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Anderson v. Liberty Lobby: A New York "State of Mind"

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NOTES AND COMMENTS

ANDERSON V. LIBERTY LOBBY: A NEW YORK "STATE OF MIND"

> [The Court] contents itself with abstractions and paraphrases of abstractions, so that its opinion sounds much like a treatise about cooking by someone who has never cooked before and has no intention of starting now.[1]

I. INTRODUCTION

Summary judgment has long been the means of precluding a case from going to trial where there exists no genuine issue of material fact.[2] It plays an integral role in the scheme of the Federal Rules of Civil Procedure.[3] Although much has been written on

1. Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2521 (1986) (Rehnquist, J., dissenting).

2. FED. R. CIV. P. 56(c).

3. "Summary judgment supplements dismissals under Rule 12, reinforces the good faith pleading requirement of Rule 11, complements issue definition procedures under Rules 26(f) and (c) and Rule 16, and is congruent with both Rule 50(a) governing directed verdicts and Rule 41(b) providing for dismissals." Schwarzer, *Summary Judgment Under the Fed-*

what constitutes a genuine issue of material fact,[4] one proposition is well settled: "Notice, intent, motive and other *states of mind* are common examples of historical facts established by inference. A dispute over such an inference is an *issue of fact* even if the underlying evidence itself is not in dispute, and it too is a jury issue."[5] The Advisory Committee also embraced this concept when amending Rule 56(e) in 1963. The Advisory Committee expressed grave doubts about granting summary judgment in state of mind cases: "Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate."[6] The underlying premise is to assure that the factfinders view the witness and draw their own inferences from her demeanor on the stand under the pressure of cross-examination.[7]

The summary judgment inquiry has been concerned with general notions of whether there is a sufficient issue of fact to require a trial. If there is a trial, the case may still be taken from the jury after the close of the evidence if the judge directs a verdict. At both procedural stages, the basic inquiry is one of whether a reasonable jury could find for either party. If it is possible for the jury to find for either party, based on the evidence at a given stage, then the case may proceed to the next stage. When the case is finally submitted to the jury, the triers of fact must ascertain whether the plaintiff has satisfied her burden of proof. The burden of proof is comprised of both the production burden and the persuasion burden. The production burden has generally been a guidepost for the trial judge, while the persuasion burden has been

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eral Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 465 (1984).

4. *See generally id.*

5. *Id.* at 470 (emphasis added). In Arnstein v. Porter, the United States Court of Appeals for the Second Circuit held that:

> [W]here, as here, credibility, including that of the defendant, is crucial, summary judgment becomes improper and a trial indispensible. It will not do, in such a case, to say that, since the plaintiff, in the matter presented by his affidavits, has offered nothing which discredits the honesty of the defendant, the latter's deposition must be accepted as true. We think that Rule 56 was not designed thus to foreclose plaintiff's privilege of examining defendant at a trial, especially as to matters peculiarly within defendant's knowledge.

154 F.2d 464, 471 (2d Cir. 1946). It should be noted, however, that under the current language of Rule 56(e), a properly supported motion for summary judgment will be granted if the non-movant does not rebut the movant's evidence. *See id.*

6. FED. R. CIV. P. 56(e) advisory committee notes (1963).

7. *See* Schwarzer, *supra* note 3, at 465. *See also* Anderson v. Bessemer City, 105 S. Ct. 1504 (1985) (credibility determinations as part of a directed verdict should be left to the finder of fact because of his ability to observe the witness's demeanor).

the means of guiding the triers of fact to a conclusion where the evidence is in equipoise. It is this substantive evidentiary standard that has been the mechanism for factfinders to scrutinize the evidence in different types of cases—whether the persuasion burden requires a finding based on a mere preponderance of the evidence, clear and convincing evidence, or beyond all reasonable doubt.

Seemingly in contradiction to these traditional propositions, the Supreme Court of the United States in *Anderson v. Liberty Lobby, Inc.*,[8] held in a "public figure"[9] defamation action: summary judgment will lie where the movant demonstrates that the non-movant cannot show, with *convincing clarity*, that the movant acted with actual malice.[10] Perhaps the Court was implicitly at-

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8. 106 S. Ct. 2505 (1986), *rev'g* Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563 (D.C. Cir. 1984), *rev'g in part*, 562 F. Supp. 201 (D.D.C. 1983).

9. The determination of what constitutes a public figure, and the significance of the term, was established in a line of cases beginning with New York Times v. Sullivan, 376 U.S. 254 (1964). In *New York Times*, the Court expressed its "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S. at 270. The Court widened the scope of "public figure" to encompass individuals beyond the parameters of those in public service. *See generally* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (categorizing a football coach as a limited purpose public figure because he voluntarily placed himself into the public limelight); Associated Press v. Walker, 388 U.S. 130, 146 (1967) (a former United States Army general was a public official because "he thrust himself into the 'vortex' of the controversy."). *See also* Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1293 n.12 (D.C. Cir. 1980) (the issue of whether an individual is a public figure is a question of law to be resolved by the Court), *cert. denied*, 449 U.S. 898.

The Court was unwilling to extend the public figure-public official category to an attorney working on a controversal murder case in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). By merely doing his job, the attorney was held not to have thrust himself into the vortex of a public issue. *Id.* at 351-52. *See also* Time, Inc. v. Firestone, 424 U.S. 448, 454-55 (1976) (wife of well-known industrial figure, whose husband held several press conferences in the midst of a highly publicized divorce, was not a public figure because she did not thrust herself into the controversy).

In the district court, the Anderson plaintiffs were considered limited purpose public figures because they were lobbyists. Liberty Lobby, Inc. v. Anderson, 562 F. Supp. 201, 208 (D.D.C. 1983) (relying on Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188, 196 (8th Cir. 1966)(Blackmun, J.), *cert. denied*, 388 U.S. 909 (1967)).

10. Actual malice was constitutionally defined as a "statement . . . made with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 279-80 (1964). The Court also held that this constitutional standard must be shown with "convincing clarity" as opposed to the usual preponderance of the evidence standard. *Id.* at 285-86.

The Court emphasized the subjective state of mind requirement noting that "only those false statements made with the *high degree of awareness* of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions" in Garrison v. Louisiana, 379 U.S. 64, 74 (1964) (emphasis added). In a later case, the Court was explicit in distinguishing between a high degree of requisite intent and simple negligence:

[R]eckless conduct is not measured by whether a reasonably prudent man would

tempting to give trial courts the impetus to grant summary judgment more liberally in the first amendment area, where even the threat of a trial may have an undesirable chilling effect on the media.[11] If that rationale were true, however, it would seem that the Court could have more easily based and more closely tapered its decision to the first amendment concerns. The Court did not rely on that line of analysis. Instead, the opinion is based primarily on the summary judgment procedures. Furthermore, it is readily apparent that summary judgment has often been granted in the first amendment area since the Court's decision in *Hutchinson v. Proxmire*,[12] where the Court suggested restraint in granting summary judgment in defamation cases. Finally, the unusual[13] makeup of the Court also suggests that *Anderson* was more a battle over the standard of proof with respect to summary judgment rather than a typical first amendment libel case.

In *Anderson*, the plaintiffs sued columnist Jack Anderson and others involved in his publication, *The Investigator*. The action

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have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

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

11. In Washington Post Co. v. Keough, Judge Skelly Wright wrote:

In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate. One of the purposes of the [*New York*] *Times* principle, in addition to protecting from being cast in damages in libel suits filed by public officials, is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government. The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, especially to advocates of unpopular causes. All persons who desire to exercise their right to criticize public officials are not well equipped financially as the Post to defend against a trial on the merits. Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide open for self-censorship affecting the whole public is "hardly less virulent for being privately administered."

