Appeals Court of the Commonwealth of Massachusetts

№ 2018-P-1605

Walter Tuvell
Plaintiff/Appellant

v.

Jack Marshall
Defendant/Appellee

On Appeal From A Judgment Of The
Middlesex Superior Court (№1781CV02701)

APPEALS APPENDIX

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NOTE: *The addition of an OCR/searchable text layer to PDFs (required by this Court's "e-filing" rules) generally results in some unavoidable (though non-substantive) degradation of reproduction quality, especially to images. In this Appeals Appendix, this effect is particularly noticeable in OppExhA.*

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1781CV02701 Tuvell, Walter vs. Marshall, Jack

- Case Type
- Torts
- Case Status
- Open
- File Date
- 09/13/2017
- DCM Track:
- A - Average
- Initiating Action:
- Defamation
- Status Date:
- 09/13/2017
- Case Judge:
-
- Next Event:
-

All Information | Party | Event | Tickler | Docket | Disposition

Party Information

Tuvell, Walter
- Plaintiff

Alias

Party Attorney
- Attorney
- Pro Se
- Bar Code
- PROPER
- Address
- Phone Number
-

More Party Information

Marshall, Jack
- Defendant

Alias

Party Attorney

More Party Information

Events

Date	Session	Location	Type	Event Judge	Result
04/18/2018 02:00 PM	Civil C Rm 610	Courtroom 610	Rule 12 Hearing	Barry-Smith, Hon. Christopher K	Rescheduled
06/07/2018 02:00 PM	Civil C Rm 610	Courtroom 610	Rule 12 Hearing	Barry-Smith, Hon. Christopher K	Held as Scheduled

Ticklers

Tickler	Start Date	Due Date	Days Due	Completed Date
Service	09/13/2017	12/12/2017	90	
Answer	09/13/2017	01/11/2018	120	
Rule 12/19/20 Served By	09/13/2017	01/11/2018	120	08/21/2018
Rule 12/19/20 Filed By	09/13/2017	02/12/2018	152	08/21/2018
Rule 12/19/20 Heard By	09/13/2017	03/12/2018	180	08/21/2018

Tickler	Start Date	Due Date	Days Due	Completed Date
Rule 15 Served By	09/13/2017	11/07/2018	420	08/21/2018
Rule 15 Filed By	09/13/2017	12/07/2018	450	08/21/2018
Rule 15 Heard By	09/13/2017	12/07/2018	450	08/21/2018
Discovery	09/13/2017	09/03/2019	720	08/21/2018
Rule 56 Served By	09/13/2017	10/03/2019	750	08/21/2018
Rule 56 Filed By	09/13/2017	11/04/2019	782	08/21/2018
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Judgment	09/13/2017	09/14/2020	1097	08/21/2018
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Docket Information

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09/13/2017	Case assigned to: DCM Track A - Average was added on 09/13/2017	
09/13/2017	Original civil complaint filed.	1
09/13/2017	Civil action cover sheet filed.	2
09/13/2017	Demand for jury trial entered.	
09/13/2017	Attorney appearance On this date Pro Se added for Plaintiff Walter Tuvell	
09/19/2017	Service Returned for Defendant Marshall, Jack: Service via certified mail; on 9/14/17 at 836 Main St., Reading MA 01867.	3
10/06/2017	General correspondence regarding FAX TRANSMISSION DATED OCTOBER 4, 20170- Letter dated Oct.4, 2017 by defendant requesting time to respond to the complaint. (Filed in Court this day)	4
10/11/2017	Defendant's Notice of intent to file motion notice of intent to file a motion for dismissal. (Fax transmission dated October 9, 2017- Filed in Court this day) Applies To: Marshall, Jack (Defendant)	5
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03/16/2018	The following form was generated: Notice to Appear Sent On: 03/16/2018 10:01:35	
03/16/2018	Event Result: Judge: Barry-Smith, Hon. Christopher K The following event: Rule 12 Hearing scheduled for 04/18/2018 02:00 PM has been resulted as follows: Result: Rescheduled Reason: By Court prior to date	

Docket Date	Docket Text	File Ref Nbr.
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Case Disposition

Disposition	Date	Case Judge
Judgment after Finding on Motion	08/21/2018	

Superior Court of the Commonwealth of Massachusetts
County of Middlesex

Walter Tuvell
836 Main St.
Reading, MA 01867
Plaintiff, Pro Se

v.

Jack Marshall
2707 Westminster Place
Alexandria, VA 22305
Defendant

Case № 1781CV02701

COMPLAINT (VERIFIED)

JURY TRIAL DEMAND

INTRODUCTION (INCLUDING JURISDICTION)

¶1 Plaintiff Walter Tuvell, an individual residing at 836 Main St., Reading, Middlesex County, Massachusetts, 01867, complains of defamation (“cyberlibel”) committed against him by Defendant Jack Marshall, an individual residing at 2707 Westminster Place, Alexandria (independent city), Virginia, 22305, and alleges causes of action, as hereby related herein *passim.*

¶2 “Long-arm” personal jurisdiction[1] inheres in this Court, as the Complaint arises out of activities satisfying the due-process doctrines of: (i) “minimal contacts;” (ii) “purposeful availment;” (iii) “express aim;” (iv) “effect;” and (v) “fair play and substantial justice.” *Viz.,*

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1 MGL §223A 3(d). See generally https://en.wikipedia.org/wiki/Personal_jurisdiction_in_Internet_cases_in_the_United_States. Recent Federal case on-point: *Hawbecker v. Hall, No. SA-14-CV-1010-XR (W.D. Tex., Feb. 19, 2015).*

upon knowledge/information/belief:

(i) Defendant: (a) has spent many years of his life as a resident of Massachusetts; (b) has held regular employment in Massachusetts; (c) has been and remains a "lifetime fan of the Boston Red Sox;" (d) is a member of the Massachusetts bar; (e) currently conducts ongoing business in Massachusetts, with Massachusetts residents (https://ethicsalarms.com/2017/09/11/morning-ethics-warm-up-91117-irma-and-climate-change-hype-democrats-and-anti-catholic-hypocrisy); (f) operates a long-running, heavily-trafficked, highly-interactive, purposefully-nationwide Internet blogsite (¶5); which (g) reaches and is visited/read by Massachusetts residents (e.g., readers/writers of the Boston Business Litigation Blog, http://bostonbusinesslitigation.mt4temp.lexblognetwork.com/employment/public-employees-can-lose-their-jobs-over-online-information); (h) blogs about Massachusetts-specific affairs (e.g., https://ethicsalarms.com/2012/08/04/massachusetts-a-state-lottery-shows-its-corrupt-and-irresponsible-core), and about (i) Massachusetts residents (https://ethicsalarms.com/2012/05/19/the-significance-of-pow-wow-chow, https://ethicsalarms.com/2012/09/27/more-revelations-regarding-elizabeth-warrens-alleged-unauthorized-practice-of-law-and-why-this-matters); and (j) who for the purposes of the instant Complaint actively/specifically/knowingly reached across state lines into Massachusetts (there directly targeting Plaintiff) via email and his blogsite *(passim);* by means of which

(ii) he, personally, intentionally entered into specific dealings/interaction (via email and blogsite) with Plaintiff, personally *(passim);*

(iii) specifically targeting Plaintiff's civil action *(Tuvell v. IBM)*

and follow-up Judicial Misconduct charge (D.Mass. and First Circuit, both courts and Plaintiff being located in Massachusetts, as Defendant knew, since he self-admits reviewing these matters on Plaintiff's website) (¶4, ¶14·I), while knowing that he and Plaintiff were contemporaries who had graduated from "rival" colleges in Cambridge, Massachusetts (Harvard and MIT, announced in Plaintiff's email of ¶6, later reiterated by a post on Defendant's blogsite (¶5)) (Marshall also has another degree from Hampshire College, also in Massachusetts), and that the fact of Plaintiff's residence in Massachusetts (a widely-perceived "liberal/progressive" state) plausibly (but falsely)† imbued Plaintiff with characteristics indicative of "academicism" that he viewed as negative (¶8); with

(iv) tortious/defamatory effect *(passim);* while

(v) Plaintiff is wholly innocent of any wrongdoing in this affair *(passim);* and he has no cognizable dealings with the state of Virginia or its residents apart from this Complaint — beyond which his only contacts with the state have been less than a dozen intermittent/ sporadic visits for brief periods (business meetings, visiting friends, camping trips, drive-throughs), totaling less than three weeks' time over his lifetime.

¶3 All dates cited herein are implicitly understood to occur in the year 2017, unless explicitly specified otherwise. The essential substantive events described herein occurred on Sat Aug 26 – Wed Aug 30. The (superscript) tags "†" and "‡" scattered throughout are explained in ¶17.

STATEMENT OF FACTS

¶4 Plaintiff is a PhD mathematician and software engineer, and is a concerned American citizen deeply interested/involved in Judicial Misconduct, for which purpose he maintains an Internet website, "Judicial Misconduct USA" (http://JudicialMisconduct.US).

¶5 Defendant is a lawyer, and a (self-professed) ethicist, exercising specialized expertise in legal ethics. He maintains both: (i) a national ethics training and consulting firm, "ProEthics, Ltd." (website http://ProEthics.com); and (ii) an Internet "blogsite," "EthicsAlarms" (http://EthicsAlarms.com), which he advertises as "the per-eminent *[sic]* and most visited ethics community blog on the web" (http://www.LinkedIn.com/in/jack-marshall-86a85b8), claiming more than 3,200 "followers."

¶6 On Sat Aug 26, Plaintiff conceived an idea of raising/discussing his Judicial Misconduct concerns (primarily, abuse of Summary Judgment) with Defendant — thinking that subject-matter (which inherently implicates questions of legal/judicial ethics) would provide excellent fodder for his EthicsAlarms blogsite. To the end of gauging the feasibility/viability of such interaction, Plaintiff sent to Defendant an initial/exploratory private email (as the general public is invited to do, "for any purpose," according to the blogsite's About page, http://EthicsAlarms.com/about), inquiring about perceived inconsistencies between: (i) the blogsite's intended/advertised design/ambitions (as articulated on its About page); and (ii) the substantive content in the blogs and comments actually being posted on the blogsite in practice.

Appropriately, the “subject” header-line of Plaintiff’s email was “I can’t figure you out.”

¶7 Defendant did not reply (directly) to Plaintiff’s private email (¶6). Instead, on Sun Aug 27, Defendant peremptorily responded (indirectly) to Plaintiff’s email publicly, via (the first part of) a blogpost on his blogsite. Defendant neither notified nor informed Plaintiff of that publicly posted blogsite response; nor did he quote any part of Plaintiff’s email; nor did he respond to the substantive aspect of Plaintiff’s email query (*viz.,* About-page vs. content-pages disparity). Instead, Defendant’s wildly off-the-wall “response” seized on only certain (falsely) twisted aspects of Plaintiff’s email — peripheral, “cherry-picked,” paraphrased, out-of-context, and misinterpreted.

¶8 In particular, Defendant’s blogpost (¶7) (falsely) accused/attributed Plaintiff of being an “academic”[†] (considered by some political/partisan activists to be a derogatory attribution; see ¶9). And on that (false) basis, Defendant launched into an unwarranted invective/harangue, applying to Plaintiff (false) negative political/partisan characteristics/traits/motives (“… the entire American Left, along with its sycophants and familiars, the universities, show business and the news media [all this, somehow, crazily, encompassing ‘academics’], have gone completely off the ethics rails since November 8, 2016 …”), culminating in false attributions of “uniquely un-American … execrable conduct.” All this for the mere asking of an innocent/polite/private query about clarification-of-purpose of the blogsite.

¶9 On this date (Sun Aug 27) and on later dates, several visitors/readers of the blogsite read‡ Defendant's (false) blogpost (¶7–¶8), and themselves posted further comments to it and to other comments, similarly (falsely) attacking Plaintiff, with no rationale other than (falsely) believing/crediting‡ Defendant's (false) lead attack.

¶10 Shortly thereafter on Sun Aug 27, Plaintiff unilaterally discovered Defendant's blogsite post/response and its subsequent comments (¶7–¶9), and posted a responsive comment thereto (publicly now, since Defendant had demonstrated his refusal to communicate privately), attempting to correct/repair the harm that had been done. Therein, Plaintiff properly/correctly: (i) quoted his original email (¶6) verbatim (in full); (ii) asserted/clarified that he was interested only in "serious ethical guidance" (and certainly not political/partisan "ranting," as Defendant himself self-admits/demonstrates he does engage in, in his own blogpost that very day (¶7)); (iii) repeated his original query concerning "the deviance of the [blog]site's content vs. the wording of its About page;" (iv) mentioned his sole interest in Judicial Misconduct, referring to his own website and ongoing case (¶4).

¶11 The "mob mentality"‡ pattern of ¶10 — false/negative/unprovoked posts/comments targeting Plaintiff, who responds with corrections/clarifications — continued throughout the day (Sun Aug 27), and carried over to the next day, Mon Aug 28.

¶12 On that day (Mon Aug 28), Defendant (falsely) accused Plaintiff of "choosing [the] precise [divisive] issue[/subthread]"† of Left/Right

liberal/conservative democrat/republican partisan politics. Instead, that subthread was in fact started/propagated by others, whereas the Plaintiff consistently displayed curiosity only about the design-vs.-implementation of the blogsite itself (via his interest to engage in an ethical discussion of Judicial Misconduct), repeatedly disavowing any interest whatsoever ("dog in the fight") concerning the subthread.

¶13 Later on Mon Aug 28, Defendant (falsely) pretended to "defend" his blogsite, by tallying his Right-leaning vs. Left-leaning blogposts for the month of July (which Plaintiff hadn't seen/read), and purportedly showing they were ideologically "balanced" — unaccountably avoiding, yet again, Plaintiff's query about design-vs.-implementation of the blogsite. Plaintiff responded, patiently explaining, yet again, that "I don't care about Left/Right anything! What I care only about is Ethics *per se* …"

¶14 Finally on Mon Aug 28, Defendant (falsely) "went nuclear"† against Plaintiff, (falsely) "banning"† Plaintiff from the blogsite (thereby preventing† Plaintiff from publicly defending himself against Defendant's false attacks/accusations), and issuing a rapid-fire sequence of remarkably malicious/vicious/venomous (false) posts,† (falsely) enthusiastically stating/asserting/arguing there was "something very bad"† (but there wasn't) about Plaintiff's posts and other writings (on his website, ¶4), using incendiary (one is tempted to say "crazed/deranged/lunatic/rabid/hysterical") language† such as the following ("meta-comments," in *{italicized curly brackets}*, are here added for the special purposes of this Complaint, see ¶17):

A I just banned† Walt. … He's special.† *{false: these negative acts/epithets are based solely upon the other false statements in this Complaint (esp. this list), hence are themselves defamatory ("banning" is especially potent in this regard, being the "kiss of death" on the Internet)}*

B I have already spammed† *{i.e., tagged as "spam" and disallowed to be published}* two more posts by the jerk.† *{Plaintiff did issue those two (perfectly reasonable) posts, but unfortunately does not retain copies of them, due to the general nature of the blog-posting protocol}*

C **ATTENTION: Walt Tuvell is banned from commenting here.** … He sandbagged† me *{false: no such "sandbagging" happened, in any sense}*. He submitted nothing but whiny† posts *{false: nothing was "whiny," to any reasonable/rational observer}* denying that he had accused† Ethics Alarms of being obsessed with partisan political topics *{false: it was a (private, non-public) "observation/query," not an "accusation"}* … initially with a link† in a comment to another commenter *{false: no such link to another comment/commenter was supplied}*, causing† me to miss it *{false: presumably this is the "sandbagging" Defendant complains of, but it didn't happen, so "caused" nothing}* …

D [He] posted a comment† saying that the blog advertised itself as covering judicial misconduct and doesn't *{false: no such comment was submitted}* (there are **dozens** of

judicial ethics posts *{false:† here, Defendant (falsely) confuses Judicial Misconduct with judicial ethics, which are two distinctly/obviously different areas of concern]}* …

E Walt issued bitching comment after bitching comment† … *{false: none of Plaintiff's comments was "bitching," by any reasonable/rational measure, much less a sequence of them}*

F [H]e finally† revealed his agenda *{false (not "finally"): Plaintiff had already/proactively "revealed"/proclaimed his (never hidden) "agenda," namely, a discussion of the ethics of Judicial Misconduct, in his very first post to the blogsite (¶10)}* …

G [W]hen I finally† get the link to the ethics issue he says he wants a reaction to *{false (not "finally"): it had already been prominently included in Plaintiff's very first post to the blogsite (¶10)}* …

H GUESS WHAT? Come on, *guess!* Walt's "issue" is about **his own case,**† *{false: Plaintiff's "issue" was/is avowedly/expressly/primarily about Judicial Misconduct in general, and only peripherally "about his own case"}* and the link goes to **his single issue website**† *{false: Plaintiff's website (¶4) is not "single issue" (by which Defendant means, as just quoted, "Plaintiff's own case")}* …

I The case is **Tuvell v. IBM,** and skimming his messy post† *{false: the case (¶4) is not a "messy post," by any stretch of anyone's imagination, instead being an extremely well-*

constructed piece of legal writing} that teeters on the edge of madness,† *{false: Plaintiff's website nowhere exhibits any trait remotely characteristic of "madness"}* I discern that the reason Walt is interested in judicial misconduct is the judge decided the case was lousy,† *{false: the judge did not "decide the case was lousy," because the judge did not in fact "decide 'the case'" at all — rather, she "decided" a "different" case, one that she illegally/criminally* ***fabricated/falsified the facts*** *of}* and dismissed it.

J I was going to, as a favor to Walt, because i *[sic]* am a nice guy, show my good faith† *{false: this wording suggests "bad faith" on the part of the Plaintiff, which is in no way true}* by addressing his issue *even though he didn't have the courtesy or honesty to come right out and say what he wanted.*† *{false: Plaintiff did certainly "come right out and say what he wanted," explicitly/proactively, in his very first post to the blogsite (¶10)}*

K Then I read as much of the entry on his blog *{false: Plaintiff's website is not a "blog;" it does not even incorporate a "blogging" feature (yet)}* — which purports to be about judicial misconduct in summary judgments generally but is in fact only about his case† *{false: Plaintiff's website is indeed about Judicial Misconduct generally, both at Summary Judgment (¶4) and otherwise, while Plaintiff's case comprises only one of several Case*

Studies reported/researched on the site} — as I could stand …

L [I] realized that Walt is, in technical terms … a few cherries short a sundae.† *{false: by invoking "technical terms," Defendant represents/alludes to a scientific/ medical/clinical expertise/credentials that he does not possess (which he falsely pretends to "inoculate" as an "opinion"); and even if he did possess the requisite expertise, his conclusion of "a few cherries short of a sundae" is wildly false/insane}*

M This became clear in this passage† *[extended excerpt, omitted here, from Plaintiff's website (and court filing) describing Plaintiff's (long-term, diagnosed) PTSD (Post-Traumatic Stress Disorder)] … {false: Defendant here pretends to inextricably link (via his false allusion to medical/clinical expertise, ¶14·L) "a few cherries short of a sundae" to PTSD — which all sane/rational/reasonable people in this day-and-age know (though which some readers of his blog presumably don't know) to be false incoherent/inciteful stigmatization/bias}*

N I used to get letters† from people like this, long rambling† *{false: to characterize solid/full/complete/exhaustive documentation/proof of claims/propositions as "long" (when in (false) pejorative combination with "rambling") is unfair/false; further, nothing at all that Plaintiff submitted to Defendant's blogsite, nor anything on Plaintiff's own website, can be fairly characterized as*

"rambling"} things with court cites and exclamation points. I answer phone calls† from people like Walt, and try to help them if possible, but it's usually futile, and often they keep calling and calling† until I have to just duck the phone calls. And I get e-mails† with long, rambling documents. *{false: whether or not Defendant's invocation of "letters," "phone calls," "e-mails" from others are correct, Plaintiff pelted Defendant with none of these, so linking them to Plaintiff is false/defamatory}*

O This is the first time,† *{false: characterizing Plaintiff with an "unprecedented" act unduly/defamatorily prejudicial (not to mention that it didn't happen at all)}* however, someone has abused† *{false: Plaintiff "abused" nothing whatever}* Ethics Alarms for a personal agenda.† *{false: to the extent that by "personal agenda" Defendant means "undisclosed/secret/surreptitious motive," Plaintiff did no such thing at any time}* I'm sorry for Walt's trouble, but he was not honest,† *{false: Plaintiff was scrupulously honest}* and misrepresented† *{false: Plaintiff misrepresented nothing}* his purpose by the charming device of insulting my integrity.† *{false: Plaintiff insulted no one's "integrity" (in fact, Plaintiff has no idea what this accusation is supposed to mean)}* Obviously,† *{false: this is not obvious to any sane person; instead, it's a false figment of Defendant's diseased/putrid imagination}* he wanted to

check to see whether my sympathies would be with his cause† *{false, to the extent that by "his cause" Defendant here refers to the Tuvell v. IBM case; instead, Plaintiff was only interested in discovering whether the Ethics Alarms blogsite was a suitable forum for (non-political/partisan) discussion of Judicial Misconduct generally, and if so, to learn Defendant's thoughts relating thereto}* before submitting it for consideration. As I tell all my clients, I can't be bought,† *{false: this language falsely suggests Plaintiff was involved in some sort of bribe/fraud}* and you take your chances. Walt was obviously looking for a cheap,† as in *free {false: this language falsely suggests Plaintiff was trying to get "something for nothing," whereas in fact there is no fee whatever imposed for anyone posting to Defendant's blogsite}*, expert opinion† that he could use in his crusade against the judge.† *{false: (i) on the one hand, even if Plaintiff had wanted/planned/attempted (which he manifestly/emphatically did not) to "use" Defendant's "expert opinion" in Plaintiff's "crusade against the judge," it was LITERALLY IMPOSSIBLE to do so, because at the posture the case was in (Judicial Council/Conference review), no "third party 'evidence'/filing" (such as "expert opinion" or "amicus brief," whether or not desired/supported by Plaintiff), was even allowable, by rule/law (28 USC §359(b)), to be injected into the process (as any lawyer, much less a legal ethics*

expert, must know well), unless invited/ordered by the reviewing body, which was never requested/hinted/ happened; (ii) on the other hand, Plaintiff cannot even conceive (though it may be conceivable to mentalities similarly compromised as Defendant's, to which he was communicating) of any possible "opinion" that any "expert" (much less an un/self-credentialed pseudo-"expert" like Defendant) could render that would/ could have any imaginable value for the Judicial Council/ Conference}

P *What an asshole!* The fact that he may be a desperate asshole† *{false: there is not the slightest (true) evidence anywhere that Plaintiff was a "desperate asshole," however defined}* doesn't justify wasting my time, and others who responded to him and misrepresenting his motives.† *{false: there is no evidence anywhere that Plaintiff "wasted the time" of anyone, in any sense}*

Q For this, Walt earns the ultimate ban.† *{for the defamatory effect of "banning," see ¶14·A (not to mention that banishment was not "earned" in this case) …}* He will not be re-instated,† *{… and, "ultimate" ban of "no reinstatement allowed" is especially/emphatically defamatory}* and if he submits one more comment having been so warned, I will delete every one of his comments† *{by "banning," Defendant removes from Plaintiff's reach even the potential/possibility of defending/rehabilitating*

> *himself against Defendant's defamation (because Plaintiff had no way to communicate to the recipients of Defendant's published lies); and by further "deleting" Plaintiff's comments, Defendant even threatened to "cover-up," by destroying the evidence of his tortious defamation (which is why Plaintiff posted no further comments)}* so the stench† of his abuse no longer lingers here.† *{being based, as it is, on the preceding false defamatory statements, the negative epithet of "lingering stench" intentionally imparts further over-the-top false defamatory harm}*

¶15 On Tue Aug 29, Plaintiff sent an email to Defendant, explaining/clarifying with great patience/reserve/clarity/accuracy the errors of Defendant's posts of the preceding day (¶14). Defendant ignored it, and never responded to it.

¶16 On Wed Aug 30, Plaintiff sent a "demand" letter/email to Defendant, appealing to his senses of ethicality and legality, urging/imploring him to fulfill the requirement that he retract/correct his defamatory claims. Defendant ignored it, and never responded to it (neither to the email communication itself, nor to the "demand" it communicated), even though he has a history of issuing retractions/corrections when he recognizes/acknowledges himself to be in error (https://ethicsalarms.com/2010/04/08/apology-how-i-became-an-april-fool-and-an-ethics-dunce).

STATEMENT OF CLAIMS/DAMAGES

CAUSE OF ACTION, COUNT ONE
DEFAMATION ("CYBERLIBEL")

¶17 (See ¶3.) The tags "†" *passim* indicate, with particularity, the Defendant's (false, defamatory; see ¶18) statements and actions (quoted verbatim or explicitly cited) complained-of herein, together with accompanying explanatory comments (and meta-comments, *{…},* in ¶14) inline *in situ,* regarding their (false, defamatory) nature.[2]

¶18 The Defendant's statements and actions (¶17) are alleged to be — (i) knowingly/intentionally, and/or (ii) exhibiting reckless/fulsome/excessive disregard for their truth, and (iii) without one iota of reasonable/rational/conceivable grounds for Defendant to believe in their truth — all of the following: (iv) false (indeed, primarily out-and-out lies); (v) published/communicated to third-parties; (vi) malicious; (vii) harmful; (viii) unauthorized; (ix) unprivileged; and (x) made with malevolent intent/effect of significantly injuring/impairing/defaming/diminishing/"sliming" Plaintiff's reputation/goodwill with shame/ridicule/contempt/scorn/disgrace/distrust/disgust/hatred, both generally and in special respect of Plaintiff's good standing in his position/job/calling/field as a "champion/crusader/opponent" against Judicial Misconduct, within considerable/respectable segments of the Internet legal/ethical and Judicial Misconduct "communities."

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2 The tags "‡" indicate that the complained-of defamatory comments were indeed communicated/published to unprivileged others (who were in fact (falsely) influenced by them, negatively towards Plaintiff). These tags are for advisory purposes only; they are not actually required here, because of *a priori* assumption of *de facto* unprivileged publication via the public Internet.

¶19 As immediate/proximate result of Defendant's extreme/outrageous defamatory statements/actions (¶18), Plaintiff has suffered significant material/emotional harm/damage/distress.[3,4]

PRAYER FOR RELIEF

¶20 Wherefore, Plaintiff hereby prays/requests/demands this Court to render judgment against Defendant, and award Plaintiff: (i) (public) retraction/correction/apology for any/all defamatory statements; (ii) compensatory and punitive damages, in an amount to be determined at trial (which Plaintiff believes to be well in excess of $100,000); (iii) other relief (such as injunction against further web/blog publication, and all expenses/costs/fees/interest), insofar as it deems just and proper.[5]

Actually, punitive rewards are not (currently) recoverable in libel cases in Mass. See *Sharratt v. Housing Innovations*. See Opp ℘19ƒ22.

DEMAND FOR JURY TRIAL

¶21 A trial by jury is hereby requested/demanded, for all issues properly so tried.

---

3 Noting that under controlling Massachusetts common law, all defamation/libel is *per se* defamatory (*Sharratt v. Housing Innovations,* 365 Mass. 141 (Mass. 1974)), hence actionable even in the absence of "special [monetary] damages" (claim/proof of economic loss).

4 Noting that under controlling Massachusetts common law, even the *truth* (much less the blatant *falsity* exhibited here), when uttered/published with "actual ['unrelated to any legitimate interest,' sometimes (incorrectly) interpreted to implicate monetary considerations] malice" (a criterion usually applicable only to "public figures," but present here, in the controlling/popular sense of malevolent intent/ill-will), gives rise to liability for a defamation/libel claim (*Noonan v. Staples,* 556 F.3d 20 (1st Cir., 2009)).

5 ~~Noting that under controlling Massachusetts common law, "Summary judgments are disfavored in defamation cases" (*Alba v. Sampson,* 44 Mass. App. Ct. 311, Middlesex County, 1998).~~ {NOTICE: THIS IS ERROR/MISQUOTE, CORRECTED IN PLAINTIFF'S OPPOSITION TO MOTION FOR DISMISSAL, AT Opp℘12ƒ17.}

SIGNATURE; VERIFICATION

¶22 Respectfully submitted, and signed, under the pains and penalties of perjury:

Walter Tuvell, *Pro Se*
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Reading, MA 01867
781-475-7254
walt.tuvell@gmail.com

September 13 2017

TABLE OF DEFAMATIONS

This Table tabulates the **"~57" incidents** of defamation pled/claimed/asserted by Plaintiff in his **Comp (Complaint).** (The "~" notation indicates a certain amount of unavoidable overlap/duplication.)

These ~57 incidents are identified by their **"†" tag** and **"¶" paragraph number** (as appearing in Comp), with an additional **qualifier** (a, b, c, …) if/as necessary. They are briefly described, using **boldface tag-words** (which are referred-to throughout).

The incidents are classified (in both Opp and in this Table) as:

- **DGIMF = ~29 Disputed Genuine Issues of Material/False Fact (LIES = "Ⓛ")**
- **CTXDEFIMPL = ~32 Contextually Defamatory Implications = "Ⓘ"** (which *includes* "pseudo-'opinions' based on false or undisclosed facts")

INCI-DENT ID **Comp †¶**	**DESCRIPTION OF DEFAMATORY INCIDENT**	**DEFAMATORY MATERIALLY FALSE LIE, OF DISCLOSED STATEMENT OF FACT (DGIMF)**	**DEFAMATORY IMPLICATION (CTXDEFIMPL)** **Includes opinion based on false or undisclosed facts**
†2	Marshall claims Tuvell is "an **academic**" (defaming Tuvell). *{Note: This incident is defamatory, but has never been claimed actionable in the present case, because it didn't identify Tuvell to the audience, as explicitly explained at Opp℘12f18.}*	Ⓛ Tuvell is not "an academic" (as Marshall later acknowledged, at OppExhA℘8).	Ⓘ "Academicism" is defamatory to the audience in this context (as Marshall explicitly explained, at OppExhA℘1–2).
†8			
†12	Marshall claims Tuvell **chose the precise divisive** issue/subthread ("Left"/"Right" partisan politics). (That accusation defames Tuvell.)	Ⓛ It was *others, only,* who chose and discussed it. (Tuvell has *always disavowed all "political" issues.*)	*N/A*
†14a	Marshall "goes nuclear" against Tuvell: bans him; prevents him from defending himself; issues false posts; disparages Tuvell's posts; uses incendiary language.	*{These introductory comments are prefatory to the subsequent defamatory incidents accused in Comp¶14, and tabulated in this Table infra.}*	
†14b			
†14c			
†14d			
†14e			
†14f			

INCI-DENT ID **Comp †¶**	**DESCRIPTION OF DEFAMATORY INCIDENT**	**DEFAMATORY MATERIALLY FALSE LIE, OF DISCLOSED STATEMENT OF FACT (DGIMF)**	**DEFAMATORY IMPLICATION (CTXDEFIMPL)** **Includes opinion based on false or undisclosed facts**
†14Aa	Marshall **bans** Tuvell from his blog. (Banning someone is defamatory to the target.)	Ⓛ His stated facts underlying the banishment are false (Comp¶14).	He (probably) also had (still-) undisclosed facts underlying the banishment.
†14Ab	Marshall calls Tuvell **"special"** (referring to "especially bad behavior" justifying the banning, hence defamatorily to Tuvell).	*N/A*	Ⓘ "Special" refers to the banishment, hence it implies false/undisclosed underlying facts.
†14Ba	Marshall **"spams" two posts** of Tuvell's, i.e., deletes them as objectionable "spam." (Accusing someone of "spamming" is defamatory to the target.)	Ⓛ None of Tuvell's posts could reasonably be called "spam" (however defined).	*{Marshall illicitly destroyed this evidence, and Tuvell retained no record of it.}*
†14Bb	Marshall calls Tuvell a **"jerk."** (Being a "jerk" is defamatory, but it's not this mere "insulting" word that's at issue.)	*N/A*	Ⓘ "Jerk" refers to the "spam," which was false/ defamatory.
†14Ca	Marshall claims Tuvell **"sandbagged"** him. ("Sandbagging" is defamatory.)	Ⓛ No such "sandbagging" occurred, in any reasonable sense (however defined).	*N/A*
†14Cb	Marshall calls Tuvell's posts **"whiny."** (Calling posts "whiny" is defamatory.)	*N/A*	Ⓘ "Whiny" refers to "sandbagging," which was false.
†14Cc	Marshall claims Tuvell **"accused" him of being "obsessed with partisan political topics"** (harming Marshall, hence defamatory to Tuvell).	Ⓛ Tuvell's comment was a *private* comment/ observation/query, not "accusation."	*N/A*
†14Cd	Marshall claims Tuvell **"linked"** to another comment (somehow related to something harming Marshall — which is defamatory to Tuvell).	Ⓛ No such "linking" was ever done.	*N/A*
†14Ce	Marshall claims Tuvell **"caused" him to "miss"** something, harming him (which defames Tuvell).	Ⓛ Never happened (refers to the "linking," which never happened).	Ⓘ Marshall's claim refers to the "linking," which was false.

INCI-DENT ID **Comp †¶**	**DESCRIPTION OF DEFAMATORY INCIDENT**	**DEFAMATORY MATERIALLY FALSE LIE, OF DISCLOSED STATEMENT OF FACT (DGIMF)**	**DEFAMATORY IMPLICATION (CTXDEFIMPL)** **Includes opinion based on false or undisclosed facts**
†14Da	Marshall claims Tuvell wrote that his blog **advertised itself as covering judicial misconduct and doesn't,** harming him (which defames Tuvell).	Ⓛ Tuvell never wrote anything resembling this.	*N/A*
†14Db	Marshall claims his blog contains **dozens of judicial misconduct/ethics posts** (thereby portraying himself to the audience as a expert qualified to "dis" Tuvell's Judicial Misconduct claims, which defames Tuvell).	Ⓛ No such "dozens of posts" exist (in fact, not even a single post appears to exist).	Ⓘ Marshall is here falsely (with intent to harm Tuvell) mis-identifying "judicial ethics" with "judicial misconduct."
†14E	Marshall claims Tuvell issued **bitching comment after bitching comment** (defaming Tuvell).	Ⓛ No such "bitching" comments exist, in any reasonable sense (however defined).	*N/A*
†14F	Marshall claims Tuvell **finally revealed his (previously "hidden") agenda** (thereby tricking Marshall, which defames Tuvell).	Ⓛ There never was any "finally" or "hidden agenda" — Tuvell revealed all his reasons for contacting Marshall from the very beginning.	Ⓘ Marshall's claim falsely implies Tuvell "delayed and kept something hidden," with intention to harm him.
†14G	Marshall claims he **finally got the link** to Tuvell's ethics issue (thereby tricking Marshall, which defames Tuvell).	Ⓛ There was no "finally" — Tuvell supplied the link at the beginning.	Ⓘ (Same as preceding item †14F.)
†14Ha	Marshall claims Tuvell's **issue ("agenda") is about his own case.** (This is in the same context as the "finally" and "hidden agenda" of the preceding two items, hence defamatory to Tuvell.)	Ⓛ Tuvell's issue is about Judicial Misconduct, with his case *(Tuvell v. IBM)* as example.	*N/A*
†14Hb	Marshall claims Tuvell's website is **single-issue** (defaming Tuvell, because Tuvell claims his website is about Judicial Misconduct generally).	Ⓛ Tuvell's website is indeed about Judicial Misconduct, not only *Tuvell v. IBM*.	Ⓘ In context (see preceding item †14Ha), "single-issue" falsely refers to the *Tuvell v. IBM* case.

INCI-DENT ID Comp †¶	DESCRIPTION OF DEFAMATORY INCIDENT	DEFAMATORY MATERIALLY FALSE LIE, OF DISCLOSED STATEMENT OF FACT (DGIMF)	DEFAMATORY IMPLICATION (CTXDEFIMPL) Includes opinion based on false or undisclosed facts
†14Ia	Marshall calls Tuvell's website (esp. its *Tuvell v. IBM* case study) a **messy post** (defaming Tuvell).	Ⓛ The website is not a "messy post" in any sense (however defined).	Ⓘ This is *not* "opinion based on disclosed true facts," because Marshall did not actually read Tuvell's website (per preceding two items †14Ha,Hb).
†14Ib	Marshall claims Tuvell's website **teeters on the edge of madness** (defaming Tuvell).	*N/A*	Ⓘ This is opinion based on false/ undisclosed facts (†14Ha,Hb,Ia).
†14Ic	Marshall claims the judge **decided Tuvell's case was lousy** (defaming Tuvell).	Ⓛ The judge didn't decide Tuvell's case *(Tuvell v. IBM)* at all, but rather a falsely fictionalized case.	Ⓘ The attribution "lousy" (which is Marshall's, not the judge's) is opinion based upon false facts (the judge's and Marshall's).
†14Ja	Marshall claims he is **in good faith.**	*N/A*	Ⓘ The defamatory implication is that Tuvell is *not* in good faith (see the "Captain sober today" example, OATAnn*e*18).
†14Jb	Marshall claims that Tuvell didn't have the **courtesy or honesty** to come right out and say what he wanted (defaming Tuvell).	Ⓛ Tuvell did come right out and say what he wanted.	*N/A*
†14K	Marshall claims Tuvell's website claims to be about Judicial Misconduct generally but is **only about his case** (defaming Tuvell). (This is similar to item †14Hb.)	Ⓛ Tuvell's website is indeed about Judicial Misconduct generally.	*N/A*
†14L	Marshall claims Tuvell is **a few cherries short of a sundae.** (The phrase implies "loathsome mental infirmity," which is defamatory *per se,* by OATAnn*e*134(β).)	*N/A*	Ⓘ In context this relies upon items †14Hb,Ia,Ib,K, which are false.

