

NOTES

Agricultural Disparagement Statutes: Tainted Beef, Tainted Speech, and Tainted Law

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INTRODUCTION

Not many Constitutional law experts would have predicted that Oprah Winfrey would be at the center of a First Amendment debate involving free speech and agricultural disparagement, but she was. On April 16, 1996, the topic of “The Oprah Winfrey Show” was “Dangerous Foods,” and Ms. Winfrey and her guests discussed the possibility of mad cow disease¹ developing in the United States.² Paul Engler, owner of one of the largest cattle-feeding operations in the country, was so incensed by the program that he brought an action against Winfrey, her production company, and a guest who appeared on the show.³ Engler and other

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1. Mad Cow disease, also known as Bovine Spongiform Encephalopathy (“BSE”), is a debilitating brain-destroying disease that killed thousands of cattle in the United Kingdom in the late 1980’s. Creutzfeldt-Jakob Disease (“CJD”), a variation of BSE that affects humans, is responsible for the death of at least twenty-three people. *See* World Health Organization Fact Sheet No. 113, Nov. 1996. A copy of the factsheet is available at: <<http://www.who.int/inf-fs/en/fact113.html>> (last visited Mar. 30, 1999).

2. *See* Amended Complaint § III, *Texas Beef Group v. Winfrey*, 11 F. Supp. 2d 858 (N.D. Tex. 1998) (No. CIV. A. 2:96-CV-208-J). Relevant portions of the transcript are included in the complaint. A copy of the complaint is available at: <<http://www.cnn.com/CNN/bureaus/chicago/stories/9801/oprahtrial/index4.html>> (last visited Mar. 30, 1999) or (on file with the *Fordham Intellectual Property, Media & Entertainment Law Journal*).

3. *See id.*; *Texas Beef Group v. Winfrey*, 11 F. Supp. 2d 858 (N.D. Tex. 1998).

cattle ranchers claimed that the program defamed the cattle industry and “disparaged the safety of American beef.”⁴ This may sound like a frivolous claim; however, the suit was based on the Texas False Disparagement of Perishable Food Products Act.⁵ This statute, and other so-called “veggie libel” statutes that have been passed around the country, intend to protect the agricultural industry from unfounded assertions about the safety of their food products. However, critics of the laws assert that they also curb free speech and prevent inquiry into the safety of American food.⁶ As the first case to go to trial under a veggie libel statute, this case could have set a precedent for courts to follow. However, by failing to rule on the constitutionality of the Texas statute, Judge Mary

4. Amended Complaint, *supra* note 2, § IV.

5. TEX. CIV. PRAC. & REM. CODE §§ 96.001 to 96.004 (West Supp. 1996). The statute states:

§ 96.001. Definition

In this chapter, “perishable food product” means a food product of agriculture or aquaculture that is sold or distributed in a form that will perish or decay beyond marketability within a limited period of time.

§ 96.002. Liability

(a) A person is liable as provided by Subsection (b) if:

- (1) the person disseminates in any manner information relating to a perishable food product to the public;
- (2) the person knows the information is false; and
- (3) the information states or implies that the perishable food product is not safe for consumption by the public.

(b) A person who is liable under Subsection (a) is liable to the producer of the perishable food product for damages and any other appropriate relief arising from the person’s dissemination of the information.

§ 96.003. Proof

In determining if information is false, the trier of fact shall consider whether the information was based on reasonable and reliable scientific inquiry, facts, or data.

§ 96.004. Certain Marketing or Labeling Excluded

A person is not liable under this chapter for marketing or labeling any agricultural product in a manner that indicates that the product:

- (1) was grown or produced by using or not using a chemical or drug;
- (2) was organically grown; or
- (3) was grown without the use of any synthetic additive.

Id.

6. See Marianne Lavelle, *Food Abuse: Basis for Suits*, NAT’L L.J., May 5, 1997, at A1; Haya El Nasser, *Texas Decision Leaves ‘Veggie Libel’ Laws Intact*, USA TODAY, Feb. 27, 1998, at 3A; Jerry Jackson, *Bashing Beef? Be Careful of State Libel Law*, ORLANDO SENTINEL, Aug. 23, 1997, at A6.

Lou Robinson left open the question of the legality of these laws.

This Note analyzes the Texas False Disparagement of Perishable Food Products Act and ultimately provides guidelines for courts to follow when considering cases that involve agricultural disparagement statutes. Part I examines the origins of veggie libel statutes and provides a history of the Texas law. Moreover, it analyzes the standards for liability under the statute. This Part also discusses the torts of defamation and business disparagement. In addition to highlighting the similarities and differences between these two torts, this Part discusses the constitutional standards for defamation that were established in *New York Times Co. v. Sullivan* and demonstrates how these standards have been applied to disparagement. Part II reviews the case of *Texas Beef Group v. Winfrey*. This Part explores issues on both sides of the controversy and gives each side's arguments supporting their positions. Part II outlines Judge Mary Lou Robinson's important decision granting the defendant's motion for judgment as a matter of law, and reviews other pending cases brought under veggie libel statutes. In addition, Part II discusses the formation of a free speech coalition that was established to expedite the process of determining the constitutionality of these statutes. Part III argues that actionable speech under the Texas False Disparagement of Perishable Food Products Act falls under the umbrella of speech protected by the First Amendment. This Note concludes that the constitutional requirements for defamation and disparagement established in *New York Times Co. v. Sullivan* must be applied to agricultural disparagement statutes in order to prevent a chilling effect on speech.

I. VEGGIE LIBEL AND DEFAMATION AND BUSINESS DISPARAGEMENT STATUTES

This Part discusses the origins of veggie libel statutes and how they protect the agriculture industry. In addition, this Part outlines the litigation that prompted many states to pass these statutes, discusses the history of the Texas False Disparagement of Perishable Food Products Act, and analyzes the liability standard under the statute. This Part also examines the origins and elements of defamation, including the landmark case of *New York Times Co. v. Sul-*

*livan*⁷ and outlines the constitutional protections that this decision afforded defamation defendants. It also discusses business disparagement and analyzes the differences between this tort and defamation. Lastly, this Part demonstrates how the *New York Times Co. v. Sullivan* constitutional standard has slowly been applied to disparagement law.

A. *Veggie Libel Statutes*

1. Agricultural Disparagement Statutes: A New Kind of Law

Agricultural disparagement statutes are a new breed of legislation that many states around the country have passed in order to ensure that farmers and fishermen have a means of protecting themselves against false or misleading reports about the safety of the food they produce. Texas is one of thirteen states to pass a food disparagement statute.⁸ In addition, a number of other states are considering passing an agricultural disparagement statute, or have deliberated one in the past.⁹ These disparagement laws are

7. 376 U.S. 254 (1964).

8. TEX. CIV. PRAC. & REM. CODE §§ 96.001-96.004 (West Supp. 1996). The twelve other states that have voted to protect their agricultural industry are: Alabama, ALA. CODE, §§ 6-5-620 to 6-5-625 (Michie Supp. 1998), Arizona, ARIZ. REV. STAT. ANN. § 3-113 (West Supp. 1998), Colorado, COLO. REV. STAT. § 35-3.5 (Bradford Supp. 1995), Florida, FLA. STAT. REV. § 865.065 (West Supp. 1999), Georgia, GA. CODE ANN. §§ 2-16-1 to 2-16-4 (Michie Supp. 1998), Idaho, IDAHO CODE §§ 6-2001 to 6-2003 (Michie Supp. 1998), Louisiana, LA. REV. STAT. ANN. §§ 29:4501-4504 (West Supp. 1999), Mississippi, MISS. CODE ANN. §§ 69-1-251 to 69-1-257 (West Supp. 1998), North Dakota, N.D. CENT. CODE §§ 32-44-01 to 32-44-04 (Michie Supp. 1997), Ohio, OHIO REV. CODE ANN. § 2307.81 (Anderson Supp. 1998), Oklahoma, OKLA. STAT. ANN. tit. 2, §§ 3010-12 (West Supp. 1999), and South Dakota, S.D. CODIFIED LAWS ANN. §§ 20-10A-1 to 20-10A-4 (Michie Supp. 1995).

9. See, e.g., S. 492 1995-96 Reg. Sess. (Cal. 1995); S. 311, 136th Leg., 1991-92 Reg. Sess. (Del. 1991); S. 234, 89th Leg., 1995-96 Reg. Sess. (Ill. 1995); H.R. 106, 76th Iowa Gen. Assem., Reg. Sess. (1995); H.R. 389, 77th Leg., 1st Sess. (Iowa 1997); S. 445, Md. Leg. (1996); H.R. 1370, 1998 Reg. Sess. (Md. 1998); S. 937, 181st Leg., 1997 Reg. Sess. (Mass. 1997); H.R. 4660, 89th Leg., 1997 Reg. Sess. (Mich. 1997); H.R. 2804, 78th Leg., Reg. Sess. (Minn. 1994); H.R. 923, 89th Leg., 2d Reg. Sess. (Mo. 1998); H.R. 175, 95th Leg., 1st Sess. (Neb. 1997); H.R. 1105, 155th Leg., 2d Sess. (N.H. 1997); H.R. 5159, 205th Leg., 1st Reg. Sess. (N.J. 1992); H.R. 949, 179th Pa. Gen. Assem., Reg. Sess. (1995); S. 160, S.C. Statewide Sess. (1995); H.R. 735 Vt. Leg., Adjourned Sess. (1996); H.R. 1098, 54th Wash. Leg., Reg. Sess. (1995); H.R. 702, 92d Wis. Leg., Reg.

designed to protect food producers from unsubstantiated reports claiming that their products are unsafe.¹⁰ The laws vary from state to state; however, they all give food growers a cause of action for the dissemination of false information about the safety of their products.¹¹

The agricultural disparagement laws that have been passed around the country protect the agriculture and aquaculture industries; however, critics argue that they are unconstitutional.¹² Those who question the constitutionality of these laws contend that the difficulty of winning cases under the malicious intent standard of business disparagement prompted many state legislatures to pass veggie libel legislation containing an easier burden of proof.¹³ One commentator argues that the laws define “falsity” too broadly to protect free speech rights under the First Amendment.¹⁴ Although each state law is different, they all generally define false information as that “not based upon reliable scientific facts and reliable scientific data that the disseminator knows or should have known to be false.”¹⁵ This definition, one critic argues, is too vague and does not provide a clear standard because scientific standards vary from community to community.¹⁶ Critics also argue that the laws create a chilling effect on speech, silencing critics who question

Sess. (1995); H.R. 127, 54th Leg., Gen. Sess. (Wyo.1997).

10. See Lavelle, *supra* note 6, at A1.

11. See *id.*

12. See RODNEY A. SMOLLA, *THE LAW OF DEFAMATION* § 16.04 (1986) (“Food disparagement laws are uncommonly silly, and, in many cases, undoubtedly unconstitutional.”); see also *infra* Part III for a discussion of the chilling effect the Texas False Disparagement of Perishable Food Products Act has on free speech.

13. See Megan W. Semple, Note, *Veggie Libel Meets Free Speech: A Constitutional Analysis of Agricultural Disparagement Laws*, 15 VA. ENVTL. L.J. 403, 411-14 (1995-96).

14. See David J. Bederman et al., *Of Banana Bills and Veggie Hate Crimes: The Constitutionality of Agricultural Disparagement Statutes*, 34 HARV. J. ON LEGIS. 135, 158 (1997) (discussing the different elements of falsity in all the veggie libel statutes).

15. *Id.* at 147-48 (quoting ARIZ. REV. STAT. ANN. § 3-113 (E) (1) (West Supp. 1998), FLA STAT. ANN. § 865.065(2) (a) (West Supp. 1999), and similar to OHIO REV. CODE ANN. §2307.81(B) (2) (Anderson Supp. 1998).

16. See Semple, *supra* note 13, at 440 (quoting from *Auvil* “there is no such thing as scientific certainty because there is always tomorrow and always new evidence and you never know what the next day will bring” (citation omitted)).

the safety of our food products.¹⁷ In addition, one commentator says that the laws violate the “of and concerning” requirement in the tort of defamation by allowing almost any plaintiff to bring suit after being criticized in a food safety report.¹⁸ Critics also argue that the statutes essentially shift the burden of proof to the defendant, making them prove that what they said about the food was true.¹⁹

2. *Auvil v. CBS “60 Minutes”*

Many veggie libel laws were passed in response to the Washington State apple growers’ unsuccessful business disparagement action against the CBS program “60 Minutes”²⁰ for its report on a pesticide that was contaminating apples.²¹ “60 Minutes” aired a segment on a National Resource Defense Council (“NRDC”) report²² that said the chemical daminozide, commonly known as Alar, was being sprayed on apples to enhance their growth and appearance.²³ This chemical can cause cancer, and the program said that Alar cannot be washed off the apples, nor can peeling the skin remove the risk.²⁴ In addition, since children consume most apples, children are most in danger of developing cancer in the future.²⁵ As a result of the broadcast, people around the world boycotted apples, and the Washington State growers suffered an estimated loss of seventy-five million dollars.²⁶

17. See *supra* note 6 for articles criticizing the food disparagement statutes for violating free speech. See also *infra* Part III for a discussion of the chilling effect the Texas False Disparagement of Perishable Food Products Act has on free speech.

18. See Bederman et al., *supra* note 14, at 160-61.

19. See Sue Anne Pressley, *Testing a New Brand of Libel Law: ‘Oprah’ Case Likely to Leave Its Mark on ‘Food Disparagement’ Statutes*, WASHINGTON POST, Jan. 17, 1998, at A1; Bederman et al., *supra* note 14, at 159.

20. See *Auvil v. CBS “60 Minutes” (“Auvil I”)*, 800 F. Supp. 928 (E.D. Wash. 1992).

21. See Lavelle, *supra* note 6, at 1.

22. Bradford H. Sewell & Robin M. Whyatt, M.P.H., National Resource Defense Council, *Intolerable Risk: Pesticides in Our Children’s Food* (1989).