365 F.2d 965, 968 (D.C. Cir. 1966) (citation omitted).

12. 493 U.S. 111 (1979). *See supra* note 15 for a discussion of *Hutchinson* and the frequency of summary judgment adjudication in libel cases. *See also* B. SANFORD, LIBEL AND PRIVACY: THE PREVENTION AND DEFENSE OF LITIGATION § 13.3.2.1 nn. 145-48 and accompanying text (citing 31 recent libel cases where summary judgment was granted).

13. It is rare to find Chief Justice Burger and Justices Brennan and Rehnquist aligned on the same side of a decision. It should be noted that Justice Brennan dissented separately from the others.

was brought as a result of three articles which profiled the plaintiffs as neo-nazis, anti-Semites, racists, and fascists.[14] After discovery, the defendants moved for summary judgment, submitting a plethora of sources in support of the proposition that the articles were the product of credible and in-depth research--thus removing them from the bounds of the *New York Times* actual malice standard.[15] The plaintiffs asserted that some of the main sources relied on by the author were inaccurate. Further, the plaintiffs relied on evidence that an editor of *The Investigator* told the author "that the articles were 'terrible' and 'ridiculous.' "[16]

The *Anderson* Court, finding that the circuit court applied the wrong standard, held that the standard of proof necessary at trial is the appropriate mechanism by which motions for summary judgment should be analyzed. In essence, the Court held that the clear and convincing evidence requirement must be considered by a court ruling on a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure in a case to which *New York Times* applies. Because the court of appeals failed to apply this standard, the Supreme Court reversed and remanded.

The Court analogized the standard for summary judgment to that which a movant would have to meet on directed verdict;[17] i.e., whether a reasonable jury could find by clear and convincing evidence that the defendant acted with actual malice. Although at first blush *Anderson* does not seem to establish a new doctrine, closer analysis reveals the potential for dramatic impact on the summary judgment rule.[18]

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14. 106 S. Ct. at 2508.

15. *See supra* note 10 for a discussion of the actual malice standard.

16. *Id.* at 2509. For a complete discussion of the facts surrounding the cause of action see *infra* notes 86-99 and accompanying text.

17. *Id.* at 2511.

18. One of the questions this Comment addresses is whether the holding of *Anderson* will be as far-reaching as the entire spectrum of summary judgment, or whether it will be limited to the context in which it arose. A caveat for libel litigants is that summary disposition cannot be underestimated in its bite. *Anderson* appears to have given the Rule new teeth. One other potential effect is to deny the advocate the opportunity to wait and see what might develop at trial.

It must be noted, however, that *Anderson* is not wholly without supportive precedent in the lower courts. In Nader v. de Toledano, the court held: "[A] motion for summary judgment should be granted if (1) taking all reasonable inferences in the light most favorable to the nonmoving party, (2) a reasonable juror, acting reasonably *could not* find for the nonmoving party, (3) under the appropriate burden of proof." 408 A.2d 31, 42 (D.C. 1979) (footnote omitted), *cert. denied*, 444 U.S. 1078 (1980). *See also* Yiamouyiannis v. Consumers Union of the United States, Inc., 619 F.2d 932 (2d Cir.) ("[A] judge in denying a defendant's summary judgment motion must conclude that, based on the evidence asserted in the plaintiff's affidavits, 'a reasonable jury *could find* malice with convincing clarity.' " *Id.* at 940

Applying the burden of proof required at trial on summary judgment has at least three important ramifications. First, in the small group of cases which require a heightened evidentiary standard, i.e., clear and convincing evidence, the trial court is now required to apply that standard. It is questionable whether this does not, in fact, require trial judges to weigh the evidence.[19] Assuming that the movant's well supported motion for summary judgment appears to show the non-existence of a material fact, the basic inquiry is no longer whether a jury could return a verdict for the nonmovant. It now requires asking whether the party with the burden of proof at trial has demonstrated that its evidence is sufficiently *weighty* that a reasonable jury could find for it with convincing clarity. With this insertion of a new factor in the basic equation, one must question whether trial judges will have greater difficulty in ruling on summary judgment motions, or whether summary judgment analysis will be improved.

(quoting *Nader*, 408 A.2d at 49), *cert. denied*, 449 U.S. 839 (1980); Guam Fed'n of Teachers Local 1581 v. Ysrael, 492 F.2d 438 (9th Cir. 1974) (applying similar reasoning on a motion for directed verdict); Wasserman v. Time, Inc., 424 F.2d 920, 922 (D.C. Cir. 1970) (Wright, J., concurring) (quoting *New York Times*, 376 U.S. at 285-286). This line of cases appeared to suggest summary judgment was the rule as opposed to the exception until Hutchinson v. Proxmire, a case involving the speech and debate clause, clouded the so-called rule. 443 U.S. 111 (1979). In *Hutchinson*, Senator William Proxmire was sued by the recipient of one of his illustrious Golden Fleece awards. The Court suggested that:

> Considering the nuances of the issues raised here, we are constrained to express some doubt about the so-called "rule". The proof of "actual malice" calls a defendant's state of mind into question and does not readily lend itself to summary disposition. In the present posture of the case, however, the propriety of dealing with such complex issues by summary judgment is not before us.

Id. at 120 n.9 (citations omitted). The actual statistics, however, reveal no significant difference in the quantity of summary judgments granted before and after the controversial footnote. Between 1976 and 1980, 75% of defendant's summary judgment motions were granted. Louis, *Summary Judgment and the Actual Malice Controversy in Constitutional Defamation Cases*, 57 S. CAL. L. REV. 707, 710-11 n.23 (1984) (citing Franklin, *Suing Media for Libel: A Litigation Study*, 1981 AM. B. FOUND RES. J. 795, 801-02.) After *Hutchinson* and its footnote 9, approximately 75% of defendant's motions for summary judgment were likewise granted. *Id.* at 711 n.29 (citing Libel Defense Resource Center Study, *Summary Judgment in Libel Litigation: Assessing the Impact of* Hutchinson v. Proxmire, 4 LIBEL DEF. RESOURCE CENTER BULL. 2, 2(pt.2) (Oct. 15, 1982)). *Hutchinson* spawned much speculation and criticism. *See generally* Louis, *Summary Judgment and the Actual Malice Controversy in Constitutional Defamation Cases*, 57 S. CAL. L. REV. 707, 710-12 (1984); Note, *Summary Judgment in Defamation Actions: A Threat to the Substantive Rights of Public Figure Plaintiffs*, 3 CARDOZO L. REV. 105 (1981); Comment, *The Propriety of Granting Summary Judgment for Defendants in Defamation Suits Involving Actual Malice*, 26 VILL. L. REV. 470 (1980-81); Note, *Public Figure Defamation: Preserving Summary Judgment to Protect Free Expression*, 49 FORDHAM L. REV. 112 (1980).

19. *Anderson* seems to require judges to weigh the evidence at summary judgment, while simultaneously warning judges not to weigh the evidence. 106 S. Ct. at 2519 (Brennan, J., dissenting). *See also infra* notes 107-09 and accompanying text.

Second, and of equally significant impact, *Anderson* seems to displace a traditional jury function by requiring the judge to make an early assessment of the evidence in light of the burden of persuasion.[20] The *Anderson* Court's consideration of the heightened evidentiary standard at the summary judgment level encroaches on a traditional function of the jury—in Wigmore's terms, "the risk of non-persuasion of the *jury*."[21] The Court seems to paint with a broad brush when it rationalizes that summary judgment "mirrors" directed verdict.[22]

Third, the Court's mirror metaphor—that the summary judgment inquiry mirrors the directed verdict inquiry—impacts both on general notions of jury functions as well as problems inherent in state of mind and credibility cases. Specifically, it seems to increase the capacity to preclude issues encompassing state of mind and witness credibility from reaching the trial stage, where the subjective nature of such matters is not readily reducible to tangible evidence.[23] This seems to fly in the face of the well established maxim requiring that finders of fact be afforded the opportunity to assess witness demeanor at trial.[24]

This Comment will address the issues *Anderson* raises. The authors are primarily concerned that the Court failed to state clearly the actual impact of its decision. The authors will also address the impact of the new summary judgment standard on the jury system. This will take into consideration the early analysis of the persuasion burden, a function historically within the province of the jury. Finally, the authors will analyze the potential impact in state of mind and credibility cases.