INCI-DENT ID Comp †¶	DESCRIPTION OF DEFAMATORY INCIDENT	DEFAMATORY MATERIALLY FALSE LIE, OF DISCLOSED STATEMENT OF FACT (DGIMF)	DEFAMATORY IMPLICATION (CTXDEFIMPL) Includes opinion based on false or undisclosed facts
†14M	Continuing in the context of †14L, Marshall claims **this ("few cherries") became clear in this passage** *{quoting a long excerpt about Tuvell's PTSD} …*	Ⓛ A diagnosis of PTSD does not entail loathsome mental infirmity.	Ⓘ Any implication that PTSD implies loathsome mental infirmity is false.
†14Na	Marshall claims Tuvell's website and his arguments are similar to certain other **long rambling things** (implying nonsensicality), i.e., other communications via letters, phone calls and emails that he's received from certain unnamed others. (This defames Tuvell and his website.)	Ⓛ Tuvell's website and arguments are fully solid/proven, presented on a state-of-the-art professional website, certainly nowise resembling Marshall's false characterization.	Ⓘ Furthermore, *even if* Marshall's slur is viewed as "opinion," he's relying on false and/or undisclosed underlying facts, namely the other communications he mentions (to gauge their degree of "similarity").
†14Nb			
†14Nc			
†14Nd			
†14Ne			
†14Oa	Marshall claims this is the **first time** (†14Oa) someone has **abused** (†14Ob) his blogsite for a **personal agenda** (†14Oc). (The "first time" is defamatory to Tuvell, as are the other two statements.)	Ⓛ "First time," if factual statement, requires proof (it may be false).	Ⓘ "First time," if opinion (e.g., exaggeration), relies on (false or) undisclosed facts.
†14Ob		*N/A*	Ⓘ "Abuse" refers to the panoply of "sandbagging" (†14Ca), "delayed linking" (†14Cd, Ce), "false representation" (†14Da), "hidden agenda" (†14F), etc., etc. — which are all false.
†14Oc		*N/A*	Ⓘ "Personal agenda" is dealt with in †14F,Ha.
†14Od	Marshall claims Tuvell was **dishonest.** (Defamatory to Tuvell.)	Ⓛ/Ⓘ Whether intended as fact or opinion, this refers to item †14Ob, which is false.	
†14Oe	Marshall claims Tuvell **misrepresented his purpose.** (Defamatory to Tuvell.)	Ⓛ/Ⓘ Whether intended as fact or opinion, this refers to †14Ob,Od, which are false.	

INCI-DENT ID Comp †¶	DESCRIPTION OF DEFAMATORY INCIDENT	DEFAMATORY MATERIALLY FALSE LIE, OF DISCLOSED STATEMENT OF FACT (DGIMF)	DEFAMATORY IMPLICATION (CTXDEFIMPL) Includes opinion based on false or undisclosed facts
†14Of	Marshall claims Tuvell used a **charming device to insult his integrity.** (Defamatory to Tuvell, no matter what "device" is supposed to mean.)	Ⓛ If intended as fact, there was no such "device," or insult.	Ⓘ If intended as opinion, this relies on some undisclosed "device" and insult.
†14Og	Marshall claims it is **obvious** (†14Og) that Tuvell (in his original private email to Marshall) wanted to check to see whether Marshall's **sympathies would lie with his cause** (†14Oh). (Defamatory to Tuvell.)	*N/A*	Ⓘ Not "obvious;" relies on false fact.
†14Oh		Ⓛ Tuvell's original email was sent to "check" on the scope (design vs. implementation) of Marshall's blogsite (not to check on his sympathies).	*N/A*
†14Oi	Marshall claims he **can't be bought** (referring to †14Oj). (Defamatory to Tuvell.)	*N/A*	Ⓘ This "opinion" is based upon undisclosed/false facts concerning bribery/fraud.
†14Oj	Marshall claims Tuvell was "obviously" **looking for a cheap/free expert opinion,** but was underhandedly trying to get it without paying for it. (Defamatory to Tuvell.)	Ⓛ This accusation of attempted theft of valuable professional services is false.	Ⓘ The "opinion" word "obviously" is based upon the false accusation.
†14Ok †14Ol	Marshall claims Tuvell wanted to **use Marshall's valuable work-product (expert opinion) in his crusade against the judge.** (Defamatory to Tuvell.)	Ⓛ Falsity: it was *impossible* (per Judicial Misconduct process rules) to inject any work-product of Marshall's into that process.	Ⓘ "Crusade" is an "opinion" word which is based on various false facts of Marshall's (see the panoply listed in †14Ob).
†14Pa	Marshall calls Tuvell **"desperate asshole" for misrepresenting his motives.** (Defamatory to Tuvell)	*N/A*	Ⓘ Whatever else Marshall accuses Tuvell of, the charge of "desperation" relies on facts undisclosed/false.

INCI-DENT ID Comp †¶	DESCRIPTION OF DEFAMATORY INCIDENT	DEFAMATORY MATERIALLY FALSE LIE, OF DISCLOSED STATEMENT OF FACT (DGIMF)	DEFAMATORY IMPLICATION (CTXDEFIMPL) Includes opinion based on false or undisclosed facts
†14Pb		Ⓛ As factual statement, "misrepresentation of motives" is factually false.	Ⓘ As "opinion," "misrepresentation of motives" relies on other false facts/opinions (see the panoply listed in †14Ob).
†14Qa	Marshall claims Tuvell **earned the ultimate ban** (whatever "ultimate" means, Marshall doesn't define it, but see †14Qb).(Defamatory to Tuvell.)	*{For "banning," see †14Aa.}*	Ⓘ The "opinion" about "earning" and "ultimate" rely on undisclosed facts (certainly, nothing in this Table discloses how/why Tuvell "earned" either).
†14Qb	Marshall states the Tuvell will **not be re-instated** (perhaps this is what "ultimate" means in †14Qa). (Defamatory to Tuvell.)	*N/A*	Ⓘ Marshall prevents Tuvell from trying to "rehabilitate" himself in the eyes of the audience, thereby enhancing/ perpetuating the defamation.
†14Qc	Marshall threatens to **delete all comments** of Tuvell's, if he submits one more comment. (Defamatory to Tuvell.)	*N/A*	Ⓘ This reinforces the defamatory retaliation of †14Qb.
†14Qd	Marshall deplores Tuvell's **lingering stench** on his blogsite.	*N/A*	Ⓘ This over-the-top "opinion" is based upon, and emphasizes, various other undisclosed/false facts/opinions (see the panoply listed in †14Ob).
†14Qe			

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MIDDLESEX SUPERIOR COURT

Trial Court of the Commonwealth Superior Court Department

Civil Docket NO. 1781CV02701

MOTION TO DISMISS WITH PREJUDICE

Walter Tuvell, plaintiff

v.

Jack Marshall, defendant

Pursuant to Superior Court Rule 9A, Defendant hereby moves to dismiss Plaintiff's Complaint with prejudice. The justifications for this Motion are set forth in the accompanying memorandum.

Dated this 16th Day of October, 2017

Jack Marshall

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MIDDLESEX SUPERIOR COURT

Trial Court of the Commonwealth Superior Court Department

Civil Docket NO. 1781CV02701

MEMORANDUM In SUPPORT OF

MOTION TO DISMISS WITH PREJUDICE

Walter Tuvell, plaintiff
v.
Jack Marshall, defendant

FACTS

1) Plaintiff Walter Tuvell contacted Defendant Jack Marshall (that is, me) via my personal email on August 26, 2017. The email regarded Ethics Alarms (https://ethicsalarms.com/), my personal and professional blog, which discusses ethics issues daily and has since October of 2009. The blog also encourages free-wheeling discussions and arguments regarding the issues raised, which I moderate and actively participate in.

I am a professional ethicist specializing in professional ethics and legal ethics particularly. I am a licensed attorney in the Commonwealth [BBO # 321760], and for the past three years I have taught the legal ethics section of MCLE's mandatory Practicing with Professionalism course for new Massachusetts Bar admittees, and teach a similar course in the other jurisdiction where I have an active license to practice law, Washington D.C.

2) Participants in the blog are presumed to have read and agree to the terms of blog use linked to the Home page. In the ABOUT section (https://ethicsalarms.com/about/), I explain that the site is an ethics blog, and is constituted of my opinions, It reads in part,

> "I will usually make strong statements and espouse definite positions in the posts here. The objective isn't to be "right," though if I post an opinion, I believe it. The objective is to provoke thought about the issue that isn't controlled by biases, pre-conditioned reflexes, ideology or rationalizations. This is the same successful formula I employ in the ethics seminars I facilitate across the country for corporations, associations, non-profits, student groups and law firms. I don't need you to agree with me; there are often many legitimate ways to judge an ethical problem. I do need you to follow the Comment Policies. Check them out, please."

The Comment Policies page (https://ethicsalarms.com/comment-policies/) describes what is expected of commenters, and conditions under which they may be banned from commenting.

3) The Plaintiff's email to me read...

> Jack —I've been following your website (https://ethicsalarms.com) since I "discovered" it a couple of months ago. Its About page is especially lucid and luring.
>
> The problem is, your posts don't live up to the About advertisement. Specifically, the About page speaks only about whole-life ethics (a very laudable goal, what I was looking for), but says nothing about partisan/political rants. Yet, it seems like that's what the website does, and only that. Further, everything you say appears to be entirely one-sided (right/conservative/republican is good, left/liberal/democrat is bad).
>
> Is that the way you really see things? Or am I missing something? Thx.— Walter Tuvell (PhD, Math, MIT & U.Chicago — i.e., "not-a-crank")

4) As I have on occasion with other private emails I receive regarding the blog and the issues it covers, I referred to the Plaintiff's email in a post titled, Morning Ethics Warm-Up: 8/27/17 (https://ethicsalarms.com/2017/08/27/morning-ethics-warm-up-82717/comment-page-1/#comment-464837), using it as to begin a discussion of my efforts to be objective and unbiased, since the issue is often raised. I did not use the Plaintiff's name. The post began,

> "I received a nice, polite e-mail from a new reader here who accused me of engaging exclusively in 'partisan/political rants.' Further," he wrote, "everything you say appears to be entirely one-sided (right/conservative/republican is good, left/liberal/democrat is bad)."

> The man is an academic, so one might expect a little fairness and circumspection, but then, the man is an academic. His description is in factual opposition to the contents of the blog. (I'm trying to think of the last Republican leader, conservative or otherwise, I designated as "good"), but I know from whence the impression arises:..."

5) Following this post, the Plaintiff began posting a series of comments on this and other posts, primarily pushing his claims that the blog was partisan in nature, and falsely represented itself as covering other ethics areas, such as judicial misconduct. His first comment, which took umbrage at the fact that I mistakenly had called him an "academic," [I immediately apologized, writing, "*And sorry for the mistake regarding your erudition. I come from a tradition where only scholars and academics attach their degrees and alma mater to their name. I know I don't.* I concluded with this paragraph,

> *"Third: I maintain a website documenting a major cultural/governmental (but not "political/partisan") phenomenon affecting many thousands of Americans yearly, namely Judicial Misconduct (http://JudicialMiscoduct.US). THAT'S the sort of thing I wonder what a non-political/partisan (though legally trained/savvy) ethicist thinks about. Start, say, with the "Smoking Gun" at http://JudicialMisconduct.US/CaseStudies/WETvIBM/Story#smokinggun."*

I did not check his website at first, nor did I read it.

6) By the next day, August 28, 2017 the Plaintiff's comments had become increasingly irrelevant to the topics of discussion and continued to impugn my integrity. At this point, I finally did visit his website. It was not, as he had represented, on the general topic of judicial misconduct, but was actually a single-minded attack on the integrity of Denise Jefferson Casper, United States District Judge of the United States District Court for the District of Massachusetts, the former Deputy District Attorney for the Middlesex District Attorney's Office in Cambridge, Massachusetts. Her offense was ruling against the Plaintiff in one of his frivolous lawsuits, *Tuvell v. IBM, in the Plaintiff's words,* "falsely granting IBM's Motion for Summary Judgment and dismissing the case."

7) It then became clear to me that the Plaintiff's initial contact and subsequent involvement in the blog was undertaken under false pretenses. He wanted free, expert assistance in his vendetta against a Massachusetts judge in a legal matter involving his personal interests, but was neither candid nor honest about this. As a Massachusetts lawyer and a legal ethics specialist, I knew that Commonwealth lawyers are bound by **R.P.C. Rule 8.2: Judicial and Legal Officials:**

> "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or a magistrate, or of a candidate for appointment to judicial or legal office."
>
> Adopted March 26, 2015, effective July 1, 2015.

It is my professional opinion that associating myself in any way with the Plaintiff's vendetta would violate the spirit, and perhaps the letter of this rule.

8) On August 28, 2017 at 6:07 PM, I announced to the blog readers that I had banned the Plaintiff, as I had every right to do as proprietor of the site. As is my practice, I explained the reasons why this was done:

> **ATTENTION: Walt Tuvell is banned from commenting here.** I don't even care to spend any more time on him, but I'll give some background. He sandbagged me. He submitted nothing but whiny posts denying that he had accused Ethics Alarms of being obsessed with partisan political topics, then denied he had done that, then said the all he was looking for was a discussion of a judicial conduct issue (but did this initially with a link in a comment to another commenter, causing me to miss it) then just posted a comment saying that the blog advertised itself as covering judicial misconduct and doesn't (there are **dozens** of judicial ethics posts), and THEN, when I finally get the link to the ethics issue he says he was seeking a reaction to—HINT: if you want a reaction to a specific issue, the best way is to write me at jamproethics@verizon.net, and ask, "What do you think about this?" If it's a good issue, I'll respond like a good little ethicist and jump through your hoop.
>
> But no, Walt began by accusing me of pure partisan bias, and issued bitching comment after bitching comment until, finally, he actually revealed his agenda, and GUESS WHAT? Come on, guess! Walt's "issue" is about **his own case**, and the link goes to **his single issue website**, which you can try to wade through here. The case is ***Tuvell v. IBM***, and skimming his messy post that teeters on the edge of madness, I discern that the reason Walt is interested in judicial misconduct is that the judge decided that his case was lousy, and dismissed it. That obviously means to him that the judge is unethical. I was going to, as a favor to Walt, because I am a nice guy, show my good faith by addressing his issue even though he didn't have the courtesy or honesty of fairness to come right out and say what he wanted. Then I read as much of the entry

on his blog – which purports to be about judicial misconduct in summary judgments generally, but is in fact only about his case — as I could stand, and realized that Walt is, in technical terms — this is an opinion, Walt, not an assertion of fact, you can't sue me: put down the banana — a few cherries short of a sundae. This became clear in this passage.

> Tuvell suffered severe shock/dismay/devastation, and worse. For, Tuvell was/is a long-term victim of whistleblowing/bullying-instigated PTSD, stemming from previous defamatory/abusive workplace incidents he'd experienced more than a decade previously while at another employer, but which was since in remission ("passive"/"dormant" phase). Knabe/Feldman's accusation immediately caused/"triggered" Tuvell to reexperience an acute/"active" PTSD flashback"/relapse.

I used to get letters from people like this, long rambling things with court cites and exclamation points. I answer phone calls from people like Walt, and try to help them if possible, but it's usually futile, and often they keep calling and calling until I have to just duck the calls. And I get e-mails with long, rambling court documents. This is the first time, however, someone has abused Ethics Alarms for a personal agenda. I'm sorry for Walt's troubles, but he was not honest, and misrepresented his purpose by the charming device of insulting my integrity. Obviously, he wanted to check and see whether my sympathies would be with his cause before submitting it for consideration. As I tell my clients, I can't be bought, and you take your chances. Walt was also obviously looking for a cheap, as in free, expert opinion that he could use in his crusade against the judge.

What an asshole! The fact that he may be a desperate asshole doesn't justify wasting my time, and others who responded to him and misrepresenting his motives.

For this, Walt earns the ultimate ban. He will not be re-instated, and if he submits one more comment having been so warned, I will delete every one of his comments so the stench of his abuse no longer lingers here. Can you tell that I'm ticked off?

9) Because the Defendant had been permanently banned and no reinstatement would be considered, I blocked any further e-mail contact from him. Admittedly, I did not anticipate that he would be making demands and threatening a lawsuit, because there was and is no grounds for any.

10) On September 13, 2017, the Plaintiff swore out a summons and a complaint alleging defamation based on the exchanges in the Ethics Alarms comments from August 16-August 28, and demanding $100,000 in damages.

ARGUMENT

1. Plaintiff's claim involved insufficient service of process.

A) As a complaint regarding alleged harm done by a website operated by a Virginia corporation in Massachusetts, the Plaintiff was required to give Defendant 30 days to respond to a Chapter 93A Demand letter. No such letter was ever received or sent. If it had been sent, the Summons and Complaint was still issued before 30 days could have elapsed.

B) The Summons received by Defendant was not delivered by registered mail, not was Defendant able to sign for it. Indeed, Defendant is not even sure exactly when it arrived.

2. Plaintiff's complaint fails to state a claim for which relief can be granted.

"Defamation is the publication, either orally or in writing, of a statement concerning the plaintiff which is false and causes damage to the plaintiff. *McAvoy* 40*40 *v. Shufrin,* 401 Mass. 593, 597, 518 N.E.2d 513 (1988). To establish a claim of defamation, a plaintiff must satisfy the following elements:

First, the defamatory statement must "hold the plaintiff up to contempt, hatred, scorn, or ridicule or tend to impair his standing in the community, at least to his discredit in the minds of a considerable and respectable class in the community." *Tartaglia v. Townsend,* 19 Mass.App.Ct. 693, 696, 477 N.E.2d 178 (1985) (quotation omitted).

Second, the statement must have been to at least one other individual other than the one defamed. *Brauer v. Globe Newspaper Company,* 351 Mass. 53, 56, 217 N.E.2d 736 (1966).

Third, where the speech is a matter of public concern, a defamation plaintiff must prove not only that the statements were defamatory, but also that they were false.[11] *Dulgarian v. Stone,* 420 Mass. 843, 847, 652 N.E.2d 603 (1995); *see also Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 776, 106 S.Ct. 1558, 89 N.Ed.2d 783 (1986) (holding that where plaintiff is a private figure and newspaper articles are a matter of public concern, there is a "constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages").
Finally, the plaintiff must show that he suffered special damages and must set forth these damages specifically. *Lynch v. Lyons,* 303 Mass. 116, 119, 20 N.E.2d 953 (1939).
Yohe v. Nugent, 321 F.3d 35 (1st Cir., 2003)

The Defendant stipulates that the statements that form the basis of the Plaintiff's complaint were published. However, none of the other elements required can be shown, even with unusual leeway.

A) Although the statements alleged to be libelous under the Plaintiff's complaint fail by the lesser standard, Mr. Terrell qualifies as a "limited public figure" under the holding in *LaChance v. Boston Herald, Inc.*, 78 Mass. App. Ct. 910 (2011). Through his own website, he has "actively sought the attention of those visiting the site...and thus "voluntarily inject[ed] himself . . . into a particular public controversy."

The Plaintiff stated at https://ethicsalarms.com/2017/08/27/morning-ethics-warm-up-82717/comment-page-1/#comment-464837:

> " I maintain a website documenting a major cultural/governmental (but not "political/partisan") phenomenon affecting many thousands of Americans yearly, namely Judicial Misconduct (http://JudicialMiscoduct.US)

As a limited public figure, Plaintiff has the burden of showing actual malice, meaning that the alleged defamatory statements must be shown to be made with knowledge that they were false or with reckless disregard of whether they were false or not." He does not meet this burden

B) None of the statements Plaintiff has alleged to be defamatory meet any accepted definition of the term, in online discourse through blog comments or any other medium. All statements erroneously claimed to be defamatory are either...

- **Opinion.** [See Scholz v. Delp, 473 Mass. 242 (2015), which held that it was not defamation for a newspaper to publish opinions based on disclosed facts that did not imply that the writer had knowledge of undisclosed defamatory facts. Such opinions are not defamatory.],
- **Statements that were arguably inaccurate.** [Inaccuracy by itself does not make a statement defamatory. It is inconceivable that this inaccurate account of Yohe's Special Forces training could hold Yohe "up to contempt, hatred, scorn, or ridicule or tend to impair his standing in the community." *See Tartaglia*, 19 Mass. App.Ct. at 696, 477 N.E.2d 178.]

- **Insults.** [An "expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified or unreasonable the opinion may be or how derogatory it is." *Id.* Consequently, Chief May's opinion about Yohe's mental state is not actionable. *Dulgarian,* 420 Mass. at 850-51, 652 N.E.2d 603, quoting *Lyons,* 415 Mass. at 266, 612 N.E.2d 1158.

- **Other statements that no objective observer or reader could believe** "hold the plaintiff up to contempt, hatred, scorn, or ridicule or tend to impair his standing in the community, at least to his discredit in the minds of a considerable and respectable class in the community." *Tartaglia v. Townsend,* 19 Mass.App.Ct. 693, 696, 477 N.E.2d 178 (1985)

[Above from *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)]

Here is the Plaintiff's complete list, noting that it is hard to determine what the complaint is alleging in many cases:

Paragraph 7, pg. 5. Plaintiff complains that Defendant did not notify him of the initial reference to his email on the blog, and that in the post, which never mentioned the Plaintiff by name, I misrepresented his message. This is not defamation, falling under the excluded statements enumerated in *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003): "(2) statements which — although likely false — could not reasonably be considered offensive to the average person in the community."

Paragraph 8, pg. 5. Plaintiff claims that the post mistakenly referring to him as "an academic," a mistake I immediately apologized for (see pg. 4, above) constituted an intentional slur and was defamatory. This is not defamation. Authority: "(2) statements which — although likely false — could not reasonably be considered offensive to the average person in the community."
Yohe v. Nugent, 321 F.3d 35 (1st Cir., 2003)

Paragraph 8, pg. 5. Plaintiff attributes text in the post that began with a reference to his e-mail query as an attack on him personally. He wasn't named in the post, and second, no rational person could

read what was written to be in reference to the Plaintiff at all. This is not defamation. Authority: "(2) statements which ...could not reasonably be considered offensive to the average person in the community." *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

Paragraph 9, pg. 6. Plaintiff complains that various commenters read the post and commented on it, "falsely attacking Plaintiff." Plaintiff makes no offer of proof that alleged "attacks" were false, and consented to submitting to criticism by participating in the blog after reading the conditions and rules, as he admitted that he had at https://ethicsalarms.com/2017/08/27/morning-ethics-warm-up-82717/comment-page-1/#comment-464837.

Paragraphs 10-12, Pg. 7. Plaintiff complains that other commenters criticized him. He consented to this when he commented on the blog.

Paragraph 13, Pg. 8. Plaintiff complains about a rebuttal of his arguments in the thread, alleging that it was false that he complains about can be fairly summarized as "You are wrong." That is not defamation. Authority: "(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action..." *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

Paragraph 14, pg. 8-14. Here the Plaintiff lists the primary statements, "A –Q" that he considers defamation.

A) "I just banned Walt .... He's special."
The Comment policies stated clearly that I could and would ban commenters. Not Defamation. Authority: "1) unrefuted statements of fact.....[do not provide] a basis for a defamation cause of action..." *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

B) "I have already spammed two more posts by the jerk.

- Spamming a Comment is not defamation, Stating truthfully that a comment has been spammed is not defamation. Authority: "1) unrefuted statements of fact.....[do not

provide] a basis for a defamation cause of action..." *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

- "Jerk' is an insult, but opinion, and not defamation. Authority: "...insult, but an opinion, and not defamation." *Dulgarian*, 420 Mass. at 850-51, 652 N.E.2d 603, quoting *Lyons*, 415 Mass. at 266, 612 N.E.2d 1158.

C) "ATTENTION: Walt Tuvell is banned from commenting here .... He sandbagged me." "Sandbagged," as used here, means to gain an advantage by concealing something. This accurately refers to my discovery that the Plaintiff had solicited my views on Judicial Misconduct without revealing his motives. Not defamation: "(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action..." *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

"He submitted nothing but whiny posts..." Not defamation: "(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action..." *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

...denying that he had accused Ethics Alarms of being obsessed with partisan political topics." Not defamation: "(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action..." *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

D) "[He] posted a comment saying that the blog advertised itself as covering judicial misconduct and doesn't..." Not defamation: "(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action..." *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

- Plaintiff writes, "Defendant (falsely) confuses judicial Misconduct with judicial ethics, which are two distinctly/obviously different areas of concern..." Not defamation: "(2) statements which ...could not reasonably be considered offensive to the average person in the community...[do not provide] a basis for a defamation cause of action..." *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

E) "Walt issued bitching comment after bitching comment."

Characterizing a complaint as "bitching" is not defamation: "(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action..." *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

F) "[H]e finally revealed his agenda."

Not defamation. "(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action..." *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

G) "[W]hen I finally get the link to the ethics issue he says he wants a reaction to..."

Not defamation: "(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action..." *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

H) "GUESS WHAT? Come on, guess! Walt's "issue" is about his own case.."

This is not a defamatory statement: "(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action..." *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

- "and the link goes to his single issue website""

Calling a website "single issue" is not defamation, and with every other characterization in my comment, any reader has the opportunity to check my sources. Authority: "Inaccuracy by itself

does not make a statement defamatory. It is inconceivable that this inaccurate account of Yohe's Special Forces training could hold Yohe "up to contempt, hatred, scorn, or ridicule or tend to impair his standing in the community." *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003):

"(2) statements which ...could not reasonably be considered offensive to the average person in the community...[do not provide] a basis for a defamation cause of action..." *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

I) "The case is Tuvell v. IBM, and skimming his messy post..."

I hurt the Plaintiff's feelings by calling his post messy. It is messy. But even if it were not, that isn't defamation: "(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action..." *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

- "that teeters on the edge of madness." This is not defamation: "insult, but an opinion, and not defamation" *Dulgarian,* 420 Mass. at 850-51, 652 N.E.2d 603, quoting Lyons, 415 Mass. at 266, 612 N.E.2d 1158. And "(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action..." *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

Moreover, this statement and the entire comment post that forms the bulk of the Plaintiff's complain was framed by this disclaimer: "...this is an opinion, Walt, not an assertion of fact, you can't sue me." Not defamation: "To determine whether or not a statement is an opinion, a court "must `examine the statement in its totality and in the context in which it was uttered or published. The court must consider all the words used ... [and] must give weight to cautionary terms used by the person publishing the statement.' Finally, the court must consider all of the circumstances surrounding the statement." *Lyons v. Globe Newspaper Co.*, 415 Mass. 258, 263, 612 N.E.2d 1158 (1993), quoting *Fleming v. Benzaquin*, 390 Mass. 175, 180-81, 454 N.E.2d 95

(1983). Here, the qualified language of the statement ("it was *his belief*") makes clear that May was expressing his own opinion about Yohe's mental state on May 11 and 12, 1997. ..." *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

- " Walt is interested in judicial misconduct is the judge decided the case was lousy"

Not Defamation: "(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action..." *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003).

J) "I was going to, as a favor to Walt, because i [sic] am a nice guy, show my good faith by addressing his issue even though he didn't have the courtesy or honesty to come right out and say what he wanted.'"

Again, Plaintiff claims that this is a false characterization. It is how I interpreted his actions, and how I still do. If the Plaintiff had "come right out and said what he wanted," I would have read, "I am challenging the ethics of a judge who dismissed my lawsuit. Would you be willing to review the matter and offer your professional opinion?" My statement was not defamation:
"(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action..." *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

K) "Then I read as much of the entry on his blog.."

Plaintiff says that calling what he regards as a website a blog is defamatory.

It isn't: "(2) statements which ...could not reasonably be considered offensive to the average person in the community...[do not provide] a basis for a defamation cause of action..." *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

- "which purports to be about judicial misconduct in summary judgments generally but is in fact only about his case"

Not Defamation: "(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action..." *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

L) " [I] realized that Walt is, in technical terms ... a few cherries short a sundae."

Not Defamation:

"insult, but an opinion, and not defamation". . *Dulgarian*, 420 Mass. at 850-51, 652 N.E.2d 603, quoting Lyons, 415 Mass. at 266, 612 N.E.2d 1158.

"(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action..." *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

"To determine whether or not a statement is an opinion, a court "must `examine the statement in its totality and in the context in which it was uttered or published. The court must consider all the words used ... [and] must give weight to cautionary terms used by the person publishing the statement.' Finally, the court must consider all of the circumstances surrounding the statement." *Lyons v. Globe Newspaper Co.*, 415 Mass. 258, 263, 612 N.E.2d 1158 (1993), quoting *Fleming v. Benzaquin*, 390 Mass. 175, 180-81, 454 N.E.2d 95 (1983). Here, the qualified language of the statement ("it was *his belief*") makes clear that May was expressing his own opinion about Yohe's mental state on May 11 and 12, 1997. ..." *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003) .

M) I characterized the plaintiff's own words, and my opinion is obviously an opinion. Since the opinion involved words are published for all to see (as were all the words prompting all the comments alleged to be defamatory), my characterization cannot be defamation: "(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action..." *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

N) "I used to get letters from people like this, long rambling..."

The implication that the Plaintiff's blog reminds me of the letters I received from disturbed people is an opinion, and not defamatory: "insult, but an opinion, and not defamation." *Dulgarian*, 420 Mass. at 850-51, 652 N.E.2d 603, quoting Lyons, 415 Mass. at 266, 612 N.E.2d 1158, and "(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action..." *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

- "..things with court cites and exclamation points. I answer phone calls from people like Walt and try to help them if possible, but it's usually futile, and often they keep calling and calling until I have to just duck the phone calls. And I get e-mails with long- rambling documents."

  See above.

- "This is the first time, however, someone has abuse Ethics Alarms for a personal agenda." Plaintiff offers no proof that others have similarly abuses Ethics Alarms for a personal agenda: "1) unrefuted statements of fact.....[do not provide] a basis for a defamation cause of action..." *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)
- "I'm sorry for Walt's trouble, but he was not honest and misrepresented his purpose by the charming device of insulting my integrity." - "(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action..." Yohe v. Nugent , 321 F.3d 35 (1st Cir., 2003). Plaintiff says he was "scrupulously honest." Withholding material information---that he was seeking advice as he tried to impugn a judg -- is dishonesty by omission. I teach this professionally.
- Plaintiff says that my statement "falsely suggests Plaintiff was involved in some sort of bribe/fraud." My statement was "As I tell all my clients, I can't be bought.' This is true. There is no assertion about the Plaintiff being made here whatsoever, and certainly no defamation.
- Plaintiff alleges "defamation" because my characterization that he would use the information he was seeking from me in "his crusade against the judge. Using the information in the Plaintiff's "crusade" simply meant including anything by or from me on his anti-judge website.

My statements were not defamatory: "(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action..." *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

P) "What an asshole! The fact that he may be a desperate asshole.."

Stipulated: such invective, like "jerk" above, is an insult, but insults like "asshole" are not defamatory. From the Mass Law blog:

> (https://masslawblog.com/what-were-they-thinking/is-it-defamatory-to-call-someone-a-dumb-ass/):
> "In dismissing a defamation suit by two politicians who were listed as numbers one and two on a list of "Top Ten Dumb Asses," the Court observed:
>
> The accusation that plaintiffs are top-ranking "Dumb Asses" cannot survive application of the rule that in order to support a defamation claim, the challenged statement must be found to convey "a provably false factual assertion." . . . A statement that the plaintiff is a "Dumb Ass," even first among "Dumb Asses," communicates no factual proposition susceptible of proof or refutation. It is true that "dumb" by itself can convey the relatively concrete meaning "lacking in intelligence." Even so, depending on context, it may convey a lack less of objectively assayable mental function than of such imponderable and debatable virtues as judgment or wisdom. To call a man "dumb" often means no more than to call him a "fool." One man's fool may be another's savant. Indeed, a corollary of Lincoln's famous aphorism is that every person is a fool some of the time.
>
> Here defendant did not use "dumb" in isolation, but as part of the idiomatic phrase, "dumb ass." When applied to a whole human being, the term "ass" is a general expression of contempt essentially devoid of factual content. Adding the word "dumb" merely converts "contemptible person" to "contemptible fool." Plaintiffs were justifiably insulted by this epithet, but they failed entirely to show how it could be found to convey a provable factual proposition."
>
> *Vogel v. Felice*, 2005 WL 675837 (Cal. Ct. App., March 24, 2005).

Though this is a California case and not binding in Massachusetts, particularly as it applies to online arguments, the conclusion seems irrefutable. "Asshole" is not, moreover, sufficiently unambiguous to constitute an assertion of fact.

- "[who] doesn't justify wasting my time,"

The Plaintiff argues that this is defamatory because he says he wasn't wasting anyone's time. I believe every individual is entitled to determine what he or she regards as a waste of time. This is not defamation: "(2) statements which ...could not reasonably be considered offensive to the average person in the community...[do not provide] a basis for a defamation cause of action..." *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003), and "(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action..." *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003

Q) Finally, the Plaintiff argues that banning him from Ethics Alarms is defamatory. Plaintiff read the rules, and consented by participating in the blog discussions. It is my website, and I can ban whoever I want for whatever reason I deem appropriate. Moreover, the statement that I had banned him was true, and cannot be defamatory as a matter of law: "1) unrefuted statements of fact.....[do not provide] a basis for a defamation cause of action..." *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

Conclusion: In the entire complaint there is not one statement that meets the Massachusetts standards for defamation, as defined by statute, case law, and common sense.

3. The Plaintiff's Complaint Fails To State Any Harm or Damages from the Conduct Alleged.

> "The plaintiff must show that he suffered special damages and must set forth these damages specifically." *Lynch v. Lyons*, 303 Mass. 116, 119, 20 N.E.2d 953 (1939).
> Yohe v. Nugent, 321 F.3d 35 (1st Cir., 2003)

In his complaint. Plaintiff fails to show any damages at all. Plaintiff asks for damages "well in excess" of $100,000, while offering no support for that claim whatsoever. Ethics Alarms has an elite readership, and averages approximately a thousand visitors a day. There have been 8009 views of the

8/27 post that is the subject of the complaint, which means no more than 250 individuals read it. Many of those did not read the comments: I do not have the means to determine the number. Even if the statements I made were defamatory as Plaintiff claims, and they were not, there is no way that less than 250 strangers scattered across the world (Ethics Alarms has readers in over a hundred nations), few if any who know who the Plaintiff is, could conceivably cause Plaintiff $100,000 of damages, or any tangible harm at all

Moreover, the Plaintiff, far from mitigating damages, deliberately published his complaint on his own website, and through links, sent readers to the very posts he claims are defamatory.

Conclusion

For the reasons stated, Defendant's Motion To Dismiss with Prejudice should be granted.

ATTACHMENTS

EXHIIT 1: About Ethics Alarms

EXHIBIT 2: Ethics Alarms Comment Policies

CERTIFICATE OF ACKNOWLEDGEMENT OF NOTARY PUBLIC

[Exhibit 1]

About

Ethics Alarms

Updated 2016

[Note: relevant sections are highlighted. On-line version at https://ethicsalarms.com/about/]

Welcome!

The content published here, just to get this out of the way, is copyrighted and original unless otherwise noted. If you want to use it for any purpose, I expect a link and attribution, both on ethical and legal grounds.

My name is **Jack Marshall.** I'm an ethicist, which means I make my living teaching, consulting, speaking and writing about ethics, and a lawyer, and the president of ProEthics, Ltd. I write this blog. If you want to know more about me, there is a biography below.

Ethics Alarms is *not* about me, however. It is about *ethics,* defined as the study of right and wrong, and how to become better at telling the difference. **Although I will frequently discuss issues involving law and the legal system, none of the opinions here should be taken as legal opinions, because they aren't.** My field is ethics, I specialize in legal ethics, but with rare exceptions, I no longer practice law.

Ethics Alarms are the feelings in your gut, the twinges in your conscience, and the sense of caution in your brain when situations involving choices of right and wrong are beginning to develop, fast approaching, or unavoidable. The better your alarms work and the sooner they start sounding, the more likely you are to do the right thing, or at least to use good ethical reasoning to decide what to do. This is a blog that aspires to help keep everyone's ethics alarms in good working order....including mine.

How? By pointing out ethical problems and dilemmas from all segments of society, professions and experiences of life. By applying principles of ethical analysis, and reaching conclusions about what is right, what is wrong, and what remains uncertain. By developing tools, terms and approaches to solving ethics conflicts and dilemmas, and by discussing, arguing, disagreeing, opening doors of perception and closed minds, and by helping us be more alert to ethical issues in our own lives.

I will usually make strong statements and espouse definite positions in the posts here. The objective isn't to be "right," though if I post an opinion, I believe it. The objective is to provoke thought about the issue that isn't controlled by biases, pre-conditioned reflexes,

ideology or rationalizations. This is the same successful formula I employ in the ethics seminars I facilitate across the country for corporations, associations, non-profits, student groups and law firms. **I don't need you to agree with me; there are often many legitimate ways to judge an ethical problem. I do need you to follow the Comment Policies. Check them out, please.**

Ethics Alarms is a project of ProEthics, LTD, an ethics training and consulting firm based in Alexandria, Virginia. The firm emerged to counter the widespread belief that ethics had to be boring and technical, and stands for the proposition that most people are engaged by ethics and care about the resolution of right and wrong when the issues are discussed directly and dynamically.