23. See *Auvil I*, 800 F. Supp. at 930. The entire transcript of the “60 Minutes” segment is reprinted at 937-41.

24. See *id.* at 930.

25. See *id.*

26. See *id.* at 930-31.

The class action suit, brought on behalf of 4,700 apple growers, was originally filed against CBS and the NRDC, alleging defamation and product disparagement.²⁷ In response to the apple growers' action, the network moved for dismissal and summary judgment on the grounds that the broadcast was not "of and concerning" the plaintiffs as a group or as individual apple growers.²⁸ The district court denied the motion, declaring that the program satisfied the disparagement claim and was "of and concerning" all apples whether treated with Alar or not.²⁹ In a separate decision, the district court granted the NRDC's motion for summary judgment.³⁰ The court held that the NRDC's report was simply about the risk of developing cancer from using Alar and other chemicals on our agriculture; therefore, it was not specifically "of and concerning" the plaintiffs' apples.³¹ The court did eventually grant CBS's motion for summary judgment, finding that the plaintiffs failed to establish the falsity of the broadcast.³² On appeal, the Ninth Circuit affirmed without addressing the "of and concerning" requirement, therefore leaving that issue open for interpretation.³³

3. False Disparagement of Perishable Food Products Act

The Texas legislature, in addition to being concerned with the precedent set in *Auvil v. CBS "60 Minutes,"*³⁴ passed the False Disparagement of Perishable Food Products Act after a report regarding the safety of a product from Texas falsely accused the

27. See *id.* at 931 (explaining that the suit was originally filed in Yakima Superior Court and then removed to federal district court).

28. See *id.* at 934.

29. *Auvil v. CBS "60 Minutes"* ("*Auvil I*"), 800 F. Supp. 928, 935 (E.D. Wash. 1992).

30. See *Auvil v. CBS "60 Minutes"* ("*Auvil II*"), 800 F. Supp. 941 (E.D. Wash. 1992).

31. See *id.* at 943-44.

32. See *Auvil v. CBS "60 Minutes"* ("*Auvil III*"), 836 F. Supp. 740 (E.D. Wash. 1993), *aff'd*, 67 F.3d. 816 (9th Cir. 1995), *cert. denied*, 517 U.S. 1167 (1996).

33. See *Auvil v. CBS "60 Minutes,"* 67 F.3d. 816, 819 n.4 (9th Cir. 1995). See *infra* Part I.B.4 for a discussion of the "of and concerning" element in disparagement. See also *infra* Part III.B.4 for a discussion of applying the "of and concerning" requirement to cases brought under veggie libel statutes.

34. See *supra* Part I.A.2 for a discussion of the holdings in the case.

product of being unsafe for human consumption.³⁵ In 1991, the United States Center for Disease Control and Prevention (“CDC”) released a report connecting salmonella food poisoning to the Texas cantaloupe industry.³⁶ As a result of the media reports concerning the bacteria, Texas farmers reportedly lost approximately twelve million dollars.³⁷ Cantaloupe growers were incensed when the media reports continued despite the CDC tracing the salmonella to unsafe food handling after the fruit was cut in half.³⁸

The Texas cantaloupe growers suffered tremendously from this report; as a result, the livestock and agricultural industry used this scare to convince the state legislature to pass a law to protect their interests.³⁹ Bob Turner, D-Voss, sponsored the False Disparagement of Perishable Food Products Act and helped pass it through the Texas House and Senate.⁴⁰ Turner said the law “was designed to hold the media responsible for unsubstantiated and irresponsible reports about perishable products.”⁴¹

Like the other veggie libel statutes passed around the country, the Texas statute creates a cause of action for farmers or ranchers whose products have been disparaged by reports concerning their crops or livestock. The statute specifically defines a “perishable food product” as an agriculture or aquaculture product “that is sold or distributed in a form that will perish or decay beyond marketability within a limited period of time.”⁴² The standard for liability under the veggie libel statute is three-pronged. The disseminated information must be about perishable food products.⁴³ The person communicating the information must know it is false.⁴⁴ Thirdly, the conveyed information must state or imply that the perishable

35. See Tim Pareti, *What's Eating Oprah Winfrey?*, TEXAS LAWYER, Jan. 5, 1998, at 1.

36. See *id.*

37. See *id.*

38. See *id.*

39. See *id.*

40. See *id.*

41. See *id.*

42. TEX. CIV. PRAC. & REM. CODE § 96.001 (West Supp. 1996).

43. See *id.* § 96.002(a) (1).

44. See *id.* § 96.002(a) (2).

food is unsafe for human consumption.⁴⁵ The statute allows any producer of a food product to sue for appropriate relief arising from the dissemination of the information.⁴⁶ In addition, the statute states that when “determining if information is false, the trier of fact shall consider whether the information was based on reasonable and reliable scientific inquiry, facts, or data.”⁴⁷

Ironically, a Texas legislator recently introduced a bill to repeal the Texas False Disparagement of Perishable Food Products Act.⁴⁸ State Representative Ruth Jones McClendon, D-San Antonio, has introduced the one-page bill to abolish the statute.⁴⁹ If her proposal passes, however, it will not affect any cases pending under the statute.⁵⁰

B. *Defamation and Business Disparagement*

Because these new veggie libel laws contain elements of both defamation and business disparagement, it is necessary to trace and analyze the development of both these torts when discussing the constitutionality of the statutes.

1. Defamation

Early defamation law was a confusing mix of “anomalies and absurdities” that sought to hold defendants liable for speaking untruths, while at the same time protecting victims who had been seriously harmed by these statements.⁵¹ The tort of defamation has its origins in a criminal action and is concerned with protecting an

45. *See id.* § 96.002(a) (3).

46. *See id.* § 96.002(b).

47. *Id.* § 96.003. This may be a confusing standard, since it applies to knowledge rather than falsity. It seems to suggest that knowledge of falsity can be inferred from unreliable information, although that is not necessarily true.

48. *See House Member Has A Beef Against ‘Veggie Libel’ Statute; Cattle Feeders Among Associations That Will Fight Repeal*, DALLAS MORNING NEWS, Jan. 9, 1999, at 28A.

49. *See id.*

50. *See id.*; *see also infra* Part III.B for a discussion of other cases brought under veggie libel statutes.

51. DAN D. DOBBS ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, §111, at 769-70 (5th ed. 1984) [hereinafter PROSSER AND KEETON].

individual's reputation.⁵² The roots of defamation can be traced back to William the Conqueror, who established special courts within the church that heard cases concerning people who had "sinned" by bearing false witness.⁵³ One Supreme Court case, discussing the origins of the tort, said the original laws made "punishable any writing which tended to bring into disrepute the state, established religion, or any individual likely to be provoked to a breach of the peace because of the words."⁵⁴

Common law defamation eventually developed into a tort with four different elements.⁵⁵ Under the *Restatement (Second) of Torts*, defamation plaintiffs are now required to prove that the defendant made a false and defamatory statement.⁵⁶ In addition, there must be an unprivileged publication to a third party.⁵⁷ Thirdly, the speaker's fault in publishing the defamatory statement must amount to at least negligence.⁵⁸ Lastly, some plaintiffs must prove special harm resulted from publication in order to recover.⁵⁹ After 1964, however, plaintiffs who attempted to hold a defendant liable for defamation had more of an up-hill battle.

52. See Gordon Shneider, *A Model for Relating Defamatory "Opinions" to First Amendment Protected "Ideas"*, 43 ARK. L. REV. 57, 85 n.96 (1990) (discussing the case of *De Libellis Famosis* [1609] 5 Rep. 125, which treated defamation as a criminal offense whether true or false).

53. See SHELDON W. HALPERN, *THE LAW OF DEFAMATION, PRIVACY, PUBLICITY AND "MORAL RIGHTS"* (1995).

54. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 151 (1967); see generally, Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903) (discussing the origins of the tort of defamation).

55. See RESTATEMENT (SECOND) OF TORTS § 558 (1977). The Restatement's four requirements are more prescriptive, particularly in the speech/defendant category. In addition, certain requirements, such as falsity and negligence were not required as part of the plaintiff's case at common law. Much of the state law has been required by *Sullivan* and post-*Sullivan* First Amendment doctrine to include falsity and negligence as a requirement in defamation actions. Moreover, many, or most jurisdictions may have been moving in that direction in any event.

56. See *id.*

57. See *id.*

58. See *id.*

59. See *id.*

a. *New York Times Co. v. Sullivan*

Defamation went through a dramatic change with the Supreme Court's decision in *New York Times Co. v. Sullivan*.⁶⁰ This case came before the Court in 1964, in the midst of the civil rights movement, and established the constitutional standard that is applied to defamation law today.⁶¹ The respondent, Mr. L. B. Sullivan, was the Commissioner of Public Affairs for the police, fire, cemetery, and scales departments in the City of Montgomery, Alabama.⁶² Mr. Sullivan sued *The New York Times* and four African American clergymen, whose names appeared in an advertisement entitled "Heed Their Rising Voices," claiming that statements made in the full-page advertisement were libelous.⁶³ The advertisement discussed the struggles of southern African-American students who participated in non-violent demonstrations in order to affirm their rights of "human dignity" as provided by the Constitution.⁶⁴ The advertisement said that these students were met by a "wave of terror" in their efforts for civil rights. It also went on to describe specific events in this "wave of terror."⁶⁵ Although Mr.

60. 376 U.S. 254 (1964).

61. For a discussion of *New York Times Co. v. Sullivan* as it relates to the civil rights movement, see Anthony Lewis, *New York Times Co. v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment"*, 83 COLUM. L. REV. 603, 605 (1983) ("What was at stake . . . was more than the fate of one newspaper. It was the ability, or the willingness, of the American press to go on covering the racial conflict in the South as it had been doing [T]he libel suit . . . was a weapon in a political struggle."); Fred D. Gray, *The Sullivan Case: A Direct Product of the Civil Rights Movement*, 42 CASE W. RES. L. REV. 1223 (1992). Written by one of the attorneys who represented the four black Alabama ministers in the trial in the Circuit Court of Montgomery County, Alabama, this is a reaction to a book written by Anthony Lewis entitled MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT (1991). See also Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 192 (1964) ("A cursory examination of the case reveals that the decision was responsive to the pressures of the day created by the Negro protest movement."); Bruce L. Ottley et al., *New York Times v. Sullivan: A Retrospective Examination*, 33 DE PAUL L. REV. 741 (1984) (analyzing the facts of the case as they relate to the civil rights movement).

62. See *New York Times*, 376 U.S. at 256.

63. See *id.*

64. *Id.*

65. *Id.* at 256-57. The statements at issue were: "In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were

Sullivan was never specifically mentioned by name in the advertisement, he claimed that the word “police” in the advertisement referred to him as the Commissioner who supervised this “wave of terror.”⁶⁶ The Circuit Court in Montgomery County, Alabama ruled in favor of the plaintiff and awarded him \$500,000.⁶⁷ On appeal, the Supreme Court of Alabama affirmed the judgment.⁶⁸ The Supreme Court granted *certiorari* in this case “[b]ecause of the importance of the constitutional issues involved,” and it reversed the earlier decision.⁶⁹

In his opinion, Justice Brennan held that the First Amendment and the Constitution apply to defamation law.⁷⁰ This was a sweeping victory for defendants in defamation actions and has changed the face of defamation, requiring that it be subject to close First Amendment scrutiny in every jurisdiction.⁷¹ As a result of this case, public official plaintiffs have a much more difficult burden of proof in establishing liability for defamation.⁷²

expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.” *Id.* at 257.

66. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 258 (1964).

67. See *id.* at 256.

68. See *id.*

69. *Id.* at 264.

70. See *id.* at 265.

71. See, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 49 (1988) (finding state-law defamation requirement satisfied the *New York Times* standard); *Bose Corp. v. Consumers Union of the United States, Inc.*, 692 F.2d 189 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984); *Herbert v. Lando*, 781 F.2d 298 (2d Cir. 1986), *cert. denied*, 476 U.S. 1182 (1986); *Rosenbloom v. Metromedia, Inc.*, 415 F.2d 892, 894 (3d Cir. 1969), *aff'd*, 403 U.S. 29 (1971); *Time, Inc. v. Johnston*, 448 F.2d 378, 379, 384 (4th Cir. 1971); *Bussie v. Larson*, 501 F. Supp. 1107 (M.D. La. 1980); *Roberts v. Dover*, 525 F. Supp. 987, 989 (M.D. Tenn. 1981); *Desai v. Hersh*, 719 F. Supp. 670, 673 (N.D. Ill. 1989), *reh'g denied*, No. 90-1435 and 90-2207, U.S. App. LEXIS 5383 (7th Cir. 1992); *Brown v. Herald Co.*, 560 F. Supp. 123, 124 (E.D. Mo. 1982), *aff'd*, 698 F.2d 949 (8th Cir. 1983); *San Antonio Community Hosp. v. Southern Cal. Dist. Council of Carpenters*, 125 F.3d 1230, 1235 (9th Cir. 1997), *reh'g denied*, No. 96-56124 U.S. App. LEXIS 2206 (9th Cir. 1998); *Rinsley v. Brandt*, 446 F. Supp. 850, 855 (D. Kan. 1977); *Morgan v. Tice*, 862 F.2d 1495, 1497, 1500 (11th Cir. 1989), *reh'g denied*, 871 F.2d 122 (11th Cir. 1989), *cert. denied*, 493 U.S. 813 (1989); *Clyburn v. New World Communications, Inc.*, 903 F.2d 29, 31 (D.C. Cir. 1990).

72. See *Church of Scientology of California v. Siegelman*, 475 F. Supp. 950, 954 (S.D.N.Y. 1979) (citations omitted) (“The Church of Scientology has thrust itself onto

This decision established four constitutional standards relating to defamation actions involving a public official plaintiff and set a precedent for future courts.⁷³ The first requirement is that plaintiffs must prove that the defendant published the defamatory words with actual malice.⁷⁴ This means that a plaintiff must show the court that the defendant spoke the defamatory statement “with knowledge that it was false or with reckless disregard of whether it was false or not.”⁷⁵ The conventional meaning of “malice” in early defamation law usually referred to the speaker’s attitude toward the defamed person.⁷⁶ Under Justice Brennan’s opinion, however, malice “refers to the defamer’s attitude *toward the defamatory remark*, connoting knowledge of or indifference to its falsity.”⁷⁷

The *New York Times Co. v. Sullivan* actual malice standard has been applied in a number of other instances. The first important defamation case to be decided by the Court after *New York Times Co. v. Sullivan* was *Curtis Publ’g Co. v. Butts*.⁷⁸ In that case, the Court extended the actual malice privilege to public figures as well

the public scene, and accordingly should be held to the *stringent New York Times* burden of proof in attempting to make out its case for defamation.” (emphasis added).

73. See *Newton v. National Broad. Co.*, 930 F.2d 662, 669-70 (9th Cir. 1990). In discussing the legal standards in the case, the court stated:

In *New York Times*, the Supreme Court established the constitutional rule that a public figure . . . cannot recover damages for defamation without clear and convincing proof that a false “statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” The Supreme Court also mandated that in public figure defamation cases, we must ‘make an independent examination of the whole record’ so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

Id. (quoting *New York Times*, 376 U.S. at 279-80, 285); *Barger v. Playboy Enter., Inc.*, 564 F. Supp. 1151, 1153 (N.D. Cal. 1983) (holding that the plaintiffs who sue under defamation must show the statements made were “of and concerning” them). The court stated that “because defamation suits threaten the freedom of speech and of the press protected by the First Amendment, the ‘of and concerning’ requirement may take on constitutional significance.” *Id.* (citing *New York Times*, 376 U.S. at 288-92).