II. SUMMARY JUDGMENT

A. *Basic Concerns*

Rule 56 of the Federal Rules of Civil Procedure has been the victim of inconsistent, confusing, and indefinable federal court jurisprudence from its inception.[25] The Rule was designed to "dis-

20. *See infra* notes 110-131 and accompanying text.

21. 9 J. WIGMORE, WIGMORE ON EVIDENCE § 2485 (3d ed. 1940) (emphasis added).

22. 106 S. Ct. at 2511.

23. *See id.* at 2519 (Brennan, J., dissenting) (accusing the majority of reducing summary judgment to "a full blown paper trial on the merits").

24. *See supra* notes 3 and 5. *See also* Poller v. Columbia Broadcasting Sys., 368 U.S. 464 (1962) (holding summary judgment is inappropriate in state of mind cases). *But see* Sonenshein, *State of Mind and Credibility in the Summary Judgment Context: A Better Approach*, 78 NW. U.L. REV. 774 (1983) (strongly criticizing *Poller*).

25. *See* Schwarzer, *supra* note 3, at 465.

pos[e] of actions in which there is no genuine issue as to any material fact"[26] by a summary judgment. In 1946, the Rule was amended to allow adjudication on the issue of liability and to determine the amount of damages at trial.[27] In 1963, the Rule was once again amended to resolve a problem which arose in the Third Circuit because of that Circuit's insistence of allowing the non-movant to stand on his "well-pleaded"[28] complaint. The Advisory Committee expressly addressed the issue, stating that "[t]he very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial."[29]

Summary judgment illustrates the inherent tension between the competing goals of efficiency and fairness—the values embodied in the Federal Rules of Civil Procedure.[30] The trial judge needs the mechanism to dispose of disputes which need not be resolved at trial, thus committing only those judicial resources necessary to that level of dispute resolution. In contrast, the judge must not infringe on the litigant's right to his day in court before *a jury of his peers*.[31] In the realm of media-defendant defamation cases,

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> The summary judgment procedure under Rule 56 is plagued by confusion and uncertainty. It suffers from misuse by those lawyers who insist on making a motion in the face of obvious fact issues; from neglect by others who, fearful of judicial hostility to the procedure, refrain from moving even where summary judgment would be appropriate; and from the failure of trial and appellate courts to define clearly what is a genuine issue of material fact.

Id. (footnote omitted); F. JAMES & G. HAZARD, CIVIL PROCEDURE 207 (3d ed. 1985) (Summary judgment has fallen far short of its potential to terminate controversy in which there is no substantial disagreement on the evidence: "This is because, as the procedure is generally administered, (1) the party against whom the motion is made has not been rigorously required to 'put up or shut up' in its contentions as to the facts; and (2) a 'genuine issue of material fact' is regarded as presented if there is the 'slightest doubt' as to what the facts are."); Louis, *supra* note 15, at 708-15; Sonenshein, *supra* note 21, at 774-75 (summary judgment has failed to achieve its goal because of uncertainty in application); *see also supra* note 3.

26. FED. R. CIV. P. 56 advisory committee's note (1938 amendments).

27. FED. R. CIV. P. 56(c) advisory committee's note (1946 amendments). The changes were prompted by doubts expressed in Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620 (1944).

28. FED. R. CIV. P. 56(e) 1963 advisory committee's note.

29. *Id.* The Committee went on to state "[w]here the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented." *Id. See also* Adickes v. Kress, 398 U.S. 144, 159-60 (1970).

30. *See* FED. R. CIV. P. 1.

31. The Constitution of the United States provides: "In Suits at common law where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

judges must also consider the goals embodied in the first amendment. Therefore, the trial judge must balance concerns of efficiency, the right to trial by jury, and general notions of free speech.

Confusion has generally reigned over the determination of what constitutes a *genuine* issue of material fact.[32] In the media-defendant defamation action, part of the confusion has been grounded on the evidentiary standards and burdens to be applied at the summary judgment level. It is the Court's apparent attempt to remedy the confusion and the potential for greater confusion as a result of the new standards which is at the center of this Comment's analysis.

B. *Special Concerns: State of Mind, Credibility, and Clear and Convincing Evidence*

1. STATE OF MIND AND SUMMARY JUDGMENT JURISPRUDENCE

Factual questions requiring determination of a litigant's subjective state of mind or credibility have always occupied a peculiar position in summary judgment adjudication. Where a case turns on the subjective intent of a party, great deference has been given to permitting the factfinders to view the demeanor of witnesses. This concern is closely related to the historically strong value our judicial system has placed on the jury—especially where an ultimate fact[33] hinges on personal credibility. Moreover, evidence of such matters is not always easily reducible to a tangible state.[34] The Court has struggled to develop applicable standards for tackling the difficult problem of when to take a "state of mind" case from the jury.

In *Poller v. Columbia Broadcasting System, Inc.*,[35] the Su-

32. *See supra* note 17.

33. Ultimate facts are those which are mixed questions of law and fact and present the most difficult determinations for a trial court. *See* Baumgartner v. United States, 322 U.S. 665, 760-71 (1944); *see also* Schwarzer, *supra* note 3, at 470.

34. It should be noted, however, that the defendant's state of mind in the media defendant defamation context has been held to be discoverable. Herbert v. Lando, 441 U.S. 153 (1979).

35. 368 U.S. 464 (1962). In *Poller*, a private antitrust action, a television station owner claimed that CBS illegally conspired to eliminate his business. The district court granted the defendant's motion for summary judgment on the basis of four affidavits, all of whom were interested parties—high ranking CBS officials. *Id.* at 468. The affidavits all went to the state of mind of the relevant actors. In response, the plaintiff rested on the bare assertion that the defendants intentionally engaged in a conspiracy to unfairly compete with and undermine his business. *Id.* at 478-79 (Harlan, J., dissenting). The Supreme Court reversed and remanded, pointing to the considerations which accompany cases heavily reliant on the state of mind of a party.

preme Court stated that summary judgment

> should be used sparingly . . . where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "evenhanded justice."[36]

The broad language quoted above invited lower courts to proceed with utmost caution in adjudicating issues similar to those present in *Poller*. The net result has been a long adhered to practice of denying motions for summary judgment where state of mind is at issue, even where movants have come forward with tangible evidence to support the motion, thereby defeating an underlying premise of the summary judgment rule.[37]

In *First National Bank of Arizona v. Cities Service Co.*,[38] the Court reached the opposite result as in *Poller*. The Court let stand a summary judgment in an extremely lengthy and complex antitrust case, pointing to the necessity of coming forward with sufficient evidence to defeat an otherwise well supported motion for summary judgment.[39] In so doing, the Court merely reaffirmed what had long been the basic standard for summary judgment

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36. 368 U.S. at 473 (footnotes omitted).

37. One of the standards developed as a result of this doctrine is the "slightest doubt" test employed primarily by the Second Circuit which "seems to ask whether the opposing party could conceivably develop a prima facie case at trial, notwithstanding the strength of the moving party's proof." Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745, 761 (1974). *See also* Dolgow v. Anderson, 438 F.2d 825, 830 (2d Cir. 1970) ("A litigant has a right to a trial where there is the slightest doubt as to the facts . . .") (quoting Doehler Metal Furniture Co. v. United States, 149 F.2d 130, 135 (2d Cir. 1945); Chubbs v. City of New York, 324 F. Supp. 1183, 1187 (E.D.N.Y. 1971); United Rubber Workers v. Lee Nat'l Corp., 323 F. Supp. 1181, 1187 (S.D.N.Y. 1971).