Ethics Alarms is the blog successor to The Ethics Scoreboard, the ethics commentary website that will continue to serve as an ethics archive and resource.

Like the Scoreboard, Ethics Alarms is dedicated to starting discussions, not ending them, despite the tone of certitude that often invades its commentary. Creating an ethical culture is the shared obligation of everyone, and each of us needs to think critically about what is right and wrong, make our opinions known, and never hesitate to communicate those opinions for fear of being "judgmental." We *should* be judgmental—civil, fair, open-minded, and also willing to hold ourselves to the highest standards of conduct. Living ethically is not always easy, but it becomes easier with thought, debate and practice.

This blog takes positions, attempting to be bold without being reckless. When there is an error or misstatement, I will correct it. When I am wrong, I will admit it. When I have made a mistake, I will apologize for it.

As with the Scoreboard, I will attempt to reply to as many comments as possible. Please keep yours civil and on topic, without foul language or political rants. **Ethics Alarms** takes the position that anonymous posts are unethical, and discourages them, but will begin by allowing them if they abide by the rules of the blog and there is a name of some kind attached to the comment. If you are determined to use a name other than your own, I request that you send me an e-mail with your real name. I can be reached for this and any other purpose at **jamproethics@verizon.net**

[Exhibit 2]

Ethics Alarms

Comment Policies

Revised, July 9, 2017

[Note: relevant sections are highlighted. On-line version at https://ethicsalarms.com/comment-policies/

Ethics Alarms has now been active for seven full years, and there have been more than 160,000 comments on the posts here. It is time to revise the Comment Policies based on what I have learned, and based on what the blog has become and what I want it to accomplish.

This site exists to encourage an ongoing, rigorous and engaging inquiry about ethics, from the perspective of events large and small, in the United States and the world. **Ethics** evolves as societal standards and norms evolve. We accomplish that evolution, usually in enlightened directions, through advocacy, disagreement and debate, using logic, values, principles, systems and facts. The comment section should be a moderated colloquy among intelligent and open-minded readers, and me, as the host and moderator. I have learned a great deal from the site's readers, and hope to continue to do so.

Ethics Alarms offers the following 20 guidelines and rules to advance this mission:

1. **Before you comment for the first time,** check the terms and concepts page if you can. It will avoid misunderstandings

2. **I prefer full names attached to comments.**. If you want to use a screen name, I have to know who you are. You can e-mail me your name at jamproethics@verizon.net, and it will not be divulged. You must enter an e-mail address, and it must be real. If you use a fake e-mail address, your comment will be deleted. No comment signed "anonymous" will be posted. Ever. (Well, hardly ever) If you use a URL as your screen name, I will treat the comment as spam no matter how trenchant your observations are.

3. **I have to approve every first time commenter**, and as with bar associations and Harvard College, the standards used to screen applicants are tougher than the standards applied once you pass. If your initial foray here is gratuitously disrespectful, nasty, snotty, disparaging, obnoxious, or just plain stupid, your comment won't make it out of moderation. Similarly, non-substantive comments expressing approval or disapproval without more are worthless, and I'll reject them. Initiating your relationship on Ethics Alarms with snark, sarcasm, nastiness or ridicule is a bad strategy–as I noted above, you have to earn the privilege of talking to me like that. You may not get a second chance.

4. Regular commenters have special privileges. They can engage in tough rhetoric bordering on insult, as well as brief comments that would not pass muster with a first-timer. But always remember that you are a guest here. Guests are obligated to prove their trustworthiness and good will before they are extended special privileges, and even those privileges have their limits.

5. Political rants are not welcome. In addition, efforts to muddle genuine objective ethical analysis by pressing ideological talking points and bombarding me with links are not appreciated, and won't be tolerated for long, if at all..

6. Keep comments as civil as possible. Ethics Alarms does, at its discretion, permit vulgarity and profanity for style and emphasis. I will show limited tolerance for rude and abusive comments and commenters, depending on the combatants. At my sole discretion, I may extend special dispensation for regular, substantive commenters here who have accumulated good will and trust, even when they cross lines that I would not permit to be crossed by a less-credentialed visitor [*See below*]. While a verdict of "you are an idiot," may occasionally be justified, I may ding comments that include gross personal attacks, subject to the exceptions noted above, unless it has an extremely impressive substantive argument accompanying it. In the heat of debate, Ethics Alarms will tolerate the occasional insult If commenters become overly nasty and personal in their exchanges with each other or habitually so, I will intervene.

7. Ethics Alarms discourages text jargon and abbreviations. "LOL", in particular, is guaranteed to annoy me. Also disfavored are popular slang words designed to denigrate a belief, an individual or political groups, like "Repugs," or juvenile name-calling like "The New York Slimes" or "The Washington Compost."

8. I'm very likely to respond to your comments. Don't try hit-and-run tactics here, and don't think you can get away with an unsupported, badly-reasoned or purely emotional argument and not get called on it. On the other hand, if I don't respond, don't take it personally.

9. Re Links: Relevant links are appreciated. Irrelevant links will cause a comment to be deleted as spam.(*Remember that if you include more than one link, your comment gets automatically stalled in moderation.*)Links to your related blog posts must be supported by a substantive comment on the topic as well: this isn't your bulletin board. Similarly, the URL of your blog is not going to make it into the comment, and if you persist in trying to slip it through, I will start marking the comments as spam. I am happy to plug, including a link to your blog, if you write me first and explain why it is relevant and useful to Ethics Alarms readers, and I concur. Your comment, however, is not a vehicle for spreading your blog information around the web…not here, anyway.

10. **Typos: I regret that WordPress has yet to install a good editing function for comments. Please proof yours.** I will endeavor to fix obvious typos, and if you e-mail me a request to delete or otherwise repair a mis-typed section of a legitimate comment, I will try to reply. I will respect style choices like eccentric punctuation, capitalization, syntax or spelling, but comments that are careless and difficult to read or understand risk being rejected.

11. Me: I reserve the right to sharply express my annoyance with comments that I regard as careless, poorly argued, based on partisan hackery, stupid, unethical or ignorant. I am prone to be testy at comments that fall into any of the following categories:

1) *Those that say I should be writing about "more important things."* I do. But I don't have to write *every* post about the earth-shattering, and trivial incidents can still teach important lessons.

2) *Comments that include* "lighten up," "calm down," "get a life," or anything similar. Please don't presume to gauge my emotional state or dictate it.

3) Comments that accuse me of ignoring topics or not making arguments when in fact other posts on the site *covered* those topics and *did* make those arguments. I don't require that you read everything, but do not make allegations when a simple key word search on the site would disprove them.

4) Putting words in my mouth, or ascribing opinions to me that I have not stated. I hate that.

5) Being snotty about typos. I make mistakes, and appreciate being told about them. Nicely.

6) Mockery without substance.

7) Racist, misogynist and otherwise bigoted rants.

12. On occasion my annoyance may cause my reply to seem excessively severe. In such cases, please point this out, and I may well apologize. I may not, too. If a comment is especially ignorant or dumb, I have been known to bluntly describe it as such, and diagnosis the commenter as the kind of individual inclined to so express himself or herself. I will continue to do so. This is part of my effort to elevate the discussion through negative reinforcement. This is not a site where you can just dash off a barely considered statement and get away with it.

13. **DO NOT accuse me of an *ad hominem* attack** if I judge your intellectual prowess or ethical proclivities based on the quality your post, and state that judgment. That's not what an a*d hominem* attack is, and I'm sick of explaining it.

14. If and when I break my own rules, please call me on it. Politely. I reserve the right to break my rules, but I don't want to do it unintentionally.

15: Ethics Alarms Discipline: Discipline for inappropriate comments is meted out in several ways. If you cross a line, you will usually be warned not to do it again. Occasionally I will insist on an apology to avoid some form of discipline.

16. Banning: If you obliterate a standard here, you may be banned. If you are banned, you can apply for reinstatement by contacting me off-site and sincerely apologizing. Again, I reserve the right to decide who is banned and when. Am I entirely consistent? No, not always. Since the blog launched in 2009, the following offenses have resulted in commenters being banned:

....Repeating the same arguments over and over again while not acknowledging or rebutting counter arguments from others.

...Relying on partisan talking points

...Exhibiting racism or other bias

...Insulting me, in particular by questioning my integrity, honesty, objectivity, intentions, motives, qualifications, or credentials

...Denying the assumptions of the blog, which are that there are ethical standards, that we all have an obligation to help define them, and that right and wrong is usually not situational and subjective.

*...Violating **the Stupidity Rule**, which holds that some people are just too ignorant or stupid to take part in the discussion here, and interfere with the orderly exchange of opinions and ideas.*

...Ignoring warnings

...Lying, or using fake authorities and sources.

17. Other Penalties: Ethics Alarms also has more limited punishments. If it is clear that a commenter is obsessed or over-heated on a certain topic, indicated by repeated re-statements of the same points, I may ban them from posting any more comments on that topic. This is a **"time out."** I am also, with this revision, instituting a **suspension policy.** A suspension of commenting privileges, usually for 30 days, will be issued when I deem a comment from a regular commenter so disrespectful and outrageous that my head explodes.

18. Three Strike Rule for Regulars: Occasionally an esteemed commenter will make a comment that embarrasses him or her with uncharacteristic excess. Their status here earns them three such mistakes, unless it is so egregious that I feel it requires immediate redress. This usually occurs when the comment insults me.

19. Grandstanding: If you make grand and indignant exit, and announce your permanent withdrawal from the blog, you are gone for good. An e-mail to me with an appropriate apology and a request to be reinstated will occasionally work if you change your mind. Maybe. Don't count on it.

20. The Comment of the Day: Especially excellent or provocative comments are sometimes re-published as a "Comment of the Day." Whether such a comment is actually awarded this distinction is somewhat arbitrary and dependent on too many factors to list. Many wonderful comments do not get selected. Again, if yours is one of them, don't take it personally.

Finally, PLEASE don't write comments on this page. Nobody will see them. If you have a comment on the comment policies, e-mail me directly at jamproethics@verizon.net, or make them on a current post, where I will see them.

Affidavit of Jack Marshall, Attorney at Law
(Massachusetts and District of Columbia)

In the Commonwealth of Virginia, City of Alexandria

The undersigned, **Jack Marshall**, being duly sworn, hereby deposes and says,

Regarding the information stated in the attached Motion to Dismiss in the case of

Walter Tuvell, plaintiff v. Jack Marshall, defendant (Civil Docket NO. 1781CV02701)

Filed in Middlesex Superior Court, Massachussetts, Trial Court of the Commonwealth Superior Court Department,

I declare that, to the best of my knowledge and belief, the information herein is true, correct and complete.

EXECUTED THIS 16 DAY OF Oct, 2017

Jack Marshall

Certification of Acknowledgment of Notary Public

State of Virginia City of Alexandria

The foregoing instrument was acknowledged before me, a Notary Public, the 16 day of OCTOBER, 2017 by JACK MARSHALL, the person whose name is subscribed to within the instrument and acknowledged to me the he executed the same in his authorized capacity, and that by his signature on the instrument the person or entity upon which the person acted, executed this instrument.

CHECK ONE OF THE FOLLOWING (REQUIRED):

__ Personally known to me - OR - __ Produced identification

Type of Identification Produced: VIRGINIA DRIVERS LICENSE

WITNESS my hand and official seal

REX MARSHALL
NOTARY PUBLIC 7025520
COMMONWEALTH OF VIRGINIA
MY COMM. EXPIRES DECEMBER 31, 2020

Signature of Notary Public

REX MARSHALL
Print Name of Notary Public

My Commission expires: 12-31-20

Superior Court of the Commonwealth of Massachusetts
County of Middlesex

Walter Tuvell
836 Main St.
Reading, MA 01867
Plaintiff, Pro Se

v.

Jack Marshall
2707 Westminster Place
Alexandria, VA 22305
Defendant

Case № 1781CV02701

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

MEMORANDUM (IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS)[1]

Plaintiff hereby files this Memorandum in Opposition **("Opp")** to Defendant's Motion (and Memorandum) to Dismiss **("Diss").**[2]

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1 Throughout this document, all dates are implicitly understood to occur in the year 2017. Reference notations used throughout: **Comp** = Plaintiff's original Complaint (Sep 13); **Diss** = Defendant's Memorandum in Support of Motion to Dismiss (Oct 16); **Opp** = the instant Memorandum in Opposition (Oct 25); **Exh** = Exhibit(s); ℘ = page(s); ¶ = paragraph(s); **§** = section(s); **ƒ** = footnote(s); **MRCP** = Massachusetts Rules of Civil Procedure; **MSCR** = Massachusetts Superior Court Rules; **(ABA) MRPC** = (American Bar Association) Model Rules of Professional Conduct ("Lawyer Ethics"). Where source-document paragraphs are unnumbered (or inadequately/ambiguously numbered), and no better reference technique is available (such as a brief quotation indicating the referent), we fabricate our own (informal) per-page paragraph designators: a *partial* initial paragraph (if present, and *including* structural elements, such as headings) being designated **#0,** the first *full* paragraph being designated **#1,** etc. (or, *negative* numbers (including **#−0**) if counted from the *bottom* of the page).

2 As a general matter, we note that (i) Diss appears to be rendered throughout in 10-point font-size. Since MSCR 9A(a)(5) specifies 12-point font-size, the 10-point size is (by standard typographical convention) acceptable only in footnotes (though Diss has no footnotes). That, together with (ii) Diss's page-length, and the fact that (iii) Diss's side-margins are configured at only ¾″ (standard "legal" convention is 1″), renders Diss in violation ("too dense," "too voluminous," not counting optional/secondary/*pro forma*

DISMISSAL OR SUMMARY JUDGMENT?

While Defendant styles his Oct 16 Motion (with Memorandum) filing(s) as for (i) "Dismissal" (presumably meaning MRCP 12(b)(6), though unstated in Diss; *cf.* "MRCP 8(a)(1) 'notice pleading'," and/or "*Twombly/Iqbal*-style 'plausibility pleading'"), his Motion *may* also, at the Court's discretion/determination, (later) end up being suited/treated as a (ii) Motion for "Summary Judgment" (MRCP 56(b), though unstated in Diss, hinging on "DGIMF," *infra*). Hence Plaintiff herein, mindful/anticipatory of the "Dismissal-to-Summary-Judgment 'Conversion Clause'" of MRCP 12(b),[3] indicates/"flags" via the editorial tag/rubric **"DGIMF,"** (some of) the

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"boilerplate" elements, such as blocks of caption/signature/certification/hearing/appendices/etc.) of the (letter and spirit of) MSCR — absent prior/advance leave of Court (though Plaintiff has not been notified of such). *NB:* Action-initiating Complaints are exempt from the strictest of these procedural formatting rules/guidelines, by judicial policy/design/intent (particularly with respect to *pro se* litigants).

3 To wit (emphasis added): "the motion [to dismiss] shall be treated [at the discretion/determination of the Court] as one for summary judgment … **provided … all parties shall be given <u>reasonable opportunity to present all material</u>** made pertinent to such a [summary judgment] motion." See also ƒ17 *infra.* Pursuant to this provision, nothing in this Opp is to be construed as waiver by Plaintiff of "reasonable opportunity to present all material made pertinent." In particular, **Plaintiff at this Motion-to-Dismiss stage need make *<u>only</u> claims/allegations,* and *<u>need</u> not (but <u>may</u>: MSCR 9A(a)(2))* make proffer of *proof/evidence* of said claims/allegations** — though he is in fact ready/willing/able to do so later (even in the present premature/incipient/unripe posture of the case if need be, absent discovery/deposition/etc.), **if/as/when invited/ordered to do so by the Court:** http://JudicialMisconduct.US/CaseStudies/TUVELLvMARSHALL. First, though, Defendant must be required by the Court to indicate his demurrals precisely, with specificity/particularity (in the sense of MSCR 9A(b)(5)(i)), which Defendant has unfairly not currently provided adequately/consistently/fairly in Diss, relying instead too much on "generalized/unspecified/speculative/conclusory innuendo." *Until such time* (i.e., "conversion to Summary Judgment," with MSCR 9A(b)(5)(i) requirement for specificity/particularity language by Defendant), Plaintiff hereby issues this: **<u>"blanket denial/rejection of Defendant's claims/assertions."</u>** For the *time being* (Motion-to-Dismiss), Plaintiff is content to proffer here just the single "smoking gun" evidence, **"Exhibit A, OppExhA"** attached hereto (MSCR 9A(a)(2)) — and not (yet), for example, excerpts from his own website (which is independently available at http://JudicialMisconduct.US).

“Disputed Genuine Issues of Material Fact” (MRCP 56(c)) that may be relevant to a potential (later) Summary Judgment determination — noting that the *mere existence (without deciding “who wins”) of even a single DGIMF* (asserted in good faith) already defeats a Motion for Summary Judgment (and hence *a fortiori* a Motion for Dismissal).

RESPONSE TO “FACTS” SECTION (DISS℘2–6)

Diss℘3¶2 *(et passim, ad nauseum; DGIMF)* — The mere *assertion* by Defendant, in this place and throughout Diss, that his EthicsAlarms blog “is constituted of [his] opinions” (hinting “only,” as opposed to “facts”) is not dispositive, cannot be trusted, and is in many places disputed by Plaintiff (DGIMF). Instead, in fact, the character of any utterance (oral or textual; with respect to a defamation action) as “fact vs. opinion” is a determination reserved for the ultimate fact-finder (judge (in a bench trial), or jury (as in the present case)). And that is a highly non-trivial determination indeed,

being in fact **the most difficult and complicated question**[4] to be addressed/answered (by ultimate fact-finder) in a defamation action — particularly with respect to the aspect of so-called **"Contextualized Defamatory Implication,"** herein indicated/"flagged" via the editorial tag/rubric **"CTXDEFIMPL."** That is: the fact-vs.-opinion character of a defamatory (oral or textual) utterance can be determined/decided (by ultimate fact-finder) only by a totality-of-circumstances contextual analysis, necessarily including the entire spectrum/nexus of implications/deductions adhering to it:[5]

> To determine ***whether or not*** **a statement is an *opinion,*** a court must examine the statement in its *totality* and in the *context* in which it was uttered or published. The court must consider *all the words* used … Finally, the court must consider *all of the circumstances* surrounding the statement. … Of course, the fact that a statement is an **opinion does not**

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4 In particular, the distinction/difference between "fact vs. opinion" is **decidedly not "easily distinguishable"** — instead, it's highly nuanced/shaded/contingent/nontrivial. Yet, Defendant falsely trivializes this issue on his blogsite (in a post entitled "Now THAT'S Defamation …," https://ethicsalarms.com/2017/09/30/now-thats-defamation, Sep 30). Importantly, "facts" are *independent* of "opinions," that is, facts are objectively verifiable/falsifiable (provable/disprovable), no matter what the defamer subjectively "thinks/opines." Of course, at the time of that post, Plaintiff had already filed the instant defamation/"cyberlibel" action. The only reason (conjecturally) that Defendant blogged about such "triviality" of defamation was to "further slime Plaintiff's suit." The problem is: in doing so, Defendant falsely misleads/deceives his own (> 3,200, Comp℘4¶5) "faithful" readers/followers, thereby committing the very height of legal/ethical hypocrisy/irresponsibility. *Example of non-trivial fact-vs.-opinion interpretation of utterances (oral or textual):* "Do President Trump's so-called 'Travel Ban Executive Orders,' nominally issued in the name of 'national security,' in actuality comprise 'dog-whistle innuendos for racial/religious/national-origin bias/discrimination,' or not?"

5 See generally *Fact and Opinion in Defamation: Recognizing the Formative Power of Context,* Rodney W. Ott, 58 Fordham L. Rev. 761 (1990, http://ir.lawnet.fordham.edu/flr/vol58/iss4/8), which begins with these words: "Despite decades of modern first amendment [defamation] litigation, courts continue to struggle with the basic distinction between fact and opinion."

> **automatically shield it from a defamation claim.** After all, expressions of "opinion" may often *imply* an assertion of objective fact. Thus, a cause of action for defamation may still be sustained where an opinion **implies the allegation of [disclosed or] undisclosed defamatory [false] facts as the basis for the opinion [we call this "CTXDEFIMPL"].** — *Yohe v. Nugent,* 321 F.3d 35 (First Cir., 2003; internal quotes/cites omitted, emphasis added).

Diss$_{\wp}$4¶5 — Defendant writes falsely (DGIMF): "posting a series of comments [a.k.a. 'blog-posts'] on this and other posts, primarily pushing his claims that [i] the blog was partisan in nature, and [ii] falsely represented itself as covering other ethics areas, such as judicial misconduct." Instead, in fact, Plaintiff *never made even a single claim in any blog-post* about either of these two items [i], [ii].[6]

Diss$_{\wp}$4¶5 — Defendant writes falsely (DGIMF): "I did not check[/visit] his website at first [nor, seemingly, has he *ever* in-good-faith done so], nor did I read[/understand/comprehend] it." Under the assumption that Defendant writes truthfully here (this being a "statement against his self-interest," hence presumptively true), then Defendant here self-declares/admits his culpability/commission of **"actual malice,"** defined as: (i) **knowledge of falsity** (noting that "knowledge" encompasses

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6 Indeed: issue [i] was raised by Plaintiff only in Plaintiff's original email to Defendant (not a blog-post), then introduced to Defendant's blog by Defendant himself (improperly incompletely/excisively as a partial quotation, hence later merely/properly completed via full quotation by Plaintiff; OppExhA$_{\wp}$7), as an observation (not a "claim") of politicism/partisanship, begging clarification-of-scope; while issue [ii] was never raised (what was raised instead was a *query* about scope of the EthicsAlarms website, not a *claim/accusation* of false representation).

"constructive knowledge ('should-have-known')," by having been referenced directly to Plaintiff's website; OppExhA℘7); and/or (ii) **reckless disregard of the truth** (by "recklessly neglecting/refusing to visit/read Plaintiff's website"). Opp℘11 *infra*.

Diss℘4¶6 — Defendant writes falsely (DGIMF): "Plaintiff's comments had become [i] increasingly irrelevant to the topics of discussion and [ii] continued to impugn my integrity." Instead, in fact, [i] the *one-and-only* "topic of discussion" that Plaintiff introduced (at OppExhA℘7, in his first/initial post) was that regarding Judicial Misconduct (as quoted in Diss℘4¶5 [Defendant writes falsely (DGIMF) "I concluded with this paragraph," whereas in fact it was Plaintiff who posted that quoted paragraph]). Nowhere did Plaintiff [ii] "impugn" Defendant's integrity (Plaintiff only sought clarification to his initial email *query* concerning scope of Defendant's blogsite; OppExhA℘7).

Diss℘4¶6 — Defendant writes falsely (DGIMF): "[i] [Plaintiff's website, http://JudicialMisconduct.US] was not, as he had represented, on the general topic of judicial misconduct, but [ii] was actually a single-minded attack on the integrity of [Judge] Denise Jefferson Casper. … Her offense was ruling against the Plaintiff in one of his [iii] frivolous lawsuits, *Tuvell v. IBM*." Instead, in fact, [i] Plaintiff's website was/is indeed wholly devoted to the general topic of Judicial Misconduct, as Plaintiff correctly represented;

while his [ii] attack on Judge Casper and [iii] discussion of his (non-frivolous [and certainly never nominated as such by any court]) lawsuit both comprise just *one (only) example* (albeit the leading/prototypical example) of Judicial Misconduct, appearing as a "Case Study" on Plaintiff's website (with more Case Studies still in process).

Diss$_{\wp}$5¶7 — Defendant writes falsely (DGIMF): "Plaintiff … [i] false pretenses … [ii] wanted free, expert assistance … [iii] was neither candid or honest about this." Instead, in fact: [i] Plaintiff never made any "false pretense" about anything, much less about [ii] "free, expert assistance,"[7] and was [iii] everywhere scrupulously "candid and honest."

Diss$_{\wp}$5¶7 — Defendant writes falsely (DGIMF), concerning his citation of MRPC 8.2(a).[8] For: (i) That rule is predicated upon "a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity,"

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7 Defendant's "freeness" accusation is particularly puzzling/crazy, given that all the services available on https://EthicsAlarms.com are already 100% free-of-charge, to all-comers, always. It appears (without Defendant clarifying) that Defendant is insinuating that Plaintiff was somehow attempting to "steal" some sort of "expert witness/opinion" paid-service, such as Defendant peddles elsewhere (at ProEthics, Ltd., https://ProEthics.com); but Plaintiff never contemplated that, not even for a nanosecond. Finally, the actual language that Defendant used in his blog-post (but falsely omitted from Diss$_{\wp}$5¶7) charged that Plaintiff was seeking "expert opinion that he could use in his crusade against the judge" (OppExhA$_{\wp}$16); but it was "LITERALLY IMPOSSIBLE" for Plaintiff to inject/"use" any such "expert opinion" in his Judicial Misconduct activities. All this is explained in Comp¶14·O (on Comp$_{\wp}$12–14). DGIMF.

8 Defendant uses the mis-moniker "R.P.C.," instead of the proper/correct "MRPC," with emphasis on the "Model," as clarified ever since the late-1970's era, and the Kutak Commission. https://en.wikipedia.org/wiki/American_Bar_Association_Model_Rules_of_Professional_Conduct; https://www.americanbar.org/groups/professional_responsibility/resources/report_archive/kutakcommissiondrafts.html; http://www.kutakrock.com/kutak-commission; Ronald D. Rotunda, *Legal Ethics in a Nutshell (Third Ed., 2007),* Thomson/West, $_{\wp}$3–5.

whereas instead, in fact, all of Plaintiff's representations (regarding *Tuvell v. IBM,* or otherwise) are quite true (as any competent lawyer can verify at-a-glance, in the case of *Tuvell v. IBM*). Further: (ii) If Defendant were *really* interested in his own legal ethics (which is why Plaintiff approached him in the first place), he'd instead have consulted/obeyed MRPC 8.3(b): "A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority."

Diss¶8 (on Diss℘5–6) — It is agreed that Defendant has the right to ban anyone from his blogsite — provided it's not for an illegal/wrongful reason, as here. However, Defendant's writing in explaining his reasons for the banning (as quoted in Diss¶8; OppExhA℘15–16) is false (DGIMF). This falsity is explained in detail at Comp¶14·A–Q (on Comp℘7–15).

Diss℘6¶9 — Defendant writes falsely (DGIMF): "Because … I blocked any further e-mail contact from him." Instead, in fact, the two acts of (i) "banning" someone from a blogsite, and (ii) "blocking email" from someone, are two completely distinct/independent/orthogonal/unrelated activities. And in any event, (iii) Defendant's website itself continued to prominently advertise, unconditionally (but falsely, emphasis added): "*I <u>can</u> be reached*

for this and <u>any</u> other purpose at **jamproethics@verizon.net**."[9,10]

RESPONSE TO "ARGUMENT" SECTION (DISS℘7–19)

As an initial observation, we observe that a significant percentage of Diss's "Argument" section is mere "boilerplate blather," *a propos* of nothing. Hence, such boilerplate is properly passed over in silence here.

Diss℘7¶1A — Defendant writes falsely, concerning MGL Pt.I Tit.XV 93A (specifically, its provision for a "demand letter," §9(3)). Instead, in fact, MGL 93A is a consumer protection law, applicable only to unfair/deceptive acts/practices in the business/conduct of trade/commerce. The instant defamation action is taken under the law of tort, not of statute MGL 93A (which is, therefore, in no sense applicable in the instant case).[11]

Diss℘7¶1B — Defendant writes falsely: "Summons … was not delivered by registered mail." Instead, in fact, Plaintiff's service of (Comp and) Summons was fully compliant with the Rule, MRCP 4(e)(3) (which does not require so-called "registered" mail; Plaintiff used "certified" mail), as

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9 Certainly, Defendant never notified Plaintiff that his emails were being blocked. And, now, Plaintiff doubts Defendant has ever implemented such blocking at all. DGIMF.

10 For a recent case concerning the "ethics of spam filters as inexcusable neglect," see *Emerald Coast Utilities Authority v. Bear Marcus Point, LLC,* __ So.3d __ (Fla. 1st DCA, No. 1D15-5714, 10/6/2017) (on rehearing), 2017 WL 4448526.

11 Indeed, in a defamation action, it *does not even make sense* for a "pre-defamation" demand letter to be required, since the damage as already been done. Thus, it's incomprehensible why Defendant contends/pretends otherwise. (Though, in fact, Plaintiff did send a demand letter to Defendant — but, as a simple/hopeful/unrequired courtesy, not as a requirement. Comp℘15¶16.)

proven in Plaintiff's Proof of Service (filed with this Court on Sep 25).[12]

Diss℘7¶2 — Defendant writes falsely, where he quotes/cites *Yohe v. Nugent's* quotation/citation of *Lynch v. Lyons,* regarding "special damages" (as distinguished/opposed to *per se* defamation).[13] Indeed, in fact, while Defendant quotes/cites *Yohe v. Nugent* "sort-of more-or-less 'literally correctly'," he does so only improperly/excisively/out-of-context.[14] Namely, he falsely conceals that said quotation/citation is, not only mere *dicta* without precedential *(stare decisis)* value/force, but most relevantly it speaks only to (oral) *slander*, as opposed to the (textual) *libel* involved in the instant case.[15]

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12 In Diss℘7¶1B, Defendant *may* be objecting to the *manner* in which he *"received"* service (as opposed to any shortcoming of Plaintiff's manner of "providing" service). *If so,* that would still be equally false, but would be even more absurd/inane/insane/insipid/ frivolous (it's almost beyond belief that a lawyer/Defendant would be so unethical/ shameless/arrogant as to try to "put a fast one over" on the Court like this) — given that Defendant himself has already long ago (Sep 21) freely self-declared/admitted (*cf.* Plaintiff's Proof of Service), "against self-interest" (hence presumptively [and even, in this case, provably] truly), that **Defendant did indeed *actually* receive service:** "Although the *manner* in which the paper *reache[s]* the attorney or party *[i]s not essential*, *actual* delivery [i]s *crucial*" (MRCP 5(d), Reporter's Note 1973, emphasis added).

13 See ƒ15 *infra.*

14 *Six-lines aphorism of Cardinal Richelieu:* "If you give me [just/merely] six lines written by the hand of the most honest/honorable of men, I will find something [falsely out-of-context] in them which will hang him."

15 *Sharratt v. Housing Innovations,* 365 Mass. 141 (Mass. 1974) (already cited at Comp℘17ƒ3) (i) explicitly/expressly holds/pronounces (emphasis added): **"[W]e now hold that *all libel* is actionable *per se* [as opposed to *per quod*]."** The footnote to *Sharratt* further (ii) explains that *"per se"* ("obvious," "facial," "on-its-face," "not requiring extraordinary/specialized study/explanation/interpretation," at least to the community-of-interest) entails, by definition, "without pleading special damages [usually monetary/economic/commercial];" and it also (iii) explicates/emphasizes the differing law of (oral) slander vs. (textual) libel, with reference to *Lynch v. Lyons.*

Diss℘8¶A — The classification of Plaintiff as a "limited- (as opposed to all- or general-) purpose public figure" **(LPPF)** (in the sense of, say, *LaChance v. Boston Herald*)[16] is a "particularized determination" for this Court (not Defendant) to make (*Bruno & Stillman v. Globe* 633 F.2d 583, 589 (First Cir. 1980), noting that the concept is in legal limbo/flux in the Internet era (Katherine D. Gotelaere, *Defamation or Discourse?: Rethinking the Public Figure Doctrine on the Internet,* 2 Case W. Res. J. L. Tech. & Internet 1 (2011)). Be that as it may, Defendant writes falsely (emphasis added): "[i] [Plaintiff] has the burden of *showing* actual malice … [ii] He does not meet this burden." Instead, in fact, the only practical consequence of the LPPF classification at this stage of proceedings (Motion to Dismiss (or, potentially, Summary Judgment, Opp℘2 *supra*)) is Plaintiff's burden to merely [i] *plead/claim/assert* (not *show/prove*) "actual malice" (*LaChance v. Boston Herald; Biro v. Condé Nast,* USCA Second Cir №14-3815-cv (2015)); and this burden he has [ii] obviously met (and is continuing to meet, again, herein) (Comp℘16¶18; Opp℘5 *supra*).

Diss℘8¶B — Defendant writes falsely: "None of the statements Plaintiff has alleged … meet any accepted definition …" DGIMF. CTXDEFIMPL.

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16 Noting, though, that since Defendant also qualifies as a "media" defendant, the *Restatement (Second) of Torts* (§580A Cmt.h, §580B Cmt.) applies: the same standard of fault — whether it be "negligence" or "actual malice" (depending on the plaintiff) — should apply to media and non-media defendants alike.

Diss℘9¶#4 — Defendant writes falsely: "… hard to determine what the complaint is alleging in many cases," (falsely) indicting Comp's degree of "particularity." Instead, in fact, Comp cannot be improved in that respect.[17]

Diss℘9 at "Paragraph 7, pg. 5" — Defendant writes falsely: no defamation is claimed in Comp℘5¶7.

Diss℘9 at "Paragraph 8, pg. 5" — Defendant writes falsely: Defendant's attribution to Plaintiff of being "an academic" (OppExhA℘1) *is* defamatory,[18] because (i) Defendant intended it to be defamatory,[19] and (ii)

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17 Namely, Comp's usage of its (i) "†" convention, and (ii) everywhere-interpolated comments, are expressly designed for (and succeed at) the very purpose of the "particularity" requirement (Comp℘16¶17). ***Notice:*** In this regard of "particularity," Plaintiff hereby takes this opportunity to proactively/voluntarily correct an **error** in Comp (which, though, has no further ramifications for the instant case, because it was a side-remark, which Plaintiff nowhere relies upon), with his apology. At Comp℘17ƒ5, *Alba v. Sampson* was inadvertently misquoted as standing for the proposition, "Summary judgments are disfavored in defamation cases" — whereas the correct quote proposes the opposite. *However,* we do here note that said *"favor" extends no further than the requirement for "particularity"* in "Pleading Special Matters" (MRCP 9(b)), which Comp has accomplished (Comp℘16¶17), as just noted: "[If] allegedly defamatory statement[s] [are] set out verbatim [actually, only "particularity" is required, by MRCP 9(b)] and publication and extrinsic facts are *stated with particularity* [at Motion-to-Dismiss stage, then] the plaintiffs' … complaint is to be analyzed under the *traditional standard* governing rule 12(b)(6) motions [Motion-to-Dismiss], leaving fatal defects in the potential proof to be more properly decided under Mass.R.Civ.P. 56 [Summary Judgment], after the *completion of a more expanded record*." — *Eyal v. Helen Broadcasting,* 411 Mass. 426 (1991) (emphasis added, internal citations omitted).

18 Plaintiff concedes, though, that this "academic" defamation is not actionable *as to Plaintiff,* for the simple reason that it did not identify Plaintiff to others. The reason the "academic" vignette has been included in the narrative is that it illustrates the "baked-in mindset/pattern" that Defendant held against Plaintiff from the very beginning. And, we have no insight/guarantee that Defendant didn't have pre-knowledge about Plaintiff (say, by "Googling") before issuing the "academic slur." These are questions for the ultimate fact-finder: Why else would Defendant be so antagonistic against Plaintiff blindly/right-off-the-bat? Was Defendant really hateful of all well-educated people? Was Defendant using academicism as a "set-up" so his later attacks would seem "justified?"

19 For a more full-throated harangue by Defendant "against academics" (in the "purest" form of "academics," namely "colleges" and "professors," which Defendant originally viewed Plaintiff as), see his blogpost at https://ethicsalarms.com/2017/09/20/ethics-

(some of) the audience on Defendant's website considers it to be defamatory. Comp℘5¶8–9. CTXDEFIMPL. Furthermore, (iii) Defendant's claimed "apology" may speak to mitigation (see Opp℘18 *infra*) (at trial-time, not Motion-to-Dismiss stage), but it doesn't blot out the original defamation.

Diss℘9 at "Paragraph 8, pg. 5" — Defendant writes falsely: (i) the referenced post (OppExhA℘1) *is* an attack on Plaintiff personally (albeit unidentifiably, ƒ18 *supra*). Further, (ii) "no rational person … average person in the community" is false, because the "community" in question is the "EthicsAlarms community," so Comp℘5–6¶8-9, and the preceding paragraph (and its footnotes ƒ18–19), *supra,* are applicable. CTXDEFIMPL.

Diss℘10 at "Paragraph 9, pg. 6" — Defendant writes falsely: "no offer of proof," because no such offer is required/acceptable at Complaint-time (some is *now* presented herewith, as OppExhA; ƒ3 *supra*). And, yes, the attacks therein are false (and defamatory). DGIMF. CTXDEFIMPL.

Diss℘10 at "Paragraph 1–2, pg. 7" — Defendant writes falsely: while Plaintiff consented to reasonable criticism from other commenters, he did not consent to false/defamatory/illegal/wrongful criticism. CTXDEFIMPL.

Diss℘10 at "Paragraph 13, pg. 8"[20] — Defendant writes falsely: no

observations-on-the-trump-deranged-profs-2016-post-election-freak-out.

20 Beginning at this place (and many places thereafter), Defendant (falsely) quotes/cites *Yohe v. Nugent* for the proposition that: "statements of opinion based upon disclosed facts … [do not provide] a basis for a defamation cause of action." But, while this quote/cite is "sort-of more-or-less 'literally correct'," it is really false (just as Defendant's other quote/cite of *Yohe v. Nugent* concerning "special damages" was false, as explained

defamation is claimed in Comp℘8¶13.