74. See *New York Times*, 376 U.S. at 279-80.

75. *Id.* at 280.

76. See Sheldon W. Halpern, *Of Libel, Language, and Law: New York Times Co. v. Sullivan at Twenty-Five*, 68 N.C. L. REV. 273, 278 (1990).

77. *Id.* (citation omitted).

78. 388 U.S. 130 (1967) (Warren, C.J., concurring).

as public officials.⁷⁹ In 1971, Justice Brennan's opinion in *Rosenbloom v. Metromedia, Inc.*⁸⁰ stretched the actual malice standard to apply to both public and private figures.⁸¹ The Court held that proof of actual malice is required for speech involving matters of public concern even if the plaintiff is a private citizen.⁸² The landmark decision in *Gertz v. Robert Welch, Inc.*,⁸³ however, disagreed with the theory that actual malice should apply irrespective of the plaintiff's status.⁸⁴ The Supreme Court rejected the notion that actual malice should be taken wholesale from public official cases and applied to public concern cases. Instead, it held that in a defamation action for compensatory damages for an actual injury, the plaintiff is required to prove actual malice only if she were a public figure or a public official.⁸⁵ The *Gertz* Court defined a public figure as one who is notorious for her achievements and can seek the public's attention through the media. As a result of her notoriety, she is afforded less protection.⁸⁶ The Court also held that those who inject themselves into a particular public controversy become limited-purpose public figures, in which case the actual malice standard also applies.⁸⁷ Therefore, as a result of *Gertz*, a plaintiff does not have to show actual malice if she is a private figure and has been defamed. The *Gertz* Court did, however, state that in cases with a private figure plaintiff and an issue of public concern, the constitutional standard for actual malice will apply when the plaintiff is seeking presumed or punitive damages.⁸⁸

In addition to establishing the actual malice fault standard, *New York Times Co. v. Sullivan* created a second constitutional standard that related to the appellate review of First Amendment cases. Justice Brennan held that the Court "must 'make an independent ex-

79. *See id.* at 163-65.

80. 403 U.S. 29 (1971).

81. *Id.* at 42-44.

82. *See id.*

83. 418 U.S. 323 (1974).

84. *See id.* at 346. ("The extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge this legitimate state interest [in protecting private individuals from defamatory falsehoods] to a degree that we find unacceptable.")

85. *See id.* at 343.

86. *See id.* at 342.

87. *See id.* at 351-52.

88. *See id.* at 349.

amination of the whole record,' so as to assure [itself] that the judgment does not constitute a forbidden intrusion on the field of free expression."⁸⁹ This *de novo*, or second,⁹⁰ review requires that the Court make an independent inspection of the record to ensure that constitutional principles are applied correctly.⁹¹ Later courts have affirmed this application of *de novo* review in defamation cases applying actual malice.⁹²

Normally, appellate review depends on whether the court is looking into a question of law or a question of fact.⁹³ Appellate judges are obligated to review questions of law and to overturn a lower court's decision if they decide that it was incorrect.⁹⁴ Appellate judges, however, are deferential to their trial judge associates when reviewing questions of fact, because trial judges have a better opportunity to examine the record and determine the credibility of witnesses.⁹⁵ Accordingly, questions of fact from a jury trial are reviewed on a clearly erroneous standard.⁹⁶ As to mixed questions of law and fact, the appellate review doctrine is complex and nuanced. Therefore, appellate judges, applying *de novo* review to de-

89. See *New York Times*, 376 U.S. at 285 (internal citations omitted).

90. See BLACKS LAW DICTIONARY 435 (6th ed. 1990).

91. See *New York Times*, 376 U.S. at 285.

92. See, e.g., *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 660, 688 (1989) (applying independent review of the entire record in a case where a candidate for judicial office sued a newspaper for libel); *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 514, 492 (1984) (holding that an appellate court's review of a case involving First Amendment issues was not limited to the clearly erroneous standard of Rule 52(a) under the Federal Rules of Civil Procedure; rather, the court "must perform a *de novo* review, independently examining the record.").

93. See Tigran Eldred, Note, *Amplifying Bose Corp. v. Consumers Union: The Proper Scope of De Novo Appellate Review in Public Person Defamation Cases*, 57 *FORDHAM L. REV.* 579, 581 (1989).

94. See *id.* at 582.

95. See *id.* at 582-83; see also *United States v. Lang*, 149 F.3d 1044, 1046 (9th Cir. 1998) ("We review . . . questions [of fact] under a deferential, clearly erroneous standard for a number of reasons, chief among them a recognition that the district court is in a superior position 'to judge the accuracy of witnesses' recollections and make credibility determinations in cases in which live testimony is presented.'" (quoting *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir. 1984) (*en banc*))).

96. See *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 514 n.31 (1984) (commenting that there may be other questions of fact in a defamation case that are irrelevant to the constitutional standard of *New York Times Co. v. Sullivan*, and to which a "clearly erroneous" standard of appellate review applies).

termine if actual malice was established, must break away from this standard practice and re-examine the merits of the case on their own.

In *New York Times Co. v. Sullivan*, Justice Brennan laid down a third constitutional standard that made the “of and concerning” requirement a necessary element of defamation law.⁹⁷ He held that the evidence presented by the petitioner was “constitutionally defective” because “it was incapable of supporting the jury’s finding that the allegedly libelous statements were made ‘of and concerning’ respondent.”⁹⁸ He stated that the advertisement made no reference to Mr. Sullivan, nor to the police commissioner; as a result, *The New York Times* could not be held accountable.⁹⁹ Supporting the “of and concerning” requirement, Brennan also stated that it was unconstitutional for “an otherwise impersonal attack on governmental operations” to be libelous of the official in charge of those operations.¹⁰⁰

For a statement to satisfy defamation’s “of and concerning” requirement, the listener must reasonably believe that the statement refers to the plaintiff.¹⁰¹ To satisfy the “of and concerning” standard in a *group* libel action, the plaintiff must prove that either: (1) the group is so small that the statement can reasonably be understood to refer to particular members, or (2) the circumstances of the publication can reasonably lead the listener to conclude that the statement makes reference to one member of the group.¹⁰² Therefore, a defamatory remark does not have to mention the plaintiff by name to be “of and concerning” that party.¹⁰³

The fourth constitutional standard created by *New York Times Co. v. Sullivan* requires that evidence presented to prove actual malice be established with convincing clarity.¹⁰⁴ The Court held

97. See 376 U.S. 254, 288 (1964).

98. *Id.*

99. See *id.*

100. *Id.* at 292.

101. See RESTATEMENT (SECOND) OF TORTS § 558 cmt. b, § 564 cmt. a, b (1977); SMOLLA, *supra* note 12, § 4.09[1].

102. See RESTATEMENT (SECOND) OF TORTS § 564A (1977).

103. See *id.* at § 558 cmts. a, b, d, and g; SMOLLA, *supra* note 12, § 4.09[2].

104. 376 U.S. 254, 285-86 (1964).

that the constitutional standard requires this high burden of proof.¹⁰⁵ Generally, the elements of a tort action must be proven by a preponderance of the evidence, meaning that the plaintiff must introduce enough evidence for a reasonable person to conclude that the element was more than likely met.¹⁰⁶ Under the “clear and convincing” constitutional standard, however, the plaintiff has to establish malice in publication by more than a mere preponderance.¹⁰⁷ In *New York Times*, Justice Brennan did not clarify what is necessary to establish “convincing clarity;” rather, the Court defined the term in a later decision.¹⁰⁸

b. Supreme Court’s Clarification of *New York Times Co. v. Sullivan*

In *Gertz v. Robert Welch, Inc.*, the Supreme Court interpreted convincing clarity to mean “clear and convincing proof.”¹⁰⁹ In *Bose Corp. v. Consumers Union of the United States, Inc.*,¹¹⁰ the appellate court cited the Supreme Court’s clarification of the “convincing clarity” standard in *Gertz*: “This requirement, now the ‘clear and convincing proof’ test, calls for the plaintiff to prove more than would be necessary under the preponderance of the evidence standard but something less than what the beyond a reasonable doubt standard requires.”¹¹¹

*Anderson v. Liberty Lobby, Inc.*¹¹² is a landmark case that greatly expanded the importance of convincing clarity in defamation litigation and helped those accused of libel or slander to defend against these claims. *Anderson* involved a libel action against a magazine, its publisher, and its chief executive officer. The main issue was whether the clear and convincing evidence standard must be considered by a court when ruling on a motion for summary

105. *See id.*

106. *See* PROSSER AND KEETON, § 41, at 269.

107. *See Bose Corp. v. Consumers Union of the United States, Inc.*, 692 F.2d 189, 195 (1st Cir. 1982), *aff’d*, 466 U.S. 485 (1984).

108. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

109. *Id.*

110. 692 F.2d 189 (1st Cir. 1982).

111. *Id.* at 195 (quoting *Yiamouyianis v. Consumers Union of the United States*, 619 F.2d 932, 940 (2d Cir. 1980)).

112. 477 U.S. 242 (1986).

judgment when a case involves the principles of *New York Times Co. v. Sullivan*.¹¹³ Normally, under Rule 56 of the Federal Rules of Civil Procedure, summary judgment shall be granted if: “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [the] moving party is entitled to a judgment as [a] matter of law.”¹¹⁴ In this case involving First Amendment principles, the *Anderson* Court analyzed motions for summary judgment and directed verdicts, and the Court stated that it must consider “the substantive evidentiary standard of proof that would apply at the trial on the merits,” when considering these kinds of motions.¹¹⁵ Accordingly, the Court holds that when the *New York Times Co. v. Sullivan* clear and convincing evidence standard applies, the trial judge’s summary judgment inquiry must consider whether the evidence presented would allow a reasonable jury to find that the plaintiff had shown actual malice by clear and convincing evidence.¹¹⁶ If a plaintiff cannot establish this, the motion will be granted.¹¹⁷

113. *See id.* at 244.

114. FED. R. CIV. P. 56.

115. *Anderson*, 477 U.S. at 252.

116. *See id.* at 255-56. The Court stated:

In sum, we conclude that the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. This is true at both the directed verdict and summary judgment stages. Consequently, where the *New York Times* ‘clear and convincing’ evidence requirement applies, the trial judge’s summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant. Thus, where the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.

Id.

117. *See id.* at 252-53.

2. Business Disparagement

While an individual's reputation is paramount under defamation law,¹¹⁸ business disparagement protects an injured party's economic interests against pecuniary loss.¹¹⁹ Because product disparagement protects a person's business interests, this tort evolved separately from defamation.¹²⁰ The earliest business disparagement¹²¹ cases involved false statements concerning a person's title or right to real estate.¹²² These causes of action were called "slander of title."¹²³

In order to establish liability for product disparagement, The *Restatement (Second) of Torts* mandates that a plaintiff satisfy six requirements.¹²⁴ She must prove that there was an (1) intentional, (2) unprivileged, (3) publication of (4) a false statement that (5) disparages the property of another, in a manner that can be (6) measured through pecuniary loss.¹²⁵ A business disparagement plaintiff must prove that the defendant intended to harm the plaintiff's business interest by making the disparaging statement; otherwise, if the defendant did not intend to disparage the business, the plaintiff must prove that the defendant knew, or should have known, that the statement would be harmful.¹²⁶ In addition, the plaintiff in a product disparagement action must prove that the de-

118. See *supra* Part I.B.1 for a discussion of the origins and protections of defamation.

119. See, e.g., *Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 766 (Tex. 1987). In contrasting defamation and product disparagement, the court states: "The action for defamation is to protect the personal reputation of the injured party, whereas the action for injurious falsehood or business disparagement is to protect the economic interests of the injured party against pecuniary loss." *Id.*

120. See RESTATEMENT (SECOND) OF TORTS § 623A cmt. g (1977).

121. This cause of action has been referred to, among other things, as injurious falsehood, product disparagement, trade libel, and slander of title. This Note will refer to this tort as either disparagement, product disparagement, or business disparagement.

122. See PROSSER AND KEETON, § 128, at 962-63 (discussing early product disparagement cases dating back to the 1600's).

123. See *id.*; see also Rawn Howard Reinhard, Note, *The Tort of Disparagement and the Developing First Amendment*, 1987 DUKE L.J. 727, 728-29 (citing *Ratcliffe v. Evans*, [1892] 2 Q.B. 524, 527-28 (C.A.)).

124. RESTATEMENT (SECOND) OF TORTS § 623A (1977).

125. See *id.*

126. See *id.*

defendant knew the statement was false or acted in reckless disregard as to its veracity.¹²⁷

3. The Similarities and Differences Between Defamation and Business Disparagement

In many respects, defamation and business disparagement are similar torts. Often it is difficult to determine whether the actionable speech should give rise to a defamation or disparagement action, and frequently plaintiffs will sue for both.¹²⁸ In addition, many courts have recognized the overlap between these two torts.¹²⁹

While the two causes of action are somewhat alike, they protect different interests and have a number of contrasting elements.¹³⁰ At common law, the elements of disparagement and defamation differ in their requirements for falsity, fault, and damages.¹³¹ The burden of proof is heavier on a plaintiff in a disparagement action than in a defamation case.¹³² The falsity requirement in a defamation case is presumed. Accordingly, to prevail a defendant must prove the absolute truth of his words.¹³³ On the other hand, a defendant in a product disparagement action is not held liable unless the plaintiff proves (a) falsity and (b) that the de-

127. *See id.*

128. *See* SMOLLA, *supra* note 12, § 11.02[4], at 11-35.

129. *See* Lisa Magee Arent, Note, *A Matter of "Governing" Importance: Providing Business Defamation and Product Disparagement Defendants Full First Amendment Protection*, 67 *IND. L.J.* 441, 455 (1992) (citing *Modern Prod., Inc. v. Schwartz*, 734 F. Supp. 362, 363 (E.D. Wis. 1990); *Angio-Medical Corp. v. Eli Lilly & Co.*, 720 F. Supp. 269, 274 (S.D.N.Y. 1989); *Allcare, Inc. v. Bork*, 531 N.E.2d 1033, 1037 (Ill. App. 1988); *Dairy Stores, Inc. v. Sentinel Publ'g Co.*, 516 A.2d 220, 224 (N.J. 1986)).

130. *See* RESTATEMENT (SECOND) OF TORTS § 623A cmt. g (1977); SMOLLA, *supra* note 12, § 11.02[4], at 11-35. For a discussion of the elements of each tort *see supra* Part I.B.1 and Part I.B.2.

131. *See* RESTATEMENT (SECOND) OF TORTS § 623A cmt. g (1977).