38. 391 U.S. 253 (1968). The Court rejected the plaintiff's assertion that he could rest on his allegations rather than come forward with evidence which would have rejected the movant's contentions on the non-existence of a conspiracy. *Id.* at 289. At the time of the Court's decision, the case had been embroiled in many years of discovery. Although the question presented an issue of fact, the conspiracy issue was also one of law. The judge was therefore entitled to make a legal determination of whether the facts presented would legally support the inference of conspiracy the plaintiff alleged.

39. *Cities Service*, 391 U.S. at 289.

> While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.

Id. at 290. This is seemingly analogous to the problem as it arises in the media defendant defamation case.

adjudication.[40]

2. DEFAMATION, SUMMARY JUDGMENT, AND THE CLEAR AND CONVINCING STANDARD

The issue of deciding when a case should not proceed to the jury has also been prevalent in the realm of defamation suits. Prior to *Anderson v. Liberty Lobby, Inc.*,[41] two[42] general approaches to summary adjudication of defamation suits have been developed in the lower state and federal courts. The first approach requires that the judge ascertain whether the plaintiff can meet the actual malice standard without regard to the heightened evidentiary standard required at trial. Under this approach, the trial judge would consider the evidentiary burden at the directed verdict stage of the litigation.[43] The second approach applies the clear and convincing

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40. This is not to say that the Court reached an opposite result from *Poller* because it did not give deference to the state of mind concerns. Conversely, the primary concern rested with the plaintiff's failure to respond to the defendant's well supported motion for summary judgment with any evidence in light of the lengthy pre-trial period and the plaintiff's opportunity to conduct the necessary discovery. In effect, the plaintiff was unable to show the existence of any external evidence to support his conspiracy allegations. Furthermore, both the plaintiff and defendant's interests were virtually the same with respect to the transaction at issue. *Cities Service*, 391 U.S. at 280.

The Supreme Court revisited summary judgment in Adickes v. S.H. Kress and Co., 398 U.S. 144 (1970). *Adickes* was a 42 U.S.C. § 1983 (1982) action brought by a white woman who was allegedly refused service at the defendant's restaurant because she was with six young black students. The district court granted the defendant's motion for summary judgment stating that there was "no evidence in the complaint or in the affidavits and other papers from which a 'reasonably-minded' person might draw an inference of conspiracy." *Id.* at 153 (quoting 252 F. Supp. at 144). The Supreme Court, however, found summary judgment improper because the "respondent [Kress] failed to carry its burden of showing the absence of any genuine issue of fact." *Id.* Thus, according to the *Adickes* Court, the initial burden of disproving the existence of a fact issue rests with the movant and, in that case, it never became incumbent upon the plaintiff to prove more at the summary judgment stage.

41. 106 S. Ct. 2505 (1986).

42. The authors suggest that there have been two basic approaches to resolution of summary judgment motions in media defendant defamation cases. One court has suggested, however, that there are three approaches. *See* Nader v. de Toledano, 408 A.2d 31, 42 (D.C. 1979), *cert. denied*, 444 U.S. 1078 (1980). The second and third tests suggested by the *Nader* court seem to be based on semantic and, perhaps, technical differences and appear to mesh into one approach when considering the major features of the cases cited therein.

43. Wasserman v. Time, Inc., 424 F.2d 920, 922 (D.C. Cir.) (Wright, J., concurring), *cert. denied*, 398 U.S. 940 (1970). In *Wasserman*, Judge Skelly Wright suggested a two-prong approach to early disposition of defamation cases; the first at the summary judgment stage, and the second at the close of the plaintiff's case. The plaintiff would first have to convince the trial judge at the summary judgment stage that he could make out a case in the light of the *New York Times* actual malice standard. *Id.* at 922-23. The second prong of Judge Wright's test requires the trial judge to direct a verdict for the defendant at the close of the plaintiff's case if she were convinced that the plaintiff failed to prove his case with clear and convincing evidence. *Id. See also Nader*, 408 A.2d at 46 (listing cases following the

evidence requirement at all stages of the litigation. Thus, instead of making one inquiry at summary judgment and a different inquiry at directed verdict, the second approach requires even-handed application of the heightened evidentiary standard.[44]

Regardless of the approach one takes, these approaches provide special evidentiary problems regarding the state of mind, motive, intention, and credibility issues as they arise at the summary judgment level. Further, courts must make distinctions between direct and inferential evidence of these subjective factors. A court may be forced to use external factors as indicia of one's internal subjective state. A tension is thus created between the concerns of allowing such factors to be determined by the factfinders and the need for summary disposition of non-meritorious claims.

III. ANDERSON v. LIBERTY LOBBY, INC.

A. *The Facts*

Liberty Lobby, Inc., a not for profit corporation, is a "citizen's" lobby headquartered in Washington D.C. It operates "with an avowed purpose to advocate and promote 'patriotism, nationalism, lawfulness, protection of the national interests of the United States and the economic interests of its citizens, and strict adherence to the United States Constitution and the form of government it establishes.' "[45] Liberty Lobby publishes the *Spotlight*, a

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Wasserman approach).

44. *See* Yiamouyiannis v. Consumers Union of the United States, Inc., 619 F.2d 932 (2nd Cir.), *cert. denied*, 449 U.S. 839 (1980). The *Nader* court suggested that there were two distinct approaches taken with respect to the second position discussed here.

In *Nader*, the court referred to the "neutral" approach. The so-called "neutral" approach, as presented in Guam Federation of Teachers, Local 1581 v. Ysrael, 492 F.2d 438 (9th Cir.), *cert. denied*, 419 U.S. 872 (1974), holds that summary judgment analysis should remain the same with one major exception. The sole supplemental factor is that the clear and convincing evidentiary standard, required in media defendant defamation cases, should also be applied. *Nader*, 408 A.2d at 47. This approach was taken by the Supreme Court in *Anderson*. 106 S. Ct. at 2512.

The third summary approach taken in media defendant defamation cases, according to the *Nader* court, was that of the Supreme Court of Washington in Chase v. Daily Record, Inc., 83 Wash. 2d 37, 515 P.2d 154 (Wash. 1973). The court there adapted a test under which

> [t]he trial judge at the summary judgment stage determines that the plaintiff has offered evidence of *a sufficient quantum to establish a prima facie case*, and the offered evidence *can be equated with the standard or test of "convincing clarity"* prescribed by United States Supreme Court decisions, the motion for summary judgment should be denied.

83 Wash. 2d at 43, 515 P.2d at 157-58 (footnotes and citations omitted).

45. Liberty Lobby, Inc. v. Anderson, 562 F. Supp. 201, 205 (D.D.C. 1983).

weekly national newspaper which is circulated to approximately 335,000 paid subscribers.[46] It also produces a daily radio commentary, "This is Liberty Lobby," aired on over 460 stations.[47] The organization also produces a weekly television newscast broadcast on thirty stations.[48]

Willis A. Carto is Liberty Lobby's founder, treasurer, and chief lobbyist.[49] He and his organization were the subject of a series of articles written by Charles Bermant and edited by Jack Anderson.[50] The articles appeared in the October, 1981 issue of *The Investigator*, a Jack Anderson publication.[51] Bermant relied on various sources, including many major national periodicals, such as *The Washington Post, The Washington Star, The Los Angeles Times*, William Buckley's *The National Review*, and *True Magazine* in writing his article. He also relied on sources such as the *Congressional Record*, and publications of the Anti-Defamation League of B'nai B'rith.[52] Bermant also gathered information from over 1000 pages of documents obtained through the Freedom of Information Act.[53]

The focus of the *Investigator* articles was Carto's history of involvement in the dissemination of anti-Semitic and other racist materials under the guise of furthering the principles embodied in the Constitution.[54] The articles recounted some of the many suspect ideological positions advocated by Carto. In "Yockey: Profile of an American Hitler," Bermant alluded to Carto's introduction to Francis Parker Yockey's book *Imperium*.[55] In that introduction, Carto wrote:

> The Jew is a product of another Culture. . . . This basic fact kept the Jew entirely separate from the West spiritually and racially—the West rejected his world-feeling, he rejected its. Mutual hatred and mutual persecution only strengthened the Jewish race, sharpened its cunning and increased its resentment. Thus, the Negro in general rejects the white race, and the white rejects the Negro. The culture barrier is also present, for the Negro is below our culture even though he has lived within its area

46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* (citing 5 U.S.C. § 552).
54. *Id.*
55. *Id.* at 206. IMPERIUM is currently marketed and sold by Liberty Lobby. *Id.*

for centuries. [56]

Quoting from the *Congressional Record*, on which Bermant also relied:

> An outspoken anti-Semite who has professed an abiding admiration for Hitler and Nazi Germany and has been the moving force behind a network of Jew-hating organizations and publications over the years is also the unpublicized force behind "This is Liberty Lobby," an extremist radio program carried five times a week by some 126 stations around the country. [His name is Willis A. Carto . . .[57]].