Diss℘10 at "A" — Defendant writes falsely: "the act of banning [OppExhA℘15] was not defamatory" (paraphrased). It *was* defamatory (CTXDEFIMPL), as explained at Comp℘8¶14·A.

Diss℘10 at "B" — Defendant writes falsely: the (i) spamming and the (ii) "jerk" insult (OppExhA℘14) *are* defamatory (CTXDEFIMPL), as explained at Comp℘8¶14·B.[21]

Diss℘11 at "C" — Defendant writes falsely: "sandbagged … without revealing his motives … whiny … denying," as explained at Comp℘8¶14·C, ℘9¶14·F, ℘9¶14·G, ℘10¶14·J. DGIMF.

Diss℘11 at "D" — Defendant writes falsely: "posted a comment … confuses …," as explained at Comp℘8¶14·D. DGIMF.

Diss℘12 at "E" — Defendant writes falsely: "bitching comment," as explained at Comp℘9¶14·E. DGIMF.

Diss℘12 at "F" — Defendant writes falsely: "finally revealed," as explained at Comp℘9¶14·F. DGIMF.

Diss℘12 at "G" — Defendant writes falsely: "finally get the link," as

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supra, ℘10). In this case, the falsity derives from the construction: "disclosed facts." Defendant pretends this construction means "*any* disclosed facts" (even "*false* statements of fact," which is how Defendant consistently applies it), whereas the construction obviously does mean "*true/correct/valid* disclosed facts, *only*."

21 Noting that Defendant has **destroyed evidence (obstructed justice)** by "spamming"/ deleting (OppExhA℘14) the two posts from his blogpage mentioned at Comp℘8¶14·B.

explained at Comp℘9¶14·G. DGIMF.

Diss℘12 at "H" — Defendant writes falsely: "about his own case … single issue," as explained at Comp℘9¶14·H. DGIMF. (Defendant's further comment about "average person in the community" has been addressed at Opp℘13 *supra;* CTXDEFIMPL.)

Diss℘13 at "I" — Defendant writes falsely: "messy post … edge of madness … opinion … not assertion of fact … lousy," as explained at Comp℘9¶14·I. DGIMF.

Diss℘14 at "J" — Defendant writes falsely: "didn't have the courtesy or honesty," as explained at Comp℘10¶14·J. DGIMF.

Diss℘14 at "K" — Defendant writes falsely: no defamation is claimed at Comp℘10¶14·K (the part Defendant is addressing here) regarding Defendant's mischaracterization of Plaintiff's website as a "blog."

Diss℘15 at "L" — Defendant writes falsely: "a few cherries short of a sundae," as explained at Comp℘11¶14·L. CTXDEFIMPL.

Diss℘15 at "M" — Defendant writes falsely: "I characterized the plaintiff's own words," as explained at Comp℘11¶14·M. DGIMF. CTXDEFIMPL.

Diss℘15 at "N" — Defendant writes falsely: "… long rambling…," as explained at Comp℘11¶14·N. DGIMF. CTXDEFIMPL.

Diss$_{\wp}$16¶ at 1st Bullet — Defendant writes falsely: “court cites and exclamation points,” as explained at Comp$_{\wp}$11¶14·N. DGIMF. CTXDEFIMPL.

Diss$_{\wp}$16¶ at 2nd Bullet — Defendant writes falsely: “Plaintiff offers no proof.” This is a meaningless *non sequitur,* no doubt intended to obfuscate: (i) the “first time” assertion is Defendant’s own, not Plaintiff’s, so can be taken at face value as true; (ii) nothing hinges on whether or not this is the “first time” anyway (it only matters that Defendant asserts so).

Diss$_{\wp}$16¶ at 3rd Bullet — Defendant writes falsely: “he was not honest … misrepresented … insulting my integrity … withholding information …,” as explained at Comp$_{\wp}$12¶14·O. DGIMF. CTXDEFIMPL.

Diss$_{\wp}$16¶ at 4th Bullet — Defendant writes falsely: “I can’t be bought,” as explained at Comp$_{\wp}$13¶14·O. DGIMF. CTXDEFIMPL.

Diss$_{\wp}$16¶ at 5th Bullet — Defendant writes falsely: “crusade against the judge … Using the information meant including anything by or from me on his … website.” This is a transparent (lacking even *de minimus* plausibility; doesn’t pass the “sniff test”) *new* lie by Defendant. For, the context here (Comp$_{\wp}$13¶14·O) is inextricably bound up with Defendant’s charges about Plaintiff somehow desiring to “use cheap, free, expert opinion” services from Defendant (OppExhA$_{\wp}$16) — yet, the only conceivable venue for Plaintiff to potentially want/need to “use expert opinion” (free or paid) was in formal legal proceedings, which was

"LITERALLY IMPOSSIBLE," as explained at Comp℘13¶14·O. DGIMF. CTXDEFIMPL.

Diss℘17 at "P" — Defendant writes falsely: "… asshole …," as explained at Comp℘14¶14·P. CTXDEFIMPL.

Diss℘17 at 1st Bullet — Defendant writes falsely: "justify wasting my time," as explained at Comp℘14¶14·P. DGIMF. CTXDEFIMPL.

Diss℘18 at "Q" — Defendant writes falsely: "banning … defamatory," as explained at Comp℘14¶14·Q. DGIMF. CTXDEFIMPL.

Diss℘18 at "Conclusion" — Defendant writes falsely: "[Complaint does not] meet[] the Massachusetts standards for defamation." Instead, in fact, the Comp does certainly meet all *pleading standards* for defamation (namely, DGIMFs, CTXDEFIMPLs, etc.), as proved herein *passim.*

Diss℘18¶3 — Defendant writes falsely: "… special damages …," (falsely) citing *Yohe v. Nugent.* Instead, in fact, this has already been scotched by our earlier discussion of "special damages," Opp℘10 *supra,* esp. Opp℘10ƒ15 (all libel being *per se,* special damages need not be pled).

Diss℘19¶#0 — Defendant writes falsely: "no more than 250 individuals [strangers] read it." Instead, in fact: (i) that's an entirely conjectural/unsupportable figure (there existing no means/technique/ technology available to measure "number of readers" of webpages, noting

that Defendant admits the webpage in question has had, to date, more than 8,000 “hits,” some of which could well have been downloads for later “reading”); as is (ii) the conjecture about “strangers” (since Defendant’s website allows anonymous access, some of whom could well have known about Plaintiff by other means); (iii) the “ensuing outside gossip/chatter” (potentially “viral”) is absolutely/unquestionably unquantifiable; and (iv) this whole “extent-of-exposure” issue is irrelevant at this preliminary Motion-to-Dismiss stage (being a question for the jury/trial), since Defendant has already stipulated “publication” (Diss℘8¶#0), which suffices at this stage.

Diss℘19¶#1 — Defendant writes falsely: “far from mitigating damages … published his complaint on his own website.” Instead, in fact: (i) Plaintiff *did* promptly seek/attempt the most proper mitigation measure, via his “demand letter” to Defendant (Opp℘9f11 *supra*), which Defendant aggressively belatedly rejected (*cf.* Plaintiff’s Proof of Service); (ii) Plaintiff’s lawsuit, and the publishing of Comp, *is* (following (i)’s rejection) the strongest mitigation measure that can now be taken (noting Comp presents the truth, countering Defendant’s lies, and certainly cannot “make the situation worse”); (iii) in a defamation case, Plaintiff-side mitigation is essentially/virtually “unheard-of,” except for extraordinary circumstances, not present here (it’s only Defendant-side mitigation that really musters force-of-law: MGL Pt.III Tit.II Ch.231 §93); (iv) mitigation (either Plaintiff- or Defendant-side) is irrelevant at this preliminary Motion-to-Dismiss stage

(being a question for the jury/trial); (v) damages (be they actual, compensatory, assumed/presumed, harm-to-reputation (see Comp℘16¶18), medical, shame/mortification/hurt-feelings, punitive,[22] fees, expenses, or any of the dozens other categories (*cf. Black's Law Dictionary*)) are irrelevant at this preliminary Motion-to-Dismiss stage (being a question for the jury/trial), and are (vi) (especially in defamation cases) notoriously difficult/impossible to quantify (there being (vii) no defined/delineated limits/contours to what damages the jury may award, due to the amorphous nature of quantifying "harm-to-reputation").

CONCLUSION

For all the reasons presented herein, individually and collectively *in toto,* Defendant's Motion to Dismiss should emphatically be **DENIED.**

REQUEST FOR HEARING

Pursuant to MSCR 9A(a)(2), Plaintiff hereby requests a hearing on this matter (Defendant's Motion to Dismiss, and Plaintiff's Opposition thereto).

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22 Noting that, at the present time, only a "handful" of states do *not* allow punitive damages in defamation cases (though *all should*).

SIGNATURE; VERIFICATION

Respectfully submitted, and signed, under the pains and penalties of perjury:

Walter Tuvell, *Pro Se*
836 Main St.
Reading, MA 01867
781-475-7254
walt.tuvell@gmail.com

October 25 2017

EXHIBIT A

EthicsAlarms Blogpage, Aug 27 2017 (https://EthicsAlarms.com/2017/08/27), Relevant Part (https://EthicsAlarms.com/2017/08/27/morning-ethics-warm-up-82717/#more-40109)

This blogpage (blogpost with attendant comments) is **the primary/ key piece of evidence ("Smoking Gun")** in this case. Narrative explanation for it is given at Comp℘5¶7–℘15¶14·Q.

Note: This blogpage is "threaded" (as is typical). Consequently, in particular, the chronological/timestamp-order of the posts/comments "jumps around" relative to its textual/linear-order. Plaintiff's 10 posts/comments, in chronological order, occur at (Eastern Standard Time):

- Aug 27 1:08 p.m. — OppExhA℘6.
- Aug 27 5:54 p.m. — OppExhA℘14.
- Aug 28 7:26 a.m. — OppExhA℘33.
- Aug 28 1:24 p.m. — OppExhA℘9.
- Aug 28 1:45 p.m. — OppExhA℘10.
- Aug 28 1:52 p.m. — OppExhA℘11.
- Aug 28 4:11 p.m. — OppExhA℘11.
- Aug 28 4:27 p.m. — OppExhA℘13.
- Aug 28 5:08 p.m. — OppExhA℘13.
- Aug 28 5:18 p.m. — OppExhA℘32.

Ethics Alarms

AUGUST 27, 2017 · 11:19 AM

Morning Ethics Warm-Up: 8/27/17

***GOOOD* MORNING!**

(he said through gritted teeth..)

1. **I received a nice, polite e-mail from a new reader here** who accused me of engaging exclusively in "partisan/political rants." "Further," he wrote, "everything you say appears to be entirely one-sided (right/conservative/republican is good, left/liberal/democrat is bad)."

The man is an academic, so one might expect a little fairness and circumspection, but then, the man is an academic. His description is in factual opposition to the contents of the blog (I'm trying to think of the last Republican leader, conservative or otherwise, I designated as "good"), but I know from whence the impression arises: the fact that the entire American Left, along with its sycophants and familiars, the universities, show business and the news media, have gone completely off the ethics rails since November 8, 2016. I don't know how else I am supposed to address that. It would have been nice, for balance's sake, if a conservative cast of white actors in, say, a hit musical called "The Ray Coniff Story" had stepped out of character and harassed, say, Chuck Shumer, but this didn't happen. If it had,

I would have treated that breach of theater ethics *exactly* as I did the cast of Hamilton's harassment of Mike Pence. (I would not, however, have been attacked for doing so by my theater colleagues, and no, I haven't forgotten, and I'm not forgiving.)

If a GOP figure working for CNN as an analyst, say, Jeffrey Lord, had used his connections at the network to forward debate questions to Donald Trump and then lied about it when he was caught red-handed, I would have eagerly written about it in highly critical terms—but the Republicans didn't cheat. Donna Brazile and the Democrats did.

If Hillary Clinton had been elected President and Donald Trump and the Republicans formed an anti-democractic movement called "the resistance," tried to use a single Federalist paper as a rationalization to change the rules of the election and then pressured performers not to allow the new President the privilege of a star-studded, up-beat inauguration to unify the nation, and if a large contingent of Republican Congressmen had boycotted the ceremony, saying that they did not consider Hillary as "legitimate President," Ethics Alarms would have been unmatched in expressing its contempt and condemnation. If conservatives were trying to limit free speech according to what they considered "hateful," a step toward dictatorship if there ever was one, I would be among the first to declare them a menace to society. They haven't advocated such restrictions, however. Progressives have. The Mayor of Portland has called for a "hate speech' ban. What party is he from? Howard Dean said that "hate speech" wasn't protected. What party was he the Chair of? I forget. What was the party–there was just one— of the mayors who announced that citizens holding certain views should get out of town?

"Need I go on? I could, *because the uniquely un-American, unfair and destructive conduct from Democrats, progressives and the anti-Trump deranged has continued unabated and without shame for 10 months now.* That's not my fault, and I don't take kindly to being criticized for doing my job in response to it. I have chronicled this as unethical, because it is **spectacularly** unethical, and remains the most significant ethics story of the past ten years, if not the 21st Century to date.

And the reluctance and refusal of educated and usually responsible liberals and Democrats to exhibit some courage and integrity and vigorously oppose this conduct *as they should* and *have a duty as Americans to do*—no, I am **not** impressed with the commenters here who protest, "Hey, **I** don't approve of all of this! Don't blame me!" as if they bear no responsibility—is the reason this execrable conduct continues. It is also why I have to keep writing about it.

2. I'm still awaiting the apologies and acknowledgement of my predictive abilities from all of my friends who chided me for suggesting that the Confederate flag and statuary-focused historical airbrushing mania would shoot down the slippery slope to threaten the Founders and more. CNN political commentator and former Congressional Black Caucus director Angela Rye proclaimed on CNN that the country must tear down all memorials and likenesses of George Washington and Thomas Jefferson. Rye said on CNN that "George Washington was a slaveowner. Whether we think they were protecting American freedom or not, he wasn't protecting my freedom."

Her ignorance and arrogance is staggering. Naturally, no one on CNN had the integrity, historical perspective, courage or wit to explain why her position is destructive and foolish. Hey, but it's all right! There's no slippery slope!

Oh, Professor? When Republicans and conservatives start tearing down statues of, say, Margaret Sanger in the dead of night, you can count on me to condemn **that**, too.

3. Now here's a *rant:*

As I explained in the previous post, the President's pardon of anti-immigration zealot Joe Arpaio was ill-considered and a poor use of the pardon power. To say, however, that the attacks on it are wildly disproportionate to its actual impact is an epic understatement. The crime Arpaio was convicted of is a *misdemeanor*. The sentence is light. He is 85 years old, and there is no chance of him repeating the crime–criminal contempt—or doing any further harm, other than shooting off his mouth, Joe's specialty.

I was watching CNN to see how hard Texas is being slammed by ex-hurricane Harvey, and the crawl about how outraged various politicians are over the pardon was almost continuous. There was never such unbroken focus, by CNN or anyone else, when Bill Clinton *took a bribe* to pardon a rich fugitive with no redeeming characteristics whatsoever. There was no similar indignation about contempt for the rule of law when Obama's Justice Department deliberately ruled that club-wielding Black Panthers intimidating voters at a Philadelphia polling place in 2008 was acceptable, because of their color.

Then an esteemed reader sent me this head-exploding link to a Huffington Post article by a HuffPo "social engineer"—*give me a break!*—making the claim that the pardon was unconstitutional and would have a major impact–get this— on the investigation *by the special counsel*. I responded to the link thusly, in part:

> This is in the disgraceful category of other forced arguments that Trump has committed a "high crime" that can't exist, or has triggered an opportunity to remove him, like the Emoluments clause, or the claim that it's "obstruction of justice" to fire someone he has the power to fire, or that there's a loophole to allow his election not to count....
>
> I've researched this. That "social change engineer"—how can you take anything written by someone who calls himself that?—is intellectually dishonest. ALL pardons cross the separation of powers. Only impeachment is immune from a Presidential pardon, and even that is sort of misleading. Impeachment itself isn't a conviction for a crime.
>
> The post is garbage, and the theory wouldn't last two seconds in the Supreme Court. The argument against the pardon is that it's a bad pardon. It is unquestionably a LEGAL pardon.

Later, I read my New York Times front page article that said that the pardon is "almost certainly" legal. Since the Times has never seen an impeachment theory it didn't like, "almost certainly" almost certainly means, *"No way, Jose! Even we can't concoct an argument to back this up."*

And yet a smart, observant, progressive-minded reader found the "social change engineer's ignorant claims persuasive! This is hate and confirmation bias run amuck, and, frankly, I've lost patience with it.

The predominant approach to the Trump Presidency is that all previous standards of law, logic and fairness have been suspended, because Hillary's legions and the impotent Republican bunglers who let Trump take control of their party are so *furious* that an unqualified, impulsive, narcissistic fool of inadequate education and intellectual resources became President of the United States. Well, they haven't been suspended, you bitter *assholes*. We have laws, and processes and precedents, and no matter how much you wish it were otherwise, you can't make up reasons to void an election *just because you really don't like the winner,* even if you have wonderful reasons to dislike the winner (and you do).

Owning hotels is not going to become a grounds for impeachment. **Stop saying it is**. Using his family members as advisors is not a high crime or misdemeanor. Saying and tweeting stupid things is not a high crime or misdemeanor, no matter how stupid they are. Doing things that other Presidents have done without consequences are not suddenly crimes because this President does them. The President is not "disabled" under the terms of the 25th Amendment just because you regard not bowing down to progressive cant and the Political Correctness Gods as proof of a mental illness. These and other biased, irresponsible crack-brained fantasies mislead the public, waste everyone's time and energy, and worst of all, force *me* to defend a President who **literally** *has no ethics alarms*–thus getting myself accused of being a white supremacist— because double standards are unethical *per se*.

Cut it out. It's embarrassing *you*. It's aggravating *me*. It is harming the *nation and the democracy*. Meanwhile, it increases the likelihood that President Trump really will do something epicly stupid and destructive. Just as Obama was a much worse President because the news media gave him a free pass and the impression that he was a brilliant leader when in truth he was a feckless fraud, the news media has squandered any ability it might have had to Trump him toward competency and responsibility by establishing itself as a relentless, inept, partisan adversary. Good job, Journalists. You are *pathetic*.

If everything Trump does is horrible, nothing is. If the narrative is that his very existence is grounds for impeachment, then the President has no comprehensible limits to what he can do. The assault, which has gone on literally from the second he was elected, is unethical indefensible, disastrous, destructive and incredibly stupid.

I have been, if anything, too tolerant of it. No more. This is *wrong*.

Related

The Joe Arpaio Pardon
In "Ethics Alarms Award Nominee"

Morning Ethics Warm-Up: 8/24/17 [UPDATED]
In ""bias makes you stupid""

Apologia: I'm Sorry. I'm Sorry That The Left Is Behaving So Unethically, And I'm REALLY Sorry I Have to Keep Writing About It.
In "Citizenship"

73 responses to "*Morning Ethics Warm-Up: 8/27/17*"

Other Bill
August 27, 2017 at 11:33 am

Bravo!

Reply

Steve-O-in-NJ
August 27, 2017 at 11:39 am

Amen.

Reply

JP
August 27, 2017 at 11:42 am

Bias makes you stupid, but if anything given enough time as the last 10 month have taught us it also makes you an a...ole.

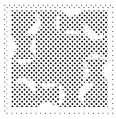
Reply

Steve-O-in-NJ
August 27, 2017 at 1:02 pm

Anyone who's been watching the last 20 years should know that. There was plenty of jerkassery on both sides over the last 2 decades.

Reply

JP



August 27, 2017 at 1:52 pm

Well to be fair to me I've only been trying to check my bias for the last 12 months.

Reply

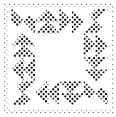
fattymoon

August 27, 2017 at 11:43 am

#1 Agree.
#2 Agree
#3 Tire Fires says it best. I think it's a metaphor... https://medium.com/geezer-speaks/tire-fires-8f783170717d

Reply

Tippy Scales



August 27, 2017 at 1:00 pm

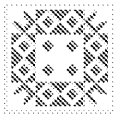
Don't worry about charges of right-wing bias. As far as I can see, you always call out all unethical behavior, no matter who does it. This is one of the few sites I've found that is fair and balanced to all sides. That's why I come here so often: To get a whiff of sanity in this hyper-partisan environment we're in right now.

And you hate John Lennon's "Imagine" to boot!

Don't you ever change.

Reply

Walter E. Tuvell



August 27, 2017 at 1:08 pm

I am the author of "Item #1" in Jack's Morning Ethics Warm-Up for Aug 27 2017. For the record, here is the content of the email I sent him, which instigated Jack's response:

Jack —

I've been following your website (https://ethicsalarms.com) since I "discovered" it a couple of months ago. Its About page is especially lucid and luring.

The problem is, your posts don't live up to the About advertisement. Specifically, the About page speaks only about whole-life ethics (a very laudable goal, what I was looking for), but says nothing about partisan/political rants. Yet, it seems like that's what the website does, and only that. Further, everything you say appears to be entirely one-sided (right/conservative/republican is good, left/liberal /democrat is bad).

Is that the way you really see things? Or am I missing something?

Thx.

— Walter Tuvell (PhD, Math, MIT & U.Chicago — i.e., "not-a-crank")

I counter-respond as follows:

First: I am not an "academic" (well-educated, yes, but worklife has been in the computer industry). Nor am I an American leftist, sycophant, familiar, university, show business, news media, etc. Rather, I'm just a guy looking for serious ethical guidance in uncertain times, of the sort Jack mentions/advertises on his About page (https://ethicsalarms.com/about).

Second: My note was not, I think, an "accusation," but rather an "observation," based on the deviance of the website's content vs. the wording of its About page. Granted I'm a relatively new reader, so don't have the benefit of long-term familiarity, but from what I've seen to date, everything has decidedly political/partisan, in one particular direction (from left to right). That seems biasedly unbalanced (black-and-white, no gray) to me.

Third: I maintain a website documenting a major cultural/governmental (but not "political/partisan") phenomenon affecting many thousands of Americans yearly, namely Judicial Misconduct (http://JudicialMisconduct.US). THAT'S the sort of thing I wonder what an non-political/partisan (though legally trained/savvy) ethicist thinks about. Start, say, with the "Smoking Gun" at http://JudicialMisconduct.US/CaseStudies/WETvIBM/Story#smokinggun.

— Walter Tuvell

Reply

Jack Marshall
August 27, 2017 at 2:24 pm

Thanks, Walter. I was hoping you would post.

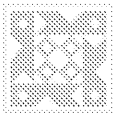
Reply

Jack Marshall
August 27, 2017 at 2:27 pm

And sorry for the mistake regarding your erudition. I come from a tradition where only scholars and academics attach their degrees and alma mater to their name. I know I don't.

Reply

Alex
August 27, 2017 at 4:27 pm

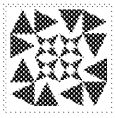


Hello Walter!

Welcome. I hope you enjoy it here. Jack has built a really nice place in here where there is genuine diversity of viewpoints and debate is almost always rational. We may seem like a rough crowd sometimes but there is a real feeling of a community that cares about ethical issues.

Reply

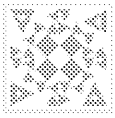
Red Pill Ethics
August 28, 2017 at 9:11 am



I mean it's nice of you to respond Walter, but Jack very clearly presented his case for why the ethics criticisms have been so one way – a large and sustained breakdown of ethics and reason in the left with many supporting examples. If you respond to anything I'd be most interested in hearing your response to that. Maybe something along the lines of an equivalent large and sustained breakdown of ethics and reason in the right with many supporting examples. If you can provide a good argument for that, then I'd 100% agree that the one sided coverage appears to show an ideological bent. If you can't... then maybe an apology is in order.

Reply

Chris
August 28, 2017 at 9:24 am



The election of Donald Trump was a massive failure of ethics on the right.

Reply

texaggo04

August 28, 2017 at 9:32 am

Quit this tired argument.

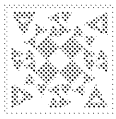
It has been made absolutely clear that the ENTIRE election, Democrat side as well, was an ethics failure.

That your side continues to pretend like Hillary wasn't as horrible of an option as Trump (the two of them having their own uniquely horrible qualities) is just further demonstration that your side has no self-awareness or accountability.

Reply

Chris

August 28, 2017 at 3:01 pm

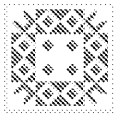


I'm not the one dodging accountability here. I agree that leftists bear some blame in helping getting Donald Trump elected. But the primary responsibility for electing Trump has to go to the people who elected him. Just as the primary responsibility for electing Clinton, had she won, would have gone to Clinton voters. Republicans had 16 other choices, only one or two of which would have been as unethical a choice as Trump. They chose Trump. This was an ethics failure at the highest levels of the Republican party, as well as on the level of voters. Democrats played a part in that failure, but the primary responsibility lies with Republicans.

Reply

walttuvell

August 28, 2017 at 1:24 pm



Red Pill Ethics: You say I should "apologize" if I don't provide a case for (an examples of) large and sustained breakdown of ethics and reason on the right.

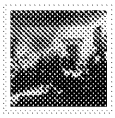
I have no idea what you're talking about. It is not ME who supports OR denies any breakdown of ethics/reason on the left OR right. Thought, that appears to be what (all?) others here care about.

With the few short notes I've posted here, I've made it clear (but I'll repeat again) that I care nothing about partisan politics, be it under the guise of "ethics" or just plain naked pot-calling-kettle-black. And I certainly won't apologize for that.

To the contrary, I tuned into this site in the hope/expectation of finding a discussion of ethics, without the smokescreen of partisan politics clouding the air. I even proposed a topic, Judicial Misconduct, with examples (http://JudicialMisconduct.US). But no takers. Such things appear not to be what this site is about.

Reply

texaggo4
August 28, 2017 at 1:34 pm



"Such things appear not to be what this site is about."

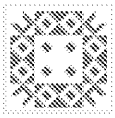
Then you should take the time to avail yourself of the 1000s of posts Jack has composed over the decade plus of his discussion group.

Jack isn't partisan or biased. It's just demonstrative of how far off the rails the Left has gone in it's unethical conduct post election. And Jack IS frank about his view their their current insurrectionist and counter-constitutional mindset and conduct ARE the gravest threat to our nation.

So of course they seem to get more coverage. But that isn't a bias problem of Jack's.

Reply

walttuvell
August 28, 2017 at 1:45 pm

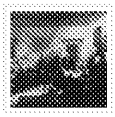


I've already disclaimed my inexperience with this site, being a new-ish user of only a couple months' standing. Unfortunately, from what I'm seeing, it's doubtful that "taking the time" of absorbing the whole past of the site, as you suggest, will disabuse me of my initial assessments.

For, what you just wrote (and which you claim is representative of the site) is itself quintessential troll-like partisanship: "Everything Jack/we say is non-partisan, because the Left has gone unethically off the rails in their insurrectionist/counter-constitutional mindset/conduct, representing a grave threat to the nation."

Reply

texaggo4
August 28, 2017 at 1:50 pm

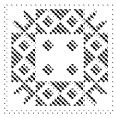


So you're not going to even try?

Good strategy.

Reply

walttuvell
August 28, 2017 at 1:52 pm



Correct. The whole partisan politics thing is tiresome/boring, and I have no dog in that fight. I just don't care about that whole "I-am-not, you-are-so" scene, from any direction. Silly.

Reply

texaggo4
August 28, 2017 at 1:56 pm

Suit yourself.

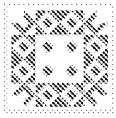
Reply

Jack Marshall
August 28, 2017 at 2:18 pm

KABOOM! If it is silly, why did you choose that precise issue to begin with?

Reply

walttuvell
August 28, 2017 at 4:11 pm



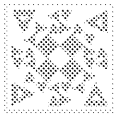
Oh Come On, Jack, I did NOT "choose that precise issue," and you know it. I wrote a private note to you about "am I missing something," in thinking I was seeing mostly partisan-politics-pretending-to-be-ethics. THAT'S the "topic" I chose (expecting a simple private respose). Instead, it got twisted (intentionally?).

The topic of THIS ("silliness") subthread is that some people think I should give some sort of apology, and/or some sort of arguments/examples about how the Left is better than the Right in some sense — "as if" I'm some kind of Leftist and believe that — because somehow I got tagged with being some sort of Leftist in some sense. But I've made no proclamations/hints whatsoever about being any such thing. Perhaps this happened because I was misperceived initially as an "academic," and some people somehow lump "academics" into the Left. Though in fact I've long disavowed being either Right or Left, and care nothing about it, because it's a silly tempest-in-a-teapot.

Why are you (and others) pretending otherwise?

Reply

Chris



August 28, 2017 at 4:24 pm

Walt, some advice from one of this blog's leftists: Move on. Jack's blog is very valuable to me, and has taught me a lot about ethics. From my perspective most of his posts lately have been about politics, but that's because politics are a great window into the ethics of a country, especially at this moment in time. I *do* agree with you that Jack, like all people, has a bias, and I think he's been less careful about mitigating that bias lately. But I've made a case for that when I've seen it, whereas you have just repeated it without really citing evidence for it. If you choose to stick around I hope you will do the same, but right now you're going in circles trying to justify your original comment, which, to me, was overly broad and unsupported.

Jack Marshall

August 28, 2017 at 2:16 pm

Walt, I'm not obligated to do this, but just for you, I picked the last full month of the blog, and kept score, running backwards, regarding whether a post criticized the left or the right. In doing so, I ignored the Daily updates, since they are mixed topics, and also decided to place criticism of President Trump down as criticism of the right, as he is technically a Republican. I did not score posts that did not involve politicians, government, new reporting or public policy debates.

I stopped after checking 16 posts, when the score was 8 to 8. I have done this before, with similar results. I'm sure, indeed I know, that there are periods when the balance is not this close, but I picked July 2017 at random. My survey simply does not support your claim. Neither would your own survey.

People are wedded to their own world view, come here, see that i designate some position that they have an emotional attachment to as based on unethical principles, and default to bias as an explanation.

Your claim is simply unsupportable on the facts, as is the claim that the blog is primarily political in nature. As I often note, the fact that the Left has inexplicably bundled issues and made it part of its cant does not make rejection of one of those

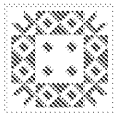
issues partisan or political. Saying that illegal immigrants should get a free pass to the benefits of citizenship isn't *liberal*, it's idiotic and wrong. Holding that gay Americans shouldn't have all attendant rights of citizenship isn't a conservative position, it's an *ignorant* position.

You can believe what you choose; most people do. But I work extremely hard to avoid exactly the kind of bias you accuse me of, and I stand by the results. I am not always right, but when I am wrong, it is not because of partisan bias.

Reply

walttuvell

August 28, 2017 at 4:27 pm



Unfortunately, you're misrepresenting me (see initial email) again, because all you doing is "keeping Left/Right score." I don't care about Left/Right anything! What I care about is Ethics per se, as opposed to partisan political rants of any kind, which is what appears to dominate this site (and seemingly from the Right=Good point of view, but that's a sub-observation, not the main theme of my interest).

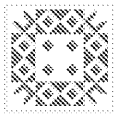
I was initially attracted to you because you're trained/savvy in the law, and I wanted to ask you opinion about the ethics of Judicial Misconduct, specifically in the sense of institutional abuse of the Summary Judgment process (e.g., http://judicialmisconduct.us/CaseStudies/WETvIBM/Story#smokinggun). You've done nothing to address that, and nobody on this site appears to have any inclination to so.

Fair enough. But at least please be straightforward about it, instead of twisting what I'm saying beyond all recognition.

Reply

walttuvell

August 28, 2017 at 5:08 pm

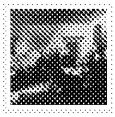


Oh, and another thing: Why in the world did I ever think that Jack (and by extension this blog/website) might be interested in Judicial Misconduct?

Why, because it's advertised on the About page, of course: "I [Jack] specialize in legal ethics ..."

Reply

texaggo4
August 28, 2017 at 5:23 pm



You sound more and more like another incarnation of a guy who would frequent this blog beating on ONE topic and ONE topic only…every thread that guy began seemed "new" but ended up ALWAYS redirecting to Supreme Court malfeasance and Judicial misconduct…

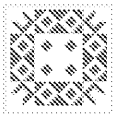
Hm.

He'd always get banned…

Then he'd always come back under another name.

Reply

walttuvell
August 28, 2017 at 5:54 pm



Oh, yes. Damnation by (invalid) innuendo. Trying to twist my one-and-only post into a multiplicity of "threads." Very clever/subtle/bogus. NOT.

Reply

Jack Marshall
August 28, 2017 at 6:08 pm

I just banned Walt. Read my post about it. He's special.

Reply

Jack Marshall
August 28, 2017 at 6:11 pm

I have already spammed two more posts by the jerk.

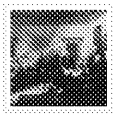
Jack Marshall
August 28, 2017 at 5:23 pm

Or, you could search for judicial ethics, or judges, right on the blog! The last judicial conduct post was almost exactly a month ago. They come up when

they come up.

Reply

texaggo4



August 28, 2017 at 5:30 pm

https://ethicsalarms.com/?s=judicial+ethics

Reply

Jack Marshall

August 28, 2017 at 6:07 pm

ATTENTION: Walt Tuvell is banned from commenting here.

I don't even care to spend any more time on him, but I'll give some background. He sandbagged me. He submitted nothing but whiny posts denying that he had accused Ethics Alarms of being obsessed with partisan political topics, then denied he had done that, then said the all he was looking for was a discussion of a judicial conduct issue (but did this initially with a link in a comment to another commenter, causing me to miss it) then just posted a comment saying that the blog advertised itself as covering judicial misconduct and doesn't (there are **dozens** of judicial ethics posts), and THEN, when I finally get the link to the ethics issue he says he was seeking a reaction to—**HINT:** if you want a reaction to a specific issue, the best way is to write me at jamproethics@verison.net, and ask, "What do you think about this?" If it's a good issue, I'll respond like a good little ethicist and jump through your hoop.

But no, Walt began by accusing me of pure partisan bias, and issued bitching comment after bitching comment until, finally, he actually revealed his agenda, and GUESS WHAT?

Come on, *guess!*

Walt's "issue" is about **his own case**, and the link goes to **his single issue website**, which you can try to wade through here

The case is **Tuvell v IBM**, and skimming his messy post that teeters on the edge of madness, I discern that the reason Walt is interested in judicial misconduct is that the judge decided that his case was lousy, and dismissed it. That obviously means that the judge is unethical.

I was going to, as a favor to Walt, because i am a nice guy, show my good faith by addressing his issue *even though he didn't have the courtesy or honesty of fairness to come right out and say what he wanted.* Then I read as much of the entry on his blog–which purports to be about judicial misconduct in summary judgments generally, but is in fact only about his case—as I could stand, and realized that Walt is, in technical terms—this is an opinion, Walt, not an assertion of fact, you can't sue me: put down the banana— a few cherries short of a sundae. This became clear in this passage..

Tuvell suffered severe shock/dismay/devastation, and worse. For, Tuvell was/is a long-term victim of whistleblowing/bullying-instigated PTSD, stemming from previous defamatory/abusive workplace incidents he'd experienced more than a decade previously while at another employer, but which was since in remission ("passive"/"dormant" phase). Knabe/Feldman's accusation immediately caused/"triggered" Tuvell to reexperience an acute/"active" PTSD "flashback"/relapse.

I used to get letters from people like this, long rambling things with court cites and exclamation points. I answer phone calls from people like Walt, and try to help them if possible, but it's usually futile, and often they keep calling and calling until I have to just duck the calls. And I get e-mails with long, rambling court dicuments. This is the first time, however, someone has abused Ethics Alarms for a personal agenda.

I'm sorry for Walt's troubles, but he was not honest, and misrepresented his purpose by the charming device of insulting my integrity. Obviously, he wanted to check and see whether my sympathies would be with his cause before submitting it for consideration. As I tell my clients, I can't be bought, and you take your chances.

Walt was also obviously looking for a cheap, as in *free,* expert opinion that he could use in his crusade against the judge.

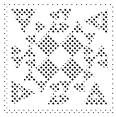
What an asshole! The fact that he may be a desperate asshole doesn't justify wasting my time, and others who responded to him and misrepresenting his motives.

For this, Walt earns the ultimate ban. He will not be re-instated, and if he submits one more comment having been so warned, I will delete every one of his comments so the stench of his abuse no longer lingers here.

Can you tell that I'm ticked off?

Reply

Chris



August 28, 2017 at 6:38 pm

Good lord.

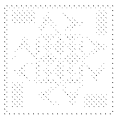
Reply

Jack Marshall

August 28, 2017 at 6:46 pm

My thoughts exactly.

Hal Mirlan



August 27, 2017 at 2:39 pm

Mr. Marshall,
I share your frustration and appreciate your continuing efforts to promote ethical behavior and civility in hopes of preserving American democracy. Please don't give up! Thank you! Hal Morlan

Reply

Jack Marshall

August 27, 2017 at 2:43 pm

Here is ABC's Sunday talking heads orgy making this single pardon into what it isn't. What is a fair word for this, other than stunning bias? Hysteria?

ABC
This Week
August 27, 2017
9:28:56 AM Eastern

(...)