132. *See id.* ("From the beginning, more stringent requirements were imposed upon the plaintiff seeking to recover for injurious falsehood . . .").

133. *See id.* In *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986), however, the Supreme Court eliminated the common law presumption of falsity in defamation cases involving media defendants and a public official or public figure, or a private plaintiff and an issue of public concern. Moreover, many states have independently altered their law, as reflected in the *Restatement (Second) of Torts* discussion of the falsity element in defamation. *See* RESTATEMENT (SECOND) OF TORTS § 623A (App. 1981).

defendant knew the statement was false or acted with reckless disregard concerning its falsity.¹³⁴ The plaintiff may also prove that the defendant made the statement with ill will or intended to interfere with the plaintiff's business interests.¹³⁵

Under the common law of defamation, a plaintiff does not have to prove fault in reference to the falsity of the defamatory statement; rather, the plaintiff must show negligence in publication.¹³⁶ Under disparagement, a plaintiff must prove that the defendant published the statement with intent to harm the plaintiff's pecuniary interests.¹³⁷ In terms of damages, a plaintiff in a slander *per se* or libel action can recover without proving special damages.¹³⁸ The plaintiff in product disparagement litigation must prove actual pecuniary loss resulting from the damaging statement.¹³⁹

4. The Constitutionalization of Business Disparagement Law? *Bose Corp. v. Consumers Union of the United States, Inc.* and its Progeny

Although shielding against a person's pecuniary loss has not been given the sweeping constitutional protections of defamation law, the "constitutionalization" and modernization of defamation law have eased some of the distinctions between disparagement and defamation. More importantly, courts have slowly begun to apply the *New York Times Co. v. Sullivan* constitutional standards to disparagement cases, thereby bringing these two torts closer together.¹⁴⁰

134. See RESTATEMENT (SECOND) OF TORTS § 623A cmt. g (1977).

135. See *id.*

136. See *id.* § 558.

137. See *id.* § 623A cmt. d.

138. See *id.* §§ 569-570.

139. See *id.* § 623A cmt. f.

140. See SMOLLA, *supra* note 12, § 11.02[3][b][i], at 11-34 ("There appeared to be a growing recognition that the constitutional principles emanating from *New York Times* and *Gertz* ought to apply . . . to injurious falsehood cases."). But see *id.* § 11.02[3][b][ii] at 11-34 (discussing the degradation of the first amendment principles to disparagement as a result of *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), which held that First Amendment protection does not apply to commercial speech. Since injurious falsehood cases tend to include commercial speech, this shows a movement away from constitutional protection for disparagement defendants). Smolla does state, however, that it is too early to assess the full impact of *Dun & Bradstreet*. See Smolla,

Indeed, *Bose Corp. v. Consumers Union of the United States, Inc.*, a prominent Supreme Court case comes close to applying all the *New York Times Co. v. Sullivan* standards to business disparagement.¹⁴¹ *Bose* is a landmark product disparagement case, and it concerned an article published in *Consumer Reports Magazine* evaluating the quality of numerous brands of stereo speaker systems.¹⁴² One of the brands discussed in the article was Bose, which was described as a “‘unique and unconventional’ system.”¹⁴³ The article mentioned that “‘individual instruments heard through the *Bose* system seemed to grow to gigantic proportions and tended to wander about the room.’”¹⁴⁴ The plaintiff disagreed with this assessment of its product, and after *Consumer Reports* refused to print a retraction, Bose initiated this product disparagement action.¹⁴⁵

The Massachusetts District Court denied the defendant’s motion for summary judgment and conducted a bench trial to determine liability, eventually ruling in favor of the plaintiffs.¹⁴⁶ In its opinion, the court held that the plaintiff was a public figure, as defined in *Gertz v. Robert Welch, Inc.*, and therefore the plaintiff had to prove that the product disparagement was made with actual malice, as defined under the *New York Times Co. v. Sullivan* standard.¹⁴⁷ Ultimately, the court held that the statement discussing the instruments’ tendency to “wander about the room” was false and disparaging.¹⁴⁸

The First Circuit reversed the lower court’s decision.¹⁴⁹ In its

supra note 12, § 11.02[3][b][ii], at 11-35.

141. 466 U.S. 485 (1984).

142. *See id.* at 487.

143. *Id.* at 488.

144. *Id.*

145. *See id.*

146. *See Bose Corp. v. Consumers Union of the United States, Inc.*, 508 F. Supp. 1249, 1251 (D. Mass. 1981), *rev’d on other grounds*, 692 F.2d 189 (1st Cir. 1982), *aff’d*, 466 U.S. 485 (1984).

147. *See Bose*, 508 F. Supp. at 1271. For a discussion of the application of the First Amendment to defamation law and the establishment of the actual malice standard, see *supra* notes 70-77.

148. *See id.* at 1269.

149. *See Bose Corp. v. Consumers Union of the United States, Inc.*, 692 F.2d 189 (1st Cir. 1982), *aff’d*, 466 U.S. 485 (1984).

opinion, the Court of Appeals agreed with the district court's finding that the statement was disparaging.¹⁵⁰ More importantly, it noted that Bose did not contest the lower court's determination that it was a public figure and therefore subject to the actual malice standard.¹⁵¹ The judges held that their review of the case was not limited to the clearly erroneous standard of Rule 52(a) under the Federal Rules of Civil Procedure.¹⁵² Instead, the decision stated that the court "must perform a de novo review, independently examining the record to ensure that the district court ha[d] applied properly the governing constitutional law and that the plaintiff has indeed satisfied its burden of proof."¹⁵³ In overruling the lower court, the First Circuit stated that it was unable to identify clear and convincing evidence that *Consumer Reports Magazine* published the statement about the speakers with knowledge that it was false or with reckless disregard of its falsity.¹⁵⁴ The court concluded that although the article used imprecise language, its choice of language did not constitute evidence of actual malice.¹⁵⁵ The Supreme Court granted *certiorari* to consider whether the First Circuit had erred when it failed to apply the clearly erroneous standard of Rule 52(a) to the District Court's finding of actual malice.¹⁵⁶

Although the Supreme Court did not specifically endorse the application of defamation's constitutional privileges to disparagement law,¹⁵⁷ the Court's decision in *Bose* and its progeny indicates

150. *See id.* at 194.

151. *See id.*

152. *See id.* at 195; FED. R. CIV. P. 52(a).

153. *Bose*, 692 F.2d at 195.

154. *See id.* at 197.

155. *See id.*

156. *See Bose*, 466 U.S. 485, 493 (1984).

157. *See id.* at 513. The Supreme Court stated:

The Court of Appeals entertained some doubt concerning the ruling that the *New York Times* rule should be applied to a claim of product disparagement based on a critical review of a loudspeaker system. We express no view on that ruling, but having accepted it for purposes of deciding this case, we agree with the Court of Appeals that the difference between hearing violin sounds move around the room and hearing them wander back and forth fits easily within the breathing space that gives life to the First Amendment.

Id.

that the law is moving in that direction.¹⁵⁸ And since *Bose*, it has been assumed by courts and commentators that the Supreme Court's application of *New York Times Co. v. Sullivan* to *Bose* is a natural and correct application of the law. The *Bose* case applied three of the four *New York Times Co. v. Sullivan* constitutional standards to disparagement.¹⁵⁹ First, the Supreme Court affirmed the district and appeals courts' application of the actual malice and "clear and convincing" evidence standards.¹⁶⁰ The Court states: "[j]udges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'"¹⁶¹ The Court applied a third constitutional standard to this disparagement case when it held that appellate judges must exercise in-

158. See, e.g., *Simmons Ford, Inc. v. Consumers Union of the United States, Inc.*, 516 F. Supp. 742, 744 n. 4 (S.D.N.Y. 1981) (stating that the public's interest in obtaining information about products is comparable to its interest in obtaining information about people and this warrants the application of the actual malice standard to product disparagement cases when the plaintiff is a public figure); *Bose Corp. v. Consumers Union of the United States, Inc.*, 508 F. Supp. 1249, 1270-71 (D. Mass. 1981), *rev'd on other grounds*, 692 F.2d 189 (1st Cir. 1982) (discussing the application of the actual malice standard to product disparagement cases); *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 1042-43 (*en banc*), *cert. denied*, 485 U.S. 934 (1988) (In an action by an author against a newspaper injurious falsehood for failing to include his book on the best sellers list, the court states: "Although the limitations that define the First Amendment's zone of protection for the press were established in defamation actions, they are not peculiar to such actions but apply to all claims whose gravamen is the alleged injurious falsehood of a statement."); *Dairy Stores, Inc. v. Sentinel Publ'g Co.*, 191 N.J. Super. 202, 210 n.2 (Law Div. 1983), *aff'd*, 198 N.J. Super. 19 (App. Div. 1985), *aff'd*, 104 N.J. 125 (1986) (stating that the defamation claims could be viewed as claims for product disparagement).

159. The only constitutional standard for defamation not applied in *Bose* is the "of and concerning" requirement.

160. See *Bose*, 466 U.S. at 513 (stating that it agrees with the Court of Appeals' understanding of the "breathing space" requirement under the First Amendment). See also BRUCE W. SANFORD, *LIBEL AND PRIVACY*, § 8.2.6, at 371 (Prentice Hall Law and Business 1994) (2d ed. 1997) ("The *Bose* Court affirmed the decision of the court of appeals that the defendant's conduct did not constitute actual malice under the circumstances." (citing *Bose*, 466 U.S. at 513)); Lackland H. Bloom, Jr., *Proof of Fault in Media Defamation Litigation*, 38 VAND. L. REV. 247, 256 (1985) ("The Supreme Court recently reendorsed 'clear and convincing' evidence as the constitutionally mandated standard of appellate review of the record in public figure defamation cases in *Bose v. Consumers Union of the United States, Inc.*" (citing *Bose*, 466 U.S. at 510-11)).

161. 466 U.S. at 511.

dependent review of the record as a whole to determine if actual malice has been proven with convincing clarity.¹⁶² The Court states: “We hold that the clearly-erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by *New York Times Co. v. Sullivan*.”¹⁶³

Bose is not the only disparagement case to apply the actual malice, and convincing clarity constitutional standards to disparagement cases.¹⁶⁴ In *Quantum Electronics Corp. v. Consumers Union of the United States, Inc.*,¹⁶⁵ the Rhode Island district court held that the plaintiff was a limited-purpose public figure; therefore, in order to prevail on its defamation and disparagement claims, the plaintiff must prove actual malice by clear and convincing evidence.¹⁶⁶ The facts of *Quantum Electronics* are very similar to *Bose*. The defendants are the publishers of *Consumer Reports Magazine* and wrote an article that included comparative reviews of different types of air cleaners.¹⁶⁷ Of the two ozone generators that were reviewed, Quantum’s was described as “not acceptable” because its ozone emissions exceeded allowable levels under federal government requirements.¹⁶⁸ As a result of the article, Quantum initiated this action against Consumers Union. In granting the defendant’s motion for summary judgment, the court followed *Anderson v. Liberty Lobby*.¹⁶⁹ The court stated: “[a]s a matter of law, . . . Quantum is a limited-purpose public figure . . . it cannot prevail on either its defamation or product disparagement claims, without proving by clear and convincing evidence, that the article published by Consumers Union . . . contained defamatory false-

162. *See id.* at 514.

163. *Id.*

164. *See, e.g.,* *Quantum Elecs. Corp. v. Consumers Union of the United States, Inc.*, 881 F. Supp. 753, 768-69 (D. R.I. 1995). The court stated that since the plaintiff is held to be a limited-purpose public figure, it cannot prevail on a defamation or disparagement claim without proving by clear and convincing evidence that the article was published with actual malice. *See id.*

165. *Id.*

166. *See id.* at 766.

167. *See id.* at 756.

168. *Id.*

169. *See id.* at 761 (citing *Anderson*, 477 U.S. 242, 254 (1986)).

hoods and was published with actual malice.”¹⁷⁰

The “of and concerning” constitutional standard has been a required element in disparagement cases as well. In *Auvil v. CBS “60 Minutes,”* the court denied the defendant’s motion for summary judgment when it argued that the broadcast was not “of and concerning” the plaintiff’s apples.¹⁷¹ The court held that the CBS broadcast was “of and concerning” the Washington State apple growers, even though the program was about a generic food product.¹⁷² The apple farmers had an economic interest in the product; therefore, the program did in fact disparage them.¹⁷³ Another case that has applied the *New York Times Co. v. Sullivan* “of and concerning” requirement to disparagement is *Blatty v. New York Times Co.*¹⁷⁴ In *Blatty*, the author of a book sued *The New York Times* for injurious falsehood¹⁷⁵ because her book was not included on *The Times*’ best sellers’ list, despite proof of book sales that would warrant its inclusion.¹⁷⁶ Ruling in the defendant’s favor, the court held that the “of and concerning” standard requires specific reference to the plaintiff;¹⁷⁷ since the best sellers’ list made no mention or implication of the author’s book, the plaintiff could not recover.¹⁷⁸

The *Blatty* Court held: “The fundamental reason that the various limitations rooted in the First Amendment are applicable to all

170. *Quantum Elecs. Corp. v. Consumers Union of the United States, Inc.*, 881 F. Supp. 753, 769 (D. R.I. 1995).

171. *See* 800 F. Supp 928, 935 (E.D. Wash. 1992).; *see also supra* Part I.A.2 for a discussion of this case.

172. *See id.* at 934.

173. *See id.* at 930 n.2 (discussing the fact that “60 Minutes” did not use the term “red apples” in their story). The court noted that the graphics (a red apple with a skull and crossbones) used to open the segment left no doubt that they were the subject matter of the program. *See id.* In addition, the Washington State Apple Advertising Commission (“WSAAC”) had put on an aggressive ad campaign around the country promoting Washington State as the prime producer of red apples. *See id.*

174. 728 P.2d 1177 (Cal. 1986), *cert. denied*, 485 U.S. 934 (1988).

175. Injurious falsehood is an umbrella term for all torts that involve an injury to business or commercial interests which are caused by the publication of false information. Torts falling within the umbrella include: slander, title, product disparagement, and trade libel. *See SMOLLA, supra* note 12, § 11.02[1], at 11-32 (citation omitted).

176. *Blatty*, 728 P.2d at 1178-79.

177. *See id.* at 1182.

178. *See id.*

injurious falsehood claims and not solely to those labeled ‘defamation’ is plain: although such limitations happen to have arisen in defamation actions, they do not concern matters peculiar to such actions but broadly protect free-expression and free-press values.”¹⁷⁹ As of *Blatty*, all four of the constitutional protections established by *New York Times Co. v. Sullivan* have been applied to business disparagement in some capacity.