Bermant also relied on the opinion of Winfred Scott Stanley, Jr., the editor of two John Birch Society publications, who "stated that it was indeed his view that Carto was anti-Semitic and, in addition, racist."[58] Additionally, Bermant relied on an article which appeared in *True Magazine* (*True*), in November 1969, written by Joseph Trento and Joseph Spear entitled: "How Nazi Nut Power Has Invaded Capitol Hill."[59] Liberty Lobby sued *True* for defamation, but ultimately settled out of court.[60] The settlement included money and publication of a favorable article about Liberty Lobby in *True*.[61]

Spear was also *The Investigator*'s Managing Editor, who assigned Bermant the task of writing the Liberty Lobby articles.[62] Bermant's detailed appendix to his affidavit[63] lists the Trento and Spear article as a source for some of Bermant's allegations.[64] The court of appeals pointed out that Bermant also relied on the testimony of Robert Eringer, a freelance journalist, as a major source, even though Bermant had never met Eringer and had "only one telephone conversation with him."[65] Judge Scalia pointed out that this virtually anonymous, unverified source was reminiscent of the

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56. *Id.* (footnotes omitted) (quoting F. YOCKEY, IMPERIUM 311-13 (1962)).

57. *Id.* at 205 (quoting 120 Cong. Rec. E4841 (daily ed. July 18, 1974) (remarks of Rep. Eilberg)).

58. Liberty Lobby, Inc. v. Anderson, 562 F. Supp. 201, 204 (1983).

59. Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563, 1566 (1984). At the time the *True* article was published, Trento and Spear worked for Anderson. *Id.* n.3.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 1567. Bermant submitted a lengthy affidavit in support of his motion for summary judgment that included a detailed list of over 100 sources which he used in researching the articles.

64. *Id.*

65. *Id.*

Supreme Court's hypothetical in *St. Amant v. Thompson*,[66] which was similarly "based wholly on an unverified anonymous telephone call."[67]

Carto and Liberty Lobby brought a libel action against Anderson, Bermant, and others in the District Court for the District of Columbia.[68] The plaintiffs alleged that the defendants acted with actual malice[69] in writing and publishing the articles.[70] After discovery, the defendants moved for summary judgment on the theory that there existed no genuine issue of material fact as to whether they acted with actual malice.[71] In granting the defendants' motion, the district court relied on *Wasserman v. Time, Inc.*,[72] which reasoned that the *New York Times* standard should be applied at the summary judgment level.[73]

The court of appeals reversed as to nine counts of the complaint, and affirmed as to twenty-one.[74] The Court of Appeals for the District of Columbia held that it was inappropriate to apply the *New York Times* standard at the summary judgment level, reasoning that:

> Imposing the increased proof requirement at this stage would change the threshold summary judgment inquiry from a search for a minimum of facts supporting the plaintiff's case to an evaluation of the weight of those facts and (it would seem) of the weight of at least the defendant's uncontroverted facts as well. It would effectively force the plaintiff to try his entire case in pretrial affidavits and depositions—marshalling for the court *all* the facts supporting his case, and seeking to contest as many of the defendant's facts as possible. Moreover, a "clear and convincing evidence" rule at the summary judgment stage would compel the court to be more liberal in its application of that provision of Fed. R. Civ. P. 56(e) . . . Finally, if summary judgment were supposed to be based on a "clear and convincing" standard, it is hard to explain the Supreme Court's statement questioning the asserted principle that in public figure libel cases "summary judgment might well be the rule rather than the

66. 390 U.S. 727, 731 (1968) (distinction between requisite intent of actual malice and simple negligence).

67. *Id.* at 732.

68. Liberty Lobby, Inc. v. Anderson, 562 F. Supp. 201 (D.D.C. 1983).

69. *See supra* notes 8 and 9 and accompanying text.

70. 562 F. Supp. at 201.

71. *Id.* at 204.

72. 424 F.2d. 920, 922 (D.C. Cir.) (Wright, J., concurring), *cert. denied*, 398 U.S. 940 (1970).

73. *Id.*

74. 106 S. Ct. at 2509.

> exception," and affirming to the contrary that "[t]he proof of 'actual malice' . . . does not readily lend itself to summary disposition."[75]

The Supreme Court rejected Judge Scalia's well-reasoned decision and reversed and remanded the case. In so doing, the Court ruled 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."[76] The Court went on to state that this holding, as one would logically conclude, is applicable at both the directed verdict and summary judgment stages.[77] As a consequence, the Court concluded that "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."[78] Thus, trial courts must apply the clear and convincing evidentiary standard at the summary judgment level.

B. *The Court's Analysis*

In holding that the evidentiary standard required at trial is applicable at the summary judgment stage, the Court's reasoning turned on the essence of the summary judgment inquiry. The inquiry of whether there is a genuine issue of *material* fact requires analysis of the substantive law to ascertain whether a fact is material.[79] Next, the trial judge must determine whether the issue is *genuine*.[80] A determination of the genuineness of an issue requires questioning whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[81] "The inquiry performed is the threshold determination of whether there is a need for a trial. In other words, the court must inquire as to whether there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[82]

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75. Liberty Lobby, Inc. v. Anderson, 746 F.2d at 1570 (citation omitted).
76. 106 S. Ct. at 2514.
77. *Id.*
78. *Id.*
79. *Id.* at 2510.
80. *Id.*
81. *Id.*
82. *Id.* at 2511.

The next logical step suggested by the Court requires analysis of genuineness in light of the standard of proof. The Court reasoned that ascertaining how "genuine" an issue is depends on the substantive evidentiary burden one must meet at trial. If the party with the burdens of proof and production cannot come forward with evidence of a character sufficient that a reasonable jury *could* find in his favor, then the issue is not sufficiently *genuine* for submission to the jury, and must be decided as a matter of law. This effectively forecloses one from getting to the trial stage where there is no possibility for a jury to find for the plaintiff.

The Court also stated that this evidentiary inquiry mirrors the standard for directed verdict.[83] It is this common rationale which underlies the Court's reasoning and justification: "the trial judge must direct a verdict if, under the governing law, *there can be but one reasonable conclusion as to the verdict.*"[84] The Court went on to state that "[i]f *reasonable minds could differ* as to the import of the evidence, however, a verdict should not be directed."[85] Thus, if evidence has been presented, or documented in the case of a motion for summary judgment, the trial judge must determine whether a reasonable jury could find for either party. Where the evidence permits more than one reasonable inference, and thus differing conclusions, the case must be submitted to the jury because the issue of fact is genuine. Thus, because the court of appeals failed to use the appropriate evidentiary standard, the Supreme Court remanded for analysis in light of that standard.

The dissenting opinions reflect two differing concerns with the opinion of the Court. Justice Brennan[86] is primarily concerned with the heightened evidentiary burden imposed at the summary judgment stage of the litigation. The central focus of his dissent is the Court's discussion of precluding a case from going to the jury

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83. *Id. See* FED. R. CIV. P. 50(a).