ROLAND MARTIN: I do not want us to forget what Arpaio did: He racially profiled individuals. I'm not dealing with the politics. He defied a court order, that's what he did. What Trump has been doing is pushing the racial resentment buttons of white Americans from the elections to the present day. He was also in line with the birther who was racist and shameful, his attacks on President Obama. Trump and Arpaio have yet to apologize for that. What is more shameful, are these conservative evangelicals who stand with Trump, who do not condemn inhumane treatment from Arpaio. And that's Paula

White, that's Jerry Farwell Jr., that's Ralph Reed. They are more focused on the p-r-o-f-I-t of the faith, not the p-r-o-p-h-e-t. Be prophetic voices who lead!

MATTHEW DOWD: Just to drop back a little bit on this is – Donald Trump in his desire to destabilize the status quo, which needs reform and all that. Has gone out of his way to decimate the common standards and the attributes of our country and the institutions of our country. Where the last two weeks have demonstrated how much we need the institutions of our government. Charlottesville was a demonstration of on how much we need a president that can heal, that can bring the country together and unify, and not benefit from racial divisions in this. The hurricane that we're in, is a demonstration how important the institutions of the government are. And as and Donald Trump, one after another after another, decimates those institutions, we have an inability as a country to unify and fix it.

GEORGE STEPHANOPOULOS: Jen Psaki, you see lot of Democrats saying in the wake of this Arpaio pardon, that what that really was was a signal to anyone who might be a target of Robert Mueller's investigation, "I've got your back."

JEN PSAKI: Well, yes. And here's why. The process piece of this that should be concerning to people is one, he sought out his attorney general to see if he could get rid of the nasty piece of legal business against his political friend. And two, the Department of Justice was not remotely involved in the pardon, which they've said. That is what is very different from past presidents.

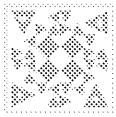
So it just furthers this belief that he lives above the law. That he doesn't think that he's all powerful. That the checks and balances that have been in place for decades, hundreds of years, don't apply to him. And that's concerning to people because people suspect there could be a need for more pardons to come for over political allies.

DOWD: He ran on this law and order candidate and has done his very best to try to dent the law and order of our country and the rule of law.

Reply

Chris

August 27, 2017 at 3:47 pm



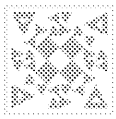
I can't find a single line in there I find inaccurate or over-the-top, Jack.

On the other hand, your false claim that the Obama DOJ ruled the Black Panthers' voter intimidation as "acceptable" is ridiculously over-the-top, has no relation to reality, and is far beneath the standards you have set for this blog.

Reply

Chris

August 27, 2017 at 3:28 pm



Jack:

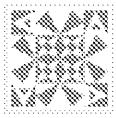
There was no similar indignation about contempt for the rule of law when Obama's Justice Department deliberately ruled that club-wielding Black Panthers intimidating voters at a Philadelphia polling place in 2008 was acceptable, because of their color.

I have much more to say on this thread, but this line really jumped out at me, Jack. **It is blatantly untrue.** This massively misstates both the judgment in this case and the bipartisan process that led up to it. You need to edit to update this article and issue a correction; as long as this lie stands, you are simply confirming your friend's allegation of partisan bias.

Reply

Matthew B

August 27, 2017 at 4:06 pm



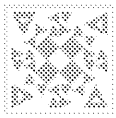
Are you saying the US Civil rights administration is lying about the case?

http://www.usccr.gov/NBPH/USCCR_NBPP_report.pdf

Reply

Chris

August 27, 2017 at 4:11 pm

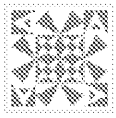


I'm not reading a 232-page document. Point me to the part that supports Jack's claim that the Obama administration, which filed an injunction against one of the Black Panthers in this case, found their actions "acceptable."

Reply

Matthew B

August 27, 2017 at 4:38 pm



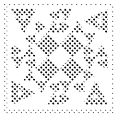
Well there is a logic jump necessary. If someone commits illegal actions, and those with the authority to prosecute, do not do so because *they disagree with the enforcement* not because of the strength of the case, it's not a stretch to say that those electing not to prosecute find the conduct "acceptable."

As to where: Start reading 1/2 way down on page 50 and read the next 9 pages. Do you consider it acceptable for African Americans to intimidate voters? Or is it only bad if whites do it? If you are for the latter, you're a disgusting person.

Reply

Chris

August 27, 2017 at 4:43 pm



Well there is a logic jump necessary. If someone commits illegal actions, and those with the authority to prosecute, do not do so

The ringleader of the intimidation **was prosecuted.**

because they disagree with the enforcement not because of the strength of the case, it's not a stretch to say that those electing not to prosecute find the conduct "acceptable."

The Bush administration filed a criminal case against the two Black Panthers, but dropped it. Do you assume that the Bush administration found their actions acceptable?

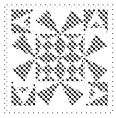
As to where: Start reading 1/2 way down on page 50 and read the next 9 pages. Do you consider it acceptable for African Americans to intimidate voters? Or is it only bad if whites do it? If you are for the latter, you're a disgusting person.

Do you beat your wife? If so, you are a disgusting person.

Reply

Matthew B

August 27, 2017 at 5:25 pm



You failed at the fallacy of supposition: It's supposed to read *do you still beat your wife?*

Reply

Jack Marshall

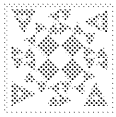
August 27, 2017 at 5:14 pm

The Panthers were indicted, had already defaulted in their trial by not showing up, and the racialist Obama Civil Rights division deliberately withdrew the charge. If that doesn't signal behavior is acceptable, what else do you call it?

Reply

Chris

August 27, 2017 at 5:26 pm



Where are you getting your info from? The government got a default injunction against

one of the Panthers after he failed to show up. I don't know if that counts as an "indictment," but as far as I know it was never withdrawn. The charge against the other Panther, who was not carrying a nightstick, was withdrawn, but I don't believe he was ever indicted. The case was weak; no voters who claimed to have been intimidated were ever found. By your logic, any time the government withdraws a charge against someone, we can accuse them of finding the underlying behavior behind the charge "acceptable." That isn't reasonable.

Reply

Jack Marshall

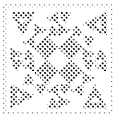
August 27, 2017 at 5:41 pm

The law does not require that voters claim to be intimidated. That's a dodge (not YOUR dodge, but the dodge that was used at the time.) I don't want to relitigate this one again; I wrote about it a lot at the time. It was a pure, race-based decision, with Perez taking the position that blacks doing what whites had been charged with and punished for doing was not worth addressing when the perps were black. This signaled the racial bias that would poison the entire Obama administration for eight years, and sowed the seeds that bloomed into the disastrous racial divide we have now.

This was a per se and undeniable violation.

Reply

Chris



August 27, 2017 at 5:43 pm

Why did the Bush administration drop their criminal case?

Reply

Jack Marshall

August 27, 2017 at 6:00 pm

Here was the account by J. Christian Adams, a civil rights attorney who resigned from DOJ over the case:

On the day President Obama was elected, armed men wearing the black berets and jackboots of the New Black Panther Party were stationed at the entrance to a polling place in Philadelphia. They brandished a weapon and intimidated voters and poll watchers. After the election, the Justice Department brought a voter-intimidation case against the New Black Panther Party and those armed thugs. I and other Justice attorneys diligently pursued the case and obtained an entry of default after the defendants ignored the charges. Before a final judgment could be entered in May 2009, our superiors ordered us to dismiss the case.

The New Black Panther case was the simplest and most obvious violation of federal law I saw in my Justice Department career. Because of the corrupt nature of the dismissal, statements falsely characterizing the case and, most of all, indefensible orders for the career attorneys not to comply with lawful subpoenas investigating the dismissal, this month I resigned my position as a Department of Justice (DOJ) attorney.

The federal voter-intimidation statutes we used against the New Black Panthers were enacted because America never realized genuine racial equality in elections. Threats of violence characterized elections from the end of the Civil War until the passage of the Voting Rights Act in 1965. Before the Voting Rights Act, blacks seeking the right to vote, and those aiding them, were victims of violence and intimidation. But unlike the Southern legal system, Southern violence did not discriminate. Black voters were slain, as were the white champions of their cause. Some of the bodies were tossed into bogs and in one case in Philadelphia, Miss., they were buried together in an earthen dam.

Based on my firsthand experiences, I believe the dismissal of the Black Panther case was motivated by a lawless hostility toward equal enforcement of the law. Others still within the department share my assessment. The department abetted wrongdoers and abandoned law-abiding citizens victimized by the New Black Panthers. The dismissal raises serious questions about the department's enforcement neutrality in upcoming midterm elections and the subsequent 2012 presidential election.

The U.S. Commission on Civil Rights has opened an investigation into the dismissal and the DOJ's skewed enforcement priorities. Attorneys who brought the case are under subpoena to testify, but the department ordered us to ignore the subpoena, lawlessly placing us in an unacceptable legal limbo.

The assistant attorney general for civil rights, Tom Perez, has testified repeatedly that the "facts and law" did not support this case. That claim is false. If the actions in Philadelphia do not constitute voter intimidation, it is hard to imagine what would, short of an actual outbreak of violence at the polls. Let's all hope this administration has not invited that outcome through the corrupt dismissal.

Most corrupt of all, the lawyers who ordered the dismissal – Loretta King, the Obama-appointed acting head of the Civil Rights Division, and Steve Rosenbaum – did not even read the internal Justice Department memorandums supporting the case and investigation. Just as Attorney General Eric H. Holder Jr. admitted that he did not read the Arizona immigration law before he condemned it, Mr. Rosenbaum admitted that he had not bothered to read the most important department documents detailing the investigative facts and applicable law in the New Black Panther case. Christopher Coates, the former Voting Section chief, was so outraged at this dereliction of responsibility that he actually threw the memos at Mr. Rosenbaum in the meeting where they were discussing the dismissal of the case. The department subsequently removed all of Mr. Coates' responsibilities and sent him to South Carolina.

Mr. Perez also inaccurately testified to the House Judiciary Committee that federal "Rule 11" required the dismissal of the lawsuit. Lawyers know that Rule 11 is an ethical obligation to bring only meritorious claims, and such a charge by Mr. Perez effectively challenges the ethics and professionalism of the five attorneys who commenced the case. Yet the attorneys who brought the case were voting rights experts and would never pursue a frivolous matter. Their experience in election law far surpassed the experience of the officials who ordered the dismissal.

Some have called the actions in Philadelphia an isolated incident, not worthy of federal attention. To the contrary, the Black Panthers in October 2008 announced a nationwide deployment for the election. We had indications that polling-place thugs were deployed elsewhere, not only in November 2008, but also during the Democratic primaries, where they targeted white Hillary Rodham Clinton supporters. In any event, the law clearly prohibits even isolated incidents of voter intimidation.

Others have falsely claimed that no voters were affected. Not only did the evidence rebut this claim, but the law does not require a successful effort to intimidate; it punishes even the attempt.

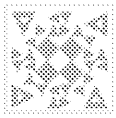
Most disturbing, the dismissal is part of a creeping lawlessness infusing our government institutions. Citizens would be shocked to learn about the open and pervasive hostility within the Justice Department to bringing civil rights cases against nonwhite defendants on behalf of white victims. Equal enforcement of justice is not a priority of this administration. Open contempt is voiced for these types of cases.

Some of my co-workers argued that the law should not be used against black wrongdoers because of the long history of slavery and segregation. Less charitable individuals called it "payback time." Incredibly, after the case was dismissed, instructions were given that no more cases against racial minorities like the Black Panther case would be brought by the Voting Section.

Refusing to enforce the law equally means some citizens are protected by the law while others are left to be victimized, depending on their race. Core American principles of equality before the law and freedom from racial discrimination are at risk. Hopefully, equal enforcement of the law is still a point of bipartisan, if not universal, agreement. However, after my experience with the New Black Panther dismissal and the attitudes held by officials in the Civil Rights Division, I am beginning to fear the era of agreement over these core American principles has passed.

Reply

Chris



August 27, 2017 at 6:02 pm

J. Christian Adams? Seriously?

Why don't I just use Media Matters to rebut him, since we're using biased partisan hacks as trustworthy sources for information now?

I know you can do better than this because I've watched you do better than this.

Reply

Jack Marshall

August 27, 2017 at 6:23 pm

That's just *ad hominem*, Chris. This occurred before anyone heard of Adams. In part, this episode made him a conservative blogger. He is a lawyer, He testified under oath. His view should be respected. It's what he saw, and how he saw it. That doesn't mean he's right in all respects. he was accurate regarding the process timeline, which was what you asked about, no?

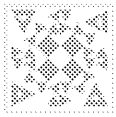
But what he wrote was before OPR (the office of professional responsibility) filed its report, which I wrote about here. I concluded,

> One of the reasons the incident generated so many articles is that there were multiple ethical issues involved: the original decision, the media's immediate reaction of assuming the critics were politically motivated, the intellectual dishonesty and deceit of some pro-Administration flacks in describing the incident as "trumped up," the late coverage of the story by papers like the Washington Post, ultimately condemned by the paper's own ombudsman, and more. In my view, the eagerness of the media to bury the story was more disturbing than the allegations themselves.
>
> The OPM report, thorough as always, reviews its investigation and concludes that there was not, in fact, a race-based decision made regarding the two men, and that whether or not the Justice Department made the right call, it was a good faith call that was defensible under the facts.
>
> Case closed. I've read the report; you can too, if you like, here. Already, I have read accusations on various blogs that it is a whitewash: this is utter nonsense. OPM is independent, and exists to root out unethical attorney conduct in the U.S. Government, not to protect it. The report is thorough, covers all sides and allegations, and is scrupulously fair.
>
> The fact that the allegations were shown to be unsupportable, however, does not in any way vindicate those who tried to ignore the seriousness of the allegations and pretend that there was nothing to investigate. There was a prima facie case of biased enforcement that, like many prima facie cases prosecuted every day, could not be proven with the available evidence. I continue to believe, having read the report, that while the handling of the case was not unethical and was in good faith, it was spectacularly stupid, and unnecessarily sowed distrust in the

Obama Justice Department.

That was written 6 years ago. Now that I have seen how the Justice Department behaved in the following years, I'm less sanguine about the OPR report. I wouldn't call it a whitewash, but it relied on the good faith of Perez and others, and I have learned that Perez especially should not be trusted.

Chris



August 27, 2017 at 6:43 pm

Jack, if I cited Media Matters to rebut you, I'd expect you wouldn't waste your time reading it. That's how I feel about Adams. Call that ad hominem all you like; I've read his accounts of the incident before, and I have come to the conclusion that he's a dishonest person.

Your previous analysis is far more fair, and I don't think you've provided anything to support your claim in this article that the DOJ " ruled that club-wielding Black Panthers intimidating voters at a Philadelphia polling place in 2008 was acceptable, because of their color."

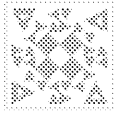
If a lefty responded to Trump's pardoning of Arpaio by saying "Trump ruled that Arpaio's targeting of Latinos was acceptable, because of their color," you'd take that as evidence of Trump Derangement Syndrome. And yet you fall into Obama Derangement Syndrome here.

Jack Marshall

August 28, 2017 at 9:03 am

No, actually I'm pretty sure Trump does think profiling Hispanics to find illegal immigrants is acceptable, and that is one of the messages the pardon sends. Just like Obama pardoning drug sellers in part sends the message that drug use is acceptable. Anytime anyone is pardoned, there are ancillary messagaes, real or perceived.

Chris

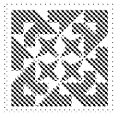


August 28, 2017 at 9:23 am

Fair response, Jack, but the Black Panthers were not pardoned.

Chris marschner

August 27, 2017 at 9:34 pm

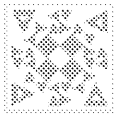


Page 92. Doj filed suit. Not contested by Shabazz. Court issues default judgement for DOJ then DOJ withdraws dropping all sanctions.

Reply

Chris

August 27, 2017 at 11:17 pm

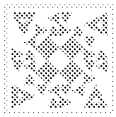


No, they did not drop *all* sanctions, and page 92 doesn't say they did.

Reply

Chris

August 27, 2017 at 3:44 pm



The man is an academic, so one might expect a little fairness and circumspection, but then, the man is an academic. His description is in factual opposition to the contents of the blog (I'm trying to think of the last Republican leader, conservative or otherwise, I designated as "good"), but I know from whence the impression arises: the fact that the entire American Left, along with its sycophants and familiars, the universities, show business and the news media, have gone completely off the ethics rails since November 8, 2016. I don't know how else I am supposed to address that. It would have been nice, for balance's sake, if a conservative cast of white actors in, say, a hit musical called "The Ray Coniff Story" had stepped out of character and harassed, say, Chuck Shumer, but this didn't happen. If it had, I would have treated that breach of theater ethics exactly as I did the cast of Hamilton's harassment of Mike Pence. (I would not, however, have been attacked for doing so by my theater colleagues, and no, I haven't forgotten, and I'm not forgiving.)

I have no doubt this is true.

If a GOP figure working for CNN as an analyst, say, Jeffrey Lord, had used his connections at the network to forward debate questions to Donald Trump and then lied about it when he was caught red-handed, I would have eagerly written about it in highly critical terms—but the Republicans didn't cheat. Donna Brazile and the Democrats did.

I have no doubt this is true.

But when Don Trump Jr. was caught red-handed attempting to get dirt on Hillary Clinton from what he was told was the Russian government, you said it was no big deal.

then pressured performers not to allow the new President the privilege of a star-studded, up-beat inauguration to unify the nation, and if a large contingent of Republican Congressmen had boycotted the ceremony, saying that they did not consider Hillary as "legitimate President," Ethics Alarms would have been unmatched in expressing its contempt and condemnation.

I have no doubt this is true.

But when Donald Trump decided to boycott the White House Correspondents' Dinner, you said this was an ethical decision.

If conservatives were trying to limit free speech according to what they considered "hateful," a step toward dictatorship if there ever was one, I would be among the first to declare them a menace to society. They haven't advocated such restrictions, however.

Conservatives have also advocated many restrictions on free speech. For instance, the ban on doctors asking about guns in Florida. Threats to take away funding for colleges that perform plays conservatives don't like. Trump's threat to open up the libel laws.

What was the party–there was just one— of the mayors who announced that citizens holding certain views should get out of town?

What party was the president who said that citizens who protested against him should be investigated? What party was the president who said the press was "the enemy of the people," which you called an ethical statement?

I have no doubt that you would have condemned Republicans for doing the same things the Democrats did in the statements above. I also have no doubt that if Democrats did some of the things I just talked about Republicans doing, you would have absolutely condemned them, even though you did not condemn the Republicans in those cases. If Chelsea Clinton had attended a meeting with the expectation that she was going to get damning intel on Trump from the Russian government, I think you would see that as a major scandal. If President Obama had refused to attend the WHCA because Fox News would be there, and called them "the enemy of the people," I think you would have seen that as a threat to the First Amendment and evidence of an embarrassingly thin skin.

So I think that while the reader who e-mailed you is overstating their case, you do show evidence of a bias against the Left.

2. I'm still awaiting the apologies and acknowledgement of my predictive abilities from all of my friends who chided me for suggesting that the Confederate flag and statuary-focused historical airbrushing mania would shoot down the slippery slope to threaten the Founders and more. CNN political commentator and former Congressional Black Caucus director Angela Rye proclaimed on

CNN that the country must tear down all memorials and likenesses of George Washington and Thomas Jefferson. Rye said on CNN that "George Washington was a slaveowner. Whether we think they were protecting American freedom or not, he wasn't protecting my freedom."

Her ignorance and arrogance is staggering. Naturally, no one on CNN had the integrity, historical perspective, courage or wit to explain why her position is destructive and foolish. Hey, but it's all right! There's no slippery slope!

That a few people start making dumb arguments using the same talking points as other, better arguments, does not mean that the worst-case scenarios of a slippery slope will come to pass. There are pedophiles who use similar talking points as the LGBT community used to argue that pedophilia should be legalized. Does that mean gay rights are a "slippery slope" that naturally lead to tolerance of pedophilia?

3. Now here's a rant:

As I explained in the previous post, the President's pardon of anti-immigration zealot Joe Arpaio was ill-considered and a poor use of the pardon power. To say, however, that the attacks on it are wildly disproportionate to its actual impact is an epic understatement. The crime Arpaio was convicted of is a misdemeanor. The sentence is light. He is 85 years old, and there is no chance of him repeating the crime–criminal contempt—or doing any further harm, other than shooting off his mouth, Joe's specialty.

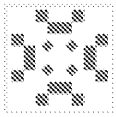
The response isn't about what Joe has been convicted of, it's about everything he's gotten away with. He faked an assassination attempt against himself. He tortured people in his jails. Dozens of people died in his jails as a result of the conditions. He ignored sex crimes to focus on targeting Latinos. He had critics arrested. Trump's pardon of Arpaio signals his approval of all of this.

Yes, the pardon was legal, and liberals who say otherwise are idiots. But outrage is absolutely appropriate here.

Reply

Isaac

August 27, 2017 at 9:25 pm



Sure, the minimum amount of outrage, maybe. It's pretty well accepted now that Presidents pardon people who are convicted of crimes. That's kinda the point.

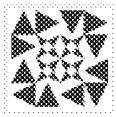
You may recall that Bill Clinton pardoned over 400 convicted criminals, including his scoundrel brother (who proceeded to go out and drive drunk within a year), people who fell on their sword to protect him in the Whitewater scandal, terrorist bombers, tax frauds, Democrat Congressman child pornographers and embezzlers from the government, a guy who stole millions of dollars that was supposed to go to starving people in Iraq, various people who had given Bill and his wife money over the years, friends, associates, kidnappers, drug cartel guys, money launderers, etc.

Either you want the President to be able to pardon people, or you don't. But we're WAY past accepting that a President might use the power of the pardon in a myriad of shady and unethical ways. Clinton pretty much covered the entire spectrum of them, and was (after a lot of handwringing) found to have been within his rights.

Reply

Red Pill Ethics

August 28, 2017 at 9:34 am



I'm gonna be honest I only skimmed this response but at least aprt of it was so wrong that I felt compelled to respond.

"Conservatives have also advocated many restrictions on free speech. For instance, the ban on doctors asking about guns in Florida. Threats to take away funding for colleges that perform plays conservatives don't like. Trump's threat to open up the libel laws."

No conservatives don't advocate restrictions of free speech you hack. This is a blatant mischaracterization.A single state (my home state of Florida) passed a stupid bill that censored a single extremely narrow and easily identifiable topic. That law was subsequently struck down with absolutely no protest or rioting from the right. That's a *far* cry from the comically vague hate speech that mayors, governers, congressmen, senators, and the base from every corner of liberal America actively push for and occasionally riot over when they don't get their way. I also recall that Jack criticized the law here.

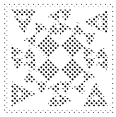
I'm not familiar with the theater thing and I threw a few google searches at with nothing to show for it. If you shoot me a link I'll check it out.

As for Trump's libel nonsense, I'll also need a link but I can guess what it was about. In the end though Trump is Trump and actions speak louder than his half formed thoughts. What actions has he taken to stifle freedom of speech in the US and when have those actions been widely embraced by the conservative base? I'm betting not a lot and hardly ever. Compare that to the Obama's administration where the hate speech witch hunt would occasionally rear it's ugly head to thunderous applause from across the left.

Reply

Chris

August 28, 2017 at 2:55 pm



No conservatives don't advocate restrictions of free speech you hack

...I just showed you that they have, and in response, you didn't provide any argument that they haven't; you just said they haven't done so to the same degree as the left. I agree.

Let me repeat that: I agree that the majority of threats to free speech, at this moment in time, are coming from the left.

Reply

Matthew B

August 27, 2017 at 3:46 pm

Mike Rowe (of "Dirty Job" fame) recently dealt with a similar attack where he was accused of being a white supremacist in a massive logical fallacy. His response is pretty impressive:
https://www.facebook.com/TheRealMikeRowe/posts/1639271342749669

This is truly a derangement syndrome on the part of many people. They've had all logical reasoning overridden by emotion and can't discuss anything rationally.

Reply

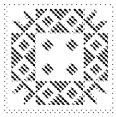
Wayne

August 27, 2017 at 4:02 pm

Jack I dedicate this song to the mainstream media, the Democratic Party, NEA, and liberal academics everywhere:

Reply

walttuvell



August 27, 2017 at 5:18 pm

Right, Jack, you don't "wear you credentials on your sleeve," to your credit, which I generally agree with (though your bio does indicate you're a "Harvie (Harvard)," whereas I'm a "Techie (MIT)"). I only appended the "not-a-crank disclaimer" as a prophylactic, because "on the Internet, nobody knows you're a dog" (https://en.wikipedia.org/wiki/On_the_Internet,_nobody_knows_you%27re_a_dog). The point being, that some sort of cred-establishment is more-or-less required upon an initial encounter, esp. on the Internet, where "everybody is a troll, until proven otherwise" (just like in Court, "everybody is a liar, until proven otherwise").

Reply

Jack Marshall

August 27, 2017 at 5:29 pm

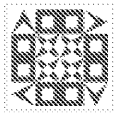
I know. Sorry, I was teasing. I am unusually anti-credentials. Some of the wisest, smartest people I know have none, and some of the biggest fools have an alphabet after their names. I am also disgusted with scholars, academics and alleged smart people right now. I shouldn't have taken it out on you.

I apologize, Walt; you didn't deserve the snark,

Just for that, you can call me partisan again.

Reply

Sue Dunim

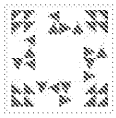


August 27, 2017 at 8:14 pm

Partisan? I'll call you a Glaive, or a Guisarme!

Reply

Steve-O-in-NJ

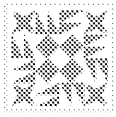


August 28, 2017 at 10:22 am

You've just been poleaxed.

Reply

Eternal optometrist



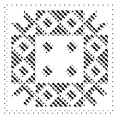
August 27, 2017 at 9:47 pm

In court, a person is not a liar until proven otherwise. In fact, just the opposite. There are jury instructions that you should assume witnesses are telling the truth until you have evidence to the contrary.

Reply

walttuvell

August 28, 2017 at 7:26 am

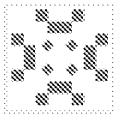


Are you, perhaps, referring to the aphorism (not "jury instruction") that "the accused is presumed innocent until proven guilty" (https://en.wikipedia.org/wiki/Presumption_of_innocence)? If so, then you're misinterpreting what I (intended to) say, and we're actually in agreement. For, what we're both saying amounts to "the burden of proof is on the prosecution/claimant" — i.e., "the prosecutor/claimant (not the accused) is presumed to be lying, until they provide proof of what they're saying (to some standard, e.g., 'beyond a reasonable doubt')".

Reply

Isaac

August 27, 2017 at 5:31 pm



It WOULD be nice if we could claim a moral equivalency and not have to single out one side for most of the outlandish behavior. It would be nice, if:

-Thousands of conservative rioters, most of whom didn't even vote, had wrecked several American cities in anger after the election of President Obama.

-Millions of Men's Right's Activist alt-righters had swarmed Washington and other large cities with their junk hanging out, dragging kids along and holding nasty signs, wearing penis-hats, and then left mountains of trash and junk all over the streets for public servants to clean up.

-Thousands of people were dying in cruel attacks all over the world perpetuated by Bible-thumping, Christian fundamentalists, targeting completely innocent families and children. And with the tacit approval of somewhere between 15-35% of all self-identifying Christians. And with Rightist politicians, local governments, and celebrities insisting that being too concerned about this was definitely anti-Christian and therefore racist.

-Universities and corporations were singling out Left-wing points of view, even fairly moderate ones, and banning them from public platforms under flimsy pretenses.

-Right-wingers were using major news outlets to campaign against the very idea of free speech and a marketplace of ideas, insisting that the government and corporations should be allowed to decide

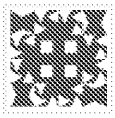
arbitrarily what ideas and people should be allowed to be heard.

-The Tea Party was pooping on police cars, blocking streets, and hiding rapes within their ranks from the police, instead of just having a bunch of potlucks and peaceful meetings.

If THAT were the case, than I wouldn't have to look like a "partisan hack" for pointing out the obvious: that there are massive differences in scale between the crazy Right and the crazy Left right now.

Reply

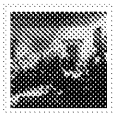
Wayne
August 27, 2017 at 7:16 pm



Hahaha, this is pretty good sarcasm!

Reply

texaggo4
August 28, 2017 at 9:39 am



I don't it was sarcasm. It's a valid point made that the vast majority of political misbehavior since Trump's election has been from the Left.

And the Left does not care.

Reply

slickwilly
September 12, 2017 at 1:22 pm

AND they say the right 'acts just like that'

Reply

Superior Court of the Commonwealth of Massachusetts
County of Middlesex

Walter Tuvell
836 Main St.
Reading, MA 01867
Plaintiff, Pro Se

v.

Jack Marshall
2707 Westminster Place
Alexandria, VA 22305
Defendant, Pro Se

Case № 1781CV02701

TRANSCRIPT OF ORAL ARGUMENT (ANNOTATED)

INTRODUCTION

This document presents a **transcription** of the oral argument held on Jun 7 2018, together with **annotations (in endnotes)** thereto (with authors individually identified).

NOTATIONS

- **Comp** = Plaintiff's Complaint (Sep 13 2017).
- **Diss** = Defendant's Motion to Dismiss (Oct 16 2017).
- **Opp** = Plaintiff's Opposition to Diss (Oct 25 2017).
- **OppExhA** = Exhibit A to Opp (Oct 25 2017).
- *e* = Endnote (used for Annotations here).
- **Quote-marks** = Verbatim quotation or paraphrase. E.g.: "'marketplace of ideas'" at *Milkovich* ℘18 (see *e*19 *infra*) paraphrases O. W. Holmes.
- †, ‡ = Inline-notes (as opposed to footnotes or endnotes).

TRANSCRIPTION

Participants

- **Judge** Christopher K. **Barry-Smith.**
- **Plaintiff** Walter E. **Tuvell.**
- **Defendant** Jack A. **Marshall.**
- **Court Clerk** Arthur T. **DeGuglielmo.**

Court Clerk *00:05.4*

Plaintiff on the right please.

Parties and counsel identify themselves for the record.

Tuvell *00:11.0*

I am Walter Tuvell. I am the Plaintiff.

Marshall *00:14.3*

My name’s Jack Marshall. I am the Defendant, and also a Massachusetts attorney. I am representing myself *pro se*.

Judge *00:21.3*

All right.

And Mr. Tuvell, I take it you’re representing yourself.

Tuvell *00:24.8*

I am.

Judge *00:25:3*

All right. OK, so.

I have read the Complaint. I've read the moving papers. I'll hear from the moving party. I might have some questions. But at the outset I'll let you each say your piece.

I will tell you a couple — this probably goes, this probably is not surprising — but whatever else you'd like to say, I'd like to hear about two things.

The first is "opinion."[1] What's your positions are on what portions of these alleged defamatory statements, if any, are opinion, and therefore generally not actionable.

And the other issue is "the forum."[2] Whether it makes a difference what forum this occurs in. Reading the hornbook[3] I see that it has to discredit[4] the Plaintiff in a considerable and respectable class of the community.[5] This is a hypothetical question: if there was a forum that it was known that there was only two[6] members of, for instance, just to take an extreme example, that might really raise a question. If I heard that this particular forum is one where there's 10,000 known users, I'd push that issue to the side. But I think it's worth discussing.

But the bigger issue is "opinion." So I'll hear from you on all matters, but especially those two.

So the moving party can proceed.

Marshall *01:47.6*

Thank you, your honor. Good afternoon.

This episode came as a result of the fact that the Plaintiff, I think, had his feelings hurt[7] on an exchange on a*[n]* ethics blog that I have maintained for over nine years.

The defamation suit — I am making a motion to dismiss with prejudice. And a motion, if that is granted, to award costs.

There are four — I have four basic arguments. But in the interest of time, I will concentrate primarily on two.

The first is that the lawsuit was premature and unnecessary, and did not follow, it's — my understanding of Massachusetts procedure. I never received a demand letter, as I understand is required by Chapter 93A.[8] And that's more as a result — I was — indeed as a result, I did not even open the initial package I got from the Plaintiff, because it was not sent registered mail.[9] I did not even know it was a lawsuit. So I was totally surprised. And as a result I was behind the eight-ball. It came at a tough time.

And by the way I want to apologize to your honor, and also to the Plaintiff. There were — in reviewing my response — there were a lot of typos, and I'm a lousy typist, and a bad proofreader, and I apologize. I am usually better than that, and my — I hope you will grant that apology.

And I don't — that's not a mere technical flaw.[10] I have maintained a website and a blog for close to twenty years.[11] In that time I have had five

instances — I have written well over 9,000 posts — I have had five instances[12] where someone contacted me and claimed to be defamed or otherwise harmed by the post. In — prior to Mr. Tuvell — the other four, in two of them, I contacted the individual and took down the part of the post that upset them. In the fourth, I felt I was being basically bluffed and extorted by someone, refused to do it, and indeed they did not go forward. Had I received a demand letter, in all likelihood, we would not be here today. So that's a threshold issue.[13]

The other three is that — are that — all of the claims of libel — defamation — in the Plaintiff's Complaint, by all of my research, and what I knew about this prior — because I had done some work in this area — are not defamatory as a matter of fact of law.

Third, the Plaintiff not only didn't try to mitigate damages,[14] but actually put a link to my blog, where we had this exchange, on his own website, and discussed the matter on his own website, thus increasing whatever circulation[15] that he claimed whatever was harmful to him.

And finally that his claim of damages is not only speculative, but unsupportable.[16]

But let's — if we just focus on your main issue, which is "opinion," and whether any of these are in fact defamation. There are 33 separate instances of defamation in the Complaint.[17] According to *Lyons v. Globe Newspaper,*[18] which is a 1993 case, quoting a 1983 case, it says:

"To determine whether or not a statement is opinion, a court must ex-

amine the statement in its totality, and the context in which it was uttered or published. The court must consider all the words used, and must give weight to cautionary terms used by the person publishing the statement. Finally, the court must consider all of the circumstances surrounding the statement."

By that methodology, it would be hard to find a set of statements that had been more definitively stated as opinion.[19] First of all, my blog — both in the About section,[20] which is at the top of the page, and in the section that is guidance to commenters[21] — makes it clear — I state, it says right up front, that this is an opinion blog, that I am uttering my opinion, that it is out here for discussion purposes. So everything that is in there at least is covered by that.[22] And the Plaintiff said in the course of our discussion that he had in fact read the/this/these statements.

But, to the next level: In the primary post[23] — in which virtually, not quite all, but all of the, virtually all of the offending statements were made — I said at the beginning of it,[24] in that statement, I said: "Now this is an opinion, Walt, not an assertion of fact. You can't sue me."[25] I framed the entire thing that way.[26] That, underneath an overall, an overarching statement, officially taken by the blog: "All blog users, this is my opinion."

Now, of the 33, I can break, I've broke all of them down into five[27] different areas. And I'll do this quickly, I'm not going to run through all of the 33 individually, unless you want me to, I'll just give an example.

[#1] Five[28] of them had — were things that had nothing to do with libel

or defamation under any interpretation. Such as, I banned him from the blog, as a result of what I considered disruptive and insulting comments.[29] The Plaintiff argued that banning him from my blog, Ethics Alarms, was defamatory.[30] Nothing defamatory about telling somebody they can't comment on the blog anymore. That's simply an administrative act that I have every right to do. I have blocked probably 20–30 people over the nine years I've run the blog.

[#2] There are three[31] examples of statements, though likely false,[32] could not reasonably be considered offensive to the average person in the community. An example of that: Plaintiff claims that the post mistakenly referring to him as an "academic"[33] — a mistake I immediately apologized for — constituted an intentional slur and was defamatory. I am not aware — although I have my own opinions about academics — I'm not aware that that is a defamatory statement.[34]

[#3] Statements of opinion based upon disclosed facts.[35] Every statement made in this exchange was based on, either the Plaintiff's own website — which I included, had a link included — or his own statements. There were no undisclosed facts that anything was being based on. So, for example, here, there were, let's see, eleven[36] of those statements.

I said, characterizing his website: "The reason Walt is" — this is a quote — "The reason Walt is interested in judicial misconduct is that the judge decided his case was lousy."[37] That was my characterization and my belief.[38] And anyone who wanted to check it out, could check it out, and could dis-

agree with it if they chose.[39]

[#4] Uh, four, the fourth category is unrefuted statements of fact [40] — from *Yohe v. Nugent,* which is a 2003 case — do not provide a basis for defamation cause-of-action.[41] I said, in the course of banning Walt:[42] "This is the first time, however, that someone has abused Ethics Alarms for personal agenda."[43] I believe that is true,[44] and that is why he was banned.[45] The personal agenda had to do with the fact that he contacted me,[46] and said, "Why don't you ever write about Judicial Misconduct?"[47] I said, "I have."[48] I checked. I have maybe thirty–forty posts about judicial ethics.[49] I lecture on judicial ethics. I'm interested in judicial ethics.

As it turned out — and I was not aware of this,[50] as he came on — he has a website that, much of which is devoted to his own case that a Massachusetts judge — this would be Denise Jefferson Casper, United States District Judge of the United States District Court of the District of Massachusetts — engaged in judicial misconduct by dismissing his case.[51] When I found out that that had been the effort that he was, I felt slyly, trying to get me to give my opinion on without me knowing it,[52] I felt that I had been sandbagged. I said I had been sandbagged,[53] and I got angry.

