⁵¹ See *id.* at 692 (stating that it is likely that the newspaper's inaction was a product of a deliberate decision to not interview Stephens because that might have confirmed the probable falsity of the charges).

constituting an extreme departure from ordinary standards of investigation and reporting is alone enough to establish (rather than merely evidence of) the malice necessary to assess liability in public figure libel cases.¹⁵²

So we have the acknowledgement that, at the very least, the method of investigation is evidence to be considered on the issue of malice.¹⁵³ It is probative.¹⁵⁴ It is not by itself decisive.¹⁵⁵ The worst investigation in the world will not assure liability, but on the other hand, it does go to the consideration for malice.¹⁵⁶

So these are the factors:

1. The reliability of the sources¹⁵⁷

In *St. Amant*, the Supreme Court said that if there are obvious reasons to question the veracity of the source, or the accuracy of the account, the reporter can be held liable for actual malice.¹⁵⁸ So there are two issues there—the reliability of the source, the accuracy of the report—and if there are obvious reasons to question either or both of those, there must be some effort undertaken to dispel the questions.¹⁵⁹

2. The opportunity available to investigate

This would involve being given the tape and not listening to it, for instance.¹⁶⁰ I'm sorry to use you as an example, but you chose the Baptist seat today.

¹⁵² *Id.* at 696–97 (Scalia, J., concurring).

¹⁵³ *See id.* at 688 (“A ‘reckless disregard’ for the truth, however, requires more than a departure from reasonably prudent conduct. ‘There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.’” (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968))).

¹⁵⁴ *See id.*

¹⁵⁵ *See id.* at 692 (“Although failure to investigate will not alone support a finding of actual malice, . . . the purposeful avoidance of the truth is in a different category.”).

¹⁵⁶ *See id.* at 688 (“[R]ecklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.” (citing *St. Amant*, 390 U.S. at 731)).

¹⁵⁷ *See St. Amant*, 390 U.S. at 730.

¹⁵⁸ *Id.* at 732.

¹⁵⁹ *See id.* at 730–31.

¹⁶⁰ *See id.* at 730.

3. The urgency of publication¹⁶¹

We talked about “hot news.” Urgency of publication is a marketplace definition, not a defendant definition.¹⁶² Just because the defendant wants to publish something by 9:00 a.m. tomorrow morning and may feel it’s urgent to get it out, that does not meet the “hot news” definition.¹⁶³ It is a more objective test: would failure to get it to press timely affect the value of the news?¹⁶⁴

4. The degree of sensationalism from which improbability may be inferred¹⁶⁵

For instance, if a responsible paper were to come out with a headline tomorrow saying “Steve Heninger: Product of Sexual Liaison between Mule and Chicken,” since mules are not capable of passing on their genes, they’re not fertile, that is a highly improbable statement.¹⁶⁶ It is obviously improbable and might be something to be pursued.¹⁶⁷

Now, I used a very extreme hyperbole, and I notice some of you are wincing, as if “do what?” But I’m trying to show that there can be some things that are reported by a confidential source or someone else that are so improbable that the court would recognize that you’ve got to be a dumbass to believe it, and especially to report it.¹⁶⁸

There is a case from Texas, called *Bentley v. Bunton*,¹⁶⁹ where the court said that imagining something may be true is not the same as belief.¹⁷⁰ Just because a reporter says, “Well, I thought it was true,” which is imagining it may be true, this is not the same as believing it is true.¹⁷¹

¹⁶¹ See *id.* at 731.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ See *id.* at 732.

¹⁶⁶ See *id.*

¹⁶⁷ See *id.*

¹⁶⁸ See *id.*

¹⁶⁹ 94 S.W.3d 561 (Tex. 2002).

¹⁷⁰ See *id.* at 583.

¹⁷¹ Cf. *id.*

There is some need for responsible journalism.¹⁷² If there are no reliable sources other than a confidential source, I think that's a problem in the law, it's a problem.

And the subject of the investigation or the suit may provide objective criteria himself. If he or she were to say, "Well, I never do X," and yet in this case did X, that might show that, even subjectively, he had violated his own pattern of beliefs to go after this story and nail it, even though he had some doubts.

Let me end with this. I know the panel will get into more discussion. I do want to pick up the gauntlet that Gary threw down, because he wants me prior to my brief to announce to you and to him and to *SI* what my beliefs are on the shield law in Alabama.¹⁷³ Fortunately, I have a federal district judge who says it much better than I do.¹⁷⁴

I have found, and I imagine most of you have too, especially in this modern age of the Internet, that rumors grow wings and fly—the media helps them grow wings, sometimes with justification—while the truth creeps on the ground, especially through litigation, with discovery and whatever is involved. I think freedom of the press is absolutely essential to our established form of government. I come from a state, as does Gary, where Hugo Black, one of the most staunch defenders of the First Amendment, hailed, and I share his views.¹⁷⁵ But I must add it needs to be a responsible press. There is a tension between freedom of the press and each of our rights, and even celebrities' rights, in their reputation and truth.¹⁷⁶

¹⁷² See Soc'y of Prof'l Journalists, *Code of Ethics*, at http://www.spj.org/ethics_code.asp (last visited on Jan. 30, 2005).

¹⁷³ See ALA. CODE § 12-21-142 (2004).

¹⁷⁴ See generally *Price v. Time*, 304 F. Supp. 2d 1294 (N.D. Ala. 2004).

¹⁷⁵ See Biographical Directory of the U.S. Congress, *Hugo Lafayette Black*, at <http://bioguide.congress.gov/scripts/biodisplay.pl?index=B000499> (last visited on Feb. 2, 2005).

¹⁷⁶ See, e.g., Sudakshina Sen, Comment, *Fluency of the Flesh: Comments of an Expanding Right of Publicity*, 59 ALB. L. REV. 739, 753 (1995) ("[T]he continuing privatization of the celebrity by protecting all incidents of identity diminishes the public's opportunity to construct and to circulate diverse views of what the celebrity means to society.").

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So it's important that the press not be an accomplice to falsehoods.¹⁷⁷ What the Court has said is, you can't be a knowing or idiotic accomplice, basically. You may be an accomplice, unwittingly, and we will not hold you responsible.¹⁷⁸ But if you are a co-conspirator or a willing, or even a reckless, accomplice, then you may be held liable.¹⁷⁹

Let me speak about shield laws.¹⁸⁰ How many of you are familiar with the term, or had ever thought about it, and were dreaming last night about it in fact, anxiously awaiting this discussion?

[Show of hands.]

Not all states have shield laws.¹⁸¹ At common law there was no reporter's privilege, none, and you know if there's no privilege at common law, one should not be created in our system, absent a statute or a constitutional provision.¹⁸²

Some states have provided by statute that reporters may not be required to disclose sources of information.¹⁸³ The statutes vary in language throughout the United States.¹⁸⁴ They fall basically into three categories, but they are not uniform at all.¹⁸⁵

In our state, for whatever reason, the statute says that people who are engaged by newspapers, radio stations, or TV stations may not be compelled to identify sources.¹⁸⁶ Magazines are left out.¹⁸⁷ Other media are left out.¹⁸⁸

And there are several other states—California was like that.¹⁸⁹ In the *Alioto* case, the Supreme Court of California found that the

¹⁷⁷ See *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

¹⁷⁸ See *id.*

¹⁷⁹ See *id.*

¹⁸⁰ See, e.g., ALA. CODE § 12-21-142 (2004).

¹⁸¹ Cf. *Price v. Time, Inc.*, 304 F. Supp. 2d 1294, 1299 (N.D. Ala. 2004).

¹⁸² Cf. *id.*

¹⁸³ See, e.g., ALA. CODE § 12-21-142 (2004).

¹⁸⁴ See, e.g., *id.*; N.Y. CIV. RIGHTS LAW § 79-h (McKinney 2001).

¹⁸⁵ See Elrod, *supra* note 86.