II. THE CATTLE INDUSTRY V. OPRAH AND OTHER “VEGGIE LIBEL” CASES

A. *Oprah v. The Beef Industry*

In *Texas Beef Group v. Winfrey*,¹⁸⁰ the plaintiffs sought to hold Winfrey, her guest, and her production company liable for statements made on “The Oprah Winfrey Show” about the feeding practices of cattle. The plaintiffs argued that Winfrey and her producers knew the statements concerning the beef industry and mad cow disease were false.¹⁸¹ In addition, they claimed that the statements made by Ms. Winfrey and her guest, Howard Lyman, were greatly exaggerated and not based on scientific fact.¹⁸² The defendants, on the other hand, stood upon the First Amendment and asserted that the statements on the program did not satisfy the “of and concerning” requirement that is necessary under the Constitution and Texas law.¹⁸³ Claiming the allegedly defamatory program was just a general discussion of meat and therefore not actionable, the defendants argued that “the subject matter of the [p]rogram is so wide-ranging and the discussion so all-embracing, the resulting dilution precludes a finding that it was ‘of and concerning’ either these [p]laintiffs or beef.”¹⁸⁴

179. *Id.* at 1183.

180. 11 F. Supp. 2d 858 (N.D. Tex. 1998).

181. See Amended Complaint, *supra* note 2, § IV.B, ¶ 14.

182. See *id.* § I.

183. See Defendant’s Motion to Dismiss § III & IV, *Texas Beef Group v. Winfrey*, 11 F. Supp. 2d 858 (N.D. Tex. 1998) (No. CIV. A. 2:96-CV-208-J) (on file with the *Fordham Intellectual Property, Media & Entertainment Law Journal*).

184. *Id.* § IV, ¶ 31.

1. The Program

On April 16, 1996, the topic of “The Oprah Winfrey Show” was “Dangerous Foods.” One of Ms. Winfrey’s guests was Howard Lyman, the Executive Director of the Humane Society’s Eating with Conscience. He stated that the feeding practices of cattle ranchers in the United States are similar to the United Kingdom, and as a result, the deadly mad cow disease could easily develop in the United States.¹⁸⁵ The program also said the outbreak of mad cow disease “could make AIDS look like the common cold.”¹⁸⁶ Dr. William Hueston, a representative from the United States Department of Agriculture, agreed to be on the show to be “a voice of reason to calm the hysteria” concerning mad cow disease.¹⁸⁷ Instead, Hueston claimed that most of his statements concerning the disease were edited out, leaving an unbalanced program.¹⁸⁸ It is these statements by Lyman, and other remarks made on the program, that the plaintiffs alleged defamed the cattle industry.¹⁸⁹

185. See Amended Complaint, *supra* note 2, § III, ¶ 8.

186. *Id.*

187. Mark Babineck, *Mad Cow Expert Says He Felt ‘Ambushed’ on ‘Oprah’ Broadcast*, FORT WORTH STAR-TELEGRAM, Jan. 28, 1998, at 16.

188. See *id.*

189. See Amended Complaint, *supra* note 2, § III. Some of the following excerpts aired on the Apr. 16, 1996 “Oprah Winfrey Show”:

WINFREY: You said this disease could make AIDS look like the common cold?

LYMAN: Absolutely.

...

LYMAN: Absolutely. And what we’re looking at—at right now is we’re following exactly the same path that they followed in England: 10 years of dealing with it as public relations rather than doing something substantial about it. One hundred thousand cows per year in the United States are fine at night, dead in the morning. The majority of those cows are rounded up, ground up, fed back to other cows. If only one of them has mad cow disease, [it] has the potential to infect thousands. Remember, today, the United States—14 percent of all cows by volume are ground up, turned into feed and fed back to other animals.

...

LYMAN: . . . We should have them eating grass, not other cows. We’ve not only turned them into carnivores, we’ve turned them into cannibals.

...

WINFREY: Now doesn’t that concern you—all a little bit right here, hearing that? It has just stopped me cold from eating another burger. I’m stopped. . . .

...

2. The Litigation

Essentially, the plaintiffs claimed that the show's producers intentionally edited the program to increase the ratings.¹⁹⁰ They stated in their complaint: "The carefully and maliciously edited statements were designed to hype the ratings at the expense of the American cattle industry. In the stampede to win ratings, the truth is often the first to get trampled."¹⁹¹ The plaintiffs believed that the final broadcast was unbalanced and favored the anti-beef activists because many of Dr. Will Hueston's pro-beef statements were edited out of the final cut. Oprah's producers agreed that many of their guests' statements did not make it into the final program; however, producers argued that guests' statements were omitted

LYMAN: Well, what—what I know about what is happening out there with cattle, like feeding cows to cows, I look at it and say that that's a risk that I'm unwilling to take.

...

LYMAN: And if we continue to do what we're doing—feeding animals to animals—I believe we're going to be in the same place, because I've heard all of these things before in England. . . . They have put the public at risk.

...

LYMAN: Ask yourself the question. Today, we could do exactly what the English did and cease feeding cows to cows. Why in the world are we not doing that?

...

LYMAN: Why are we skating around this and continuing to do it when everybody sitting here knows that that would be the safest thing to do? Why is it? Why is it? Because we have the greedy that are getting the ear of the government instead of the needy, and that's exactly why we're doing it.

...

LYMAN: Well, what it comes down to is about half the slaughter of—of animals is non-salable to humans. They either have to pay to put it into the dump or sell it for feed, they grind it up, turn it into something that looks like brown sugar, add it to all of the animals that died unexpectedly, all of the road kills and the euthanized animals—add it to them, grind it up and feed it back to other animals.

...

LYMAN: We ended up feeding downed cows to mink; the mink came down with the disease, transfer it to animals. The animals came down with it. And you're sitting here, telling everybody that it's safe. Not true.

Id.

190. *See* Amended Complaint, *supra* note 2, § I.

191. *Id.*

because they were repetitious.¹⁹²

The plaintiffs believed that when Ms. Winfrey talked about the dangers of beef and said, “It has just stopped me cold from eating another burger,”¹⁹³ people followed her example and refrained from eating meat.¹⁹⁴ The plaintiffs argued that the price of cattle and cattle futures plummeted on the commodities market as a direct result of the anti-beef sentiment of the broadcast.¹⁹⁵ They said the “Oprah Crash” occurred right after the program aired and cost them millions of dollars.¹⁹⁶ Ms. Winfrey’s lawyers, on the other hand, argued that the plaintiffs did not suffer any harm because the ranchers were able to buy livestock at low prices and thereby increase their profits.¹⁹⁷

Commentators believe that the plaintiffs sued the talk show queen because of the influence she has with the American public.¹⁹⁸ They claim that Oprah Winfrey is so popular that she can sway the tastes of her viewers.¹⁹⁹ One author wrote: “It’s amazing. Oprah endorses a product—and hundreds of thousands of her fans immediately put on their coats, dash out the door and purchase that item, simply because their television best friend recommended it.”²⁰⁰ This influence she has on the marketplace is referred to as the “Oprah Factor.”²⁰¹

192. See Babineck, *supra* note 187, at 16.

193. Amended Complaint, *supra* note 2, § III.

194. See Richard Roeper, *Oprah’s Sheep Ready to Follow Every Whim*, CHICAGO SUN-TIMES, Jan. 22, 1998, at 11 (“If Montel Williams goes on TV and says he’ll never eat another hamburger, the world pays no attention. But if Oprah does the same thing, it affects an entire industry—or so the cattlemen would have you believe.”).

195. See Amended Complaint, *supra* note 2, § I.

196. See *id.*

197. See *Sides Rest in Oprah Beef Trial; Jury Could Begin Deliberation Today*, DALLAS MORNING NEWS, Feb. 25, 1998, at 12D.

198. See Melanie McFarland, *Talk Shows, Hawk Shows—Whether Plugging Books or Toys (Or Unwittingly Causing Cattle Futures to Drop), Oprah and Rosie Have Market Power*, SEATTLE TIMES, Feb. 17, 1998, at E1; Roeper, *supra* note 194, at 11; Ann Oldenburg, *Trial Starts Today: Did TV Talk Show Queen Turn Fans Off Beef? Supporters Contend They’re Oprah’s Fans, Not Followers*, USA TODAY, Jan. 20, 1998, at 1A.

199. See Oldenburg, *supra* note 198, at 1A (discussing that whenever Oprah picks a book for the monthly book clubs on her show, it automatically becomes a best seller).

200. Roeper, *supra* note 194, at 11.

201. See Oldenburg, *supra* note 198, at 1A (discussing how the Oprah Factor influences the publishing business).

a. Causes of Action

The first cause of action the plaintiffs asserted was for the false disparagement of perishable foods.²⁰² The lawsuit was based on the Texas statute that prohibits the spread of false information concerning agricultural products.²⁰³ Engler claimed that the defendants “disseminated false, disparaging, and misleading remarks about BSE . . . and the safety of American beef. The [d]efendants allowed anti-meat activists to present biased, unsubstantiated, and irresponsible claims against beef not only disparaging the beef industry, but also placing a tremendous amount of unwarranted fear in the public.”²⁰⁴ The plaintiffs also sought relief for common law business disparagement, because they claimed the defendants published these defaming statements with a reckless disregard for the truth.²⁰⁵ In addition, the plaintiffs sued Ms. Winfrey for negligence and negligence *per se*, claiming that the defendants did not exercise ordinary care in broadcasting, publishing, and airing the allegedly false statements.²⁰⁶ Lastly, the plaintiffs contended that they were slandered and libeled by the television program.²⁰⁷ They claimed the statements on “The Oprah Winfrey Show” contained all the elements of a *prima facie* case for defamation,²⁰⁸ and although the program did not specifically mention the plaintiffs by name, “it referred to cattle feeders in general of which the [p]laintiffs were part of that specific group.”²⁰⁹

b. Procedural History

One week after “The Oprah Winfrey Show” aired, two separate lawsuits were filed against Ms. Winfrey, her guest, Howard Lyman, her production company, Harpo Productions, and her syndication company, King World Productions.²¹⁰ These cases

202. See Amended Complaint, *supra* note 2, § IV.A.

203. See *id.* § IV.A, ¶ 10 (citing the TEX. CIV. PRAC. & REM. CODE § 96.002).

204. *Id.* § IV.A, ¶ 11.

205. See *id.* § IV.B, ¶ 14.

206. See *id.* § IV.C.

207. See *id.* §§ IV.D & IV.E.

208. See RESTATEMENT (SECOND) OF TORTS § 558 (1977). See *supra* Part I.B.1 for the elements of defamation.

209. Amended Complaint, *supra* note 2, § IV.D, ¶ 21.

dication company, King World Productions.²¹⁰ These cases were later joined and the suit was removed to the United States District Court in Amarillo, Texas. Before this class action trial brought on behalf of the American cattle industry²¹¹ began, the defendants moved for dismissal, arguing in part that the program was not “of and concerning” the plaintiffs.²¹² Judge Mary Lou Robinson did not grant the defendant’s motion to dismiss; however, when the defendants moved for judgment as a matter of law after the plaintiff’s case in chief, the judge ruled in their favor.²¹³ In her amended order, Judge Robinson dismissed the defamation and negligence actions and the portion of the claim based on the False Disparagement of Perishable Food Products Act.²¹⁴ After the judge’s decision, the defendants presented their case in defense of common law business disparagement, the only remaining cause of action. The jury eventually ruled in favor of the defendants and found Ms. Winfrey, Howard Lyman, and Harpo Productions not liable for the disparagement of the cattle.²¹⁵

c. Defendant’s Arguments for Judgment as a Matter of Law

The defendants focused their arguments on the nature of beef and the definition of a “food product” under the Texas False Disparagement of Perishable Food Products Act. They maintained that cattle are alive and, therefore, are not a “perishable food product.”²¹⁶ The defendants also argued that cattle themselves are not a food product, so they do not fall under the statute.²¹⁷ Ms. Win-

210. See Pareti, *supra* note 35, at 1.

211. See Thomas Goetz, *After the Oprah Crash: Venerable Talk Show Host Gets First Taste of Food Disparagement Laws*, VILLAGE VOICE, Apr. 29, 1997, at 39.

212. See Defendant’s Motion to Dismiss, *supra* note 183, §§ III & IV.

213. See 11 F. Supp. 2d 858, 864-65 (N.D. Tex. 1998).

214. See *id.* For a more detailed discussion of the Judge’s decision, see *infra* Part II.A.2.c.

215. See Stephen Braun, *Jury Rejects Texas Cattlemen’s Beef With Winfrey*, LOS ANGELES TIMES, Feb. 27, 1998, at A27.

216. See Defendant’s Motion for Judgment as a Matter of Law & Brief in Support § II, ¶ 1, *Texas Beef Group v. Winfrey*, 11 F. Supp. 2d 858 (N.D. Tex. 1998) (No. CIV. A. 2:96-CV-208-J) (on file with the *Fordham Intellectual Property, Media & Entertainment Law Journal*).

217. See *id.* The defendants in their motion argue:

frey's lawyers also argued that the plaintiffs were not "producers" of a perishable food, because they "merely feed live cattle."²¹⁸

The defendants also attacked the plaintiffs' evidence of falsity. They claimed that the knowing falsehood element under the Texas statute was not proven in the plaintiffs' case.²¹⁹ The defendants argued that there was no evidence that Ms. Winfrey and her guests knew that the information they were disseminating was false.²²⁰ In addition, they asserted that many of the comments made by Howard Lyman were opinions; therefore, they should not be held liable for him giving his views on a matter of great public concern.²²¹

Lastly, the defendants argued that the Texas False Disparagement of Perishable Food Products Act was unconstitutional.²²² The defendants believed that the veggie libel statute chilled free speech and prevented consumer groups and others from speaking out about the safety of our nation's food supply.²²³ They said the statute is too broad and contains no "of and concerning" requirement; therefore, it allows almost anyone along the chain—from food growers to produce shippers—to seek relief against a food safety activist.²²⁴

First, plaintiffs' cattle are not a 'food product' under § 96 because cattle are not eaten as food. Second, cattle certainly are not a 'food product' because when the cattle are sold or distributed by [p]laintiffs, the cattle are not in a form fit for consumption by the public, yet the statute so defines a food product.

Id.

218. *Id.* § II, ¶ 2.

219. *See id.* § II, ¶ 5.

220. *See id.*

221. *See id.* § II, ¶ 13.

222. *See id.* § II, ¶ 18.