One of the reasons I was angry is — you know, I teach legal ethics. In fact, I do part of the legal ethics introduction for the new admittees to the Massachusetts bar, every other month. Massachusetts is one of the jurisdictions that has Rule 8.2,[54] which makes it unethical for a lawyer to make a statement that the lawyer knows to be false, or with reckless disregard as to

its truth or falsity, concerning the qualifications or integrity of a judge or a magistrate. Now, if I had a website like Mr. Tuvell's, I believe that would be a violation of rule 8.2.[55] And I felt it would be, I felt that I would be, sort-of, tricked into giving opinions that would in fact enable this activity.[56] And so, yes, I did indeed get angry at that.

The fourth — so, I said this is the first time someone has abused Ethics Alarms for personal agenda — it *was* the first time.

[#5] Five — and there were seven[57] of these — I'm not proud of this. Insult, but/though an opinion, is not defamation. There were at least seven examples where I would confess to insulting Mr. Tuvell. In my comment guidelines,[58] I say there will be times that I sometimes will be unduly harsh with the commenter. Under those circumstances, the comm/people should call it to my attention, and I will often apologize or retract the statement. It's a free-wheeling blog. It's a forum for discussion. I moderate it carefully. But we discuss very, very emotional issues, on everything from abortion to war to Donald Trump. People get hot. People make accusations. And I — in an interest, frankly, in not censoring everything — I participate in the discussion. So, here, one of the seven insults was: "I have already spammed two more posts by the jerk." There is multiple cases in Massachusetts that basically state, characterizations such as "jerk" and others are not defamation. They're clearly opinion, and they are insult. That is, that's the law pretty much everywhere that I could find.[59]

[#6] And finally, inaccuracy.[60] The quote is: "Inaccuracy by itself does

not make a defamatory statement, or hold one up to contempt, hatred, scorn, or ridicule, or tend to impair a standing in the community." And there were three[61] episodes of those.

And that's the whole group.[62]

This is a debate forum. It is clear, it is stated up front, that it is a forum for free-wheeling opinion. The commenters frequently criticize each other, and they're often harsh with each other, although I do moderate it, to keep it from being abusive on the basis of race, religion, sexual orientation, gender, etc.[63] And sometimes, if I am sufficiently annoyed by — especially by accusations of bias, which is what I felt Mr. Tuvell was doing, over and over again — I may get harsh as well.[64] So I announced that I was banning him from the blog,[65] and you can see the offending paragraph, where I said, "And here's why," because I never ban anyone without explaining why.[66] That was the section in which I said, "Now, this is all my opinion, and analysis."[67] And I said that up-front.

So, that's — I don't even — I feel as if it's not really necessary to get into a lot of the attendant details, because literally the 33 case/instances of supposed defamation that are being claimed, by no set of law or research that I have done — and I handled another defamation case many years ago — could possibly qualify, I don't think, as defamation.

So on the basis of that, I'm asking for a dismissal.

Judge *14:52.9*

Just a couple questions. The Plaintiff attached to the Opposition, 34 pages of blog posts,[68] and my question is, is there an agreement that this is the entire scope? It appears to me to include everything. I'm just wondering if you've had a chance to review it. I'm wondering if I can categorize it as undisputed that the communications that we're talking about are this …

Marshall *15:17.9*

The various comments?

Judge *15:18.2*

… pages 1–34 that are attached to the defense. *[Indicating OppExhA.]* Have you had a chance to look at it?

Marshall *15:22.4*

I haven't, but I'll accept, I'll stipulate to that.

Judge *15:25.7*

Let me just take a short break and ask *[turning to Plaintiff]:* Is that what this is? Am I reading that correctly?

Tuvell *15:29.4*

Yes.

Judge. *15:29.5*

This is, sort-of, the whole string, as opposed to excerpts, or anything like that?

Tuvell *15:32.0*

It is indeed. It was — that blog post was started on a single[69] day; it continued into the next two or three days. All the contents are indeed right there in that Exhibit A, 32 or 34 pages that you are referring to. You ask if that's all there was to it. The short answer is — as opposed[70] to the bare facts — yes. As opposed to everything else we're arguing about here, obviously, much more[71] …

Judge *15:57.8*

Right. I'm going to give you a chance in one second.

I have one other question. And that's — this might be an academic question — I hesitate to use the term, but …

Marshall *16:04.3*

We're making law here, maybe. *[Joking.]*

Judge *16:05.5*

… academic question. What difference does it make: the forum?[72] When you set forth the rules — whether people read them or not — if a blog location sets forth rules, and generally speaking tell the users: "This is opinion.

It might get rough." However you put it. Does that matter in the defamation world? As opposed to — It sounds different than newspapers.[73] But tell me if you think it's — Is it as simple that, you said at the very beginning, and if *[we]* take all facts and circumstances into account, to determine if something is defamatory. Maybe it's that simple. I'm wondering, if there's any law that talks about when the ground rules are set by a particular forum, that it matters?[74]

Marshall

16:53.4

I have not — I've researched it. Blogs, as you know, are making — this issue is sort-of a little bit of a gray area, because we're just getting, sort-of trying to decide what's going on here. However, the — I would argue that a forum that is laid out, specifically — you know, "No, you can't defame someone in court"[75] The same in an oral argument. The same thing applies to the blog. The blog is framed as: You enter this voluntarily; it's an opinion forum.

You have the option, by the way, on my blog, of having a screen-name, and keeping your own name out of the public,[76] if you so — as long as I know who it is. So this is why I have such an extensive set of disclaimers and explanations at the beginning of the blog, to make it clear that nobody comes here under any misconceptions.

So I think, Yes, I think the forum does matter.[77]

I chose not even to get into the issue, which is still a live one, about whether the degree to which various First Amendment protections[78] apply

to publications like my blog, which has had, I think nine — I just passed the 9,000,000 visitor mark, after nine years.

However, to address the question you asked previously: Since it's an ethics blog, it has a very narrow audience, and I can determine exactly — I can determine eventually (right now I have not been able to) — exactly how many people actually viewed this post.[79] And as of this moment, I know it is less than 400, probably close to 250, spread all over the usership of the blog, which is international. And, fewer than 25 people — I think fewer than 30 people — have actually commented. And I would presume that those who have commented on the blog are the ones who were most likely to have seen the exchange that the Plaintiff is complaining about. So we're talking about a tiny percentage[80] of people outside of the community, that might have in fact seen this, even if it were defamatory, which it is not.

Judge *19:19.1*

All right. Thank you.

Let me hear from the Plaintiff. And I'll say the same thing I said at the beginning: I'm happy to hear you on all matters. I'm particularly interested in your views with respect to opinion, and what we were just discussing about the forum, and whether it makes a difference. So.

Tuvell *19:35.7*

Thank you, your honor.

So, as to forum — let me just do that first, since it's hot on the floor

right now. He just said he's had more than 9,000,000 users.[81] He did indeed post that on his blog, in the last few days.[82] I saw it — I don't frequent his blog any more[83] — but 9,000,000 users, his actual language, he just now said, in open court, that says it's a pretty big blog. OK, so that's the end of that story, as far as *size* of forum goes.

As far as *composition* of forum goes — yeah. He's interested in people — interest is in ethics. He advertises it largely as legal ethics, but really he covers a lot more than just that. And his About page[84] specifically says nothing that he's going to focus on legal ethics. He does — you know, he's got a side business — I guess it's his main business actually, on legal ethics. This blog is separate from his business, by the way. He's got a different business called ProEthics.[85] That's a separate — it has a separate website, and it's a separate business from this blog we're talking about.

Continuing with the idea of composition of forum: I myself have a website. It's not a "blog" — you know, if we get into technicalities, of what's a "blog," what's a "forum,"[86] what — it is a website. And it's devoted to Judicial Misconduct. So, anyone who was seeing both of those *[websites]* would all of a sudden say — because of what he's saying there, about — falsehoods about my, what I will now call "vocation."[87] This is the main thing that I put my time into right now, my voca*[tion]* if you wish. I would be pleased if this court ruled me a limited-purpose public figure.[88] Because, I have that blog, I am associated to Judicial Misconduct research, and he has totally impugned that. OK, so there goes, you know, reputation damage.

So that's what I have to say, at the moment, about size of forum, and composition of forum.

Judge *21:44:7*

Alright.

Tuvell *21:45:6*

In particular, on his point that he just mentioned, quite recently, about his — I think it's his About, either his About page[89] or his rules page[90] or something — he talks about he's, it consists of his opinion. *Calling* something a "opinion" does not *make* it an opinion.[91] There is absolutely no rule that ever said that, in everything that has ever been printed, in every case, anywhere, in any jurisdiction. It says, to *call* something an "opinion," and then go ahead and make a statement of fact about it, does not *make* that an *[pure, fact-free]* opinion, period. So, we know that that's true.[92]

What *would* have made a difference, had he published it on his website, is if he would have said: "This website is a satirical one." Which means: "I'm going to actively say crazy stuff here, and I don't expect anyone to believe it."[93] OK. There are big arguments nowadays on the Internet about, you know, from various fact-checking websites — Snopes[94] and, you know, several others[95] — they say: "Yeah, we've heard on the Internet somebody saying such-and-such. But, guess what? That was first published on a satirical website. You can't believe anything they say." He *[Marshall]* did not say that. He does say he *believes* — on his About page, or whatever it was — he

believes everything he writes.[96] OK. Even though he says it's going to be "opinion," he explicitly writes, on that very same page, "I believe everything I write."[97] OK.

Now, that's what I have to say, a little bit, about opinion versus fact — I'm sorry, at least about *opinion*.

Now, as to *fact:* Obviously, in all — in my whole Complaint and everything else I've written here — I don't complain about his *[pure]* opinions, at all. Every single one of them is a fact problem. Now, he gave a list of 33, he claims — I haven't actually counted, maybe it is 33. I do have here a list[98] of five — what I would call the "five top defamations." And they are all *fact* based, not "opinion" based. And I'll read those in just a moment. Or, I could do it right now, but I just wanted to get that out.

That's what I say about fact versus opinion: I know the difference, I know the difference in defamation law in particular. Just to be clear here, we're talking libel. There have been once or twice that he talks about other types of defamation[99] — this is totally libel. So it's all written, as we just agreed to, or at least I just stipulated, the 34-page Appendix[100] you have there, I think covers 99% of everything.[101] OK.

I haven't — OK, there's two orders in which I could do things here. I could go down — I just said I have a list of five things here, and I could go down those, and I will in a moment. But what might be better is, since some of these ideas are hot on the floor, that he was just talking about, and I made notes[102] on them, let me briefly mention those.

Judge *24:39.4*

However you'd like to proceed.

Tuvell *24:40.6*

Thank you.

He mentioned something about a Chapter 93 demand letter.[103] That is ridiculous. That has to do with commercial law, consumer protection. This is not such a case. This is a straight defamation tort. I don't know where he's pulling that from. It's got zero substance with this court — with this case.[104]

Judge *24:59.7*

So, I'm not going to decide the Motion-to-Dismiss based on 93A demand letters, 'cause that's — 'cause it's a defamation lawsuit. So.

Tuvell *25:07.5*

Perfect.

He mentions registered — that I didn't send it registered mail.[105] There is no rule to send anything by registered mail in this jurisdiction. I did send it by U.S. certified mail, which is the accepted way to do it. I have[106] …

Judge *25:22.2*

Same thing, I'm not gonna rule on the motion based the form of mail either.

Tuvell *25:27.1*

OK.

Judge *25:27.6*

So that, this — the ruling in this case is likely to resolve — revolve around, yeah, the issues we were just discussing: opinion, …

Tuvell *25:37.8*

But he just put up …

Judge *25:38.4*

… defamation, damages,[107] that type of thing. Go ahead.

Tuvell *25:40.9*

I'm just saying he put it out on the floor, I need to mention these just to cover my position.

Judge *25:44.0*

Just lettin' you know.

Tuvell *25:45.6*

He mentioned mitigation of damages. That's also got nothing to do with this hearing. This hearing is a Rule 12.[108] It's got nothing to do with mitigation of damages.

Judge *25:55.7*

Well, you do have to allege damages, though. Have you done that?

Tuvell *25:57.8*

I absolutely have, sir. In my Complaint [109] …

Judge *26:02.9*

Damages to reputation — I think you have. I just wanted — I say that's the relevance to the Motion-to-Dismiss, you do have to allege damages.

Tuvell *29:09.1*

And I really appreciate the comment you just made. Because this is a Rule 12 hearing. So, what we're talking about here is whether or not I have alleged claims — you know, injury on which I can — on which a reasonable jury … Sorry, let's be careful here. We're asking whether or not there may reasonably exist evidence that what I claim could cause a reasonable jury to rule that I was defamed. OK. So all of his stuff that he's talking about — *facts* — have nothing to do with a Rule 12 hearing. It's whether I *pled* the facts. And I did. OK. Just want to make sure that that's understood here.

He said that the judge for — I don't know if you want to get here — the judge in this other case decided my case was "lousy."[110] That is false, because she did not decide on, quote, "my case." What she did is, she did indeed dismiss the case on Summary Judgment, but she falsely did so, because she did not listen to the Plaintiff's Statement of Facts. She explicitly

said, in her ruling where she dismissed the case, she said: “I am going to listen only to the Defendant’s Statement of Facts.”[111] The Defendant here was IBM, by the way, I was the Plaintiff, OK. That is illegal. That is Judicial Misconduct. That’s the basis of my Judicial Misconduct Complaints about that case. So when he said the Judge ruled that “my case” was “lousy,” that is false.

Judge

27:35.2

Let me ask a different about that, though. Because, just the use of the term “lousy,” has the ring of opinion.

Tuvell

28:06.4

It does indeed. Except for the fact that in this case, he was talking about, you know, my website claiming something — one thing — and then, he’s basically saying that I was false in what I was saying: I said that she ruled on a — he said that she ruled on my case — she ruled on a case that she invented the facts about.

So, it’s not “lou–” — You’re right, just the word “lou–” OK, insult. I have — I don’t — I have no problem with insults. He mentioned before he called me an asshole.[112] I don’t care about that. I don’t care about the word “lousy.” I don’t care of any it. None of those are in my Complaint. None of those are any of the 33 of my Complaint. What I do have in a number of places is to say things which may — how should I say it? In the language of Cardinal Richelieu, the famous Six Lines Aphorism.[113] So it may — if you ex-

tract them out of context — a few little words might look like an opinion. But in the context of everything, these things are not *[pure]* opinion. And in fact, the cases say — and the law reviews — all say what's really going on here is the contextual implication of defamation.[114] So if somebody says the case is "lousy" — the word "lousy" I don't care, that's nothing, it's a word. To say my whole case and my whole website "are lousy" — that is defamitorily impugning a whole set of facts over here, in context, that makes that "word 'lousy'" much more than "just the 'word' 'lousy'."[115] OK. All right. I have citations to all this in my filings.[116]

He says that he writes about Judicial Misconduct.[117] So, my website is called JudicialMisconduct.US. He says on his website, oh, he's talked about judicial misconduct thirty-some-odd times.[118] That is false. He has talked about Judicial Ethics in a few places, which is totally separate[119] from Judicial Misconduct. Judicial Misconduct is ruled by, you know, twenty years ago[120] …

Judge

30:14.9

This one jumps out at me as proving something false for the sake of proving something false.[121] If, in describing his own website, Mr. Marshall overstated the truth, "I wrote on judicial ethics thirty or forty times," and it turns out it's ten or twenty. OK. How does that hurt you? 'Cause all of this has to hurt you.

Tuvell *30:39.9*

Absolutely. He does not address Judicial Misconduct on his site one single time, insofar as I am able to find.

Judge *30:49.8*

Same question though. If he …

Tuvell *30:52.5*

Because he’s …

Judge *30:53.2*

… tells the world incorrectly how many times he’s written on the topic, how does that hurt you?

Tuvell *31:00.0*

Oh, I see what you’re saying. You’re right, it doesn’t. That, in itself, does not hurt me. His fact of saying here he wrote about it thirty-some-odd times, that doesn’t affect me at all, and I don’t care about that. What I do care about is that he’s pretending that what he’s written about applies to me, and it doesn’t. So he’s saying false things, which by context say that he’s — that what I write on my website is false, or in my lawsuit is false.

Judge *31:31.5*

OK.

Tuvell *31:32.1*

This is a fine point. I'm willing to drop the point. I admit, for him to say anything about, you know, how many millions of times he's written about Judicial Anything makes no difference. But just to point out that he doesn't know what he's talking about. What he's talking about is Judicial Ethics, which I, you know, am not interested in. I'm interested in, strictly,[122] Judicial Misconduct. You know, the whole Judicial Misconduct proceedings, through — in the case of the Federal Courts, which is what that case[123] is in — it goes through the Judicial Council, and the Judicial Conference, which is where I'm at right now. That is a known quantity. A lawyer should know that. Instead he pretends that writing about Judicial Ethics has something to do with the Judicial Misconduct proceedings. So …

Judge *32:22.0*

So let me just interrupt again. Because, when I go through the Complaint, to determine whether your allegations allege defamatory conduct, defamatory words, that — I'm going to put each one of the statements through a filter. And the last step of that filter is, "causes harm to you."[124] So, if you're talking about things that another person says, that then don't cause harm to you …

Tuvell *32:53.0*

Ah.

Judge *32:53.9*

… that's why I use term, it's like, proving things false for the sake of proving things false …

Tuvell *32:58.0*

OK.

Judge *32:58.1*

… the cause-of-action here is defamation. It's gotta hurt you.[125] So I just want you to know that I'm gonna have a bunch of things. It has to be false, not opinion, causes harm to you;[126] there might be a couple other things. But every — I'm gonna go through the Complaint, which is basically what the Defendant asks me to do — I'm gonna go through the Complaint, and I'm gonna put every, you know, set of allegations through those filters. And they have to satisfy all those standards. So I just say, the ones that happen — if you happen to be saying that he is misstating himself — unless it hurts you,[127] that's not actionable, unless I need to be educated on a different type of law.[128]

Tuvell *33:34.5*

Good. Now that you've explained there to me, I had time to think while you were saying that, and I can say, "Yes, indeed, it did harm me."[129] Because: on his website, you know, he is more-or-less God, let's just put it that way. So all of the readers there believe him.[130] Most of them are in his

pocket, they totally agree with everything he says. So, when he says — he writes about Judicial Misconduct, and he knows everything about it — then they're going to trust him when he goes back and says, "Oh, and Walt Tuvell's case is lousy." OK. That is defamatory implication in context.[131] OK. So I think that's the best I can say about that.[132]

Judge *34:16.5*

OK.

Tuvell *34:17.8*

Fine. I have mentioned — so that's what I have notes from what he said. I mentioned that I have a list of five …

Judge *34:28.2*

Yeah, well, I heard a category of five from Mr. Marshall. And I'll hear your category of five. And I'll see which one …

Tuvell *34:38.1*

It's a different five.

Judge *34:38.9*

OK — and I figured. So go ahead.

Tuvell *34:41.0*

Well, by "different five," I meant that he also talked about 33 claims of

injury in my Complaint. So I'm going to boil those down to five top runners. So, the five top defamations. Totally different from his point of five things.[133] OK. And so here they are.

[#1] First of all: theft of professional services.[134] Uh, accusations — so I didn't actually steal anything, because he never produced any professional services for me that I ever used. But he certainly accused me of attempting to steal professional services from him. He very specifically said that I was trying to get something for free off of him, and that in doing so I had a secret personal agenda, and that I was dishonest. That is a statement of fact. The statement of fact is: that I tried to get something free off of him that had value. That's a statement of fact, saying I'm a thief, or in this case just an attempted thief. That's not *[pure]* opinion. That is not an opinion. It is a statement of fact. Period. And we can look at the actual language.

Judge *35:51.7*

Is it opinion if he discloses the basis for his view? There's some case law that says: opinions based on disclosed facts, or non-defamatory facts — you can sort-of prove them to be opinion.

Tuvell *36:11.0*

You're absolutely right, provided that the facts that are based on this utterance — that we're debating, whether it's an opinion or fact, the basis of that — is true.[135] But it's not, in this case it's false. So, he says, "Walt did a bunch of stuff over here" — all of that happened to be false, factually false.

And then he said, “And that convinces me that he tried to steal, his theft of professional services.” OK. So, in that case, that answers your question. It was — this is the contextual imp– — defamatory implication in context.

Judge *36:48.8*

I want to hear your five categories. And I mention there’s a group waiting for a 3:00 o’clock hearing, that’s been very patient. So, I want to hear your five categories, and give you a couple more minutes.

Tuvell *36:58.9*

I’ll speed up.

Judge. *36:59.6*

Thanks.

Tuvell *36:59.9*

[#2] Number two. He said that I chose that — me, Walt, as opposed to anybody else on that website — chose the precise divisive issue or subthread of Left versus Right, and that my comments were “bitching” — his language there. That is false. Now, first of all, that is a statement of fact. That’s not opinion. That’s a statement of fact — except maybe the “bitching” comment, that’s just an insult, I don’t care about that. But to say that I’m the one that started the thread of all this stuff, that’s false. That’s not true. I wrote him on the side, before any of this website came up, a question about the purpose of his website, versus the About page or whatever — the design

purpose versus the implementation. That was separate. But on his website *per se,* I only ever said, “Look at my Judicial Misconduct complaints, that’s what I want to talk about.” And it was others on the website that picked that up and ran with it, and said, “Oh, he’s an academic, oh, he’s —” I guess they think academics are pro-left-wing, and/but the whole website is pro-right-wing, or something crazy. I didn’t start that. He li– It was false. It was a false statement of fact to say that I started that thread. Period.

[#3] Number three. He calls my website a single issue website. Now, in the context of everything written here *[indicating OppExhA],* what he means is the following. So I have a website. It’s called JudicialMisconduct.US. It is a “platform” — is the way they say it in the Internet nowadays — a platform or a framework for people to complain about Judicial Misconduct. He is saying that it’s not that at all. He explicitly said: “That’s not what Walt’s — Mr. Tuvell’s — website is about. It is instead about his particular case, *Tuvell v. IBM*.” That is false. So he made a statement of fact — that it’s a single-issue website — that is false. Right now there’s at least five cases on there,[136] and it goes into other stuff too.[137] But: statement of fact, false. He impugned the website, he impugned my integrity, of saying what I do now is really my vocation,[138] so to speak. OK.

[#4] Number four. Sandbagging. He claims that I had — that I said a certain thing — that misled him, and then I jumped — turned around and jumped — and said something different. It’s a little hard to tell, but that is totally false. By him saying that I said a certain thing that misled him — I

did not say that certain thing that he just got done saying that had misled him. OK. Totally false. The word “sandbagging” I don’t care about. But for him to say I — as he said in a number of places — that I secretly, dishonestly misled him about what I was interested in — that is false. The record proves it, those 34 pages.

[#5] Last. His banning me from his website, and saying that I was the first time anyone abused Ethics Alarms — that’s the name of his website — for my personal agenda. OK. I totally agree, he owns the website, he can ban anybody he wants. However, this is the perfect example of contextual defamatory implication. Yes, you can ban me. But to say that the reason you banned me is this — you know, my paragraph 14 there, with all of these points in there *[gesturing to copy of Complaint, ¶14℘7–15],* that’s what he was relying on — all those points were false. OK. The point being, so, why do I — since it’s already been talked about, that they’re false, why am I raising that the banning is a big deal? Because that’s the kiss of death on the Internet. And if you get banned from something, you’re automatically thought to be, “Oh, a terrible person.” Remember, all these people reading his website? 9,000,000 users, as he just said a few moments ago. OK. All of a sudden, that’s defaming me. Falsely. I did not do anything for personal agenda here. By “personal agenda,” by the way, he means this business about theft of professional services, in this context, just read it, that’s what is says. *My* personal agenda was: “Hey, Jack, this would be great for you to write about — Ethics Alarms, on your website — because here’s a judge ly-

ing about a case. She picked this case, at Summary Judgment, where by rule and by law, the judge has to credit — automatically credit, without thinking — the Plaintiff's Statement of Facts. Instead, she writes, in black and white: 'I am crediting the Defendant's Statement of Facts.'" That's something that a lawyer should care about.

Last point. He mentioned Mass. Rules of Professional Conduct 8A. I think he sh– — Er, 8, what is it called?

Marshall *42:06.2*

[Background voices, speakers unidentified.] It's 8.2.

Tuvell *42:11.4*

8.2, right. I think he should have quoted Mass. Rule of Professional Conduct 8.3. And I quote it right here (it's the last thing I'll say): "A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question at to the judge's fitness for office — "office" here meaning being a judge — shall inform the appropriate authority."[139]

My proof of that is a little snippet out of her decision. I call it the Smoking Gun — it's published on my website, I pointed him explicitly to it — which proves that she explicitly said: "I, the judge, at Summary Judgment, am going to credit only the Defendant's Statement of Facts. Not the Plaintiff's."

8.3.

Judge *42:57.9*

All right.

Marshall *42:59.9*

Your honor.

Judge *43:00.3*

Mr. Marshall, if you want sixty seconds to respond, I'll give you sixty seconds.

Marshall *43:02.9*

Sixty seconds, all right, sixty seconds.

"A," I have had 9,000,000 users — views, not users. Users are much — I'm sorry, I apologize, my mistake *[speaking to the Clerk, who had gestured for him to stand up],* I was feeling faint *[joking]* — the users are much smaller than that. I have 2,000 people who officially follow my website every day.[140] So that is just, you know, that's just wrong.

Basically, I don't know how to — As far as I can see, that monologue basically supports what I've been saying. I mean, essentially what the Plaintiff is saying is, "Opinion is fact." Opinion's not fact. It's — opinion's not fact when anyone else is free to look[141] at all the evidence, every bit of evidence in which I said, "From what I saw of the website, this is a single-issue website." That's not a statement of fact. That's my analysis.[142]

Judge *43:53.4*

You would say that when you — one of the things about the Internet, where it's so easy to link to things, is that when you state what you say is an opinion, and then …

Marshall *44:03.6*

Link to the website.

Judge *44:03.6*

… link to the basis for that statement, it's almost free from being defamatory, because any reader can exercise their own mind to see if they agree with your statement or not.[143]

Marshall *44:18.7*

That's correct, they can come back and say, "He's wrong. He's full of bulljunk." But that's, nonetheless, it's still an opinion.

The stealing professional — basically, my statement was that I was brought into the Plaintiff's ambit by a suggestion that I — why don't I look into more Judicial Misconduct.[144] As a matter of fact, your honor, I think I've written more than forty or fifty[145] pieces about Judicial Ethics and Judicial Misconduct. And I don't — I have to say, I don't understand the argument that Judicial Misconduct and Judicial Ethics are completely different, at all.[146] I mean, you know, I teach this stuff. Judicial Misconduct is a breach of the canons. It's Judicial Ethics. I don't understand the argument.

And as far as the insults can — Every single item that I listed and rebutted in my Complaint — were taken directly off of the original Complaint. So, if — I don't know what Mr. Tuvell is talking about there.[147]

And that's more than my sixty seconds. I've done — I think it's pretty clear that these are all opinions being represented as fact.

Judge *45:31.8*

All right. So, I want to take the matter under advisement. These things usually take a week or two. And you should expect a decision from me in the next couple weeks. And I appreciate your arguments. You'll hear from me soon.

Marshall *45:45.5*

Thank you, your honor.

Tuvell *45:46.4*

Judge, would you entertain further business at this moment? It's not a lot. What it is, is he recently this week put in a motion for costs. I have an opposition to that. I have filed it downstairs earlier today.

Judge *46:01.7*

I'm gonna rule on costs on the papers. I don't need to hear argument on it.

Tuvell *46:08.2*

Fine.

Judge *46:08.5*

So if you submitted something, I will be sure to look at it before I make a decision.

Tuvell *43:13.3*

Fine.

The other thing I made a motion on, just today — motion with memo — is that I would like him to communicate by email with me. He has blocked me. He refuses to communicate by email. For example, I would like to have PDF copies of his filings, so I can do a search, and do an easy quote *[referring to "cut-and-paste"],* stuff like that. He refuses to give that to me. I've tried to give it to him, he refuses.

Judge *46:39.7*

So you've asked for that …

Tuvell *46:41.3*

I have indeed …

Judge *46:41.8*

… permission in your motion?

Tuvell *46:42.2*

… it’s a motion in your box.

Judge *46:42.8*

All right, I will consider it when it reaches my desk, which is usually a little while. OK.

Good. Thank you. And you should expect a decision in the next couple weeks.

Other than those motions you just mentioned that are already on file, typically while a motion-to-dismiss is pending, I don’t expect there to be other action in the case. So that, you get a decision on this motion first. OK.

Marshall *47:08.1*

Thank you, your honor.

Judge *47:09.2*

All right.

Tuvell *47:09.5*

I do understand that, but I wanted to cover my bases, because you just said “typically.” So I don’t think what you just said is a rule, and I don’t even know your particular operating style. That’s why I filed the motions.

Judge *47:19.6*

Yeah, I’m saying, the things that are already filed, that’s fine.

Tuvell *47:22.8*

OK.

Judge *47:23.1*

And now I’m saying, O– — So I’ll be more explicit. While the motion-to-dismiss is pending, other than the things that are already filed, I don’t want any discovery, or other motions in the case.

Tuvell *47:36.0*

Totally agree.

Thank you.

ENDNOTES/ANNOTATIONS

1 *[Tuvell]* We have much to say about "opinion" throughout these endnotes/annotations, but at a minimum here, we note the word/concept doesn't even occur at all in the "hornbook" definitions of cause-of-action for defamation: see *e*3 *infra*. It's a secondary/derived/after-invented concept.

2 *[Tuvell]* The Judge's use of the word "forum" is nonstandard in the law of defamation (to placate the Judge, the Defendant and Plaintiff at oral argument fall in line and use his nonstandard word "forum" too). But from context, we assume what he means is "audience," the standard terminology for the recipients of defamatory communications.

The Judge's concern here focuses on the *size* of the audience. Elsewhere in the Judge's questioning (see *e*5,72,143 *infra*), he has *other* concerns about the audience.

The Judge's concern about the *size* of the audience is wholly nonstandard/irrelevant (i.e., "false," in the sense of "bad faith," possibly/probably aiming to bamboozle/hoodwink/swindle the *pro se* Plaintiff, and "trigger" his PTSD, see *Note* at the bottom of this endnote/Annotation). For, as long as the size of the audience is ≥ 3 (namely, the Plaintiff, and Defendant, and at least one other audience member, which has indisputably occurred, namely, during this very oral argument, Defendant himself estimates "probably close to 250" people saw the defamation at the time of events, see ℘14), the size of the audience is simply *not* a factor as an element/criterion of a cause-of-action for defamation generally, much less *(a fortiori)* at Motion-to-Dismiss time (though it may be relevant in a damages discussion) — according to every "hornbook" (see *e*3 *infra*). And indeed, as the Defendant himself has already explicitly pointed out to the Court, Massachusetts law agrees with the hornbooks on this point (*Brauer v. Globe Newspaper Co.,* 351 Mass. 53, 217 N.E.2d 736 (1966); https://law.justia.com/cases/massachusetts/supreme-court/1966/351-mass-53-2.html), at Opp℘7¶2, which we repeat here (with direct quotation and enlargement, emphasis added, internal cites omitted): "There is *no requirement* in an action of libel 'that the defamatory matter be

communicated to a large or even substantial group of persons. It is enough that it is communicated to a *single individual* other than the one defamed.'"

Note: Even though the Judge's concern about size of the audience is totally bogus, the Defendant and Plaintiff were "obliged" (because judges can be bullies/abusers-of-power, noting that such bullyism/abuse-of-power is a/ the major "trigger" for Tuvell's PTSD, which the Judge well knew Tuvell suffered from, because Marshall attacks it in OppExhA$_{\wp}$16, see *e*25 *infra*) to address it at this oral argument (and they did so).

3 *[Tuvell]* The Judge doesn't specify *which* "hornbook" he's referring to, which is OK (though it does indicate his general interest in "hornbooks"), because at this basic level it doesn't really matter (they all essentially agree on the fundamentals). (i) The "standard" "hornbook" is the *Restatement (Second) of Torts* (https://www.jstor.org/stable/25761080, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1016&context=faculty_scholarship), but it's now rather dated (http://wakeforestlawreview.com/2011/01/the-vast-domain-of-the-restatement-third-of-torts/). Up-to-date specialized treatises include: (ii) Sack's *Sack on Defamation* (we reference herein the 3rd edition, 10th release, Apr 2009 (the most recent available in the Middlesex Law Library)); (iii) Smolla's *Law of Defamation;* (iv) Collins' *The Law of Defamation and the Internet.*

For the record (since the Judge raised the point), we list here the *Restatement's* **standardized list of four elements/criteria of cause-of-action** for defamation/libel/slander reputational damage (as languaged here by *Sack* §2.1, but which can be found in the other "hornbooks" as well — **none of which mentions "opinion," which is an after-invention**):

(α) A false† and defamatory statement concerning another.

(β) An unprivileged publication to a third party.

(γ) Fault amounting at least to negligence on the part of the publisher.

(δ) Either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

In Massachusetts, in all cases of libel (including "cyberlibel," as in the instant case), the first clause of (δ) obtains: that is, ***no* claim/proof of "spe-**

cial harm" is required (this is captured/summarized by the catch-phrase **"all libel is *per se*"**). This has already been explained at Comp℘17ƒ3 and Opp℘19ƒ15 (and crops up again at *e*143‡ *infra*); it's also mentioned in *Sack* §2.4.17 ("courts in [Massachusetts] presume that reputation harm flows from words that are actionable *per se*"), and again at §2.8.3 ("in Massachusetts, all libelous communications are libelous *per se,* and are actionable without proof of special damages" (paraphrased)).

{† • One must be very careful about the word "false" here, because in the law of defamation it doesn't mean "strict/rigid/logical" falsity, but rather "material falsity." See *e*18 *infra*.}

4 *[Tuvell]* The judge speaks falsely here. In the law of defamation, there is simply *no* requirement for "(actual) discredit" as an element of a cause-of-action for defamation generally, much less *(a fortiori)* at Motion-to-Dismiss time (though it may be relevant in a damages discussion). Instead, there is only a requirement for "*potential/tendency* to discredit." (Though, in the actual event, it is plainly clear that Marshall's defamations did indeed have a detectable/measurable deleterious effect on Tuvell's reputation, in the estimation of the blog's audience, as is immediately obvious from any casual perusal of OppExhA.) See *e*5 *infra.*

5 *[Tuvell]* In *Sack* §2.4.3, the "(potential) effect of communications on the audience," is discussed in these ways (emphasis added; notes and internal quotation marks omitted):

"The *Restatement* view is that it is enough that the communication would ***tend***† *to prejudice* [there being *no requirement* to consider whether prejudice *actually* occurred to any audience member] the plaintiff in the eyes of a substantial and respectable minority of the community as a whole." {† • "The focus on whether a communication would ***tend*** to injure the plaintiff's reputation, rather than whether it *did in fact* cause such injury, is [an oddity unique to defamation law, compared to other areas of tort law — because, damage/injury/harm to reputation is so difficult-to-impossible to detect/quantify, obviously]." *Sack* §2.4.1.}

"Although it has often been said that a communication is to be consid-

ered on the basis of its effect upon the 'average' person, it is the *nature of the audience for the particular statement* in issue that determines whether the speech is defamatory [rather than an 'average' member of the general population]."

"Communications are judged on the basis of the impact that they will *probably* have upon those who are likely to receive them, not necessarily the ordinary 'reasonable men.'"

"For a *specialized audience* [e.g., in the instant case-at-bar, the people following the discussion (OppExhA) are assumed to be somewhat acquainted/interested — though largely/wholly non-lawyers, and not-necessarily-well-educated in legal matters — in law and ethics, noting that Marshall calls it a "very narrow audience" on ℘14], the statement's defamatory meaning is to be judged by the average and ordinary reader acquainted with the parties and the subject matter."

"[T]he law is stated in terms of what the reader *might reasonably understand* the offending words to mean, [and not] what the author of the words *intended [or pretended]* them to mean [in particular, not whether the author tried to inoculate/immunize the audience/himself by proclaiming/pretending everything he wrote was 'pure/fact-free opinion,' see *e*72 *infra*]."

6 *[Tuvell]* The Judge's conjecture about "only two members" is an absurd/meaningless nullity, given that the filed papers/evidence (esp. OppExhA, which the Judge himself ostentatiously waved around at this oral hearing, *e*68) conclusively prove conclusively.

7 *[Tuvell]* Classic "damning by faint understatement." The elements/criteria of cause-of-action for defamation (listed in *e*3 *supra*) do not include anything like "the feelings of Plaintiff being hurt" (as Marshall of course knows well).

8 *[Tuvell]* MGL Pt.I Tit.XV 93A, specifically its provision for a demand letter, §9(3).

9 *[Tuvell]* "Registered mail" (which provides end-to-end security in locked containers; https://en.wikipedia.org/wiki/Registered_mail) is *not* required for service of a Complaint in Massachusetts (nor, probably, in any other jurisdic-

tion in the United States or world). Plaintiff used “certified mail,” with contemporaneously provided proof of such to the Court, as is fully compliant with the relevant court rules (esp. MRCP 4(e)(3)). Opp ℘9–10.