¹⁸⁶ See ALA. CODE § 12-21-142.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Cf. CAL. CIV. CODE § 48a (West 2004) (dealing with special damages for retraction of libel not extending to magazines).

statute didn't put magazines in, so Cowles Publishing Company was not entitled to a shield.¹⁹⁰

So I find it disturbing that we in our state, as you in whatever state you hail from, have elected people to pass laws and to decide whether they should be amended or pulled out. For a forum here to sit and say, "Well, Alabama is just stupid, the legislature must be stupid to not include magazines or Internet or tabloids of others"—they had their reasons, I'm sure.¹⁹¹ Should tabloids be given the same privileges that the *New York Times* gets? I think not. Maybe others think so. I think there are differences in the types of media and the expectations for the degree of professionalism that are there.

So I feel no disability in defending the trial judge's lengthy and very erudite opinion,¹⁹² because the legislature of Alabama, whether you like it or not, whether you agree with it or not, it's a fact, it happened.¹⁹³ Judges are required to follow the law; they are not to be activists under most people's perceptions.

Thank you very much for your time. I've enjoyed being with you.

PROF. SIMS: Thank you, Steve.

We will now turn to the first of our sports writers, Mr. Gerald Eskenazi, who has had a very distinguished career. As noted, his 8000 bylines is the second-most in the history of the *New York Times*. He has recently completed a book, his fourteenth, his memoirs, called *A Sports Writer's Life*. I might mention also that his son Mike is a first-year student here at our Law School.

MR. ESKENAZI: At the risk of being an inviting target for Steve, I'd just as soon stand and speak, if that's okay.

I'm so glad I'm here today because the next time I interview Mike Tyson I'm going to refer him to *New York Times Co. v. Sullivan*¹⁹⁴ if he's complaining.

¹⁹⁰ See *Alioto v. Cowles Communications, Inc.*, 519 F.2d 777 (9th Cir. 1975).

¹⁹¹ See *Price v. Time, Inc.*, 304 F. Supp. 2d 1294, 1300 (N.D. Ala. 2004).

¹⁹² See *id.*

¹⁹³ See ALA. CODE § 12-21-142 (2004).

¹⁹⁴ 376 U.S. 254 (1964).

Some years ago, I was interviewing a coach of the Jets, defensive coordinator for the Jets, and he said, “It’s a bad situation. We’ve got to nip it in the butt.” I filed that under “silly things that coaches say inadvertently.”¹⁹⁵ I was at a Mets press conference where the manager of the Mets, a fellow named Wes Westrum, said of a close game, “Boy, that certainly was a cliff dweller.”¹⁹⁶

And of course, Yogi Berra said, “When you come to a fork in the road, take it.”¹⁹⁷

Well, what was I going to do with all this sort of arcane information that, for whatever reason, I didn’t print in the *New York Times* because we don’t like to embarrass people? One day I was doing a guest column for William Safire—not the political column, but his Sunday “On Language”—and I wrote the piece, and the *New York Times Magazine* ran it.¹⁹⁸ About two weeks later, I got a call from the *Readers’ Digest* and they said they would like to reprint the column, which was great because the *Readers’ Digest* paid me four times as much for the reprint as the *New York Times* did for the original piece.

I got a call from *Readers’ Digest* after a few days saying, “We’ve been unable to reach the Jets’ coach who said ‘we have to nip it in the butt.’” What he of course meant was “nip it in the bud.”

So I said, “Well, what do you do?”

They said, “We’re fact checkers and we check every piece of information that you say.”

So I’m thinking: they’re going to call the manager of the Mets who didn’t know the difference between a “cliff dweller” and a cliff hanger and say, “Did you tell Gerry Eskenazi a close game was a cliff dweller?” So I thought: it’s not going to make any sense.

¹⁹⁵ The correct expression is “nip it in the bud.”

¹⁹⁶ The correct expression is “cliff hanger.”

¹⁹⁷ The famed New York Yankee catcher was renowned for his silly expressions. See *Yogi-isms*, at <http://www.yogi-berra.com/yogiisms.html> (last visited on Jan. 30, 2005).

¹⁹⁸ Gerald Eskenazi, *On Language: Wordgame Champs*, Jun. 16, 1985, § 6 (Magazine), at 12.

But it raised an interesting issue with me. Newspapers, even what I consider the greatest paper in the world, and it has been a pleasure to work for them all these years, we don't have a fact checker. Magazines have fact checkers. *The New Yorker* has a fact checker, *New York* magazine has a fact checker. The *New York Times* relies on our reliability to understand what's right and what's wrong, what's fair and what's not fair, and even what's libelous and what is not libelous.

Well, what did I learn about this? The truth is until this moment I haven't learned about it at all, because no one ever sat down and taught me when I was a copy boy and then promoted to reporter what libel law is. How do we know?

Even today—I checked just the other day, in the wake of the Jayson Blair fiasco.¹⁹⁹ I said, “Does anyone teach new reporters about libel?” Now, we're talking about the most important paper in the world, a paper that gets delivered every day to the President of the United States—well, I shouldn't say gets delivered—what it says gets delivered to him every day. And we still don't teach our new reporters about what's libelous and what isn't libelous.

I can't imagine after all these years, they sent me out to cover a boxing event my first time, they sent me out to interview Reggie Jackson, they sent me out to interview Mickey Mantle, they would send me out to everyone else, and we would be in situations where if we were not writing about sports—and I have to agree with Steve on this—it's potentially libelous.²⁰⁰

For example, if I'm writing about Reggie Jackson hitting a home run and I say, “Boy, it's an odd-looking bat he has, I wonder if he corked it,” I guarantee you I could raise that question in the *New York Times* or the *New York Post* or the *Chicago Tribune* or the *Birmingham News* and I would not get sued for it. And yet, I have called into account and into question the integrity and the

¹⁹⁹ See Jack Shafer, *The Jayson Blair Project: How Did He Bamboozle the New York Times?* (May 8, 2003), at <http://slate.msn.com/id/2082741>.

²⁰⁰ See, e.g., R. Robin McDonald, *Magazine Ordered to Reveal Its Sources*, FULTON COUNTY DAILY REP. (Jan. 9, 2004) (giving an example of libel in sports), available at <http://www.law.com/jsp/article.jsp?id=1073157024395>.

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honesty of this man without any knowledge if in fact he has cheated or not. I couldn't say the same thing about a CEO.

So what we have learned is we have learned in a tribal way what is libel. And I come from a pretty good newspaper. Can you imagine all these other poor souls who aren't as fortunate to work for the *New York Times*, or *Newsday*, or the *Chicago Tribune*, or the *L.A. Times*, or the *Washington Post*? Where do these guys learn about this stuff? They don't learn about it. You hope that a copy editor on the paper will catch you before you said something stupid.

I would like to ask a question, by the way. Has anyone here ever had anything written about them in a newspaper or a periodical? Has anyone ever been quoted in a newspaper?

[Show of hands.]

So three or four people, five people. I don't know if this is enough of a universe. Can I ask you whether or not you felt that the reporter got the whole gist of what you said correctly either in quote or in context?

PARTICIPANT: I had a reporter admit to me that she made it up.

MR. ESKENAZI: Okay.

PARTICIPANT: She didn't get the answer she wanted, so she made it up. I called her on it. She said, "I made it up."

MR. ESKENAZI: Well, that's not quite the answer I wanted, but—

PARTICIPANT: This was something that was not anything that was even remotely close.

MR. ESKENAZI: So this is one out of five, this is 20 percent.

But, you know, I understand that. And there is a part of me, after forty-five years of doing this, that I understand what I do isn't perfect.

There was a recent study in which fifty-six percent of people—and I want to get the quote. The question was worded: "Do you believe that newspapers often report incorrectly?" Fifty-six percent said they believe it.