84. 106 S. Ct. at 2511 (citing Brady v. Southern Ry. Co., 320 U.S. 476, 479-80 (1943)) (emphasis added).

85. *Id.* (citing Wilkerson v. McCarthy, 336 U.S. 53, 62 (1949)) (emphasis added). The analogy to the directed verdict standard is not without precedent: "summary judgment should be granted where the evidence is such that it 'would require a directed verdict for the moving party.'" *Id.* at 2512 (quoting Sartor v. Arkansas Gas Corp., 321 U.S. 620, 624 (1944)). *See also* Bieghler v. Kleppe, 633 F.2d 531, 533 (9th Cir. 1980) (summary judgment should be granted where the moving party would be entitled to a directed verdict based on the evidence in support of the motion); Ruffin v. County of Los Angeles, 607 F.2d 1276, 1280 (9th Cir. 1979), *cert. denied*, 445 U.S. 951 (1980) (summary judgment should be granted where it is clear the movant would be entitled to a directed verdict); Neely v. St. Paul Fire and Marine Ins. Co., 584 F.2d 341, 344 (9th Cir. 1978) (where it is clear that at summary judgment the movant is entitled to directed verdict, summary judgment should be granted).

86. 106 S. Ct. at 2515-20 (Brennan, J., dissenting).

where the evidence is "so one-sided."[87] Moreover, Justice Brennan is concerned that there is no precedent for the proposition that the evidentiary standard required at trial be applied at the summary judgment level.[88] Justice Brennan expressed concern that the standards espoused by the Court would "transform what is meant to provide an expedited 'summary' procedure into a full blown paper trial on the merits."[89] Finally, he questioned the practical effect of the Court's decision. His concern was whether the quantity of evidence will now determine the genuineness of an issue.[90] To that end, Justice Brennan questioned whether in a case where one party produces 100 witnesses and the other party only one witness, does the overwhelming quantity necessarily mean that "the evidence [is] 'so one-sided that one party must prevail as a matter of law?' "[91]

Justice Rehnquist, in a dissent joined by Chief Justice Burger, viewed the Court's decision as "a procedural requirement engrafted onto Rule 56, contrary to [the Court's] statement in *Calder v. Jones*."[92] Justice Rehnquist points out the Court's decision in *Anderson v. Bessemer City*,[93] where the Court expressed the im-

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87. *Id.* at 2516 (Brennan, J., dissenting).

88. "As far as I can discern, this conclusion, which is at the heart of the case, has been reached without the benefit of any support in the case law." *Id.*

89. *Id.* at 2519 (Brennan, J., dissenting).

90. Justice Brennan suggests the following hypothetical in a breach of contract case:

> [T]he defendant moves for summary judgment and produces one purported eyewitness who states that he was present at the time the parties discussed the possibility of an agreement, and unequivocally denies that the parties ever agreed to enter into a contract, while the plaintiff produces one purported eyewitness who asserts that the parties did in fact come to terms, presumably that case would go to the jury. But if the defendant produced not one, but 100 eyewitnesses, while the plaintiff stuck with his single witness, would that case, under the Court's holding, still go to the jury?

Id. at 2520 (Brennan, J., dissenting).

91. *Id.* Justice Brennan also expressed concern over the effect of the trial judge determining whether the evidence, documented at summary judgment, satisfies the substantive evidentiary burden.

> [W]hether evidence is 'clear and convincing,' or proves a point by a mere preponderance, is for the factfinder to determine. As I read the case law, this is how it has been, and because of my concern that today's decision may erode the constitutionally enshrined role of the jury, and also undermine the usefulness of summary judgment procedure, this is how I believe it should remain.

Id. See also supra note 28 and accompanying text.

92. *Id.* at 2520-21 (Rehnquist, J., dissenting) (citing Calder v. Jones, 465 U.S. 783 (1984)). In *Calder*, the Court stated: "We have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws." *Id.* at 2521 (Rehnquist, J., dissenting) (quoting *Calder*, 465 U.S. at 790-91).

93. 105 S. Ct. 1504 (1985).

portance of the trial judge's assessment of the demeanor of witnesses in the context of a bench trial.[94] Justice Rehnquist further expressed grave doubt as to the workability of this seemingly new summary judgment standard at the trial court level.[95]

IV. *ANDERSON* ON REMAND: APPLICATION AND CONCERNS

The *Anderson* majority reversed and remanded the case because the court of appeals did not apply the proper standard in reviewing the district court's order granting summary judgment. The nine allegations at issue on appeal[96] must now be reviewed under the *New York Times* clear and convincing standard. Applying this criteria to the substantive evidentiary burden Liberty Lobby must shoulder at trial, one may analyze the potential outcome on remand.

A. *The Facts Against the Background of the New Standard*

Under the standard enunciated by the *Anderson* Court, the facts must be reassessed so as to determine "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented" against the clear and convincing evidentiary standard.[97] The majority warns that "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."[98] In undertaking to analyze *Anderson* under the Court's standard, query whether it does not actually

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> When findings are based on determinations regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.

Id. at 1512 (citing Wainwright v. Witt, 105 S. Ct. 844 (1985)).

94. 106 S. Ct. at 2521 (Rehnquist, J., dissenting).

95. "Instead of thus illustrating how the rule works, [the majority] contents itself with abstractions and paraphrases of abstractions, so that its opinion sounds much like a treatise about cooking by someone who has never cooked before and has no intention of starting now." *Id.*

96. At the inception of Liberty Lobby's action, the plaintiffs made out thirty allegations of defamation, two of which were illustrations. The district court, in granting summary judgment, dismissed all thirty. Liberty Lobby, Inc. v. Anderson, 562 F. Supp. 201, 210 (D.D.C. 1983). On appeal, the circuit court reviewed each of the thirty allegations and agreed with the district court's order as to twenty-one; however, it reversed on the other nine, finding there to be genuine issues of material fact. Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563, 1577-79 (D.C. Cir. 1984).

97. 106 S. Ct. at 2512.

98. *Id.* at 2511.

mandate weighing the evidence.[99]

The nine allegations at issue on appeal are easily subdivided into four categories. The first deals with the allegation that Carto bilked Liberty Lobby contributors out of money.[100] The second deals with the defendants' alleged characterization of Carto as an advocate of forced repatriation of black Americans to Africa.[101] The third set of allegations were those based solely on the *True* magazine article, the validity of which was at the heart of previous litigation.[102] Finally, the remaining allegations arose out of the sole conversation with Robert Eringer—a source whose credibility was admittedly not a concern of Anderson.[103]

The inquiry for each of these counts is whether a jury could reasonably find clear and convincing evidence of actual malice. The possible inferences one might draw from these facts would probably be sufficient to raise a genuine issue of material fact in a mere "preponderance of the evidence" case. The current inquiry requires more; it is now necessary that the possible inferences are supported by clear and convincing evidence. The court of appeals stated that "[i]t is for a jury to determine the truth or falsity of these matters and whether, if false, they are defamatory."[104] Under *Anderson*, the initial inquiry avoids the law-fact distinction problem and focuses on the question of whether a jury must resolve the issue.[105] In each instance, adjudication is dependent on the characterization of evidence as to whether it satisfies the clear and con-

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99. *See The Supreme Court—Leading Cases*, 100 HARV. L. REV. 100, 255 (1986) [hereinafter *Leading Cases*].

100. In allegation 11 of its complaint, Liberty Lobby alleged that the article implied Carto, as chairman and owner of the Government Education Foundation (GEF), rented a building owned by GEF to Liberty Lobby for $6,000 per month. The article asserted that Carto raised the money for the building through an urgent appeal to Liberty Lobby constituents. The obvious implication was that Carto was helping himself, under the guise of helping Liberty Lobby. In fact, no such figures were contained in the cited authority. *Liberty Lobby, Inc.*, 746 F.2d at 1577.