223. *See* Martha Groves, *Push Grows for Law on 'Veggie Libel'*, LOS ANGELES TIMES, Aug. 20, 1997, at A1. In this article, Ms. Winfrey's attorney Chip Babcock stated that "a loss in this case could have a 'freezing effect' on scientific dialogue and open discussions about human health." *Id.*

224. *See id.* Defendants also asserted that the program was not "of and concerning" beef. *See id.* It addressed dangerous foods, and never mentioned the cattle feed producers as being responsible for spreading mad cow disease. *See id.*

d. The Judge's Decision on the Motion for Judgment as a Matter of Law

The defendants won a major victory in the case when the judge granted in part their motion for judgment as a matter of law.²²⁵ The judge held that the plaintiffs failed to make their case under the False Disparagement of Perishable Food Products Act.²²⁶ In addition, the court deemed unproven the plaintiffs' common law defamation and statutory libel claims. In addition, plaintiffs could not establish negligence or negligence *per se*.²²⁷

In addressing the veggie libel claim, the judge first discussed the importance of the First Amendment and the Constitution to this litigation.²²⁸ She discussed the importance of public debate on issues of public concern²²⁹ and stated that this case must be considered against the background of *New York Times Co. v. Sullivan*. She also stated that speech on matters of public concern is afforded the "highest rung of the hierarchy of First Amendment values" and is entitled to special protection."²³⁰ Stating that the safety of American food is an issue of great importance, the judge declared that the speech in this case dealt with a matter of legitimate public concern.²³¹

In addressing the legitimacy of the veggie libel claim, the judge first analyzed the nature of live cattle.²³² She described how cattle are fed and marketed and stated: "None of this is evidence that live feed cattle fit within the carefully crafted statutory language which requires that the food product in question perish or decay 'beyond marketability.'"²³³ Therefore, the court decided that plaintiffs' cattle do not fall within the definition of a "perishable food product"

225. See *Texas Beef Group v. Winfrey*, 11 F. Supp. 2d 858 (N.D. Tex. 1998).

226. See *id.*

227. See *id.*

228. See *id.* at 862.

229. See *id.*

230. *Id.* at 862 (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985)).

231. See *Texas Beef Group v. Winfrey*, 11 F. Supp. 2d 858, 862 (N.D. Tex. 1998).

232. See *id.* at 862-63.

233. *Id.* at 863.

under the statute.²³⁴ The judge also held that the veggie libel claim could not stand because the plaintiffs failed to present enough evidence to establish that the defendants “had actual knowledge of falsity.”²³⁵ The plaintiffs could not prove that the disparaging statements were “knowingly made” by Oprah and her guests.²³⁶

The judge also dismissed the plaintiffs’ defamation action in her amended order.²³⁷ She held that the cattle ranchers failed to meet their burden of proof concerning the “of and concerning” element of the defamation claim.²³⁸ The court decided that the plaintiffs were not mentioned by name, nor did the program ever discuss Texas or the Texas Panhandle.²³⁹ The court held that, under Texas law, an individual is barred from recovery as a matter of law if the group or class exceeds 740 persons.²⁴⁰ The court reasoned that, since Paul Engler testified that there were “about a million”²⁴¹ cattlemen in the United States, the plaintiffs could not recover under defamation law.²⁴²

The judge dismissed the negligence and negligence *per se* claims, stating that the plaintiffs asserted these claims in an attempt to seek additional tort relief that was based on speech and thereby avoid the strict constitutional standards of defamation.²⁴³ The court stated that “[t]he Texas Supreme Court has expressly refused to recognize causes of action that merely duplicate the remedy of defamation and are creatively pled in an attempt to avoid the con-

234. See *supra* Part I.A.3 for a discussion of the provisions of the Texas False Disparagement of Perishable Food Products Act.

235. See *Winfrey*, 11 F. Supp. 2d at 863.

236. *Id.*

237. See *Texas Beef Group v. Winfrey*, 11 F. Supp. 2d 858, 863-65 (N.D. Tex. 1998).

238. See *id.* at 864.

239. See *id.*

240. See *id.* (citing *Webb v. Sessions*, 531 S.W.2d 211, 213 (Tex. Civ. App. 1975)). *Webb v. Sessions* involved the deputies, agents, and employees of a country sheriff’s office suing a newspaper for an article alleging that the plaintiffs were involved in petty thievery and acceptance of small bribes. In holding that a group of plaintiffs exceeding 740 people cannot sue for defamation, the court stated that the article did not refer to any individual by name and could not be construed to include all deputies, agents, and employees of the office. See *Webb v. Sessions*, 531 S.W.2d at 213.

241. *Texas Beef Group v. Winfrey*, 11 F. Supp. 2d 858, 864 (N.D. Tex. 1998).

242. See *id.* (citing *Webb v. Sessions*, 531 S.W.2d at 213).

243. See *id.* (citations omitted).

stitutional protections mandated by the First Amendment and the Texas Constitution.”²⁴⁴ In effect, the judge dismissed these claims because they were defamation actions disguised as negligence in order to “avoid . . . constitutional restrictions.”²⁴⁵

After the judge granted the defendants’ motion for judgment as a matter of law, Paul Engler and the other plaintiffs were only left with a claim for common law business disparagement.²⁴⁶ Under Texas law, the elements of business disparagement “are publication by the defendant of the disparaging words, falsity, malice, lack of privilege, and special damages.”²⁴⁷ Without the False Disparagement of Perishable Foods statute, the plaintiffs had to prove that Ms. Winfrey and her guests either knew their statements were false concerning the cattle feeding practices, or spoke with a reckless or conscious indifference to the truth.²⁴⁸ In addition, the plaintiffs had to establish that Ms. Winfrey’s program was intended to harm the cattle industry or that the producers should have known that the statements on the show would cause this harm.²⁴⁹ This “intent to harm” is much more difficult to prove than the knowing falsity standard under the Texas statute.²⁵⁰ For a plaintiff to prevail under the False Disparagement of Perishable Food Act, they must prove only that the plaintiff disseminated information implying perishable food is not safe for consumption, while knowing it was untrue.²⁵¹ The dissemination of false information is more easy to establish than the malicious intent to harm to a business.

After the judgment as a matter of law, the defendants presented their case in defense of business disparagement. On February 26, 1998, the jury returned a verdict in favor of Ms. Winfrey on the business disparagement claim.²⁵² After the verdict, Ms. Winfrey stood outside the courthouse and exclaimed, “Free speech not only

244. *Id.* (citing *Cain v. Hearst*, 878 S.W.2d 577, 584 (Tex. 1994)).

245. *Id.* (quoting *Bird v. W.C.W.*, 868 S.W.2d 767, 772 n.7 (Tex. 1994)).

246. *See Winfrey*, 11 F. Supp. 2d at 864-65.

247. *Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 766 (Tex. 1987) (citing JOHN G. FLEMING, *THE LAW OF TORTS* 697-700 (5th ed. 1977)).

248. *See* JOHN G. FLEMING, *THE LAW OF TORTS* 672-673 (7th ed. 1987).

249. *See id.*

250. *See* TEXAS CIV. PRAC. & REM. CODE § 96.002 (1995).

251. *Id.*

252. *See Braun*, *supra* note 215, at A27.

lives. It rocks!”²⁵³ In addition, editorials around the country praised the verdict as a victory for the First Amendment and denounced agricultural disparagement statutes.²⁵⁴

3. The Appeal

By throwing out the veggie libel cause of action, the judge left open the question of the constitutionality of the Texas statute.²⁵⁵ The plaintiffs have appealed the decision to the Fifth Circuit Court of Appeals in New Orleans,²⁵⁶ and have filed a new class action suit in Texas State Court.²⁵⁷ The case has been removed to federal court, but the plaintiffs are currently trying to have it sent back down to state court.²⁵⁸ The plaintiffs are hoping that the judge lets the veggie libel claim reach a jury so they can decide whether the statute was breached.²⁵⁹ Therefore, it is apparent that Oprah Winfrey’s day in court defending against the Texas cattle ranchers is far from over. Instead, the question regarding the constitutionality of this statute may ultimately be answered on appeal or in the state court action.

253. *Jury Decides in Favor of TV Star Winfrey in Suit by Cattlemen*, WALL STREET JOURNAL, Feb. 27, 1998, at B19.

254. See, e.g., Clarence Page, *Stop ‘Veggie Libel’ Laws Before They Grill Again*, SUN-SENTINEL FT. LAUDERDALE, Mar. 5, 1998, at 19A; Jerry Schwartz, *Public Forum: Oprah Verdict Was Victory For Free Speech*, LOS ANGELES DAILY NEWS, Mar. 4, 1998, at N14; *Oprah’s Victory*, SACRAMENTO BEE, Feb. 28, 1998, at B6.

255. See Braun, *supra* note 252, at A27 (“But the constitutionality of Texas’ food disparagement laws remains untested by the trial—an outcome that disappointed activists on both sides.”).

256. See Bryan Painter, *Cattlemen Appeals Winfrey Verdict*, DAILY OKLAHOMAN, Apr. 4, 1998, at 27.

257. On Apr. 16, 1998, the cattle feeders filed suit against Winfrey once again, charging violations of the state veggie libel law, business disparagement and negligence. See Tim Jones, *In War Over Veggie Libel, Both Sides Gearing Up*, CHICAGO TRIBUNE, Apr. 30, 1998, at 1. The class action suit, brought on behalf of 138 live stock owners, alleges essentially the same causes of action as the first case. This complaint was filed in Dumas, Texas, a rural town of thirteen thousand people, forty-five miles north of Amarillo. See Mark Babineck, *Dumas Could be Next to Hold Court For Oprah; Talk Show Host Faces New Beef Challenge*, DALLAS MORNING NEWS Apr. 18, 1998, at 22A.

258. See *Texas Lawmaker Aims to Slice and Dice ‘Veggie Libel’ Law; A San Antonio Legislator Has Introduced a Bill to Repeal the Statute Under Which Beef Producers Unsuccessfully Sued Oprah Winfrey*, FORT WORTH STAR-TELEGRAM, Jan. 10, 1999, at 2.

259. See Jones, *supra* note 257, at 1.

B. *The Test is Yet to Come—Other Cases Brought Under Veggie Libel Statutes*

The Oprah Winfrey agriculture disparagement case might have been the first to test the constitutionality of veggie libel statutes; however, the judge left that question unanswered when she granted the defendants' motion for judgment as a matter of law. Rather, there is another case pending that could ultimately decide whether veggie libel statutes are constitutional.²⁶⁰

Texas emu farmers are suing the Honda Motor Company for a commercial that allegedly shows their livestock in a disparaging light.²⁶¹ The television advertisement consists of a series of vignettes depicting scenes from the life of Joe, a young man looking for a job.²⁶² The commercial shows Joe driving his Honda Civic from one odd interview to the next. When he drives up to an emu ranch called "Fowl Technology," he sees "an actual emu rancher,

260. There were also two other veggie libel actions filed in Texas and Ohio. The Texas case involved alleged "lawn libel." Pat Anderton, owner of the A-1 Turf Farm, sued James McAfee for a news release that stated that Texturf 10 should not be planted in Texas because it does not survive well in humidity. The news release was later reprinted in the "House and Garden" section of the *Dallas Morning News*, and the plaintiff claimed her lawn business suffered greatly from the publication. Anderton asserted that her product fell under the Texas False Disparagement of Perishable Food Products Act because people drink grass juice as health food. See Pete Slover, *Grass Case Feeds Libel Arguments; Woman Uses Veggie Law to Defend her Firm's Turf*, DALLAS MORNING NEWS, Mar. 13, 1998, at 29A. This case has recently been dismissed, and the judge did not indicate a basis for his ruling. See Pete Slover, *Veggie-Libel Suit Involving Grass Tossed Out by Judge; Plano Turf Farmer Targeted Expert Who Issued Warning*, DALLAS MORNING NEWS, Apr. 25, 1998, at 33A. In the other veggie libel case, the Buckeye Egg Farm sued the Ohio Public Interest Research Group ("OPIRG"), a consumer organization, for saying that Buckeye illegally repackaged old eggs and sold them as fresh ones. The plaintiffs claimed that they followed federal guidelines that allow repackaging of eggs in certain circumstances. In addition, they felt that OPIRG released their report right before Easter to intentionally hurt their business when eggs sales are at their highest. See *Emu, Egg Cases to be Next Food-Libel Tests*, DES MOINES REGISTER, Mar. 5, 1998, at 3. This case, however has been dropped by the egg farmers. See Vindu P. Goel, *Buckeye Egg Farm Drops Suit Against Ohio Consumer Group*, PLAIN DEALER, July 7, 1998, at 2C.

261. For a discussion of the case *Burleson Enterprises, Inc. v. American Honda Motor Co.*, see Bruce Rubenstein, *Honda Faces Angry Texas Emu Ranchers in Veggie Libel Suit*, CORP. LEGAL TIMES, Mar. 1998, at 33. Ironically, this case will be heard in the same courtroom as *Texas Beef Group v. Winfrey*, once again providing Judge Robinson the opportunity to decide a case based on the Texas law.

262. See *id.*

missing teeth and all.”²⁶³ The farmer says, “Emus, Joe. It’s the pork of the future.”²⁶⁴ The commercial was a parody that intended to show the viewer that the only thing you can rely on is your Honda Civic.

Despite the parody, ten emu ranchers were not laughing when they filed a complaint alleging veggie libel against the car manufacturer. The complaint asserts that “[t]he sole purpose of the commercial was an attempt by the Japanese to belittle and disparage American traditions and to associate the emu industry to that of a pyramid scheme. The commercial is yet another ambush of innocent Americans by the Japanese which have once again caused Americans damage.”²⁶⁵

This case may not be the only one to test the constitutionality of agricultural disparagement statutes. Recently, a coalition of First Amendment advocates has begun a campaign to prove that the Texas veggie libel statute and others around the country are unconstitutional.²⁶⁶ The Foodspeak Free Speech Coalition is comprised of twenty-six organizations, including the American Civil Liberties Union and the Society of Professional Journalists.²⁶⁷ Led by Ralph Nader, the group plans to work with local state organizations to have existing veggie libel statutes repealed and oppose the creation of new ones.²⁶⁸ The group will also try to consolidate agriculture disparagement cases, in hopes that one makes it to the Supreme Court, where an ultimate decision on their constitutionality can be made.²⁶⁹ Constitutional law experts and members of the agriculture and consumer products industry will be following the actions of this coalition very closely.

263. *Id.*

264. *Emu Farmers Take Offense*, LAS VEGAS REVIEW-JOURNAL, Mar 9, 1998, at 6B.

265. Rubenstein, *supra* note 261, at 33 (quoting complaint filed in *Burleson Enterprises, Inc. v. American Honda Motor Co.* on Oct. 22, 1997, in U.S. District Court, Amarillo, Texas).