And yet, we still read the newspapers, and I believe most of us here get our news from newspapers, as opposed to the majority of Americans, who get their news from television.²⁰¹

When Jayson Blair, the poster boy for the anti-*New York Times*, went down to interview Jessica Lynch's mother, he made up a story about what her farm looked like and what the house looked like.²⁰² Well, they asked Jessica Lynch's mother, "Hey, you know, why didn't you call us? All you had to do was call the operator and ask for the *New York Times*."²⁰³

She said, "Well, I thought that's what newspapers do."²⁰⁴ So this is a woman whose daughter for the moment was the most famous noncombatant soldier in America. I think she got injured passively, if I'm not mistaken, as opposed to actually on a firing line.²⁰⁵ And yet, she said, "I thought this is what reporters do." Now, that's a terrible thing to think of what we do.

In the wake of Jayson Blair, many papers now send out questionnaires to people who have been written about. They ask: "Were you written about in a fair way, an objective way? Was the quote accurate?" And I think even more than that, "Was the context accurate of what you wanted to say, and was it fair?"

I think that, like newspapers everywhere, the *Times* is extremely protective of its integrity and of its ability to report the news.²⁰⁶ I think that as part of that they have a sense of fairness.

When I was a senior in college, I had job with—anyone here ever hear of the *New York Mirror*? It was the trailer park cousin of the *Daily News* in a way. It was a tabloid. Walter Winchell wrote

²⁰¹ See Frederic A. Emmert, *U.S. Media in the 1990's II: The Broadcast Media*, at <http://usinfo.state.gov/usa/infousa/media/files/media2cd.htm> (last visited on Feb. 2, 2005).

²⁰² Jayson Blair, *Relatives of Missing Soldiers Dread Hearing Worse News*, N.Y. TIMES, Mar. 27, 2003, at E13.

²⁰³ See Dan Barry et al., *Correcting the Record: Times Reporter Who Resigned Leaves Long Trail of Deception*, N.Y. TIMES, May 11, 2003, at A1.

²⁰⁴ See *id.*

²⁰⁵ See *id.*

²⁰⁶ See Am. Soc'y of Newspaper Editors, *The New York Times: Guidelines on Our Integrity*, at <http://www.asne.org/index.cfm?id=408> (Dec. 13, 2000).

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for it.²⁰⁷ It was actually the paper we used to get in my house for two cents. I lived in East New York, Brooklyn, which I'm not sure exists anymore.

But in any event, I was interested in journalism. I picked up the paper one day and they were writing about a mobster. The *Mirror* called him "a thug." I thought: "Gee, I don't know. Can you call someone a thug?" So I asked the Executive Editor of the *Mirror*, a very distinguished fellow named Glen Neville. I said, "Mr. Neville, how can you legally call someone a thug?"

He replied, "He's a convicted thug."

So I thought: "Well, at the conviction what did the judge say? Did he say, 'You're worse than a punk, you're a thug?'"

But you know what I realized? That thug, if he read the paper at all, wasn't about to sue the *New York Mirror*.

I don't know—maybe my colleagues know—can you in fact sue someone for calling you a thug? Does the fact that you've been convicted of robbery or larceny or something make you a thug?

At the *Mirror*, I was also in on a seminal moment in American history. We've heard some talk here today about suing publications. There was a famous publication of the 1950s, called *Confidential* magazine.

Maureen O'Hara sued *Confidential* magazine.²⁰⁸ Maureen O'Hara is the actress in "The Quiet Man." In fact, her memoirs have just come out.²⁰⁹ *Confidential* magazine terrorized all the Hollywood types.²¹⁰ It was about to put out a story that Rock Hudson—well, they didn't use the word "gay" in those days—so Rock Hudson wound up marrying his press agent's secretary to

²⁰⁷ See *Walter Winchell*, at http://en.wikipedia.org/wiki/Walter_Winchell (last visited on Jan. 28, 2005) (In newspapers on the radio, Walter Winchell created the gossip column, thereby breaking the journalistic taboo against exposing the private lives of public figures.).

²⁰⁸ See *Biography*, at <http://www.maureen.co.uk/biography.htm> (last visited on Feb. 2, 2005).

²⁰⁹ See MAUREEN O'HARA & JOHN NICOLETTI, 'TIS HERSELF: A MEMOIR (2004).

²¹⁰ See, e.g., *Liberace Sues Confidential Magazine*, at <http://www.bobsliberace.com/decades/1950s/1950s.9.html> (last visited Feb. 2, 2005).

avoid the possibility that he was a homosexual. In any event, Maureen O'Hara sued *Confidential* magazine.

I was working at the *Mirror* that day. I was the page one copy boy. I had worked up very quickly from general copy boy to bringing copy to page one, tearing off paper, bringing it to the conference. That day there was a very influential Supreme Court decision on integration that came down, the same day that Maureen O'Hara launched a suit against *Confidential* magazine. So here I am at the page one press conference of this newspaper I grew up with, and here I am with my future in journalism ahead of me—of course, futures are always ahead of you.

The editors were talking about it. They said, "Well, which is it on page one, integration or Maureen?" This is the way the *Mirror* thought. They finally said, "Here's a solution: 'integration' in caps, 'Maureen' in caps and lower case, but we put her picture on page one."

So they gave me what we call a "cut," a picture this big [gesturing] of Maureen O'Hara, and they tried to squeeze it into what we call the "chase," the actual form for the print. It was an eighth of an inch too long. The makeup editor said to me, "Gerry, go up to photoengraving and cut an eighth of an inch off, but cut it off her head, don't cut it off her breast."

The tabloids are driven by newsstand sales, they're driven by the front-page and the back-page headlines. That is why every day's headline of the *New York Post* has nothing to do with the news and why every day's headline of the *New York Daily News* has nothing to do with the news. It has to do with the headline and the point-of-sale impact.

Well, I brought it to the photoengraver and the jerk turned it upside-down and he cut an eighth of an inch off her breast. I showed it to the makeup editor, and he said, "Kid, you just cost us 100,000 readers."

So much for that part of journalism and integrity.

In sports, as I pointed out before, we get away with things. And I've got to admit to you, even though I'm supposed to be here—I don't know if I'm supposed to be here defending the *New*

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York Times or defending journalists. I do feel proprietary towards myself and those of my ilk.

But I find that this is such a slippery slope. As I pointed out, what if I write that a wrestler is a phony? Well, I once said that to Sky Low Low, the midget wrestler, and he was very insulted. I said to him, “You know, you guys have remarkable powers of recovery”—because as you know in wrestling, what happens is the good guy is always losing, the bad guys is jumping on top of him, and just as the bad guy is about to land the killing blow, the good guy rolls over, eludes him, hits him with a forearm, and he wins the bout.

Well, what if I wrote that he’s cheating? “Sky Low Low is a cheater,” what if I wrote that—or Bruno Sanmartino or The Rock? What if I wrote that these guys were phonies and cheaters? Would I be liable to being sued? Do these guys not have the same protection as Martha Stewart? I don’t know that. Should they have the same protection as Martha Stewart?

I know this. Ten years ago this month, the Supreme Court—I’m reading from this because I want to get the legality right; I’ve been hanging around with lawyers all morning—ten years ago this month, the Supreme Court let stand a reversal by a United States Court of Appeals for the District of Columbia Circuit, in which it wrote—

I’ll backtrack just slightly. An author sued the *New York Times* over a book review.²¹¹ The reviewer wrote that the author was guilty of “sloppy journalism” and offered several examples.²¹² The plaintiff claimed that the reviewer’s opinion is not a protected opinion—that he has to prove his claims—which the reviewer I thought did quite well.²¹³

But in any event, the U.S. Court of Appeals in reversing itself wrote that critics must have constitutional breathing space appropriate to the genre.²¹⁴ In other words, the genre here was

²¹¹ *Moldea v. N.Y. Times Co.*, 22 F.3d 310 (D.C. Cir. 1994).