10 *[Tuvell]* It’s unclear here what “technical flaw” Marshall is referring to, though both candidates are entirely bogus, as argued/proven by Plaintiff already in his Opp (so it’s false for Marshall to keep beating those drums here at oral argument): (i) If he’s referring to “registered mail,” see *e*9 *supra.* (ii) If he’s referring to “demand letter,” see Opp℘9ƒ11 where it’s additionally noted that in any case Tuvell certainly *did in fact* send a “demand letter,” via email.

11 *[Tuvell]* But of course, whether the “twenty years” here or the “nine years” on ℘4,7,14 is the correct number, no such longevity measurement is remotely relevant/exculpatory for a charge of defamation. (… see *e*12 *infra*)

12 *[Tuvell]* (… see *e*11 *supra*) For example, the five instances mentioned here (and others unmentioned) may very well have been actionable for defamation.

13 *[Tuvell]* No, it’s not a “threshold issue” in the standard legal sense. Marshall here uses the phrase “threshold issue” in a colloquial sense (namely, claiming Defendant could/would have pacified Plaintiff, without the necessity of filing a formal lawsuit), not in the standard legal sense (where the phrase refers to a “punch list” of *legal* prerequisites that must be satisfied before further proceedings can be sustained).

14 *[Tuvell]* Mitigation of damages is irrelevant here. It’s simply *not* a factor (e.g., it’s not in any “hornbook”) as an *element of a cause-of-action* for defamation generally, much less *(a fortiori)* at Motion-to-Dismiss time (though it may be relevant in a *damages* discussion).

Besides which: What Marshall says is ridiculously false anyway, because the material posted on Tuvell’s own website reflects precisely his arguments in the instant lawsuit anyway (i.e., documenting the truth of events, and exposing Marshall’s defamation) — hence it *does* amount to “mitigation of damages” (it does *not* amount to “repeating/supporting the defamation”).

See also the criticism of the "mitigating damages" at Opp℘18–19.

15 *[Tuvell]* By speaking of "increased circulation," Marshall here appears to be "agreeing" with the Judge's focus on the "size of audience" issue, but as already explained in *e*2 *supra* that issue is an irrelevant non-sequitur in defamation cases generally, much less *(a fortiori)* at Motion-to-Dismiss time.

16 *[Tuvell]* But of course, there's not need whatsoever to discuss damages here, because that's irrelevant at Motion-to-Dismiss time.

17 *[Tuvell]* It's not entirely clear where Marshall gets his count of "33 separate instances of defamation" from. That number doesn't correspond, for example, to the number of pages or of paragraphs in the Comp. Marshall does *partially* explain where the count of 33 comes from, by the six sub-counts he mentions later (see *e*28,31,36,40,57,61 with sub-counts of 5+3+11+4{?}+7+3 = 33), but he doesn't fully explain where he gets those sub-counts from.

In Comp, Plaintiff uses the symbol "†" ~57 times to tag "statements and actions complained-of" (Comp¶17), but not all of those indicate "separate/distinct instances of defamation" (there is some overlap/duplication). A *categorization* of the "Top Five Defamations" was given at oral argument (and hence recorded in this very transcription, see *e*133 *infra*). It seems inappropriate/tedious to provide here a "free-standing (that is, apart from the Comp itself) complete/exhaustive listing," in the sense of a table explicitly mapping each of those ~57 occurrences to their corresponding "Top Five Defamations" (or other defamations not amongst the top five) — though, that exercise could readily/easily be accomplished.

18 *[Tuvell]* There are two (related) 1993 cases referred to as *"Lyons v. Globe Newspaper:"* (i) *"Lyons I,"* 415 Mass. 258 (http://masscases.com/cases/sjc/415/415mass258.html). (ii) *"Lyons II,"* 415 Mass. 274 (https://law.justia.com/cases/massachusetts/supreme-court/volumes/415/415mass274.html). Since Marshall speaks about "quoting a 1983 case," he's referring to *Lyons I,* where the language Marshall cites appears on ℘263, as follows (internal cites and quotation marks omitted, emphasis added):

"In order to receive protection under these principles, a challenged

statement first must qualify as an expression of opinion. If the statement **unambiguously constitutes** either fact or opinion, this issue is a question of law for the court to decide. The court must examine the statement in its totality in the context in which it was uttered or published. The court must consider all the words used, not merely a particular phrase or sentence. In addition, the court must give weight to cautionary terms [and, the "cautionary terms" published on Marshall's About page by no means suffice: they're only vague *labels,* not crisp *proofs,* of opinionatedness] used by the person publishing the statement. Finally, the court must consider all of the circumstances surrounding the statement, including the medium by which the statement is disseminated and the audience to which it is published."

The problem, though, is that Marshall falsely omits (and the Judge falsely ignores) the crucial precondition of this quotation: *"If the statement **unambiguously constitutes** either fact or opinion, this issue is a question of law for the court to decide."* In the real world, many/most(/all) statements are of a ***mixed/intertwined** character* (*Sack* §4.3.2ƒ149.1: "Opinions implying facts are sometimes referred to as 'mixed opinions';" *Sack* §4.1: "Analysis is complicated because communications commonly consist of intertwined allegation of fact and opinion") — part fact, part opinion (and not "unambiguously only/pure fact or only/pure opinion"), and/or containing ***defamatory implication, a.k.a. defamation-by-implication/imputation/insinuation/innuendo*** (see esp. the hornbook quote from *Restatement (Second) of Torts* at the end of this endnote/Annotation; also see *Sack* §2.4.5 generally) — especially when taken *in context* (cf. the tag "CTXDEFIMPL" mentioned in *e*116 *infra*). For example, for an ignorant person to say "the moon is made of green cheese" (whether or not prefacing it with a "cautionary term," such as "I think," so that linguistic trickery/fakery doesn't count)[†] is a statement of *both* opinion and fact (in this example, a false fact). According to the terms promulgated by *Lyons I* (preceding paragraph *supra*), such mixed opinion/fact statements are *not* eligible for court/judge decision as a matter of law at -dismiss time. The statements that are subject to defamation protection are *statements of fact, whether or not they are also statements of opinion.* It is

only statements of ***pure (unmixed) opinion*** (i.e., *zero factual content*) that are exempted from defamation protection (but: **true "pure" "opinion" (vs. "fact") essentially doesn't even exist** — it's a continuum, not a dichotomy — according to the quotation from *Sack* given just below in this endnote/Annotation).

And *that* ("mixed/intertwined opinion/fact statements") is what's at stake in the case-at-bar (and in the vast majority of defamation cases, for that matter). For, indeed: **Marshall himself explicitly admits that he actually *believes* the factual content of everything he writes as *opinion*** (*e*96 *infra*).

Note that this very fact-vs.-opinion issue has already been explicitly addressed by Plaintiff at Opp ℘3–5 — where, in fact, Plaintiff also quotes the very same teaching that Defendant does (*Lyons I, supra*), but does so via the intermediary of *Yohe v. Nugent* (see Opp℘5 for citation), which crucially also adds consideration of the essential, more modern/advanced, component of **defamatory implication‡** — which Marshall and the Judge are now pretending to ignore.

In this connection, note especially the quote in Plaintiff's footnote at Opp℘4f5, regarding the **fact/opinion (that is, objective/subjective) dichotomy** :— "Despite decades of modern first amendment [defamation] litigation, courts continue to struggle with the basic distinction between fact and opinion." Or again (*Sack* §4.1): "No task undertaken under the law of defamation is more elusive than distinguishing between fact and opinion. Analysis is complicated because communications common consist of intertwined allegations of fact and opinion … Indeed, **there is some opinion in any assertion of fact, and some factual content in every statement of opinion [i.e., truly 'pure' opinion doesn't even exist].**"

Example of defamation-by-implication: The Alex Jones / Sandy Hook case, cited in *e*143 *infra* (see the referenced Motion-to-Dismiss cited there).

{† • "[I]f the statement 'John is a thief' is actionable when considered in its applicable context, the statement 'I think John is a thief' would be equally actionable when placed in precisely the same context. … Even if the context

suggests a statement is opinion [as Marshall pretends to claim, with his pretended over-arching all-encompassing About-page "opinion disclaimer"], it may be a statement of fact. Merely cloaking an allegation of fact in the garb of an opinion — 'I think that Ernie had too much to drink' — does not assure that it will not be held to state or imply a provably false and therefore potentially actionable statement of fact." — *Sack* §4.3.1.1. The Supreme Court's own way of saying this same thing is presented in *e*19 *infra.*}

{♯• (i) To quote the "hornbook" on "defamatory implication" (*Restatement (Second) of Torts* §566, emphasis added): "*Expression of Opinion.* A defamatory communication ***may*** consist of a statement in the form of an ***opinion,*** but a statement of this nature is actionable only if it ***implies*** the allegation of undisclosed [or, disclosed but false] ***defamatory facts*** as the basis for the opinion." (ii) The classic sample instance of defamatory implication is the "Captain sober today" case (Google search that; see http://volokh.com/2012/05/20/an-interesting-defamation-case/) — which should now be analyzed in the light of *Air Wisconsin v. Hoeper,* 571 U.S. ____, 134 S.Ct. 852 (2014), that is, the Supreme Court's newly revived defamation concept of **"material falsity"** (as opposed to *literal language* used), i.e., "effect on reputation of defamee in the context/minds of the relevant audience/readers/listeners." (iii) "By statute, Massachusetts permits a plaintiff to recover for a truthful defamatory statement published in writing (or its equivalent) with actual malice, G.L. c. 231 §92 …" — See *Phelan v. May Department Stores Co.,* 443 Mass. 52 n.4 (2004) (emphasis added).}

19 *[Tuvell]* This is Marshall's primary argument: "stated as opinion." Over and over again, Marshall thumps his claim/pretension (paraphrasing): "All the speaker/writer needs to do is one-time prophylactically pre-label 'all' his utterances as 'opinion" — that 'pre-inoculates' his audience, and 'pre-immunized' himself against defamation liability." But that's a ridiculous argument, as argued/proven in *e*5,25,72,77 …

… and to those arguments we here also add the ruling of *Milkovich v. Lorain Journal Co.,* 497 U.S. 1 (1990) (see also https://en.wikipedia.org/wiki/Milkovich_v._Lorain_Journal_Co.) — **which rejects the pretension that a**

separate opinion privilege (Constitutional or otherwise) exists against defamation, as follows (emphasis added):

"If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts [true or false] which lead to the conclusion that Jones told an untruth. Even if the speaker states ['discloses'] the facts upon which he bases his opinion, *if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact [hence be defamatory].* Simply couching such statements in terms of opinion does not dispel these implications; and the statement, 'In my opinion Jones is a liar,' can cause as much damage to reputation as the statement, 'Jones is a liar.' As Judge Friendly aptly stated: '[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, **explicitly or implicitly,** the words "I think."'"

20 *[Tuvell]* https://ethicsalarms.com/about/.

21 *[Tuvell]* https://ethicsalarms.com/comment-policies/.

22 *[Tuvell]* No, "everything" is *not* "covered by that," because Marshall here ignores that many/most of the statements under discussion are *mixed* fact/opinion statements, *not pure/unmixed opinion* — and hence, such mixed statements are *not* "covered," by the discussion of *e*18 *supra.*

23 *[Tuvell]* Marshall refers here to his post of 6:07 p.m. Aug 28 2017, at OppExhA℘15–16, which is analyzed at Comp℘7–15¶14.

24 *[Tuvell]* No, this is false: Marshall didn't say this "at the beginning of the primary post," and he didn't "frame the entire thing that way" (that is, he didn't intend it to apply to that whole primary post). He said it in the midst (not "at the beginning") of that post, and intended it to apply only to his comment about Tuvell's PTSD. See *e*25 *infra.*

25 *[Tuvell]* Marshall is lying/misleading here. He's speaking about the following passage (OppExhA℘16), where he wrote:

"I read as much of the entry on his blog [referring to the webpage http://

judicialmisconduct.us/CaseStudies/WETvIBM on Tuvell's website (which is, incidentally, not a so-called 'blog')] — which purports to be about judicial misconduct in summary judgments generally, but is in fact only about his case — as I could stand, and realized that Walt is, in technical terms — this is an opinion, Walt, not an assertion of fact, you can't sue me: put down the banana — a few cherries short of a sundae."

Marshall's purported pre-inoculation/immunization ("opinion … you can't sue me") is referring specifically only to the language, "a few cherries short of a sundae." That *language per se,* without more, is indeed obviously a mere/trivial opinionated/rhetorical/exaggerated/hyperbolic insult/ridicule/abuse, not an assertion of fact — and Plaintiff does *not,* in fact, anywhere complain about such *"merely-insulting"* language as an element of a cause-of-action for the instant lawsuit. See also the criticism of Marshall's "opinionation" at Opp$_{\wp}$3–5.

The things Plaintiff *does* complain about, here and elsewhere, are *other* things, which *are* false statements of fact, and/or involve defamatory implication. In this instance: (i) the false statement just quoted that "Tuvell's website is not about judicial misconduct generally, it's **in fact [not opinion]** only about his case" (paraphrasing, emphasis added); (ii) the false statement of fact (by defamatory implication) that Tuvell is somehow "mentally defective" ("a few cherries short of a sundae," which is factually falsely defamatorily implicative, to the extent that it depends on the predicate false statement that "Tuvell's website is only about his case," and/or that Tuvell's website claims about Judicial Misconduct in the case *Tuvell v. IBM*); (iii) the false statement of fact (by defamatory implication) that Tuvell's PTSD somehow renders him "mentally defective" (which is defamatory *per se,* see *e*134(β) *infra*).

In addition to which: Any such attempted inoculation/immunization is ineffective anyway, in any defamation case. For, what matters is whether or not a challenged statement *really is a statement of fact (wholly or partially, directly or indirectly, including "defamatory implication")* — not whether the author attempts/pretends to *characterize* it as "opinion only."

26 *[Tuvell]* No, Marshall did *not* "frame the entire thing that way." Instead, he only framed the explicit language "a few cherries short of a sundae" that way, as explained in *e*25 *supra.*

27 *[Tuvell]* Actually, there appear to be *six* categories. See *e*60 *infra*, and the sub-count calculations in *e*17 *supra*.

28 *[Tuvell]* Exactly which five instances? (It's important to know what he's talking about!)

29 *[Tuvell]* Except that, no such "disruptive and insulting comments" ever occurred, instead they were "invented" by Marshall (as argued in Opp).

30 *[Tuvell]* No, Plaintiff does not argue that the "mere administrative act" (without more) of "banning" was defamatory. Instead, it is argued that Marshall's stated **reasons for banning:** (i) were false (and defamatory); and/or (ii) were not the actual reasons for banning (that is, the actual reasons for banning were undisclosed, with defamatory implication, as discussed in *e*18 *supra*).

31 *[Tuvell]* Exactly which three instances?

32 *[Tuvell]* For Marshall to pretend, as he does here, that he made "only three false statements" is a blatant asinine lie. He made (and/or hinted, via repeated contextual defamatory implication) *dozens.* See Comp & Opp, *passim.*

33 *[Tuvell]* The discussion referred to here occurs at OppExhA℘1–2,6–8. But note, Marshall's crazed attribution of academicism, while both false and defamatory, is ***not*** even one of Plaintiff's complained-of instances of defamation (as explained at Opp¶12ƒ18). This "academicism" incident does, in any event, demonstrate Marshall's knee-jerk **"actual malice"** (in the technical sense of defamation law, see *Sack* §1.3.1) towards Tuvell.

34 *[Tuvell]* Yes, that attribution of "academicism" was defamatory (**in the prevailing context,** of (i) the composition of the audience, and (ii) Marshall's accompanying/explanatory verbiage), as explained at Comp℘5¶8.

35 *[Tuvell]* Marshall is here trying to invoke the received teaching that "statements of opinion based upon disclosed facts cannot be defamatory." But he falsely (in bad faith) misstates/misuses that teaching. Namely, the teaching *actually* refers to: "protected statements of (i) **pure** opinion, based upon (ii) **true/accurate/correct known/disclosed** facts." Plaintiff's complained-of defamations are all based upon (i′) **mixed** opinion/fact statements, and/or based upon (ii′) **false and/or undisclosed** fact-statements.

For (i′) **proof of falsity** (to the extent required at this Motion-to-Dismiss time, i.e., pleading, not evidence), see Comp & Opp, *passim.*

For (ii′) **false and/or undisclosed facts,** an excellent *example* is given by the "theft of professional services" incident (see ℘27). As argued at Opp℘7ƒ7, there simply were **no disclosed** facts anywhere (within the range/context of the audience, see OppExhA) that could conceivably indicate to anyone that Marshall provided any professional/paid services on his blogsite (https://ethicsalarms.com), much less that Tuvell sought to steal such services. (Marshall *does* peddle his "professional/expert" services on his *other/* business website, https://proethics.com, but Tuvell never had any interest in or discussed that site with Marshall.) So, *however* it was that Marshall concluded that Tuvell was trying to wheedle "free, expert assistance," it *must* have been based upon some kind of **false and/or undisclosed** facts (which remain to this day unknown to Tuvell, and to all other audience members).

36 *[Tuvell]* Exactly which eleven instances?

37 *[Tuvell]* (i) The quoted passage occurs at OppExhA℘15, and is discussed at Comp℘18–19¶I. (ii) "The reason Walt is interested in judicial misconduct" is ***not*** that "the judge decided his case was lousy" (which she did *not* do, because she **did not reach/decide "his case" at all**), but ***rather*** that "the judge lied and obstructed justice, by falsifying the facts of *Tuvell v. IBM* (as explained on Plaintiff's website, at http://judicialmisconduct.us/CaseStudies/WETvIBM, especially the 'Smoking Gun' screenshot thereat)."

38 *[Tuvell]* Marshall may *claim* the statement he discusses here was "his characterization and his belief," implying that it therefore could not be defama-

tory, because it was "based upon known/disclosed true facts." But, what he says/believes is false. Namely, Marshall's statement of opinion ("Tuvell's case was lousy") was actually based upon a **false** "disclosed fact" (that the "judge decided Tuvell's case"), as explained at Comp℘10p¶I (the meta-comment there attached to the word "lousy"), and defamatory.

39 *[Tuvell]* While it is true, to some degree (depending on degree of interest, time available, investigatory savviness, knowledge/skill in the underlying subject matter (legalistic technicalities, involving Summary Judgment, Judicial Misconduct, etc.), etc.), that "anyone who wanted to check it out, could check it out," that's *irrelevant* here.† Because, the ability of anyone to "check out" a defamer's statements is simply not an element of a cause-of-action for defamation, either generally or *(a fortiori)* at Motion-to-Dismiss time. *e*143 *infra*.

{† • Even though the observation "anyone *could* check it out" is irrelevant, it is indisputable that in the instant case-at-bar, (some/most/all of) the participants involved in the blog discussion (OppExhA) *in fact did not "check it out."* In fact, Marshall himself admits to being guilty of this (as quoted toward the end of *e*143 *infra*).}

40 *[Tuvell]* Exactly how many instances of this does Marshall claim? (I'm guessing it's four, given the discussion of sub-counts in *e*17.)

41 *[Tuvell]* The passage from *Yohe v. Nugent* Marshall apparently refers to is this:

"In sum, the statements challenged by Yohe all fall into one of three categories: (1) unrefuted statements of fact; … As none of these types of statements provides a basis for a defamation cause-of-action, Yohe's defamation claim … fails."

Really, there's no need to cite any specific case (such as *Yohe v. Nugent*) for the proposition that neither (i) true statements of fact (disputed or not), nor (ii) undisputed (stipulated, agreed upon) statements of fact (true or false), provide an element of cause-of-action for defamation — because it's "hornbook" (provided as always, and as *Yohe* itself explicitly acknowledges

(as noted in *e*18 *supra*), that no "defamatory implication" is involved). But, of course, Plaintiff in the instant case nowhere complains about any "unrefuted statements of [true] fact."

42 *[Tuvell]* OppExhA℘15.

43 *[Tuvell]* The quoted passage occurs at OppExhA℘16. The "personal agenda" Marshall speaks of here is also explained at OppExhA℘16, namely:

"I'm sorry for Walt's troubles, but he was not honest, and misrepresented his purpose by the charming device of insulting my integrity. Obviously, he wanted to check and see whether my sympathies would be with his cause before submitting it for consideration. As I tell my clients, I can't be bought, and you take your chances. Walt was also obviously looking for a cheap, as in *free,* expert opinion that he could use in his crusade against the judge." — **Which are statements of fact (possibly mixed with opinion), and/or opinions with defamatory implication, and all of which are <u>false</u>** (hence cannot be adjudicated by a judge at Motion-to-Dismiss time, but must be decided by a jury at trial).

44 *[Tuvell]* BUT, IT IS FALSE! This is explained at Comp℘12–14¶O.

Note, incidentally but very importantly, that Marshall here **admits** — by explicitly/emphatically formulating his statement, *"I believe that is true"* — to promulgating **"(mixed/intertwined) ***<u>fact</u>***"** (albeit *false* fact), as opposed to his pretended **"(pure) ***<u>opinion</u>:***"**

I believe *{opinion}* **that is true *{fact}.***

And here's another ready example, where Marshall **admits** he's dealing with facts (at least in his mind), not opinions: "the **fact** that the entire American Left, along with its sycophants and familiars, the universities, show business and the news media, have gone completely off the ethics rails since November 8, 2016" (OppExhA℘1, emphasis added). The point being, of course, that since much of Marshall's audience view him as "God" (*e*130 *infra*), they automatically/blindly ***believe as fact* anything he *calls "fact."***

Opinions are, by definition, statements that are *subjective/indefinite*

judgments/viewpoints/beliefs/perspectives/positions/stances/attitudes/assessments/conceptions/conjectures/estimations/persuasions/etc. — hence, they are incapable of being described as "true/false/correct/incorrect/accurate/inaccurate/verifiable/falsifiable/provable/disprovable" (it is only *objective/definite* statements of *facts,* about such things as historical events or mathematical theorems, that are capable of being "true/false/etc."). The most one can assert about opinions is that they're "right/wrong" (in the moralistic sense of "righteous/unrighteous/virtuous/wicked," or similar language, but certainly not "true/false/etc."), because it's those kinds of words that convey "degrees of opinionation/judgmentalness." As already noted (*e*18 *supra*), the opinion/fact spectrum is a continuum — there can be *many* "opinions," but only *one* "fact" — "you're entitled to your own opinions, but not to your own facts."

More generally, see *e*96,97 *infra.* Marshall's admission of belief in the truth of the facts underlying his opinions (some such facts always existing, *e*18 *supra*) falsifies Marshall's earlier assertion (see *e*22 *supra*), to the effect that "*everything* on his blog is 'covered' as being *opinion,* not *fact.*" And remember: Marshall is a *lawyer,* so he knows/understands these niceties of nuance, and hence he can't pretend "it was just a slip of the tongue." [Thank you, Jack.]

45 *[Tuvell]* By **admitting** here, as Marshall does, that the act of banning was *not* a mere "administrative act" (see *e*30), but rather was based upon his false statements about "abuse for personal agenda" (based on blatantly false and/or undisclosed facts), Marshall hereby demonstrates/proves precisely Plaintiff's claim (in *e*18 *supra*) that the banning did indeed have **defamatory implication.** [Thank you, Jack.]

46 *[Tuvell]* By this language — "he contacted me" — Marshall is saying/implying that he's speaking about Plaintiff's original/initial email of Aug 26 2017 (at OppExhA℘7). But what he says about it is false, because that email said nothing about Marshall's lack of coverage of Judicial Misconduct.

47 *[Tuvell]* This is false. Plaintiff never said anything of the sort.

Judicial Misconduct was first mentioned, briefly, in Plaintiff's first post to the Ethics Alarms blog on Aug 27 2017 (also at OppExhA℘7), and that post did mention nothing about Marshall's lack of coverage. The context in which Judicial Misconduct first did appear substantively was Plaintiff's later post (at OppExhA℘13), but it also did *not* say anything resembling "Why don't you ever write about Judicial Misconduct?" What it observed, simply/straightforwardly/correctly, was that Marshall (and/or his blog participants) hadn't picked up on Plaintiff's discussion-thread issue concerning his experience with Judicial Misconduct in the sense of institutional abuse of Summary Judgment:

"I was initially attracted to you because you're trained/savvy in the law, and I wanted to ask you[r] opinion about the ethics of Judicial Misconduct, specifically in the sense of institutional abuse of the Summary Judgment process (e.g., http://judicialmisconduct.us/CaseStudies/WETvIBM#smokinggun). You've done nothing to address that, and nobody on this site appears to have any inclination to [do] so." — Which Marshall later falsely misparaphrased/mischaracterized (OppExhA℘15) this way: "[Tuvell] posted a comment saying that the blog advertised itself as covering judicial misconduct and doesn't."

The closest Plaintiff came (but it's not very close) to saying about Marshall's lack of coverage of Judicial Misconduct came in the post where he wrote (OppExhA℘10,13): "I tuned into this site in the hope/expectation of finding a discussion of ethics, without the smokescreen of partisan politics clouding the air. I even proposed a topic, Judicial Misconduct, with examples (http://JudicialMisconduct.US). But no takers. Such things appear not to be what this site is about. … Oh, and another thing: Why in the world did I ever think Jack (and by extension this blog/website) might be interested in Judicial Misconduct? Why, it's advertised on the About page, of course: 'I [Jack] specialize in legal ethics …'"

48 *[Tuvell]* Marshall appears to be referring to his post to the effect that (OppExhA℘15, emphasis in original): "there are **dozens** of judicial ethics posts."

49 *[Tuvell]* Marshall writes falsely, where he pretends to conflate/confuse **Judicial Misconduct** (which was/is Plaintiff's concern) with **Judicial Ethics** (which is Marshall's concern (one of them), or so he claims). But these two are distinct/different realms of concern (with indeed some mutual relationship, whereas Marshall falsely pretends they are identical). Namely, as documented on Plaintiff's website, which Marshall had been pointed-to by Plaintiff (at http://judicialmisconduct.us/Introduction, under separate successive subheadings): (i) **Judicial Ethics** is "softly/fuzzily aspirational," governed by *The Code of Conduct for United States Judges (USCC, CodCon)* and the *ABA Model Code of Judicial Conduct (ABAMC);* whereas (ii) **Judicial Misconduct** is "solidly/rigidly statutory," governed by the *Judicial Conduct & Disability Act (JCDA, 28 USC §332(d)(1),351–364)* and the *Judicial Conduct & Disability Rules (JCDR).* No competent professional legal ethicist (as Marshall pretends/advertises himself to be) would ever legitimately conflate/confuse these two realms of concern.

50 *[Tuvell]* It is false for Marshall to pretend he was not aware ("constructive knowledge") of Plaintiff's website and its concerns, because Plaintiff had by this point explicitly pointed him to it (OppExhA$_{\wp}$7).

51 *[Tuvell]* To clarify, yet once again (since Marshall persists in falsely misrepresenting Plaintiff's arguments): (i) Judge Casper did *not* "dismiss 'his case'" (**she dismissed a case she invented, by falsifying the facts of Plaintiff's case,** *e*37 *supra*); (ii) Plaintiff's claims of Judicial Misconduct against Judge Casper are based on her violation of judicial/legal rules of Summary Judgment, Falsification of Facts, Obstruction of Justice, etc. (and *not* in the mere fact of "dismissing the case").

52 *[Tuvell]* Marshall speaks falsely here ("slyly … without me knowing it"), because Tuvell had expressly informed him of his concerns earlier, at the beginning of their interaction (OppExhA$_{\wp}$7).

53 *[Tuvell]* OppExhA$_{\wp}$15. See https://en.wikipedia.org/wiki/Sandbagging for the (defamatory) definition of "sandbagging."

54 *[Tuvell]* Rule 8.2 of the *Massachusetts Rules of Professional Conduct* (which

embodies the rules of “Legal Ethics,” in the sense that Marshall teaches it) states (in relevant part): “A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or a magistrate …”

The corresponding Rule 8.2(a) of the *ABA Model Rules of Professional Conduct (ABAMRPC)* (which is the document Marshall holds in his advertising/publicity photo at https://proethics.com/, with a “fair use” copy at http://judicialmisconduct.us/CaseStudies/TUVELLvMARSHALL) states: “A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer …”

But of course, Plaintiff never asked/wanted Marshall to do any such thing.

55 *[Tuvell]* Why, exactly? Where/what, ***exactly,*** is the “falsity” that Tuvell publishes on his website?

56 *[Tuvell]* And where ***exactly*** was the “trickery,” given that Tuvell had been everywhere straightforward/truthful/above-board in all his dealings with Marshall?

57 *[Tuvell]* Exactly which seven instances?

58 *[Tuvell]* See *e*21. As long as Marshall is plumping his comment guidelines here, we note that those very guidelines are quite clear that insults (by himself or others) are disindicated. So, by admitting here his insulting of Mr. Tuvell, we see that Marshall was violating how very own guidelines.

59 *[Tuvell]* And, of course, Plaintiff nowhere improperly cites “mere insult/epithet/name-calling/hyperbole” as defamatory — except insofar as it properly involves *defamatory implication* (*e*18 *supra*), and thereby furthers fans the flames of reputational damage.

60 *[Tuvell]* This seems to introduce a sixth category, above and beyond the five Marshall spoke of at ℘6 *supra.*

61 *[Tuvell]* Exactly which three instances?

62 *[Tuvell]* Apparently referring to Marshall's "33 separate instances," see *e*17 *supra*.

63 *[Tuvell]* Marshall fails/refuses to list "disability" here. And that's significant, given that he clearly *does* discriminate/abuse on the basis of disability — specifically with respect to Tuvell's PTSD, which he characterizes as "a few cherries short of a sundae" (*e*25,26 *supra*). Note that PTSD is covered by the ADA, for example: https://www.eeoc.gov/eeoc/foia/letters/2008/ada_disability_employee_misconduct.html.

64 *[Tuvell]* Multiple things need be said here:

(i) In the first place, Tuvell's main/initial "question/observation" (not even a "complaint," as it was done in private email to Marshall, see *e*46 *supra*) about Ethics Alarms was that it seemed to be mostly about "petty political/partisan harangue/ax-grinding," as opposed to the "purely ethical discussion/debate" apparently promised by the About page (*e*20 *supra*).

(ii) In the second place, the secondary observation, concerning bias/slant (and in which direction, namely, Left-to-Right), of the said political/partisan discussion environment was only ever a parenthetical comment (in the introductory preliminary private email, not as a website discussion topic), never a proposed topic for discussion.

(iii) Tuvell never even considered the issue of whether "Left is 'better' than Right, or *vice versa*." It was only the *fact* of partisanship, not its *propriety*, and the dissonance of such partisanship with the website content ("design vs. implementation of website") that was ever observed.

(iv) Marshall's "over and over again" is a blatant lie. Tuvell lodged his question/observation only a single time (in the introductory private email). It was *others* on the blogsite, not Tuvell, who kept trying to re-raise it (the trumped-up/false charge) "over and over again," with Tuvell always trying to disavow it and tamp it down.

(v) A conversation involving "political partisanship" in no sense rises to the level of the sort of "race, religion, sexual orientation, gender, etc." abusiveness that Marshall states he finds objectionable.

(vi) *Even if* Tuvell *had* raised a Left-vs.-Right discussion topic (as op-

posed to the mere presence of political/partisan debate), that would have been a perfectly valid topic to be raised/discussed on Marshall's website — it was not a reason for him to become "angry."

(vii) As for the *correctness/validity* of the preceding items ((i)–(vi), this list): Tuvell continues to stand by them, and they're a matter for a jury to decide, not a judge at Motion-to-Dismiss time. So they certainly do not belong in the present proceedings, and hence it's inappropriate for Marshall to even raise them here.

65 *[Tuvell]* Marshall's "primary post," see *e*23 *supra.*

66 *[Tuvell]* But, Marshall's "explanation why" is all false. Comp℘12–14¶O.

67 *[Tuvell]* See *e*25 *supra.*

68 *[Tuvell]* Here the Judge gestures towards his copy of OppExhA.

69 *[Tuvell]* Tuvell's usage here of "single" was an inadvertent slip-up/tongue-stumble. He should have said "certain."

70 *[Tuvell]* Tuvell's usage here (twice) of the phrase "as opposed to" was a linguistic slip-up. He should have said "as concerning." The reason for the slip-up can be seen by *e*71 *infra.*

71 *[Tuvell]* The "much more [*as opposed to* the bare facts]" Tuvell has in mind here are his own website, along with all the laws/cases/etc. attendant thereunto.

72 *[Tuvell]* This new question about the "forum"/audience is separate/different from two other of the Judge's concerns (about the *size* of the audience at *e*2 *supra,* and about the investigative responsibilities of the audience at *e*143 *infra*), but it joins one other of his concerns (about the effect on the audience at *e*5 *supra*). The issue here — "prophylactically labeling as opinion, *pre-inoculating* the audience, *immunizing* himself" — is just as bogus as his earlier focus on the *size* of the audience (*e*2 *supra*). For, this new question is simply *not* a factor as an element of a cause-of-action for defamation generally (*e*3 *supra*), much less *(a fortiori)* at Motion-to-Dismiss time: because, "mere *labeling*" as opinion is not sufficient; it must "actually *be*" (pure, fact-free)

opinion (and in the case-at-bar, it isn't, because it everywhere carries a component/connotation of factuality, falsely).

73 *[Tuvell]* There is no reason in the world for the Judge to bring up "newspapers" here. Defamation by news media is a specialized subspecies of general defamation, which is totally irrelevant to the case at bar. So why muddy the waters? Attempting to bamboozle/hoodwink/swindle the *pro se* Plaintiff?

74 *[Tuvell]* Short answer: No, it doesn't matter (see *e*77 *infra*).

75 *[Tuvell]* Marshall here refers to the well-known so-called *"litigation privilege,"* whereby statements made pursuant to official judicial proceedings are granted absolute immunity from civil liability for defamation (the rationale being that the integrity of the adversary judicial system outweighs the reputational interest of any party).

76 *[Tuvell]* Internet anonymity can be problematic in the defamation context. See Gotelaere, Defamation or Discourse, https://scholarlycommons.law.case.edu/jolti/vol2/iss1/3/.

77 *[Tuvell]* This is an absurd conclusion, as it is based upon a false equivalence with the litigation privilege (*e*75 *supra*). Namely, the litigation privilege serves an important public policy (integrity of the judicial system), while "pre-'warning' a victim (by "pre-'inoculating' an audience") that you feel free to commit future defamation by pretending to label everything you say as 'opinion'" serves no such purpose. Indeed, such a concept has no precedent/support in the law of defamation, and effectively neuters it: "prophylactic inoculation" is simply *not* a factor as an element of a cause-of-action for defamation generally, much less *(a fortiori)* at Motion-to-Dismiss time.

In any case: merely/unilaterally *labeling/declaring* a statement — whether past, present, or future — as (pure, unmixed) "opinion" does not *make* it actual opinion (in the eyes/ears of the victim/law/jury). See again the quotes toward the bottom of *e*18 *supra*).

78 *[Tuvell]* Thankfully Marshall does not bother "going there" with his First Amendment musings (for they certainly do not apply to the instant case,

there being no federal/state/governmental question involved).

79 *[Tuvell]* No, he can't do that. The technology doesn't exist (see ℯ140 *infra*). Even apart from that impossibility, Marshall has no way to determine how many *others* learned about the defamatory posts (such as blog readers reading or forwarding screenshots to others).

See also the criticism of the "250" figure at Opp℘17–18. To which we now note that Marshall himself revised that figure to "≤ 488," in a Notice of Errata he filed with the Court on Jun 1 2018, in preparation for this Oral Argument.

80 *[Tuvell]* But of course, "tiny percentage" is utterly irrelevant. See ℯ2 *supra.*

81 *[Tuvell]* Literally, Marshall said "visitors" instead of "users," but these terms are synonymous (meaning "unique/distinct individuals visiting a website") in the standard terminology of "Internet analytics" — as distinct from other related terminologies, such as "registered accounts", "pageviews," and "sessions." See, e.g., https://blog.hubspot.com/marketing/guide-to-web-analytics-traffic-terms.

82 *[Tuvell]* See https://ethicsalarms.com/2018/06/06/afternoon-ethics-warm-up-6-6-18-special-dont-sue-me-these-are-just-opinions-edition/. That post speaks inconsistently of "9,000,000 views," as opposed to the "9,000,000 visitors/users" Marshall reported at this oral hearing (so it's impossible to tell which interpretation is intended/correct).

83 *[Tuvell]* Tuvell doesn't "frequent/follow" Marshall's blog (in the standard sense of "regularly actively reading and paying attention to it"), but in preparation for this oral hearing (Jun 7 2018) he did check it the preceding day, and there saw Marshall's post advertising the 9,000,000 figure (without noting whether the post spoke of "visitors/users" or "pageviews").

84 *[Tuvell]* See ℯ20 *supra.*

85 *[Tuvell]* https://proethics.com/.

86 *[Tuvell]* Technicalities about this terminology (what's a "blog" vs. a "forum," etc.), is discussed at http://judicialmisconduct.us/forum/HowToUseForums.

87 *[Tuvell]* Hence, defamatory *per se*. *e*134(α) *infra*. In Comp¶18, instead of "vocation," Tuvell used the synonymous words, "position/job/calling/field."

88 *[Tuvell]* The concepts of "pubic figure" and "limited-purpose public figure" are significant in defamation law, and are currently in flux in the Internet context. See Diss℘8¶A, Opp℘11.

89 *[Tuvell]* See *e*20 *supra*.

90 *[Tuvell]* See *e*21 *supra*.

91 *[Tuvell]* See *e*77 *supra*.