266. See Katherine Pfleger, *Coalition Takes Aim at ‘Veggie-Libel’ Laws*, ST. PETERSBURG TIMES, Apr. 30, 1998, at 5A.

267. See *id.* Their Web site is: <<http://www.cspinet.org/foodspeak>> (last visited Mar. 30, 1999).

268. See *Free Speech Coalition to Try to Overturn or Block ‘Veggie Libel’ Laws*, DALLAS MORNING NEWS, Apr. 30, 1998, at 24A.

269. See *id.*

III. THE APPLICATION OF *NEW YORK TIMES CO. v. SULLIVAN* TO THE TEXAS FALSE DISPARAGEMENT OF PERISHABLE FOOD PRODUCTS ACT AND OTHER AGRICULTURAL DISPARAGEMENT STATUTES.

Oprah Winfrey and the other defendants ultimately prevailed against the Texas cattle ranchers, but it is questionable whether this is really a victory for free speech. Because the judge held that the veggie libel statute did not apply in this case, the question of the constitutionality of the agricultural disparagement law was left unanswered.²⁷⁰ Therefore, those who speak out about food safety can still be sued for their criticisms.

This Part discusses the protection of freedom of expression for issues of public concern and concludes that actional speech under the Texas False Disparagement of Perishable Food Products Act and other agricultural disparagement statutes is akin to defamation and disparagement, and therefore must be afforded First Amendment protection. In addition, this Part provides guidelines for courts that interpret veggie libel statutes. This Part argues that when analyzing issues falling under the First Amendment, as these statutes do, courts must apply all the constitutional requirements that were established in *New York Times Co. v. Sullivan* in order to prevent the chilling of free speech. By applying actual malice, convincing clarity, independent review of the record, and an “of and concerning” element, courts will ensure that food critics and commentators continue their open discussion of food safety.

A. *The Constitution Should Apply to Agricultural Disparagement Statutes to Prevent Chilled Speech*

Free speech is a fundamental right guaranteed in the Constitution.²⁷¹ In *New York Times Co. v. Sullivan*, the Supreme Court discussed the need for “breathing space”²⁷² to allow for the freedom

270. See *supra* Part II.A.2.a for a discussion of the procedural history of *Texas Beef Group v. Winfrey*.

271. See U.S. CONST. amend. I.

272. *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964) (quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963)).

of expression.²⁷³ Justice Brennan stated that the case should be viewed “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”²⁷⁴ In *Bose*, the Court also supported the need for open discussion when it stated: “[T]he freedom to speak one’s mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole.”²⁷⁵

Disparaging speech falling under the Texas False Disparagement of Perishable Food Act and other agricultural disparagement statutes deserves protections under *New York Times Co. v. Sullivan*. Doctrinally, this type of speech is analogous to defamation and disparagement, which are already afforded protection under the First Amendment. It addresses issues of public concern, and without constitutional protection, there will be a chilling effect on free speech.

Under current law, food safety is a legitimate matter of public concern,²⁷⁶ and this type of speech is protected under the First Amendment.²⁷⁷ Discussing the safety of apples, the *Auvil v. “60 Minutes”* court held that “[i]t would be difficult to conceive of an issue of greater public import than the presence of carcinogenic substances in the nation’s food supply.”²⁷⁸ In addition, Judge Robinson in *Texas Beef Group v. Winfrey* specifically stated that the feeding practices of American cattlemen as they relate to mad cow disease are matters of public concern, and that the case was governed by the First Amendment.²⁷⁹ Echoing the words from *Auvil v.*

273. *See id.* at 271-72.

274. *Id.* at 270.

275. *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 503-04 (1984).

276. *See, e.g.*, *Auvil v. CBS “60 Minutes” (“Auvil I”)*, 800 F. Supp. 928, 936 (E.D. Wash. 1992) (holding that a report about the safety of apples is a matter of public concern).

277. *See, e.g.*, *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940) (“The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.”).

278. *Auvil I*, 800 F. Supp. at 936.

279. 11 F. Supp. 2d 858, 862 (N.D. Tex. 1998).

“60 Minutes,”²⁸⁰ she states: “It would be difficult to conceive of any topic of discussion that could be of greater concern and interest to all Americans than the safety of the food that they eat.”²⁸¹ Since the discussion of food safety is such a valued type of speech, it should not be stifled by the threats of liability under the Texas statute.

By not applying the higher standard of review under the Constitution, this statute, and others like it, could potentially stifle speech by subjecting food critics or interest groups to potential litigation for statements they make against a food product.²⁸² Although narrow issues of legal concern are best reviewed by lower courts, and although those who speak out intentionally and create unnecessary food scares should be held liable for their accusations, not all defendants have the resources available to defend against this kind of action. Ms. Winfrey is one of the wealthiest people in the United States, and she reportedly spent five hundred thousand to one million dollars in defense of this litigation.²⁸³ Many of the potential defendants under this statute are non-profit groups that research the safety of Texas’ agriculture.²⁸⁴ They do not have the budget to combat a claim brought by a powerful agriculture conglomerate. Ms. Winfrey’s wealth also enabled her to hire the best First Amendment attorneys.²⁸⁵ Had she not been able to retain such talented legal representation, Winfrey may have been found liable under the statute. Such might be the case for a public interest group that can not afford the best lawyers.

Worse than just subjecting speakers to expensive and lengthy litigation, the Texas statute may have the effect of completely si-

280. See *Auvil I*, 800 F. Supp. at 936.

281. *Winfrey*, 11 F. Supp. 2d at 862.

282. See TEX. CIV. PRAC. & REM. CODE § 96.002 (West Supp. 1996).

283. See Tim Jones, *In Victory, Winfrey May Stand Alone; Celebrity—and Money Helped the Star Beat the Cattlemen, But Won’t Turn Back Other Suits*, CHICAGO TRIBUNE, Mar. 1, 1998, at 1.

284. See, e.g., Goel, *supra* note 260, at 2C (discussing the Ohio Public Interest Research Group, the consumer advocacy group that was the defendant in the Buckeye Egg Farm agricultural disparagement case).

285. See Jones, *supra* note 283, at 1; SMOLLA, *supra* note 12, § 16.03, at 16-15 (stating that Ms. Winfrey’s legal team was lead by noted First Amendment lawyer Charles Babcock).

lencing all critics. The threat of liability could intimidate speakers so much that they remain silent concerning food safety issues.²⁸⁶ Non-profit organizations that research food safety and genuinely believe there is a risk to our nation's agriculture will reconsider publishing their reports, since they do not want to risk being held liable by any number of potential plaintiffs. In addition, freelance writers, who do not have the backing of *The New York Times* or *The Washington Post*, will be less likely to discuss controversial food issues in their articles if there is a threat of litigation.²⁸⁷ *New York Times Co. v. Sullivan* expresses concern over rules that require critics to guarantee the truth of all their statements.²⁸⁸ The Court says this leads to "self-censorship" because "[u]nder such a rule, would-be critics . . . may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so."²⁸⁹

Without the *New York Times Co. v. Sullivan* constitutional standard being applied to cases brought under this statute, the saying "Don't Mess with Texas" has never been more appropriate. Those who speak out about the food industry will have to be particularly aware of what they are saying, and perhaps censor their report, so as not to offend any number of businesses that could potentially sue them. The statute gives farmers and cattle ranchers the power to threaten critics with the prospect of an expensive lawsuit and potential liability. These threats could result in speakers refraining entirely from addressing issues of public concern. Therefore, this veggie libel statute and others like it need to be governed by the First Amendment. Without constitutional protection, this statute prevents people from openly engaging in public debate concerning controversial safety issues and shuts down the free flow of ideas.

286. See Pfleger, *supra* note 266, at 5A ("FoodSpeak argues that the statutes bully critics, including the media, into silence by threatening them with pricey lawsuits."); see also Jones, *supra* note 283, at 1.

287. For a discussion on the problem of press self-censorship, see Robert Neal Webner, Note, *The Fact-Opinion Distinction in First Amendment Law: The Need for a Bright-Line Rule*, 72 GEO. L.J. 1817, 1848-49 (1984).

288. See 376 U.S. 254, 279 (1964).

289. *Id.*

B. *Courts Must Apply all the New York Times Co. v. Sullivan Constitutional Standards to Cases Involving Agricultural Disparagement Statutes*

Since actionable speech under agricultural disparagement statutes falls under the protections of *New York Times Co. v. Sullivan*, cases applying these statutes must conform their analysis to the constitutional requirements for defamation and disparagement.²⁹⁰ In order to withstand constitutional scrutiny, future courts hearing cases brought under an agricultural disparagement statute should ensure that all the First Amendment protections are applied. Using *Texas Beef Group v. Winfrey* and Texas law as an example, this section argues that the First Amendment constitutional standards should apply to veggie libel statutes.

1. Actual Malice

Courts analyzing agricultural disparagement statutes should mandate that actual malice be a required element of any plaintiff's case. In *New York Times Co. v. Sullivan*, the Court held that a public official plaintiff who sues a defendant for defamation concerning remarks made about him in his public capacity must prove that the defendant published the defamatory statement with actual malice.²⁹¹ This standard, which has evolved since 1964, has been extended to public figure cases, private figure cases with issues of public concern, and limited-purpose public figure cases.²⁹²

A number of courts have held that actual malice is a requirement in disparagement cases as well. For example, in *Bose*, the Supreme Court held that the magazine plaintiff did not publish the article with actual malice.²⁹³ In *Quantum Electronics*, the court held that the corporation was a limited-purpose public figure,

290. See *supra*, Part I.B.1.a for a discussion of the constitutional requirements of defamation under *New York Times Co. v. Sullivan*; see also *supra*, Part I.B.4 for a discussion of the extension of the defamation constitutional standards to disparagement law.

291. See *New York Times Co.*, 376 U.S. at 279-80. For a discussion of the actual malice standard in *New York Times Co. v. Sullivan*, see *supra*, Part I.B.1.a.

292. See *supra*, Part I.B.1.a for a discussion of the development of the actual malice standard.

293. 466 U.S. 485, 513 (1984).

thereby requiring proof of actual malice with convincing clarity.²⁹⁴ For the sake of free expression, courts apply the higher standard of actual malice in defamation and disparagement cases, while also protecting defendants who make erroneous statements.²⁹⁵

Courts should apply the actual malice standard to veggie libel cases for the same policy reasons. Like defamation and disparagement, veggie libel statutes fall under the First Amendment because they involve issues of public concern,²⁹⁶ and it is important that a higher burden of proof be applied to prevent the chilling of free speech. In *Gertz v. Robert Welch, Inc.*, the Court held that a plaintiff's status as a private or public figure should be considered in determining if actual malice should apply.²⁹⁷ The same should hold for agricultural disparagement plaintiffs. Even if an agricultural producer is a private figure, the *Gertz* Court held that actual malice should apply if the issue is a matter of public concern and the plaintiff is seeking presumed and punitive damages.²⁹⁸ Food safety is a valid issue of public concern;²⁹⁹ if a plaintiff seeks punitive damages when suing under an agricultural disparagement statute, as the plaintiffs did in *Texas Beef Group v. Winfrey*,³⁰⁰ the court should mandate the higher burden of proof.

Courts should also apply actual malice to agricultural disparagement plaintiffs because they can be considered public figures. First, agriculture producers can be considered public figures in their own right. Agriculture commodities and trade associations often enter the marketplace of ideas by advertising their products

294. 881 F. Supp. 753, 769 (D. R.I. 1995).

295. See *New York Times*, 376 U.S. at 271-72. See also *supra*, Part III.A for a discussion of the policies underlying the First Amendment in defamation and disparagement.

296. See *supra*, Part III.A for a discussion of food safety as a public concern that falls under the First Amendment.

297. 418 U.S. 323, 348 (1974).

298. *Id.* at 346 (1974).

299. See *supra*, Part III.A for a discussion of food safety as a public concern as it relates to the chilling effect that this statute has on free speech.

300. See Amended Complaint, *supra* note 2, § VII (seeking exemplary damages). The Texas statute allows plaintiffs to sue for "damages and any other appropriate relief"; therefore, they are eligible to receive punitive damages and should have to prove actual malice even if they are considered a private figure. TEX. CIV. PRAC. & REM. CODE § 96.002(b).

and espousing how delicious, safe and healthy their food is.³⁰¹ The First Amendment protects the rights of advertisers and food producers to promote their products.³⁰² Having entered the marketplace of ideas, agriculture producers should be considered public figures who are subject to the higher burden of proof under the same First Amendment principles that protect the free flow of ideas on issues of public concern.³⁰³ Second, many plaintiffs who sue for the false disparagement of their agricultural product are from conglomerates or lobbying groups that can technically be considered corporations. Moreover, corporations can be considered public figures for defamatory purposes.³⁰⁴ Under Texas law, a corporation can be considered a public figure if the controversy involves an issue of public concern.³⁰⁵ Since agriculture is a public issue, the food growers who sue under the Texas statute can be considered public figures and actual malice would be required.

Courts should also require proof of actual malice when the controversy surrounding food products draws producers into the public eye and they become limited-purpose public figures.³⁰⁶ Classifying a plaintiff as a limited-purpose public figure requires “a particularized, fact-sensitive examination of the nature and extent of

301. See SMOLLA, *supra* note 12, § 16.04, at 16-16. Many such associations advertise consistently on television, using “catchy” phrases like “Beef: It’s What’s for Dinner” or “The Incredible Edible Egg.”

302. See *id.*

303. See *id.* Smolla states: “The producers of agricultural goods are no more entitled to an exemption from the rough and tumble of public debate about their products than they would be entitled to an exemption from the fierce competition within the economic markets in which they sell those products.” *Id.*

304. See *Martin Marietta Corp. v. Evening Star Newspaper*, 417 F. Supp. 947 (D.C. Cir. 1976) (holding that a corporation can be considered a public figure under the *Gertz* standard because it had access to the media and placed itself in the middle of a public controversy). For a discussion of the different standards considered in determining whether a corporation is a public figure in a defamation action, see Cynthia S. Heckathorn, Note, *Bose Corp. v. Consumers Union of the United States, Inc.: Extending the New York Times Privilege to Product Disparagement*, 44 U. PITT. L. REV. 1039, 1046-50 (1983). See also *Quantum Elec. Corp. v. Consumers Union of the United States, Inc.*, 881 F. Supp. 753, 764-66 (D. R.I. 1995) (discussing the First Circuit’s three-part test to determine if a corporation is a limited-purpose public figure).

305. See *Durham v. Cannan Communications*, 645 S.W.2d 845 (Tex. Ct. App. 1982) (holding that a corporation is a public figure only when it has entered a public controversy).