²¹² *Id.* at 316–17.

²¹³ *See id.* at 311–12 (stating that despite this argument, the court still found in favor of the *New York Times*, because, as a matter of law, the review was truthful).

²¹⁴ *Id.* at 315.

book reviewing.²¹⁵ Constitutional breathing space. The reviewer wrote “sloppy journalism.”²¹⁶ Well, you know, I think that’s pretty well protected.²¹⁷ I think that you need the breathing space.

In sports do we need the breathing space to say that Roger Clemens intended to hurt Mike Piazza?²¹⁸ There are other issues in sports too that I wouldn’t even get into. For example, at what point do the cops come in when there’s a fight? If I throw a punch at you and miss, am I still not guilty of a battery on the street? But what if I throw the punch at you and hit you in sports? Maybe the cops come in at that point.

In any event, the *New York Times* won that case.²¹⁹ I happened to be the book reviewer, so I feel very good about the First Amendment and its rights.

But I remain troubled, because who elected me—just because I tell you “I’m a newspaper man,” what does that mean? If I tell you “I’m a dentist,” you know that I am qualified to practice in New York, or at least I’ve passed the right kind of examination. If I tell you “I’m an attorney in New York,” you know that I’ve passed the New York bar. Nothing qualifies me to be up here, other than the fact that I’ve learned a couple of things over the years. Why am I qualified to be allowed to get away with something which I stupidly write? Well, I’m not sure that I should be. I have to admit I’m of two minds about it.

I know that in the case of the fellow suing *Sports Illustrated*, if in fact he didn’t do it, and I don’t know if he did or didn’t—I’m always reminded of that very poignant statement by Ray Donovan, the Secretary of Labor, appointed by Reagan.²²⁰ After all the

²¹⁵ See *id.* at 311.

²¹⁶ *Id.* at 316–17.

²¹⁷ See *id.*

²¹⁸ See Mike Morrison et al., *2000 Sports Moments: Clemens Goes Batty, Carter Plays Leapfrog, and Rulon Gardner Upsets*, at <http://www.infoplease.com/spot-00sportsmoments1.html> (last visited Feb. 2, 2005).

²¹⁹ See *Moldea*, 22 F.3d at 320.

²²⁰ See Robert H. Bork, Jr., *English for Lawyers*, at <http://www.bork.com/englishf-47.asp> (last visited on Feb. 2, 2005) (“[T]he media coverage of the acquittal came nowhere near the volume devoted to the charges, the indictment, and the trial. At the close of the trial, Mr. Donovan turned to the prosecutor to ask that famous question, ‘What office do I go to to get my reputation back?’”).

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stories came out about him with “mob toys,” he said, “What organization do I go to to get my integrity back?”—after it was shown that these things weren’t provable?²²¹

So I am sympathetic to both sides. I don’t know what is too far in journalism. I don’t know at what point you’ve got to haul people in.

The best I can think of is that I know it when I see it, to quote someone.²²² I’ll know it when I see it that this guy is full of it. Now I’ll leave it up to the lawyers and the judges and the juries to figure out whether they know it when they see it as well.

Thank you.

PROF. SIMS: Thank you, Gerry. I just want to reassure you. On the issue of slight misquotings at least, the U.S. Supreme Court has addressed that in the case of *Masson v. Malcolm*,²²³ saying that when the change doesn’t substantially change the meaning of the quotation in a defamatory manner, that’s okay.²²⁴

Also, I wanted to reassure Steve on the point about being the offspring of a mule and a chicken. You know, that’s *Hustler Magazine v. Falwell*.²²⁵ In other words, that’s satire, a statement not to be taken seriously as fact, and cannot be recovered for either as defamation or as intentional or negligent infliction of emotional distress.²²⁶

We now turn to our last speaker, Mr. Gary Belsky, the Executive Editor of *ESPN The Magazine*, and a distinguished author, editor, and speaker on TV and radio, on not only sports but topics such as economics and finance as well.

MR. BELSKY: Thanks.

Before I start, I just want to say that if I take nothing else from this symposium, my heart is warmed by the fact that an esteemed plaintiffs’ lawyers in Alabama can look at the history of the

²²¹ *See id.*

²²² *Jacobellis v. Ohio*, 84 S. Ct. 1676, 1683 (1964) (Stewart, J., concurring) (explaining his system of classifying what constitutes pornography as “I know it when I see it”).

²²³ *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496 (1991).

²²⁴ *See id.*

²²⁵ 485 U.S. 46 (1988).

²²⁶ *See id.*

Alabama legislature and not see any reason that any statute might be either wrong or in need of revision. That's actually pretty impressive. I don't want to say too much about that august body, because for all I know you can defame a legislature. And so that's impressive.

You know, I've been on many, many panels, as I'm sure everybody else here, and I am certainly the least qualified to be here, and this is an impressive panel, but I have never been on a panel before where there were five speakers before anybody on the actual panel spoke. In fact, I want to thank Michael Taxin, even though I've never met him and he has never done anything for me.

When the lovely and talented Michael Klein called me and asked me to be on this panel, the observation about the number of speakers before we got to talk is relevant, because I actually thought the whole thing was interesting, although not necessarily for the reason that lawyers might think it was interesting.

Lawyers think about symposiums, and they take months and months, and sometimes years and years, for cases to resolve, so the law is about a long time. And life is about being forty-five feet from the exit that you were supposed to take and you have to figure out how to get over and get off the exit before you miss it, and you're somewhere in rural Mississippi or Missouri, which is where I'm from.

And so I kind of wanted to do a little bit of a meta-trick here, which is I actually consciously and purposely traded phone calls with Professor Sims, because I didn't want to prepare, because the relevant and important decisions that we have to make, relevant to this Symposium, at *ESPN The Magazine* or at ESPN the network or espn.com are the ones that we make when we're twenty feet from the exit and we have to turn.

On the *Price* case, for example, I could actually make an argument as to understanding why the legislature would exempt magazines, why they wouldn't include them, because one of the things that differentiates magazines broadly as an enterprise, by definition, from television broadly defined, and from radio broadly defined, and from newspapers broadly defined, is time. Magazines have more time than newspapers and radio and television, which

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by definition are more media of immediacy. That is the argument I would make, by the way, if you have to make an argument.

MR. HENINGER: Thank you.

MR. BELSKY: And I work for a magazine. I don't know necessarily that I would agree with that. In the end, I would probably provide shield law to magazines as well. But there is a difference.

That doesn't mean that television—you know, "60 Minutes" has as much time as we do—but broadly, those mediums are about immediacy and magazines by definition either come out every week or every month or every two weeks or every quarter, whatever the case may be.

The decision we make on what we call "enterprise stories," when we are writing about steroids—and I was talking with our luge medalist before, and she was involved with the doping scandals, and when we deal with issues—for some reason, in this day and age, the way you can most defame an athlete is to call him gay.²²⁷ And so when we deal with stories about whether or not an athlete is gay, or somebody is coming out of the closet, we have time on those stories, and in the end those issues for us are about the same issues that any publication has for any kind of fraud/public figure issue.²²⁸

We don't really worry about the public figure idea broadly, because core sports at this point are very much in the public domain. But I worry much more about the decision we have to make in a day or overnight.

Oftentimes, part of me wanted to also go talk to the First Amendment lawyers that we have, but then I thought, actually we often don't—again, when I have the presence of mind to start talking to First Amendment lawyers when we're putting out a story or we're working on a TV program, then chances are we're going to be okay. It's the times when we don't think to talk to a First

²²⁷ See, e.g., Associated Press, *'I'm Not Gay': Piazza Sets the Record Straight about Sexual Orientation*, at http://sportsillustrated.cnn.com/baseball/news/2002/05/21-/mets_piazza_ap (last updated May 22, 2002) (discussing the rumors of the homosexuality of baseball's Mike Piazza).

²²⁸ See generally *id.*

Amendment lawyer when I worry about us sort of getting in trouble.