101. The sources revealed, as Judge Scalia indicated, that Carto advocated *only* a voluntary repatriation program. Although Scalia found either scheme "repugnant," he nevertheless expressed that there is a difference between the two and that the allegation regarding forced repatriation could be viewed as defamatory. *Id.* at 1577-78.

102. *Id. See also supra* text accompanying notes 155-60.

103. *Liberty Lobby, Inc.*, 746 F.2d at 1578-79. The record further revealed that Anderson and Bermant never made any attempt to meet Eringer to assess his reliability. *Id.*

104. *Id.* at 1577.

105. *See Leading Cases, supra* note 99, at 256. For an informative discussion of the law-fact distinction problem as it arises in the context of summary judgment see Schwarzer, *supra* note 3, at 469-80; *see also* Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CALIF. L. REV. 1867 (1966).

vincing standard.[106]

Analyzing the potential outcome on remand points out the obvious shortcoming of the *Anderson* standard: it is difficult to determine what to do and how to do it. There is the initial problem of determining what is, qualitatively and quantitatively, clear and convincing evidence. Even assuming that there is an objective standard of what constitutes clear and convincing evidence, it appears that what would be a genuine issue of material fact in a simple preponderance case would not be a genuine issue in the clear and convincing case. Thus, there seems to be a great capacity for disparity in analysis of motions for summary judgment. Moreover, difficulty arises because in the defamation context, especially in close cases, state of mind, credibility, and demeanor questions are at the heart of the inquiry. The *Anderson* approach becomes even more difficult in light of the Court's admonition that the trial judge is not to weigh the evidence. It would appear that the very inquiry suggested *is* necessarily one of weighing the evidence.[107]

Justices Brennan and Rehnquist expressed concern over the potential disparity and indeterminacy of the *Anderson* rule in their dissents. Justice Rehnquist observed:

> The primary effect of the Court's opinion today will likely be to cause the decisions of trial judges on summary judgment motions in libel cases to be more erratic and inconsistent than before. This is largely because the Court has created a standard that is different from the standard traditionally applied in summary judgment motions without even hinting as to how its new standard will be applied to particular cases.[108]

Justice Brennan, echoing Justice Rehnquist's concerns, stated that

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106. It might be suggested that summary judgment should be denied as to all the allegations, because taken together, the defendant's deficiencies would permit a finding of actual malice. The above facts, taken in the aggregate, could allow a reasonable jury to find by clear and convincing evidence that the defendants acted with the requisite disregard for the truth.

107. As Justice Brennan stated in dissent:

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

106 S. Ct. at 2519 (1986) (Brennan, J., dissenting); *see also id.* at 2520-23 (Rehnquist, J., dissenting). For a discussion of the problem of weighing the evidence as it relates to allocating burdens, see 9 J. WIGMORE, WIGMORE ON EVIDENCE § 2487 (3d ed. 1940).

108. 106 S. Ct. at 2523 (Rehnquist, J., dissenting).

"the mess [the Court] make[s] is not, in the first instance, our own to deal with; it is the district courts and courts of appeals that must struggle to clean up after us."[109]

B. *Unpersuasive Use of the Burden of Proof*

1. PREMATURE CONSIDERATION OF THE BURDEN OF PERSUASION

A problem less obvious than the concern over the negative practical impact of *Anderson* exists at a more theoretical level. At issue is the allocation of the burden of proof. *Anderson* seems to make the summary judgment inquiry go beyond the question of whether the plaintiff has met its production burden sufficient to require a trial; it also goes to the persuasion burden. The production burden exists from the inception of the litigation and requires the bearer of the burden to produce sufficient evidence on all relevant aspects of the case from which a jury can return a verdict in its favor.[110] The persuasion burden is borne by the party who must persuade the factfinders[111] of his position. The standards for measuring the satisfaction of the burden differ based on the substantive nature of the case.[112] Hence, in the garden-variety negligence case the level of persuasion must be by a preponderance of the evidence, whereas the public figure plaintiff in a media defendant defamation action must persuade with clear and convincing evidence.[113]

It is the Court's apparent mandate to assess the persuasion burden at the summary judgment stage which is problematic. It appears that the majority reaches this conclusion by looking both to questions of sufficiency of evidence, as noted in precedent, and by comparing the nature of the summary judgment inquiry with that of the directed verdict. It is perhaps here that the Court causes a fundamental shift in summary judgment jurisprudence without directly addressing this aspect of its holding. Although there is much support for analogizing the "taking the case from the jury" concerns at both summary judgment and directed verdict, it

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109. *Id.* at 2520 (Brennan, J., dissenting).

110. F. JAMES & G. HAZARD, CIVIL PROCEDURE § 7.7. (3d ed. 1985) (citing J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 376 (1898); MORGAN, SOME PROBLEMS OF PROOF 73 (1956)).

111. It must be noted that the judge makes initial determinations to control the jury by setting the standards by which they must be persuaded. The first inquiry, of course, is whether the case should proceed to or be taken from the jury.

112. *See* F. JAMES & G. HAZARD, *supra* note 110, at §§ 7.6, 7.7.

113. New York Times v. Sullivan, 376 U.S. 254 (1964).

is quite another matter to conduct the analytical inquiries as if the case had progressed to the same point in both.

Until *Anderson*, it appeared to be basic hornbook law that the persuasion aspect of the burden of proof went to the factfinders' assessment of the evidence so as to derive what the facts might be.[114] The measure or standard imposed by the test was to guide the factfinders in their mission to ascertain the facts. Whether evidence satisfies the persuasion burden has traditionally been within the province of the factfinders, based on the judge's instructions.[115] As Justice Brennan pointed out in *Anderson*: "whether evidence is 'clear and convincing,' or proves a point by a mere preponderance, is for the factfinders to determine."[116]

The majority relied on precedent in support of the proposition that the substantive evidentiary burden was implied at the summary judgment stage. Specifically, the Court cited *Adickes v. Kress*[117] and *First National Bank of Arizona v. Cities Service Co.*[118] In analyzing both cases the Court determined that Rule 56 requires a court to determine whether there is a genuine issue of material fact. Yet, in so stating, the Court failed to explain how it divined this standard of applying the substantive evidentiary burden at summary judgment. The shortcoming emanates from the Court's failure to distinguish between the two components of the burden of proof, thus leading to differing analytical results.

2. SUMMARY JUDGMENT AND DIRECTED VERDICT: THE MIRROR IMAGE

> The Petitioners suggest, and we agree, that this standard [summary judgment] *mirrors* the standard for directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed.[119]

A major component of the *Anderson* Court's analysis was the discussion of the correlation of the basic inquiry at both summary

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114. *See* F. JAMES & G. HAZARD, *supra* note 110, at §§ 7.6, 7.7.

115. *Id.* at 315.

116. 106 S. Ct. at 2520 (Brennan, J., dissenting). Justice Brennan concluded: "As I read the case law, this is how it has been, and because of my concern that today's decision may erode the constitutionally enshrined role of the jury, and also undermine the usefulness of summary judgment procedure, this is how I believe it should remain." *Id.*

117. 398 U.S. 144 (1970).

118. 391 U.S. 253 (1968).

119. 106 S. Ct. at 2511 (citations omitted) (emphasis added).

judgment and directed verdict.[120] Each procedure is concerned with the underlying question of whether a case should proceed to the jury, or whether the evidence is such that the judge may decide the case as a matter of law.[121] At the directed verdict stage, it is plausible that the substantive evidentiary standard required at trial is applicable because the evidence has matured to the form in which it would go to the jury. Therefore, the relevance of the persuasion burden in passing on a motion for directed verdict is apparent. As a result, the Court's use of the "mirror metaphor," i.e., that the standard for summary judgment *mirrors* that of directed verdict, suggests that the summary judgment inquiry mirrors that of Rule 50(a) in every way. Therefore, the Court concluded, "the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits."[122]

It is unquestionable that the basic underlying inquiry of directed verdict and summary judgment is the same. Thus, the mirror metaphor is generally, as a matter of procedure, accurate. The concern in both procedures is when a case should properly be taken from a jury. The Court has much support for its proposition that the inquiries have historically been the same.[123] The phraseology has always been geared to whether "a reasonable jury could find," "whether there is but one conclusion," and as suggested in *Anderson*, "whether it [the evidence] is so one-sided."[124] Although this basic inquiry has been the same, it *is* questionable whether a cold record on a motion for summary judgment should be tested against the substantive evidentiary standard applicable at trial.