306. See *Semple*, *supra* note 13, at 432-33; *Bederman et al.*, *supra* note 14, at 153.

the plaintiff's participation in the controversy that gave rise to the alleged defamation."³⁰⁷ Under Texas law, a limited-purpose public figure plaintiff does not have to be a household name; however, he must have thrust himself into the forefront of a public controversy or have been drawn into it.³⁰⁸ Looking at the circumstances surrounding the Oprah Winfrey litigation, lead plaintiff Paul Engler falls into the category of a limited-purpose public figure. First, he became somewhat of a celebrity when he brought this suit against Ms. Winfrey.³⁰⁹ Second, plaintiffs who sue regarding a public controversy can be considered limited-purpose public figures.³¹⁰ Since limited-purpose public figures can avail themselves of the benefit of the media, as Mr. Engler arguably did, courts should require actual malice as an element of the plaintiffs' case.³¹¹

2. Convincing Clarity

Courts deciding veggie libel cases must also require proof of actual malice with convincing clarity in order to withstand constitutional scrutiny. *New York Times Co. v. Sullivan* established this standard when it held that the evidence used to prove actual malice in the publication of a full-page advertisement must be shown with convincing clarity.³¹² Proof of actual malice with convincing clar-

307. *Quantum Elecs. Corp.*, 881 F. Supp. at 763 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974)).

308. *See Simmons v. Ware*, 920 S.W.2d 438, 449 (Tex. Ct. App. 1996). The court stated that "[a] limited-purpose public figure is one who may not be a celebrity or household name sufficient to be an all purpose public figure, but who has 'thrust [himself] to the forefront of a particular public controvers[y] . . .'" *Id.* (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. at 345); *The San Antonio Express News v. Dracos*, 922 S.W.2d 242 (Tex. Ct. App. 1996).

309. *See, e.g.*, Laura Jereski, *Oprah Knocks Beef, and a Big Rancher in Texas Has a Cow*, WALL ST. JOURNAL, June 3, 1997, at A1. There have been numerous stories about Paul Engler in the media that appeared well before this case went to trial. For instance, there was a story on the "Today Show" and, on Court TV, Engler and his litigation were the subject of a story on "Justice Today" and an entire program of "Cochran and Company."

310. *See Quantum Elecs. Corp.*, 881 F. Supp. at 753 (holding that the plaintiff in a defamation and disparagement action was a limited-purpose public figure because the issue involved a public controversy and the plaintiff failed to show that the magazine acted with actual malice).

311. *See generally Gertz*, 418 U.S. 323.

312. *See 376 U.S. 254, 285-86 (1964)*; *see also supra* Part I.B.1.b for a discussion

ity has been applied to disparagement actions in addition to defamation cases.³¹³ In *Bose*, the Court held that the review of consumer products was an issue of public concern, so the plaintiff had to prove with convincing clarity that the defendant's disparagement of the stereo equipment was made with actual malice.³¹⁴ Courts require this high level of proof in determining actual malice because a defendant's First Amendment freedom of speech rights hinge on this evidence.³¹⁵

Courts should apply the convincing clarity standard to cases falling under the Texas False Disparagement of Perishable Food Products Act and other agricultural disparagement laws because, as stated above, veggie libel cases fall under the umbrella of the First Amendment.³¹⁶ Accordingly, defendants should have more protection against liability in these cases than under traditional tort law, where the plaintiff just has to prove causation by exhibiting a reasonable basis that the defendant is more likely than not responsible for the tortious conduct.³¹⁷

In addition, requiring proof with convincing clarity in veggie libel cases coincides with strong policy arguments in defamation and disparagement cases to dispose of this type of litigation as quickly as possible. In *Anderson v. Liberty Lobby*,³¹⁸ the Supreme Court held that in deciding motions for summary judgment and directed verdict, the court must consider whether the plaintiff can establish that publication was made with clear and convincing proof.³¹⁹ If he cannot, the defendant's motion will be granted and the case will not continue.³²⁰ This landmark decision established

of convincing clarity.

313. See *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 514 (1984).

314. See *id.* at 513-14.

315. See *id.* at 510-11.

316. See *supra* Part III.A for a discussion of food safety as a First Amendment issue.

317. See PROSSER AND KEETON, § 41, at 269. Discussing causation, Prosser and Keeton states that "a plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result." *Id.*

318. 477 U.S. 242 (1986).

319. *Id.* at 252.

320. See *id.*

summary judgment as a vital tool for defendants in a defamation action.

The *Liberty Lobby* holding has been applied to disparagement cases as well.³²¹ In *Quantum Electronics*, the court held that:

[A] court ruling on a motion for summary judgment must be guided by *New York Times Co. v. Sullivan*'s "clear and convincing" evidentiary standard in determining whether a genuine issue of actual malice exists—that is, whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity.³²²

This strict rule for summary judgment in cases falling under the First Amendment, derived from *New York Times Co. v. Sullivan*, where Justice Brennan articulated his objections to the "chilling effect" this type of litigation can have on speech.³²³ Granting a defendant summary judgment prevents the chilling effect that a lengthy and expensive litigation can have on news reporting and open debate.³²⁴ In fact, one New York district case has said: "because of the importance of free speech, summary judgment is the 'rule,' and not the exception, in defamation cases."³²⁵

Therefore, as a constitutional matter, the *Liberty Lobby* summary judgment convincing clarity standard must apply to agricultural disparagement cases. In order to prevent the lengthy and expensive litigation that can result from criticisms of food safety, judges must require that plaintiffs establish actual malice with clear and convincing proof during the summary judgment motion. If the judge had granted Winfrey's motion for summary judgment, the five-week trial could have been prevented and a lot of money could have been saved.

321. See *Quantum Elecs. Corp. v. Consumers Union of the United States, Inc.*, 881 F. Supp. 753 (1995).

322. *Id.* at 761-2 (quoting *Anderson*, 477 U.S. at 257).

323. See Sanford, *supra* note 160, § 13.3.2.1, at 649 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964)).

324. See *id.*

325. *Guitar v. Westinghouse Elec. Corp.*, 396 F. Supp. 1042, 1053 (S.D.N.Y. 1975), *aff'd.*, 538 F.2d 309 (2d Cir. 1976) (cited in Sanford, *supra* note 160, § 13.3.2.1, at 649).

3. Independent Review

Another constitutional requirement that courts must consider when evaluating cases brought under agricultural disparagement laws is the *Sullivan* independent review by appellate courts.³²⁶ Justice Brennan mandated that appellate courts make an independent review of the record as a whole to ensure that constitutional protections of free expression did not get trampled.³²⁷ The *New York Times Co. v. Sullivan* decision sets the precedent that whenever a First Amendment constitutional issue is involved, the appellate court must use *de novo* review.³²⁸ This *de novo* review has also been reaffirmed in disparagement cases.³²⁹ In *Bose*, the Court recognized its duty to the First Amendment and clearly followed the earlier *New York Times Co. v. Sullivan* decision of applying independent review.³³⁰ Cases involving agricultural disparagement laws must also be governed by the independent standard of review. Plaintiffs who bring agricultural disparagement statutes are questioning the veracity of a defendant's statements concerning food products. Accordingly, these cases fall into "the field of free expression" to which *New York Times Co. v. Sullivan* was referring when it required independent appellate review.³³¹

Lead plaintiff Paul Engler and the other cattle feeders appealed *Texas Beef Group v. Winfrey* to the Fifth Circuit Court of Appeals in New Orleans, arguing that Judge Robinson made incorrect rul-

326. See *supra* notes 89-96 and accompanying text for a discussion of *de novo* review.

327. See *New York Times*, 376 U.S. at 285.

328. See, e.g., *AIDS Action Comm. of Massachusetts, Inc. v. Massachusetts Bay Transp. Auth.*, 42 F.3d 1, 7 (1st Cir. 1994) ("*De novo* review of the trial court's application of a First Amendment standard to the facts before it 'ensures that the federal courts remain zealous protectors of First Amendment rights.'" (quoting *Duffy v. Sarault*, 892 F.2d 139, 142-46 (1st Cir. 1989)); see also *Duffy v. Sarault*, 892 F.2d at 145-46 (providing a lengthy discussion of *de novo* review and when this standard should be applied).

329. See *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 514 (1984) ("We hold that the clearly-erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by *New York Times Co. v. Sullivan*.").

330. See *id.*; see also *supra* Part I.B.4 for a discussion of *de novo* review in *Bose*.

331. 376 U.S. at 285.

ings and other errors.³³² Without independent review of the record, the appellate judge can apply the more deferential “clearly erroneous” standard to the facts³³³ and therefore, potentially trample the defendants’ First Amendment rights.³³⁴ In order to avoid trampling defendants’ First Amendment rights, however, appellate judges must apply independent review to all cases involving veggie libel laws.

4. Of and Concerning Requirement

Judges must also apply the “of and concerning” standard to veggie libel cases. In *New York Times Co. v. Sullivan*, Justice Brennan held that, in order to be actionable, defamatory statements must be both “of and concerning” the plaintiff.³³⁵ In order for a defendant to be held accountable, the “of and concerning” requirement mandates that defamatory statements must specifically refer to the plaintiff.³³⁶

Bose partly addressed whether the “of and concerning” principle is an element of business disparagement.³³⁷ There, the Court held that the First Amendment principles of actual malice apply to business disparagement; however, it did not specifically hold that the “of and concerning” requirement also applies.³³⁸ However, the California supreme court resolved some of this uncertainty in *Blatty v. New York Times Co.* According to *Blatty*, defamation’s First Amendment constitutional protections also apply to disparagement actions.³³⁹ Referring to the “of and concerning” require-

332. See Painter, *supra* note 256, at 27.

333. See *supra* notes 93-96 for a discussion of the traditional standard of review for appellate judges.

334. See *New York Times*, 376 U.S. at 285 (stating that *de novo* review ensures that “the judgment does not constitute a forbidden intrusion on the field of free expression.”); see also *supra* notes 89-91 and accompanying text for the policies behind applying *de novo* review.

335. See *supra*, Part I.B.1.a for a discussion of the “of and concerning requirement” in defamation law.

336. See RESTATEMENT (SECOND) OF TORTS § 558 cmts. a, b, d, and g (1977); SMOLLA, *supra* note 12, § 4.09[1].

337. 466 U.S. 485 (1984).

338. See *id.* at 513.

339. 42 Cal. 3d 1033, 1042 (1986). (The court stated that “[a]lthough the limitations that define the First Amendment’s zone of protection for the press were established in

ment, the court declared that the “specific reference requirement limits the right of action for injurious falsehood, granting it to those who are the direct object of criticism and denying it to those who merely complain of nonspecific statements that they believe cause them some hurt.”³⁴⁰ The “of and concerning” requirement falls under constitutional protection because it limits those who may sue a defendant for disparaging speech.³⁴¹ In *Blatty*, the court states that “[t]o allow a plaintiff who is not identified, either expressly or by clear implication, to institute such an action poses an unjustifiable threat to society.”³⁴²

Judges must ensure that an “of and concerning” requirement is applied in agricultural disparagement cases. Under many of the veggie libel statutes, any “producer” can sue for false disparagement.³⁴³ This language is over-inclusive. Allowing any “producer” to sue under these statutes opens the floodgates to potential litigation and chills free speech. If food critics or journalists are subject to unlimited liability, they will be silenced by the threat of litigation. The absence of an “of and concerning” element in the statutes also allows general statements concerning food products to be actionable. One commentator provides a clear example of the need for an “of and concerning” requirement.³⁴⁴ A statement about “Smith’s apples” obviously refers to both Smith and her apples; however, a statement simply about “apples” certainly does not directly “of and concern” Smith or her apples, and should not be actionable.³⁴⁵

In *Texas Beef Group v. Winfrey*, the plaintiffs were cattle feed-

defamation actions, they are not peculiar to such actions but apply to all claims whose gravamen is the alleged injurious falsehood of a statement.”).

340. *Id.* at 1044.

341. See Eric M. Stahl, Note & Comment, *Can Generic Products be Disparaged? The “Of and Concerning” Requirement After Alar And The New Crop of Agricultural Disparagement Statutes*, 71 WASH. L. REV. 517, 529 (1996).

342. *Blatty*, 42 Cal. 3d at 1044.

343. See, e.g., TEX. CIV. PRAC. & REM. CODE § 96.002(b) (West Supp. 1996); Alabama, ALA. CODE § 6-5-620 to 625 (Supp. 1995); Florida, FLA. STAT. REV. § 865.065 (West Supp. 1994).

344. See Stahl, *supra* note 341, at 534.

345. See *id.*

ers who brought suit under the Texas statute.³⁴⁶ Those who feed cattle that will eventually be brought to slaughter can hardly be considered “producer[s] of [a] perishable food product.”³⁴⁷ “The Oprah Winfrey Show” discussed the dangers of mad cow disease in our meat. There was no mention, either directly or indirectly, of American cattle ranchers; nonetheless, they were able to bring an action under this statute. If judges do not require an “of and concerning” requirement in agricultural disparagement cases, free speech will be inhibited by the threat of litigation. Therefore, by applying the *New York Times* constitutional standards to veggie libel statutes, courts will prevent the chilling of free speech.

CONCLUSION

Texas Beef Group v. Winfrey involves controversial First Amendment principles of free speech. On the surface, the talk show host may have won her defamation case against the cattle-feed industry, but the nation’s agriculture and livestock industries may claim ultimate victory because they have retained the right to sue people and organizations who make unfounded remarks about their products.

Free speech is a fundamental right for all citizens under the First Amendment, and the Texas False Disparagement of Perishable Food Products Act potentially violates this principle. The Texas veggie libel statute allows farmers and cattle ranchers to easily sue agriculture specialists who criticize their products. Open criticism and debate concerning the safety of our food products is one of the many kinds of speech protected under the Constitution. The Texas False Disparagement of Perishable Food Act, however, can chill free speech by depriving food critics and journalists of the right to openly discuss and criticize food safety with the threat of litigation.

By applying the *New York Times Co. v. Sullivan* constitutional standards to agricultural disparagement cases, courts will ensure that free speech is not chilled. With the higher burden of proof under the actual malice and convincing clarity standards, defendants

346. 11 F. Supp. 2d 858 (N.D. Tex. 1998).

347. TEX. CIV. PRAC. & REM. CODE § 96.002(b).

will not be held easily accountable for erroneous statements. In addition, with their ability to win summary judgment motions more easily after *Anderson v. Liberty Lobby*, those who debate these issues will continue speaking out because they will be assured that they can be removed from the litigation at an early stage. In addition, independent review of the record ensures that First Amendment rights are applied correctly because appellate judges make independent examination of the entire record.

Lastly, applying the “of and concerning” constitutional standard to veggie libel cases prevents chilled speech because it limits the amount of people who may sue for critical statements, thereby protecting a defendant from unlimited liability and allowing food critics and journalists to continue speaking out on issues of food safety. In order to preserve the foundations of free speech and the First Amendment, the First Amendment’s constitutional standards must be applied to agricultural disparagement statutes.