The way we look at these things in general is, first of all, we often look at the spheres of the subject. What I mean is sports is obviously a very public enterprise at this point, in no small part because everybody benefits by the dialogue, what I like to call the enterprise of conversation.

We think of the sports field as very much a conversation between journalists, fans, athletes, players, coaches, and what we call “the suits,” the owners. By definition, the idea of a “limited public figure” I just think is sort of funny, because even coaches or owners of teams, or college administrators—everybody in the field of sports now benefits from the conversation that goes on.

The reason why all of the athletes, universities, NCAA officials, and owners make so much money is because of the very conversation about sports that goes on. Sports wouldn’t exist if not for that conversation.

In the end, the reason why sports became so big societally was because the conversation was allowed to happen, first by newspapers and then by television and radio and now by the Internet. Everybody benefits from that conversation. Everybody benefits from the volume of money that comes into it, particularly college coaches, who, believe me, the reason they’re earning six or seven times what the average political science professor earns is because of that conversation.

And so sometimes I always laugh a little bit because I think that lots of people in that conversation want to have their cake and eat it too, right? They want to be able to benefit from the conversation in the way that it brings all the money into their various enterprises; on the other hand, they want to be viewed as something other than obvious public figures.

I’m not so sure that soon enough, by the way, that the conversation isn’t going to be involved in high school athletics generally, because what the whole LeBron thing and what the Maurice Claret thing are—you know, when a school agrees to let ESPN televise its basketball games, what it’s saying right then is

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the reason they're doing that is for the money.²²⁹ And so I'm kind of thinking, "in for a dime, in for a dollar." They're buying into that whole enterprise.

And so generally when I think about these things, like is it fair to go after somebody, is it fair to be—and I presume all journalists—I mean, I'm operating under the assumption that there has to be quality journalism in the way that there has to be quality plumbing. I don't think journalists are any different frankly, from a societal point of view, than plumbers. They are tools of the trade, and I don't care if they're licensed or not. Society benefits from a free discussion of ideas and society benefits from somebody taking care of our waste product. But there should be a base idea of trying hard.

When journalists don't try hard, and in the same way when plumbers don't try hard, to do their best, then they should be gone after. But even within the trying hard, it is often gray.

We sort of divide it into three things. I divide it into the athletes, the coaches, and the suits. I think those are sort of different standards, depending on the circumstances.

We are often thinking about athletes as very much—first of all, increasingly, they are kids, and oftentimes there's just a part of me from a good-natured point of view that doesn't want to go after athletes in the same way that I'm going after coaches, in the same way that I'm going after owners of teams or administrators of collegiate sports—

So, in general, we are often thinking about: what's the constituency here, and how much do we want to weigh their place in life and their knowledge, and what do we expect from them, in the context that we must decide how we will treat the information that we find, whatever that is, providing we found out that information is substantiated.

The other thing that we think about a lot is venue. There is an entirely different standard for us, Gerry. The difference between saying "a plumber is using faulty parts," to us, and saying "Sammy

²²⁹ See, e.g., Darren Rovell, 'King' James Proves a Ratings Bonanza for ESPN2 (Dec. 13, 2002), at <http://espn.go.com/sportsbusiness/s/2002/1213/1476503.html>.

Sosa is corking his bat” is that in the end bat corking doesn’t matter. It’s a game, and it’s part of that enterprise that we are all involved with. Using bad pipes or using bad surgical instruments or using bad brake pads matter in the real world, as opposed to the game world of sports.

So it is obvious to me why we get away with the opinions of cheating or illegality in sports. It’s because in the end there is sort of a societal recognition that it sort of doesn’t really matter. You can say somebody cheats—by the way, you can say somebody cheats in football, fixes a football game. The only reason fixing a football game really matters is because people are betting on it, and betting on it is generally illegal anyway.²³⁰

I wouldn’t have cared if Butts and Paul Bryant got together and fixed that game because in the end it’s like “so what?” I don’t mean—believe me, I work at ESPN and I take these things seriously—but in the end, so what?—it doesn’t really matter, nobody gets harmed from that. The kids are still getting the exercise, which I’m sure is the reason why Coach Bryant got into sports to begin with, to make sure that kids had a good sense of their body and a physical place in life.

So that’s the issue that we think about in terms of opinion. We have columnists all the time who are going after people all the time for things that they do on the field.²³¹ Our feeling is in the end it’s sort of like I want them to have a good reason why they’re calling somebody a cheater or a quitter or lazy or any of the other things that you can call players or coaches that are very much part of this whole thing.

The whole reason sports exists in the modern way it exists is because it’s sort of an extension of everybody’s id. We can’t do these things and we want to have these dramas played out for us so that we can connect with them. And so that whole conversation is about this sort of fiction that everybody sort of participates in. So I don’t worry as much about those kinds of opinions as I do about

²³⁰ See Carlton Thompson & Jerome Solomon, *NFL’s Dirty Little Secret: Gambling’s Roots Run Deep*, HOUS. CHRON., Jan. 29, 2004, at A1.

²³¹ See, e.g., *Washington v. Smith*, 80 F.3d 555, 556 (D.C. Cir. 1996) (discussing claim brought against sports columnists for criticism of coach).

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somebody saying that they beat their wife. The off-field stuff for us is an entirely different kind of set of judgments, because it's a different thing when you say an athlete stole money from a player's locker, it's a different thing when you say a coach beats his wife or potentially is doing things that are inappropriate for a school official.²³²

There's a difference to me in saying that Mike Price hung out with strippers or hookers, as a representative on a campus that is seriously in a position of influence and authority, and saying he was really dogging it at practice and didn't give them the right schemes for that zone defense. In the end, it's like the latter I don't care about: it may or may not be true, but it doesn't really hit anything that's crucial. In the former, it does because he's got a role and that affects his life, his wife, his children, and his place in the community.

And while it is true, by the way, that you can defame somebody in a sports context—you can actually say the coach is coming to practice and never doing the things that are supposed to make his team better—that could actually harm his income, that could harm his ability to get hired later.²³³ In the end, I don't care because that's part of that enterprise of conversation that I'm talking about. If you become a coach, you recognize that part of the way your income is going to be affected is by the press's perception of you.²³⁴

And so for us it's very much about what we like to think about, and our decisions broadly are made on a day-to-day, minute-to-minute basis, based on where we think everybody is participating in that conversation and where the venues of the point of criticism or investigation are.

²³² See, e.g., *Big-Foot Columnists Weigh in on Kobe* (July 19, 2003), at <http://espn.go.com/nba/news/2003/0719/1582942.html> (stating various sports columnists' opinions regarding the recent Kobe Bryant rape investigation).

²³³ See *McQueen v. Fayette County School Corp.*, 711 N.E.2d 62, 66–67 (Ind. Ct. App. 1999) (holding that coach could plead a valid claim of defamation for criticism of his job performance that resulted in a lowered reputation and inability to continue working as a coach).

²³⁴ See Mike Fish, *Sweet Deals: More and More Coaches Are Making CEO Money* (June 2, 2003), at http://sportsillustrated.cnn.com/basketball/college/news/2003/05-30/bkb_coaching_salaries.

I'll be happy to tell you completely what my views are, in theory, on the ways that I think a story has to be checked and the ways that I think a story has to be verified and what my feelings are on confidential sources and non-confidential sources.

But for us the issue is always those two spheres: who are we talking about, and where are they in that conversation, and where is the issue that we are writing about playing out? Is it on the field or is it in life where things really matter?

PROF. SIMS: Thank you, Gary.

Thank you to all the panelists.

We have time for a few questions. I'll throw a couple out myself. First, let's briefly review the facts and issues in the *Price* litigation. Steve and Gary, please correct me if I misstate anything here. To my understanding, Mike Price had negotiated but not yet signed an agreement to be the head football coach for the University of Alabama.²³⁵ He certainly had the appointment.²³⁶ He was en route to a celebrity golf tournament, not directly related to his college duties, and I it's conceded that he did spend a night barhopping.²³⁷ Is that incorrect?