One cannot escape the fact that the nature of the evidence at the two different motions is *not* the same. At the directed verdict stage, the witnesses, whose credibility may have been at stake, have been questioned and cross-examined in open court. Exhibits have been entered into evidence, and have been brought into perspective with the assistance of live persons. All this is quite different from the cold record. In consideration of these factors, a dis-

120. It should also be noted that analysis of the directed verdict inquiry is the same as that on a motion for judgment notwithstanding the verdict. The authors have limited references to directed verdicts for purposes of expediency.

121. *See* 101 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2713.1 (2d ed. 1983) [hereinafter FEDERAL PROCEDURE].

122. 106 S. Ct. at 2512.

123. *See* FEDERAL PROCEDURE, *supra* note 121, at § 2713.1.

124. 106 S. Ct. at 2512.

tinction has been drawn between what a judge may consider in ruling on either motion. At the summary judgment stage, the judge may not rule on the credibility of the evidence, whereas the judge may consider whether a witness is or is not believable in view of his presence in court.[125] In light of the stage of the case's maturity, it would appear that the directed verdict inquiry should implicate the substantive evidentiary burden. The case is as it would be submitted to the jury, and thus a judge should analyze it in the same manner that a jury would be instructed to so do. These considerations, of course, are based on a type of evidence very distinct from the paper evidence before the judge at summary judgment. Such evidence is not of the type, then, which should be considered at the higher substantive level.

This analysis also implicates basic jury concerns and the value our society places on the jury system. The Court's insistence that the summary judgment and directed verdict procedures mirror each other is not inaccurate. The metaphor is not, however, entirely representative of the litigation process. The basic inquiry, as previously discussed, is identical. The Court, however, should not have pressed for a pure use of the mirror image because of the difference in the maturity of the case at the time of the two procedures. The persuasion burden should be a means of analysis strictly within the province of the jury.[126] It is the triers of fact who should be guided by the substantive evidentiary standard so as to resolve the case in which the evidence is in equipoise.[127] In the final analysis, the use of the substantive evidentiary burden at the summary judgment level will not only impede on a traditional jury function, it will also increase the capacity for judicial error.

3. THE UNDERLYING JURY CONCERN

A concern underlying much of the discourse between the ma-

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125. On a summary judgment motion the court is not permitted to rule on the credibility of the material that is presented. When there is an issue whether the testimony of an affiant or deponent would be credible if presented at trial, the court must deny summary judgment and leave that question to be resolved by the finder of fact. However, a directed verdict motion typically would be made after the witness had testified and the court could take account of the possibility that he either could not be disbelieved or believed by the jury.

FEDERAL PROCEDURE, *supra* note 121, at § 2713.1.

126. *But cf.* McNaughton, *Burden of Production of Evidence: A Function of a Burden of Persuasion*, 68 HARV. L. REV. 1382, 1383 (1955) ("It [burden of production] describes the risk of nonpersuasion of the judge that the burden of persuasion of a reasonable jury may have been fulfilled.")

127. *See* F. JAMES & G. HAZARD, *supra* note 110, at 314.

jority and the dissents is the issue of when a case should go to the jury. This also brings to light the difficulties of resolving law-fact distinctions and the respective roles of the judge and the jury.[128] Great value has been placed on the traditional role of the jury in our system of justice.[129] But, as Justice Brennan expressed, the effect of *Anderson* may be to "erode the constitutionally enshrined role of the jury."[130]

Anderson raises the seventh amendment concern because it seemingly gives the trial judge more power to adjudicate the merits of the case without allowing the plaintiff the opportunity to present his case to the jury. In many ways it usurps the traditional role of the jury and gives it to the judge. This appears to be the natural and probable result of having the judge examine the evidence in light of the burden of persuasion—a duty traditionally in the province of the jury.[131] Thus, while enunciating procedural doctrine, the Court's decision may have serious constitutional ramifications.

V. Conclusion

After *Anderson*, it is clear that the non-movant must not only meet the traditional Rule 56(e) burden of coming forward to show a genuine issue of material fact, but must also do so in congruence with the requisite trial standard of proof. Thus, if the standard of proof required at trial is one of clear and convincing evidence, the evidence presented in opposition to a motion for summary judgment must also satisfy such an evidentiary burden.

The Court's opinion has the appearance of neatness in its analysis of the similarities between the summary judgment and directed verdict inquiries. One is lulled into what may be a false sense of security, feeling comfortable with the conclusion that it only makes sense to apply the same substantive evidentiary burden at different stages of the litigation. After all, both are geared at keeping the meritless case from going to the jury. Applying the same standard of proof at each stage forces the party with the burden of proof at trial to come forward with his case so that the trial

128. *See generally* Weiner, *supra* note 105. It would appear that what was previously characterized as being an issue for the judge or an issue for the jury may no longer be as easily distinguishable.

129. For an informative discussion of the history of the seventh amendment see Justice Rehnquist's dissent in Parklane Hosiery Co. v. Shore, 439 U.S. 322, 337-56 (1979) (Rehnquist, J., dissenting).

130. 106 S. Ct. at 2520 (Brennan, J., dissenting).

131. *See supra* notes 116-24 and accompanying text.

judge may correctly assess it before wasting the court's and litigant's time in a frivilous trial. Both procedures are a means of maintaining systematic efficiency and protecting litigants from having to defend unsubstantiated claims. In the end, the rule of efficiency embodied in Federal Rule of Civil Procedure 1 will be satisfied. Efficiency, however, is not the only goal embodied in that Rule.

Beyond the neat analysis laid out in the Court's opinion are some disturbing results. The Court seems to have undercut certain basic assumptions of our procedural system. The persuasion burden has traditionally been a standard by which the triers of fact make factual findings. The effect of *Anderson* is to usurp the factfinder's function, and require the judge to weigh the evidence at an early stage of the litigation. Unlike the directed verdict stage, the judge must rule without the benefit of having viewed witness demeanor, and observing the complete trial develop. Consideration of the substantive evidentiary burden at directed verdict is acceptable in that the evidence has matured to the level at which the case would be submitted to the jury. The nature of the evidence in a cold record at the summary judgment stage, however, does not mirror the nature of the evidence at the directed verdict stage.

Anderson was the perfect case for the Court to reaffirm its commitment to protecting media defendants in a public figure defamation action. Since *New York Times v. Sullivan,* it has been clear that such cases are disfavored actions. There are strong constitutional reasons which mandate this result. It is also clear from *Anderson* that the Court is concerned that trial judges have generally been hesitant to grant summary judgment. Thus, one should not be surprised that the Court sought to send a message in the form of this case. The Court did not, however, limit its opinion to the obvious considerations before it. Instead, it set out on a course of altering the basics of summary judgment jurisprudence. There are several potential results. If Justice Rhenquist is correct, the Court's new standard may lead to more confusion than already exists. The authors are less concerned that *Anderson* may be a new procedural rule for the benefit of media defendants, for that would be in harmony with the first amendment values at play. The authors are more concerned, however, with the potential deleterious effect the Court's holding will have on the right to jury trial "preserved" by the seventh amendment.

It may well be that the Court needed to send a message to trial courts that summary judgment is an essential mechanism for weeding out meritless claims. Such a message is certainly in line

with many of the numerous policy considerations at play. Stating a policy and radically transforming a procedural mechanism are two different matters, especially when the reformulation of the procedural mechanism necessarily impinges on equally valued goals.

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*Lawrence D. Goodman***

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* To Stacey, with love and appreciation.

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