MR. HENINGER: That's correct.

PROF. SIMS: He concedes that he became intoxicated and was helped to his hotel by a woman he didn't know.²³⁸ The specific allegations in the Yaeger article in *Sports Illustrated* suggest that he had sex with two women.²³⁹ This he denies.²⁴⁰ It would be an allegation of adultery in his case.²⁴¹

Now if we look at the earlier cases as well as the present ones, in the area of defamation related to college sports coaches, the

²³⁵ Darren Rovell, *Agent: Price Might Be Entitled to Recoup Money* (May 4, 2003), at <http://espn.go.com/ncf/s/2003/0504/1549178.html>.

²³⁶ *See id.*

²³⁷ *See* Associated Press, *Witt: Price Warned before Trip about His Behavior* (May 3, 2003), at <http://espn.go.com/ncf/news/2003/0503/1548767.html>.

²³⁸ *See* Associated Press, *Price Threatens Suit, Vows to Restore Reputation* (May 8, 2003), at <http://espn.go.com/ncf/news/2003/0508/1550943.html>.

²³⁹ Don Yaeger, *How He Met His Destiny at a Strip Club*, SPORTS ILLUSTRATED, May 12, 2003, at 38.

²⁴⁰ *Id.*

²⁴¹ *Id.*

comparison is rather interesting. If we look at that early *Butts* case, that very seminal U.S. Supreme Court decision, we're dealing with a college football coach accused of sharing game secrets with an opponent, which very closely relates to his job.²⁴²

Recently, in the case of Jim Herrick, Jr., a University of Georgia basketball coach, the allegation there is that he created a bogus exam to keep his basketball players in college, if that's correct.²⁴³ That's also very clearly related to his job.

Mike Price's alleged misbehavior is arguably a little less directly related to his job than the other two cases we mentioned involving Herrick and Butts. Still, the University of Alabama contends that it had a provision in the contract that, based solely on what Mr. Price conceded, they would have grounds not to sign that contract.²⁴⁴ Again, I believe that this is being contested by Mr. Heninger and Mr. Price.²⁴⁵

The first question I want to throw out—is there no “zone” of privacy for sports figures at all?²⁴⁶ Hypothetically, altering the scenario behind the *Price* litigation, what if there had been a report of adultery that had been under very discreet circumstances and not supposedly as the final note of a night on the town, including a topless bar? In other words, what if it was a report of a very discreet adulterous relationship relating to a college coach whose name might be a household word in Alabama but might not be elsewhere in the country? That's one of my questions.

I also want to throw out another question. As I suggested in my initial discussion, the constitutionalization of state tort law by the U.S. Supreme Court has, I personally think, stacked the cards very heavily in favor of the media.²⁴⁷ Again, the malice

²⁴² *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967).

²⁴³ Rana Cash & Mark Schlabach, *No-Brainer Final Exam Stings UGA*, ATLANTA J.-CONST., Mar. 5, 2004, at A1.

²⁴⁴ Carter Strickland, *Price Fights Back, Claims Story Relies on 'Falsehoods'*, SPOKANE REV., May 9, 2003, at C7 (Alabama believed “the contract that was presented to [Price] did not provide any compensation to him if he was terminated with cause.”).

²⁴⁵ *Id.*

²⁴⁶ See Marc A. Franklin et al., MASS MEDIA LAW ch.5 (6th ed. 2000) (discussing privacy rights).

²⁴⁷ See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

requirement will apply for most sports figures, as they will be either general or limited-purpose public figures, and malice must be proven by the plaintiff with convincing clarity and falsity by a preponderance of the evidence.²⁴⁸

Now, my question beyond that is: what about the additional protection of the state shield laws? Again, it is contested in this case whether or not the Alabama state shield law would or would not protect *Sports Illustrated*.²⁴⁹ My second question—directed especially to Gary Huckaby—is it unfair at this point, when the plaintiffs bear so much of a burden of proof, in an area where the alleged defamatory accusations, specifically adultery, are of such a significant and personal nature—is it fair to allow the media defendants to hide behind state shield laws as well?

I would also point out that this shield law was enacted in Alabama in the 1930s.²⁵⁰ We didn't have a federal constitutional malice requirement until the mid-1960s.²⁵¹ Might Alabama have thought differently about this statute if it had been aware of the breadth of the future *Sullivan* and *Butts* cases?

I just want to throw those two questions on the table.

MR. BELSKY: God bless you, Professor Sims. Those are very long questions. One question you're asking is: Is there a zone of privacy?

PROF. SIMS: Yes.

MR. BELSKY: The other question is: Should media companies be allowed to be behind shield laws?

PROF. SIMS: If they already have the advantage of the *Sullivan/Butts* malice requirement.

²⁴⁸ See generally *id.* at 285–86 (stating that “the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands”); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967) (discussing public figures); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1973) (discussing limited public figures); Franklin et al., *supra* note 246, at ch.4 (discussing defamation law); *Phila. Newspapers v. Hepps*, 475 U.S. 767 (1986).

²⁴⁹ See ALA. CODE, § 12-21-142 (2004).

²⁵⁰ See *id.*

²⁵¹ See *id.*

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MR. BELSKY: The zone of privacy from the journalist thing—I can tell you ninety percent of the adultery that goes on in professional and collegiate sports—ninety percent is what am I talking about, probably ninety-five percent—we don’t write about at all. In fact, almost all of them are adulterous. I’m not kidding. In fact, the leagues facilitate it. We have written stories in which we’ve talked about, in anonymous terms, how the leagues facilitate “smooth” adultery. What I mean is that the leagues have hookers that are on a good list, meaning that they won’t try to get pregnant and they won’t try to extort you.

So all the time reporters are familiar with malfeasance in the behavior of players and coaches and suits, and we don’t touch it at all, for a variety of reasons—and Gary can talk about this; he has been doing it way longer than me—judgment calls about whether or not it’s relevant to the person’s position, whether it will interfere with friendships that you develop with athletes and coaches and players—a whole bunch of reasons.

It’s completely understandable to me why *Sports Illustrated*, if they thought that that happened with Coach Price, would go after that, because that’s much more of a public kind of question of judgment issue that journalists will sometimes make, right or wrong, about a coach doing it, as opposed to a private indiscretion that generally we leave alone, even with the biggest of athletes.

PROF. SIMS: Is that true even if, say, the adultery was with another celebrity?

MR. BELSKY: There are very famous basketball players about whom if somebody wanted to prove an adultery case or a gambling case, it wouldn’t have been very hard for a journalist to prove that, and that person was never brought to task for it because it was thought to be not—I mean, I think there was a collective judgment that in the end it wasn’t that relevant.

PROF. SIMS: Okay.

MR. HUCKABY: But, Gary, I think you’re melding here professional journalistic standards and judgments with legal constitutional principles.

MR. BELSKY: Yes, absolutely.

MR. HUCKABY: We've done that in two or three instances. For example, I've heard references to "good" journalism, or what is the damage, or what is the value, comparing the plumbing, a bad pipe, to some cheating with a bat. That's journalism judgment. That has nothing to do with the law.

The law still is based upon what is false, and the law still holds to the principle that you cannot publish untruths.²⁵² That's a societal principle we have all agreed on.²⁵³

The only question that we now debate is whether or not the standard ought to be different and the weight that the standard ought to have. The plaintiff has a high standard, and the reason for it is that you are chilling the press.²⁵⁴

We often say—I have heard many references here—"protecting the media." I don't think it's too idealistic to say it's protecting the public. The press is absolutely the source from which the public gets its information, from which it makes its decisions, and it is the representative of the public.²⁵⁵ I don't think that's too idealistic to say. Those newspapers, *ESPN The Magazine*, *Sports Illustrated*, *Time* magazine—all have a voice that is heard. They react to it one way or the other, negative or positive.

So I think they are blurring that line a bit there.

²⁵² See, e.g., *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 11 (1990) ("Since the latter half of the 16th century, the common law has afforded a cause of action for damage to a person's reputation by the publication of false and defamatory statements."); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (stating that the right of free speech does not extend to "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words").

²⁵³ See Soc'y of Prof'l Journalists, *Code of Ethics*, at http://www.spj.org/ethics_code.asp (last visited on Feb. 4, 2005) (listing "Seek Truth and Report It" as the first topic in the journalism Code of Ethics).

²⁵⁴ See, e.g., *Masson v. New Yorker Mag.*, 501 U.S. 496, 508 (1991) (providing that "a public figure . . . could escape summary judgment only if the evidence in the record would permit a reasonable finder of fact, by clear and convincing evidence, to conclude that respondents published a defamatory statement with actual malice . . .").

²⁵⁵ See, e.g., *Minneapolis Star & Tribune Co. v. Minnesota*, 460 U.S. 575, 585 (1983) ("[An] untrammelled press [is] a vital source of public information' and an informed public is the essence of working democracy.") (quoting *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936)) (alterations in original).

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MR. BELSKY: I completely recognize that. But all I meant was when we are making decisions and we are sort of on-the-moment, if somebody in a column is opining about whether or not somebody is cheating on the field, somebody might come to me in a column and have an opinion about whether or not somebody is cutting corners in an operating room—the nature of conversation about sports playing is different than the nature of conversation about medicine.²⁵⁶

MR. HUCKABY: Gary, I want to invite you to come down to Alabama during a football game. You do not recognize the seriousness of which you speak. It is equivalent to what you are doing in hospitals here in New York on Saturday afternoon. I guarantee you that people in Alabama think the value judgments that are involved here are equally important as plumbing.

PROF. SIMS: Thank you.

Steve, did you have anything to add to that?

MR. HENINGER: Your initial question was: Is there a “no zone,” and I guess the antithesis to that is, is there an “oh zone.”²⁵⁷ I’m not sure there is a “no zone.”²⁵⁸ I’m not scholarly enough to announce that. I think there are invasions of privacy issues. But in libel I wouldn’t say there’s a “no zone.”²⁵⁹

But once you are in the zone, whatever the zone is—adultery, cheating, not doing ten pushups when you were ordered to and only doing six—the responsibility of accuracy and having backup, that’s it. I mean, who expects reports to be infallible? I don’t, and I’m about as paranoid as you can get with the press.

On the other hand, I do have an expectation, as I think courts have a right to expect of me—they can expect when I walk in that Steve Heninger is going to be a fierce advocate for his client, but

²⁵⁶ See, e.g., Phil Brown, *Bagnato Overboard*, CHI. TRIB., Nov. 9, 2002, at 2 (“It is the nature of sports reporting and broadcasting that reporters are expected to have and express opinions about their subjects.”).

²⁵⁷ See *supra* note 246 and accompanying text.

²⁵⁸ *Id.*

²⁵⁹ See generally Pamela C. Laucella & Barbara Osborne, *Libel and College Coaches*, 12 J. LEGAL ASPECTS OF SPORT 183, 199–201 (discussing reporters’ ethics and providing recommendations).

by God he's going to operate within the law. And I have the same for Gary. I've known Gary a long time, longer than we've been adversaries in this case. He is a fearsome adversary. He is wrong, but he is a fearsome adversary, and I know he will protect his client under the law. We only need the same thing from those of you who don't have licenses to be newspapermen.

PROF. SIMS: Yes?

QUESTION: Can I ask a quick question of the two writers? I'm an entertainment lawyer, but I've never worked for a publication, so I don't know this. Do you not have in-house attorneys that advise you on the articles before publication? Do they come to you and say, "There's a problem here"?

MR. ESKENAZI: Yes, of course, we have terrific in-house counsel. They advise us only if someone along the ladder things that this is potentially problematic.

So many years ago, when I did a story about recruiting, the gray areas of recruiting, what you can and can't offer a high school kid, yes, the lawyers vetted it first. But for the most part, I would say on a daily basis they don't look at it. They are told by editors who perceive a potential problem. But no, a lawyer is not sitting in his office looking at the *New York Times* report that day, and I dare say that is probably true of any newspaper in the United States.²⁶⁰

MR. BELSKY: And newspapers are different from magazines. With magazines, it's fair to say that a lawyer sees almost every page proof or story.²⁶¹ Obviously, there are some stories that we will send to them weeks in advance. But even on Saturday and Sunday of our publication cycle, they will look at the pages.

But they are presuming that what my colleagues on the panel are saying is correct. They are presuming that I and my fellow editors are making sure that our reporters are out there doing everything they can to verify the truth of the things they are saying. They are fallible too. They are looking at things and they are trying to see where—because sometimes, by the way, as the

²⁶⁰ See Rosalind C. Truitt, *When Lawyers Have Their Say . . . Their Advice May Pre-empt Problems*, PRESSTIME, Jan. 1998, at 51.

²⁶¹ See *id.*

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attorneys on the panel will tell you, you don't know what it is that somebody is going to perceive as defamation. In fact, oftentimes, the issues that we have in stories, we will kill ourselves to make sure that this is correct, and something else that we think is opinion, or just simply not even contentious, will be the point of fact in an article that people will come after us for.

So they are always assuming that the people at the *New York Times* and at ESPN and everywhere else are very much trying to get the truth, that that's what they're doing, and so they don't ask us on every story "How many sources did you have, who did they talk to, did you just talk to the confidential sources and read their notes, or did you talk to the witnesses too?" They don't do it because they can't do it. That would be a different kind of chilling of the press. If everything was taking that long to get through, you would never have anything come out in a timely way.

MR. HUCKABY: Let me add to that. I think lawyers are extraordinarily cautious. If you asked lawyers to edit the *New York Times*, probably half of it wouldn't be there.

MR. ESKENAZI: Correct.

MR. HUCKABY: And so they deliberately draw a very distinct line between what I was alluding to before, journalistic judgment.²⁶² And I know when I'm asked to pre-review a story, I try not to get involved in that area at all. They don't want me involved in that, they very jealously guard that area, because lawyers are going to say, "Is there any potential risk at all?" and they are going to call it on the most conservative side.

It is improper in my opinion for a lawyer to be injecting himself or herself into that kind of decision-making of should you publish. You simply say, "Here are the risks." And I often say, "Here are the risks," and the newspaper says either "yes" or "no," and that's the way it should be.

MR. BELSKY: True First Amendment lawyers are my favorite lawyers in the world, because the ones who have been doing it a long time actually have a very sophisticated and nuanced idea of how the law intersects with society in a fluid environment, in an

²⁶² See *supra* notes 252–253 and accompanying text.

environment that I think is almost more fluid than any other kind of intersection of real life and law that happens. It is just very hard to know.

In theory, you don't want to say anything about anybody because it is—you know, I grew up in an Orthodox Jewish home, and Orthodox Jewish law basically says you can't talk to anybody about anything, because there is a recognition that almost everything can lead to a bad consequence. In real life we don't work that way, and so it is difficult.

Most of the time, the tension is pretty healthy. I don't know if Gerry would agree with me, but the tension between the journalists and the lawyers is actually pretty interesting if you could hear those conversations, but it's a moving target, and it's a moving target being shot at by humans.²⁶³

PROF. SIMS: Excuse me. Gerry, just one clarification please on your remark. If you were covering a late-night sports event and you had to write the article very fast for a morning paper, are you telling me that a lawyer would look at that before it went to press?

MR. ESKENAZI: I'm sorry. Say that again.

PROF. SIMS: If you were covering a late-night sports event in order to make an early-morning edition, are you saying that your article would be read by a lawyer?

MR. ESKENAZI: Oh, no. Under almost no circumstances are most stories in the newspapers read in advance by lawyers, unless they just happen to be curious.

PROF. SIMS: Okay, I just wanted to clarify that.

Any other questions?

QUESTION: I have a quick comment and a question with respect to what Mr. Belsky said. I think if you spend any time in any of the hundred-some-odd legal sports books in the State of Nevada, I think those people have a lot more money and care a lot

²⁶³ See generally Truitt, *supra* note 260 (“Reporters are wary of legal review, fearing that lawyers may gut their copy, strip vital facts or change intended meaning. Editors say legal reviews take time. Publishers bemoan the high fees involved. But recently, the work of the folks in legal has earned new respect, based on an implication drawn from data collected by a [sic] media nonprofit groups: Legal review often brings legal relief.”).

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more about the outcome of a particular game than if somebody's plumbing doesn't work.

MR. BELSKY: Oh yeah, but I don't want to care about those people. I don't want to care about those people. I don't want to make societal judgments and societal law based on the needs of sports gamblers. I just don't.

QUESTIONER: They have more money and more of a practical interest in it than they do in their neighbor's plumbing.

MR. BELSKY: Okay.

QUESTIONER: My question is, you represent a great number of photographers, and there is a growing trend of photographs being manipulated by newspapers.²⁶⁴ The *New York Post*, for one, will say "photo illustration" so that the reader knows it has been manipulated in some form.²⁶⁵ But there have been some recent cases, the one with the *L.A. Times* in particular, where photographs have been manipulated.²⁶⁶ Photographers use digital cameras, and those images are capable of being manipulated prior to the time they get to the paper or at the paper.²⁶⁷ What steps are any of you gentlemen aware of—at the *Times*, Mr. Eskenazi, or at your publication—where either the photographer or the photo department in some manner certifies or verifies that a photograph that the newspaper is running is an accurate photograph?

MR. BELSKY: We do that a lot, which is perhaps why soon enough, Steve, you will see a picture of yourself with chicken feathers or a mule butt.

We do that a lot. Quite frankly, we view images in exactly the same way that we view articles, meaning that unless—by the way,

²⁶⁴ See John C. Dvorak and Jim Seymour, *John C. Dvorak vs Jim Seymour, The Influence of Computer-Based Photo Modification*, PC-COMPUTING, Vol. 3, No. 12, Dec. 1990, at 28.

²⁶⁵ See, e.g., Todd Venezia, *(Pre)historic Battle—Things Get Hairy as Boston Caveman Duels_Yanks*, N.Y. POST, Apr. 23, 2004, at 3 (denoting that a graphic is a photo illustration).

²⁶⁶ See Kathleen Norton, *Seeing May Not Be Believing with Computer Altered Photos*, POUGHKEEPSIE J., May 11, 2003, at A11 (providing that a photographer for the Los Angeles Times was fired the previous month after taking a composite of two dramatic Iraqi war photographs and submitting them for publication).

²⁶⁷ See Dvorak & Seymour, *supra* note 267.

when I say we do it a lot, we do it in terms of parody. We do a lot of humor in our magazine, and so we will often do the sorts of treatments where it's clear that we're doing a parody. We would not put a knife in a coach's hand when he's gesturing at a player if that knife really weren't there.

When I say we think about them as words, that means it's a high obligation, not a small obligation. In other words, I don't think the law necessarily—you guys can tell me—would distinguish between words and images.²⁶⁸ And so an image has to be truth.²⁶⁹ If it's not truth, if it's not wholly representational of the broad idea of what was going on, then we have to indicate to people that we made it up.²⁷⁰ So it's a standard about ideas, and ideas are about truth and untruth.²⁷¹

QUESTIONER: But my question is a more pragmatic question. A photographer brings an image to you.

MR. BELSKY: Oh, whether or not he—

QUESTIONER: You don't know whether that photograph has been digitally manipulated. Now, true, if it's an extreme example of Jackie Kennedy having sex with the Loch Ness Monster, you know it's fake. But the *L.A. Times* ran an image in the Elian Gonzalez case that indicated that the gun was pointed in a different

²⁶⁸ See, e.g., *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569 (1995) (In a case challenging the right to exclude some marchers from a parade, the Supreme Court remarked that “the Constitution looks beyond written or spoken words as mediums of expression” and noted that examples of painting, music, and poetry are “unquestionably shielded” by the First Amendment.).

²⁶⁹ See, e.g., *id.*

²⁷⁰ See, e.g., *World Wrestling Fed'n Entm't, Inc. v. Big Dog Holdings, Inc.*, 280 F. Supp. 2d 413, 440 (providing that Big Dog's disclaimer “THIS IS A PARODY” in its graphics spoofing the WWE wrestling characters and phrases was a factor in its being entitled to First Amendment Protection).

²⁷¹ See, e.g., *id.*; see also Nat'l Press Photo. Ass'n, *Digital Manipulation Code of Ethics, NPPA Statement of Principle*, at http://graphicssoft.about.com/gi/dynamic/offsite.htm?site=http%3A%2F%2Fwww.nppa.org%2Fprofessional_development%2Fbusiness_practices%2Fdigitaethics.html (last visited on Jan. 28, 2005) (reaffirming the basis of the NPPA's ethic that “Accurate representation is the benchmark of our profession. We believe photojournalistic guidelines for fair and accurate reporting should be the criteria for judging what may be done electronically to a photograph. Altering the editorial content . . . is a breach of the ethical standards recognized by the NPPA.”).

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direction than it was.²⁷² You don't have people at ESPN, and I don't think the *Times* has anybody at the *Times*, who verifies the authenticity of digital images, and newspapers run them every day.

MR. ESKENAZI: I think that is really an issue without much merit as far as *The Times* is concerned. The biggest photography scandal we've had there—the *Times* ran an editor's note recently about a *Time* magazine story in which it was a setup picture—in other words, it was shown to be as if it was actually happening, and it was posed. Once we found out about it, we very quickly ran a—you know, we have this *mea culpa* every day on page two, to the extent that people will be reading page two corrections.

I don't know of any instance—I know that many years ago we inadvertently cropped someone out on the left side or the right side and it implied that someone wasn't there, one of these Russian kinds of things where Lenin was whited out of a photograph, and we also corrected that.

So when you say do we not have anything—what can you do about it if someone is bound to do this? I would say that almost every picture we have comes from a reputable agency, and very, very few who use—we use *Agence France-Presse*, we use *AP*, and we use staff—very, very few of our pictures are done by non-staff.

MR. BELSKY: But you are right that we fact-check our stories and call the sources, but we don't call the people in the pictures and ask them, "Is this picture accurate?"

Can I ask the attorneys a question? Am I right in assuming that we have as much responsibility for the ideas conveyed by images as we have for words? I'm presuming that's correct.

MR. HUCKABY: That is correct. It is much more difficult to apply the rule because it's a question of it being presented in a false light, in a false context, and does it communicate a false idea,

²⁷² See Mike Clary, *Tens of Thousands Protest Miami Raid; Rally: Peaceful Demonstration in Little Havana Calls for Justice for Elian and Liberty for Cuba*, L.A. TIMES, Apr. 30, 2000, at A13 (referencing "the famous photograph of the federal agent pointing a gun near the terrified child during the early-morning raid").

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as opposed to the words themselves, which presumably have the plain meaning that people know.²⁷³

PROF. SIMS: Thank you so much. I'm awfully sorry but I'm afraid that we have run out of time. I apologize to those of you who still have questions. We have run out of time. However, those of you who still have questions are welcome to try to accost our panelists at the break that we're going to take now.

Thank you so much for coming. I want to thank all the panelists again for a wonderful and stimulating discussion.

²⁷³ See, e.g., *Solano v. Playgirl, Inc.*, 292 F.3d 1078 (9th Cir. 2002) (recognizing "false light" cause of action for publication of photograph that created false impression of plaintiff).