92 *[Tuvell]* Boy, do we ever "know that's true" (*calling* something "opinion" — even via immediate/direct prefacing, such as "I think," or "in my opinion," or Glenn Beck's slimy disclaimer "I'm just saying" — does not *make* it "opinion"): see the citations to *Sack* and *Milkovich* in *e*18,19 *supra*.

93 *[Tuvell]* This kind of "satiricism/parody inoculation" is valid/effective, and very different from the "opinionism inoculation" discussed at *e*25,72,77 *supra*. Satiricism means: "What I say has *false* factual content." Opinionism means: "What I say has *no* factual content" — which is basically impossible.

94 *[Tuvell]* https://www.snopes.com/.

95 *[Tuvell]* See https://en.wikipedia.org/wiki/Category:Fact-checking_websites.

96 *[Tuvell]* At https://ethicsalarms.com/about/, Marshall writes (emphasis added): "The objective isn't to be 'right,' though **if I post an *opinion*, I *believe* it**" — including, presumably, vouching for the correctness/truth of the facts underlying the opinion.

97 *[Tuvell]* We now know, by Marshall's language "I believe that is true" (*e*43 *supra*), that his blanket affirmation of "belief in his opinions" (*e*96 *supra*) really entails "belief in the truth of the facts underlying the opinions." Of course, this is not unique to Marshall (see *e*18,44 *supra* and *passim*): it's universally the case that when people "give their opinions," they're basing them on some underlying stratum of (explicit and/or implicit) facts, which they assume are true. Otherwise, they're giving their opinions in a vacuum — which

is insipid.

98 *[Tuvell]* That list, which Tuvell compiled in the hour preceding this oral hearing, can be viewed at http://judicialmisconduct.us/sites/default/files/2018-07/Notes.pdf.

99 *[Tuvell]* At Diss℘7¶2, Marshall falsely cites case law that deals with *slander,* as opposed to *libel.* This is pointed out and rebutted at Opp¶10.

100 *[Tuvell]* Referring to OppExhA.

101 *[Tuvell]* The "99%" here refers, in context, to the immediate instigating facts of the case (as opposed to the additional "much more" mentioned in *e*71 *supra*). Namely, Marshall deleted two of Tuvell's posts (see Opp℘14ƒ21), and those comprise the remaining/missing "1%."

102 *[Tuvell]* These notes can be viewed at http://judicialmisconduct.us/sites/default/files/2018-07/Notes.pdf.

103 *[Tuvell]* See *e*8,10 *supra.*

104 *[Tuvell]* The inapplicability of Ch. 93A has already been argued at Opp℘9. So, it's unclear why Defendant pretends to uphold that false fiction here.

105 *[Tuvell]* See *e*9 *supra.*

106 *[Tuvell]* The bogosity of registered mail has already been argued at Opp℘9–10. So, it's unclear why Defendant pretends to uphold that false fiction here.

107 *[Tuvell]* This is an explicit dead giveaway, that the Judge is **falsely considering "damages"** at Motion-to-Dismiss time. That is a false misstatement of the law. "Damages" is simply *not* a factor as an element of a cause-of-action for defamation generally, much less *(a fortiori)* at Motion-to-Dismiss time; it's not in any standardized "hornbook" list, see *e*3 *supra*. — **Damages are especially irrelevant in this Massachusetts jurisdiction, where all libel is *per se* (*e*3 *supra*).**

108 *[Tuvell]* "Rule 12" refers to "Motion-to-Dismiss," MCRP 12. Opp℘2.

109 *[Tuvell]* Comp℘17¶19.

110 *[Tuvell]* See *e*37 *supra.*

111 *[Tuvell]* This is the “Smoking Gun,” see http://judicialmisconduct.us/CaseStudies/WETvIBM#smokinggun.

112 *[Tuvell]* Tuvell misspeaks/misremembers what Marshall said here. Instead of the word “asshole,” Marshall used the word “jerk,” see ℘9 *supra.* (Tuvell was conflating this with Marshall’s use of the word “asshole” on his website, OppExhA℘16.)

113 *[Tuvell]* Concerning the dangers of quoting out-of-context: “If you give me six lines written by the hand of the most honest/honorable of men, I will find something in them which will hang him.” See http://judicialmisconduct.us/sites/default/files/2017-04/01_PetWritCert%2BApx_0.pdf#page=32.

114 *[Tuvell]* I.e., “defamatory implication,” see *e*18 *supra.*

115 *[Tuvell]* Namely, what it says/implies (“contextually defamatory implication,” “CTXDEFIMPL,” *e*18 *supra*) is that the whole case/website are incorrect/wrong/mistaken/false/invalid/lies/etc. — all of which are **statements of fact** (and false ones, at that), which can be adjudicated only by the ultimate fact-finder (jury) at trial, not the judge (in a non-bench trial).

116 *[Tuvell]* Referring to the tag “CTXDEFIMPL” (“Contextualized Defamatory Implication”) used throughout Opp.

117 *[Tuvell]* See *e*48 *supra.*

118 *[Tuvell]* See *e*49 *supra.*

119 *[Tuvell]* See *e*49 *supra.*

120 *[Tuvell]* Tuvell here started to discuss some of the recent history of Judicial Misconduct (JCDA, JCDR, see *e*49 s*upra*), but was interrupted by the Judge.

121 *[Tuvell]* The Judge here (“proving things false for the sake of proving things false”) *completely misstates* (innocently or maliciously) Tuvell’s argument in this area, so Tuvell had a hard time deciphering the depths of the judge’s off-the-wall misunderstanding in real-time. Tuvell eventually was able to dredge

up a response (as recorded in this transcription), ultimately calling it “a fine point,” so it may also help to recapitulate it again, here/now, as follows:

(i) The point is *not* that Defendant miscounted the number of times he wrote about Judicial Misconduct (and/or Ethics); nor even, without more, that (ii) Defendant conflates the concepts of Judicial Misconduct and Judicial Ethics. (iii) Plaintiff does *not,* in any event, anywhere even complain directly (that is, out-of-context) about these items (i–ii), without more. (iv) Instead, the point is that Defendant makes defamatory/false statements of facts (“Plaintiff’s case/website are lousy,” in various manners/locutions), whilst, in-context, falsely portraying himself as an expert on legal/judicial ethics/misconduct — thereby harming Plaintiff’s reputation. (v) And so, what *is* being proved by Plaintiff’s argument in this area is this: By (genuinely or pretendingly) not even apprehending/appreciating/acknowledging the fundamental distinction/difference between Judicial Misconduct and Judicial Ethics, Defendant is *not* actually the “legal ethics expert/professional” he portrays himself to be — thereby committing the element of cause-of-action for defamation of being “grossly/inexcusably negligent/antipathetic about truth/falsity,” with regard to critiquing/defaming Plaintiff’s case/website (and, in addition, he’s guilty of falsely inflating his own standing in the presence of the audience/community of interest, in order to pump-up his credibility to defame Plaintiff — which may become eventually relevant as a consideration in a damages/punishment discussion).

122 *[Tuvell]* “Strictly … the whole Judicial Misconduct proceedings” referring to the JCDA and JCDR, see *e*49 *supra.*

123 *[Tuvell]* Referring to *Tuvell v. IBM.*

124 *[Tuvell]* Again, the Judge falsely misstates the law here: (i) “actual” defamation (as opposed to “potential tendency”), see *e*4 *supra*; (ii) “damages,” see *e*107 *supra*.

125 *[Tuvell]* No, it doesn’t “gotta hurt you,” it’s only “gotta have the *potential/tendency* to hurt,” etc. See *e*4,124 *supra*.

126 *[Tuvell]* See *e*125 *supra.*

127 *[Tuvell]* See *e*125 *supra.*

128 *[Tuvell]* See *e*125 *supra.*

129 *[Tuvell]* Tuvell here sees the Judge is forcing him to play the Judge's false game ("*did actually* harm," as opposed to "*potential/tendency* to harm"), and so must try to play along as best he can.

130 *[Tuvell]* That is, "easily swayed by someone self-proclaimedly/seemingly authoritative," namely Marshall. Because, recall, the audience/forum consists largely/wholly of non-lawyers, generally incapable of detecting truth/falsity of legal assertions from a lawyer such as Marshall.

131 *[Tuvell]* The "context" here being the ambient environment wherein "Marshall asserts he's an expert on the subject of Judicial Misconduct, and his readers blindly/automatically believe everything he says (including his self-assertion that he's an expert)."

132 *[Tuvell]* See *e*129 *supra.*

133 *[Tuvell]* The sense in which the two lists are "totally different" is that they're based upon entirely different organizational principles, and hence are disjoint/incommensurable from one another (Marshall's "list" is very vague/handwavy, never addressing the real/complained-of issues in Tuvell's list):

Marshall's non-specific non-defamatory areas:

#1(℘6): Unrelated to libel/defamation.

#2(℘7): False, but not libelous.

#3(℘7): Opinion based upon disclosed facts.

#4(℘8): Unrefuted statements of fact.

#5(℘9): Mere insult.

#6(℘9): Mere inaccuracy.

Tuvell's specific defamatory categories ("Top Five Defamations"):

#1(℘27): Theft (attempted) of professional services.

#2(℘28): Started divisive thread of Left vs. Right.

#3(℘29): Website is single-issue, not Judicial Misconduct platform.

#4(℘29): Dishonest sandbagging.

#5(℘30): Abuse of blog for personal agenda; banning.

134 *[Tuvell]* Note that, in Massachusetts, "*Imputation* [without the requirement of successful *accomplishment*] of criminal conduct is defamatory *per se*." *McAvoy v. Shuffrin,* 401 Mass. 593, 597–598, 518 N.E.2d 513 (1988, emphasis added ; this case was already cited by Defendant in his Opp).

In this connection (and also in-line with the Judge's concern/respect for "hornbooks"), we note that the hornbooks generally support a **standardized list of four "defamations *per se*,"** as follows (languaged here by https://en.wikipedia.org/wiki/United_States_defamation_law, emphasis added; Wikipedia may comprise a "non-traditional hornbook," but it is accurate in this detail, as can be seen by consulting the traditional hornbooks):

(α) Allegations or imputations **"injurious to another in their trade, business, or profession."** [A.k.a. occupation or **vocation** = "calling/summons" = "grand purpose in life" (see https://en.wikipedia.org/wiki/Vocation), as Tuvell twice emphasized at oral argument, see ℘15,29 *supra.* The *"making-of-money"* aspect is not relevant in this regard, as that would get into a damages discussion, which is assumed/unnecessary in a libel-*per-se* jurisdiction generally, much less at Motion-to-Dismiss time. All that's involved regarding cause-of-action for defamation is the aspect of *injury to reputation.*]

(β) Allegations or imputations of **"loathsome disease"** (historically leprosy and sexually transmitted disease, now also including mental illness). [Such as **PTSD,** see *e*25,63 *supra.*]

(γ) Allegations or imputations of **"unchastity"** (usually only in unmarried people and sometimes only in women). [Not relevant here.]

(δ) Allegations or imputations of **criminal activity** (sometimes only crimes of moral turpitude). [Such as **"theft of profession services,"** see ℘27 *supra.* For which, see generally https://en.wikipedia.org/wiki/Theft_of_services, which explains that such theft of services constitutes a crime/misdemeanor/felony, typically prosecuted as larceny (this general Wikipedia reference — as opposed to legalistic citations to cases/treatises — being sufficient for our purpose here, which is to adumbrate the connotation of defamation in the mind of the audience).]

135 *[Tuvell]* Tuvell's point here — "provided that the underlying facts are true" — is precisely what the Supreme Court is talking about in the quotation taken from *Milkovich* in *e*19 *supra.*

136 *[Tuvell]* Now seven, with more planned (see http://judicialmisconduct.us/CaseStudies).

137 *[Tuvell]* "Other stuff" such as an introductory short-course in-a-nutshell about the relevant legal laws/rules (http://judicialmisconduct.us/Introduction), a compilation of resources (http://judicialmisconduct.us/Resources), information about the logo (http://judicialmisconduct.us/About/Logo), and some forums (http://judicialmisconduct.us/forum, newly added since the events at issue in the instant case).

138 *[Tuvell]* Hence, defamatory *per se*. *e*134(α) *supra.*

139 *[Tuvell]* Actually, Tuvell was here quoting (accurately) Rule 8.3(b) *ABA Model Rules of Professional Conduct.* The corresponding Rule 8.3(b) of the *Massachusetts Rules of Professional Conduct* states: "A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the Commission on Judicial Conduct." It would have been inappropriate for Tuvell to quote the latter, because Judge Casper is a First Circuit Federal (not Massachusetts) judge, so the "appropriate authority" to be informed is the federal First Circuit Judicial Council (not the Massachusetts Commission on Judicial Misconduct).

140 *[Tuvell]* This cannot be accurate. It is information Marshall cannot possibly know, because the technology/tools ("Internet analytics") don't exist capable of providing it. (i) His "official" number of "2,000" may, perhaps, reflect some collection of "officially registered users" (in some unspecified sense, such as email subscribers, or RSS feed subscribers, or website accounts, etc.; though he claims 3,200 on his website, see Comp℘4¶5), but (ii) Marshall cannot possibly know how many of those "follow his website every day," because the technology doesn't support that. Marshall may, perhaps, know (via some Internet analytics tool his website uses) (iii) approximately

the number of visitors/sessions/pageviews (all different numbers) his website receives per day, but he cannot possibly know (iv) how many of those are amongst the aforesaid 2,000 registered users, or are unregistered users, or indeed are human at all (as opposed to automated bots/spiders). Finally, he cannot know (v) how many users actually "follow" his website (in the sense of actively read and pay attention to it, see *e*83 *supra*), as opposed to "idly let the words flow past their eyes, whilst daydreaming of other things."

141 *[Tuvell]* This is absurd/insane. Marshall is here saying, "opinion is not fact as long as the audience can check/investigate it and determine the truth of the matter." There has never been any such thing ever said in the whole history of defamation law. Indeed, just the opposite is true: statements that have the mere *potential/tendency* (as opposed to the "check-it-out-for-yourself look-up-ability") to defame are actionable. See also *e*143 *infra.*

142 *[Tuvell]* This is absurd (an invalid/nonsensical legal argument). To say "the website is single-issue," when in actuality it is not, is very obviously a false statement of fact (whose truth/falsity only a jury at trial is competent to decide, not a judge at Motion-to-Dismiss time). Marshall cannot immunize himself by pretending (as he does here at oral argument, though he did not do so at the time of events, see OppExhA) that "it's his opinion/analysis," because such "analytic error/falsity" is ineffective for avoiding defamation liability: see (i) the discussion concerning "I think"-like circumlocutions in *e*18 *supra,* and (ii) the discussion concerning "gross/inexcusable negligence/antipathy about truth/falsity" in *e*121 *supra.*

143 *[Tuvell]* The judge here picks up (falsely) on Marshall's absurd/insane theory in *e*141 *supra*. For the Judge to grant any credence at all to this invalid/nonsensical legal argument bizarrely returns to his obsession/bugaboo (see also *e*2,5,72 *supra*) about the "responsibility" of the "forum"/audience to somehow "avoid/thwart defamation," by exploring parameters/barriers around the "requirement and/or difficulty for *listeners/readers to investigatively determine the truth/falsity of a statement of fact.*"[†] That's crazy.

(i) While that may be mildly interesting as a theoretical discussion, it is

simply *not* a factor as an element of a cause-of-action for defamation generally, much less *(a fortiori)* at Motion-to-Dismiss time. Namely, it puts a new, never-before-heard-of, burden on the third-party listeners/readers of the defamatory material — whereas all the actual/known elements of cause-of-action for defamation involve only the two principal parties themselves (defamer and defamee). There is simply no requirement — at cause-of-action Motion-to-Dismiss time (as opposed to, in particular, jury-decision/damages time) — for considering the *actual* (as opposed to *potential*) impact of defamatory statements on the third-party listening/reading audience/community. Defamation law just doesn't work that way.[‡] A false statement of fact is a false statement of fact. Period.

(ii) Beyond the bogus addition of a third-party requirement to the cause-of-action (just discussed in item (i) *supra*), the *degree of difficulty* of determining truth/falsity is even further totally extraneous/irrelevant. For, the same discussion could be framed in terms of a listener/reader who has the investigative resources of the New York Times, or the FBI: "If you can eventually figure out, by hook or crook (*correctly,* considering "fake news!"), the truth/falsity of a statement of fact, then it's non-defamatory." And, it's not enough for just *one* listener/reader to possess this investigative capability — they *all* must have this capability. That's transparently ridiculous.

Example: Consider the various currently active high-profile defamation case involving Alex Jones (InfoWars), concerning the 2012 massacre at Sandy Hook Elementary School (Newtown, Conn.). Jones has published/promulgated "conspiracy theory" claims/"opinions" to the effect that the shootings/murders were an elaborately staged hoax, that the events/shootings/murders didn't occur, and affected family members were paid actors. Audiences can trivially research the matter, and discover that Jones is lying (Jones portrays himself as a "journalist questioning the narrative"). Obviously. (One newspaper headline reads: "Alex Jones's Attorneys Argue That No Reasonable Person Would Believe What He Says" (https://www.texasmonthly.com/politics/alex-joness-attorneys-defamation-suit-argue-no-reasonable-person-believe-says/).) So does that mean the defamation lawsuits against him should be dismissed? No. Obviously. (As judges in the cases

are currently in the process of ruling.) Reference (Motion-to-Dismiss; warning, IMHO: legalistic/double-talk shark-attack, see https://abovethelaw.com/2018/07/just-because-youre-defending-nazis-doesnt-mean-you-have-to-be-a-prick-about-it/): https://drive.google.com/file/d/1kxMDBH1QVV_tlceTsvrF1Jw_QVd14xAr/view.

{† • We're distinguishing here, of course, between (i) "audiences *already knowing* the truth of the matter *at (or before)* the time of events," and (ii) "audiences *hopefully searching-out* the truth of the matter at some indeterminate time *afterwards*." The former (i) is exempt from actionability (because "tendency/potential to harm reputation" does not reasonably occur, not even for an instant); the latter (ii) is not exempt (because "even 'temporary' tendency/potential harm" is still "tendency/potential harm"). The standard example of (i) is "inline cards-on-the-table side-by-side comparison," that is, where the facts upon which opinions/conclusions are based are *explicitly/immediately exhibited* in the course of the discussion itself — as opposed to an *unstated implicit/prospective* hope the audience will later "look up" out-of-band vague handwaving opinion-like generalities, which is what occurred in the case-at-bar (noting that **Marshall himself admits to not "looking up" the truth (a.k.a. "actual malice," *e*33 *supra*),** in his Diss℘4: "I did not check his website at first, nor did I read it.").}

{‡ • In this regard, recall (per *e*3,134 *supra*) that under Massachusetts law, "all libel is *per se*" (as opposed to *per quod*, see Comp℘17ƒ3 and Opp℘19ƒ15). The very instant a defamatory statement is uttered, defamation attaches — there simply is no concept of "waiting for awhile, then polling the readers whether they've scoured the Internet and determined (correctly!) the truth/falsity of the statement."}

144 *[Tuvell]* No, there was never any "suggestion that Marshall look into more Judicial Misconduct." Instead, Tuvell *assumed* from the beginning that Marshall had some interest in Judicial Misconduct (since it is a subspecies of Judicial Ethics), and offered up his own experiences (as documented on his own website) as fodder for mutual discussion by Marshall (as a friendly kindred spirit with some similar interests).

145 *[Tuvell]* Compare the “thirty-forty” mentioned earlier, in connection with *e*49 *supra*.

146 *[Tuvell]* No, Tuvell has never argued that they’re “completely” different. In particular Judicial Misconduct is a subspecies of Judicial Ethics (it is unethical to commit misconduct, obviously). But they are certainly significantly different/distinct, as discussed in *e*49 *supra*.

147 *[Tuvell]* Actually, I don’t know what Marshall is talking about here. To repeat yet again, the Comp makes no complaints about “mere insults” *per se* (only about their defamatory implications, see *e*18 *supra*).

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 1781CV02701

A

WALTER TUVELL

vs.

JACK MARSHALL

DECISION AND ORDER ON DEFENDANT'S MOTION TO DISMISS

This plaintiff, Walter Tuvell ("Tuvell"), is a Massachusetts resident. Among other things, Tuvell maintains a website, titled "Judicial Misconduct USA," a topic in which Plaintiff is deeply interested. The defendant, Jack Marshall ("Marshall"), is a Virginia resident. Among other things, Marshall maintains a website, titled "Ethics Alarms." On that website, Marshall holds himself out as an ethics expert and offers commentary, in the form of blog postings, on a variety of issues from his perspective as an ethicist. On August 26, 2017, Tuvell sent an email to Marshall. On August 27 and August 28, Marshall published on his website a handful of postings that concerned Tuvell and the email Tuvell had directed to Marshall. Marshall also "banned" Tuvell from the Ethics Alarms website, and explained his reasons in one of his postings on August 28. A few weeks later, Tuvell filed this civil action for defamation, arising out of Marshall's posts to his Ethics Alarms website and his banning of Tuvell from that site. Before the court is Marshall's motion to dismiss Tuvell's complaint for failure to state a claim. For the reasons set forth below, Marshall's motion to dismiss the complaint is **allowed**.

B

C

I. Standard

A motion to dismiss may be granted where a party fails to state a claim on which relief can be granted. Mass R. Civ. P. 12(b)(6). "For purposes of deciding a motion to dismiss, [the court] accept[s] as true the allegations in the complaint, and draw[s] all reasonable inferences in favor of the party whose claims are the subject of the motion." *Fairneny* v. *Savogran Co.*, 422 Mass. 469, 470 (1996). The court, however, "do[es] not accept legal conclusions cast in the form of factual allegations." *Schaer*, 432 Mass. at 477. In order to survive a motion to dismiss, a complaint must contain factual allegations "plausibly suggesting" that the pleader is entitled to relief. *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008), quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 548 (2007). When evaluating a Rule 12(b)(6) motion, the court may take into consideration not only the allegations in the complaint but also matters of public record, items appearing in the record of the case, exhibits attached to the complaint as well as documents relied upon in framing the complaint. See *Schaer*, 432 Mass. at 477; *Golchin* v. *Liberty Mut. Ins. Co.*, 460 Mass. 222, 224 (2011). See also *Watterson* v. *Page*, 987 F.2d 1, 3-4 (1993) (observing that "documents the authenticity of which are not disputed by the parties" may be considered on a motion to dismiss).

II. Facts[1]

A

On August 26, 2017, Tuvell, who recently started visiting a website entitled "Ethics Alarms" (ethicsalarms.com), sent an email to Marshall, the website's operator. On the website, Marshall holds himself out as an ethics expert and offers commentary, in the form of blog

[1] Attached to Tuvell's opposition brief is a printout of the webpage from the Ethics Alarm website which contains the statements alleged to be defamatory. The webpage was heavily relied upon and quoted by the plaintiff in drafting the complaint, and Marshall does not appear to contest that the attached printout is an accurate representation of the webpage. Thus, the Court may rely on this printout without converting the motion to one for summary judgment. See *Golchin*, 460 Mass. at 224; *Watterson*, 987 F.2d at 3-4.

postings, on a variety of issues from his perspective as an ethicist. Tuvell sent the email to the address listed on the website's "About" section.

Marshall did not reply directly to Tuvell's email. Instead, he addressed the email in the first part of a long post titled "Morning Ethics Warm-Up: 8/27/17." The relevant portion of Marshall's post, which did not refer to Tuvell by name, stated:

A

> 1. **I received a nice, polite e-mail from a new reader here** who accused me of engaging exclusively in "partisan/political rants." "Further," he wrote, "everything you say appears to be entirely one-sided (right/conservative/republican is good, left/liberal/democrat is bad)."
>
> The man is an academic, so one might expect a little fairness and circumspection, but then, the man is an academic. His description is in factual opposition to the contents of the blog (I'm trying to think of the last Republican leader, conservative or otherwise, I designated as "good"), but I know from whence the impression arises: the fact that the entire American Left, along with its sycophants and familiars, the universities, show business and the news media, have gone completely off the ethics rails since November 8, 2016. I don't know how else I am supposed to address that. It would have been nice, for balance's sake, if a conservative cast of white actors in, say, a hit musical called "The Ray Coniff Story" had stepped out of character and harassed, say, Chuck Shumer, but this didn't happen. If it had, I would have treated that breach of theater ethics exactly as I did the cast of Hamilton's harassment of Mike Pence. (I would not, however, have been attacked for doing so by my theater colleagues, and no, I haven't forgotten, and I'm not forgiving.)
>
> If a GOP figure working for CNN as an analyst, say, Jeffrey Lord, had used his connections at the network to forward debate questions to Donald Trump and then lied about it when he was caught red-handed, I would have eagerly written about it in highly critical terms—but the Republicans didn't cheat. Donna Brazile and the Democrats did.
>
> If Hillary Clinton had been elected President and Donald Trump and the Republicans formed an anti-democratic movement called "the resistance," tried to use a single Federalist paper as a rationalization to change the rules of the election and then pressured performers not to allow the new President the privilege of a star-studded, up-beat inauguration to unify the nation, and if a large contingent of Republican Congressmen had boycotted the ceremony, saying that they did not consider Hillary as "legitimate President," Ethics Alarms would have been unmatched in expressing its contempt and condemnation. If

> conservatives were trying to limit free speech according to what they considered "hateful," a step toward dictatorship if there ever was one, I would be among the first to declare them a menace to society. They haven't advocated such restrictions, however. Progressives have. The Mayor of Portland has called for a "hate speech' ban. What party is he from? Howard Dean said that "hate speech" wasn't protected. What party was he the Chair of? I forget. What was the party–there was just one— of the mayors who announced that citizens holding certain views should get out of town?
>
> "Need I go on? I could, *because the uniquely un-American, unfair and destructive conduct from Democrats, progressives and the anti-Trump deranged has continued unabated and without shame for 10 months now*. That's not my fault, and I don't take kindly to being criticized for doing my job in response to it. I have chronicled this as unethical, because it is **spectacularly** unethical, and remains the most significant ethics story of the past ten years, if not the 21st Century to date.
>
> And the reluctance and refusal of educated and usually responsible liberals and Democrats to exhibit some courage and integrity and vigorously oppose this conduct as they should and have a duty as Americans to do—no, I am **not** impressed with the commenters here who protest, "Hey, I don't approve of all of this! Don't blame me!" as if they bear no responsibility—is the reason this execrable conduct continues. It is also why I have to keep writing about it.

(bold and italics in original). The post then went on to discuss other topics at some length in a similar fashion. Tuvell responded in the comment section of "Morning Ethics Warm-Up: 8/27/17" a few hours later, writing:

A

> **Walter E. Tuvell**
>
> I am the author of "Item #1" in Jack's Morning Ethics Warm-Up for Aug 27 2017. For the record, here is the content of the email I sent him, which instigated Jack's response:
>
> > Jack – I've been following your website (https://ethicsalarms.com) since I "discovered" it a couple of months ago. Its About page is especially lucid and luring.
> >
> > The problem is, your posts don't live up to the About advertisement. Specifically, the About page speaks only about whole-life ethics (a very laudable goal, what I was looking for), but says nothing about partisan/political rants. Yet, it seems like that's what the website does, and only that. Further everything you say appears to be entirely one sided

(right/conservative/republican is good, left/liberal/democrat is bad).

Is that the way you really see things? Or I am missing something? Thx. – Walter Tuvell (PhD, Math, MIT & U.Chicago – i.e., "not-a-crank")

I counter-respond as follows:

First: I am not an "academic" (well-educated, yes, but worklife has been in the computer industry). Nor am I an American leftist, sycophant, familiar, university, show business, news media, etc. Rather, I'm just a guy looking for serious ethical guidance in uncertain times, of the sort Jack mentions/advertises on his About page (https://ethnicsalarms.com/about).

Second: My note was not, I think, an "accusation," but rather an "observation," based on the deviance of the website's content vs. the wording of its About page. Granted I'm a relatively new reader, so don't have the benefit of long-term familiarity, but from what I've seen to date, everything has decidedly political/partisan, in one particular direction (from left to right). That seems biasedly unbalanced (black-and-white, no gray) to me.

Third: I maintain a website documenting a major cultural/governmental (but not "political/partisan") phenomenon affecting many thousands of Americans yearly, namely Judicial Misconduct (http://JudicialMiscoduct.US). THAT'S the sort of thing I wonder what an non-political/partisan (though legally trained/savvy) ethicist thinks about. Start, say, with the "Smoking Gun" at http://JudicialMisconduct.US/CaseStudies/WETvIBM/Story#smokinggun.

Following this response, Marshall and Tuvell engaged in the following conversation in the comment section:

A

Jack Marshall

Thanks, Walter. I was hoping you would post.

Jack Marshall

And sorry for the mistake regarding your erudition. I come from a tradition where only scholars and academics attach their degrees and alma mater to their name. I know I don't.

walttuvell

Right, Jack, you don't "wear you credentials on your sleeve," to your credit, which I generally agree with (though your bio does indicate you're a "Harvie (Harvard)," whereas I'm a "Techie (MIT)"). I only appended the "not-a-crank disclaimer" as a prophylactic, because "on the Internet, nobody knows you're a dog" (https:// en.wikipedia.org/ wiki/On_the_Internet,_nobody_knows_you%27re_a_dog).The point being, that some sort of cred-establishment is more-or-less required upon an initial encounter, esp. on the Internet, where "everybody is a troll, until proven otherwise" (just like in Court, "everybody is a liar, until proven otherwise").

Jack Marshall

I know. Sorry, I was teasing. I am unusually anti-credentials. Some of the wisest, smartest people I know have none, and some of the biggest fools have an alphabet after their names. I am also disgusted with scholars, academics and alleged smart people right now. I shouldn't have taken it out on you.

I apologize, Walt; you didn't deserve the snark,

Just for that, you can call me partisan again.

The next day, on August 28, 2018, Tuvell, other readers of the blog, and Marshall engaged in a heated discussion in the "Morning Ethics Warm-Up: 8/27/17" post comment section. This conversation, which was essentially in two discussion threads, lasted until Marshall banned Tuvell from the website later that afternoon. The first discussion thread contained the following posts:

A

Red Pill Ethics

I mean it's nice of you to respond Walter, but Jack very clearly presented his case for why the ethics criticisms have been so one way – a large and sustained breakdown of ethics and reason in the left with many supporting examples. If you respond to anything I'd be most interested in hearing your response to that. Maybe something along the lines of an equivalent large and sustained breakdown of ethics and reason in the right with many supporting examples. If you can provide a good argument for that, then I'd 100% agree that the one sided coverage appears to show an ideological bent. If you can't… then maybe an apology is in order.

. . . .

walttuvell

Red Pill Ethics: You say I should "apologize" if I don't provide a case for (an examples of) large and sustained breakdown of ethics and reason on the right.

I have no idea what you're talking about. It is not ME who supports OR denies any breakdown of ethics/reason on the left OR right. Thought, that appears to be what (all?) others here care about.

With the few short notes I've posted here, I've made it clear (but I'll repeat again) that I care nothing about partisan politics, be it under the guise of "ethics" or just plain naked pot-calling-kettle-black. And I certainly won't apologize for that.

To the contrary, I tuned into this site in the hope/expectation of finding a discussion of ethics, without the smokescreen of partisan politics clouding the air. I even proposed a topic, Judicial Misconduct, with examples (http://JudicialMisconduct.US). But no takers. Such things appear not to be what this site is about.

texagg04

"Such things appear not to be what this site is about."

Then you should take the time to avail yourself of the 1000s of posts Jack has composed over the decade plus of his discussion group.

Jack isn't partisan or biased. It's just demonstrative of how far off the rails the Left has gone in it's unethical conduct post election. And Jack IS frank about his view their their current insurrectionist and counter-constitutional mindset and conduct ARE the gravest threat to our nation.

So of course they seem to get more coverage. But that isn't a bias problem of Jack's.

walttuvell

I've already disclaimed my inexperience with this site, being a new-ish user of only a couple months' standing. Unfortunately, from what I'm seeing, it's doubtful that "taking the time" of absorbing the whole past of the site, as you suggest, will disabuse me of my initial assessments.

For, what you just wrote (and which you claim is representative of the site) is itself quintessential troll-like partisanship: "Everything Jack/we say is non-partisan, because the Left has gone unethically off the rails in their insurrectionist/counter-constitutional mindset/conduct, representing a grave threat to the nation."

texagg04

So you're not going to even try?

Good strategy.

walttuvell

Correct. The whole partisan politics thing is tiresome/boring, and I have no dog in that fight. I just don't care about that whole "I-am-not, you-are-so" scene, from any direction. Silly.

texagg04

Suit yourself.

Jack Marshall

KABOOM! If it is silly, why did you choose that precise issue to begin with?

walttuvell

Oh Come On, Jack, I did NOT "choose that precise issue," and you know it. I wrote a private note to you about "am I missing something," in thinking I was seeing mostly partisan-politics-pretending-to-be-ethics. THAT'S the "topic" I chose (expecting a simple private response). Instead, it got twisted (intentionally?).

The topic of THIS ("silliness") subthread is that some people think I should give some sort of apology, and/or some sort of arguments/examples about how the Left is better than the Right in some sense — "as if" I'm some kind of Leftist and believe that — because somehow I got tagged with being some sort of Leftist in some sense. But I've made no proclamations/hints whatsoever about being any such thing. Perhaps this happened because I was misperceived initially as an "academic," and some people somehow lump "academics" into the Left. Though in fact I've long disavowed being either Right or Left, and care nothing about it, because it's a silly tempest-in-a-teapot.

Why are you (and others) pretending otherwise?

Chris

Walt, some advice from one of this blog's leftists: Move on. Jack's blog is very valuable to me, and has taught me a lot about ethics. From my perspective most of his posts lately have been about politics, but that's because politics are a great window into the ethics of a country, especially at this moment in time. I *do* agree with you that Jack, like all people, has a bias, and I think he's been less careful about mitigating

that bias lately. But I've made a case for that when I've seen it, whereas you have just repeated it without really citing evidence for it. If you choose to stick around I hope you will do the same, but right now you're going in circles trying to justify your original comment, which, to me, was overly broad and unsupported.

The second discussion thread contained the following posts:

A

Jack Marshall

Walt, I'm not obligated to do this, but just for you, I picked the last full month of the blog, and kept score, running backwards, regarding whether a post criticized the left or the right. In doing so, I ignored the Daily updates, since they are mixed topics, and also decided to place criticism of President Trump down as criticism of the right, as he is technically a Republican. I did not score posts that did not involve politicians, government, new reporting or public policy debates.

I stopped after checking 16 posts, when the score was 8 to 8. I have done this before, with similar results. I'm sure, indeed I know, that there are periods when the balance is not this close, but I picked July 2017 at random. My survey simply does not support your claim. Neither would your own survey.

People are wedded to their own world view, come here, see that i designate some position that they have an emotional attachment to as based on unethical principles, and default to bias as an explanation.

Your claim is simply unsupportable on the facts, as is the claim that the blog is primarily political in nature. As I often note, the fact that the Left has inexplicably bundled issues and made it part of its cant does not make rejection of one of those issues partisan or political. Saying that illegal immigrants should get a free pass to the benefits of citizenship isn't liberal, it's idiotic and wrong. Holding that gay Americans shouldn't have all attendant rights of citizenship isn't a conservative position, it's an ignorant position.

You can believe what you choose; most people do. But I work extremely hard to avoid exactly the kind of bias you accuse me of, and I stand by the results. I am not always right, but when I am wrong, it is not because of partisan bias.

walttuvell

Unfortunately, you're misrepresenting me (see initial email) again, because all you doing is "keeping Left/Right score." I don't care about Left/Right anything! What I care about is Ethics per se, as opposed to partisan political rants of any kind, which is what appears to dominate

this site (and seemingly from the Right=Good point of view, but that's a sub-observation, not the main theme of my interest).

I was initially attracted to you because you're trained/savvy in the law, and I wanted to ask you opinion about the ethics of Judicial Misconduct, specifically in the sense of institutional abuse of the Summary Judgment process (e.g., http://judicialmisconduct.us/ CaseStudies/WETvIBM /Story#smokinggun). You've done nothing to address that, and nobody on this site appears to have any inclination to so.

Fair enough. But at least please be straightforward about it, instead of twisting what I'm saying beyond all recognition.

walttuvell

Oh, and another thing: Why in the world did I ever think that Jack (and by extension this blog/website) might be interested in Judicial Misconduct?

Why, because it's advertised on the About page, of course: "I [Jack] specialize in legal ethics …"

Jack Marshall

Or, you could search for judicial ethics, or judges, right on the blog! The last judicial conduct post was almost exactly a month ago. They come up when they come up.

texagg04

You sound more and more like another incarnation of a guy who would frequent this blog beating on ONE topic and ONE topic only…every thread that guy began seemed "new" but ended up ALWAYS redirecting to Supreme Court malfeasance and Judicial misconduct…

Hm.

He'd always get banned…

Then he'd always come back under another name.

walttuvell

Oh, yes. Damnation by (invalid) innuendo. Trying to twist my one-and-only post into a multiplicity of "threads." Very clever/subtle/bogus. NOT

Jack Marshall

I just banned Walt. Read my post about it. He's special.

Jack Marshall

I have already spammed two more posts by the jerk.

Marshall's post discussing the ban, which immediately followed the above thread, read as follows:

A

ATTENTION: Walt Tuvell is banned from commenting here.

I don't even care to spend any more time on him, but I'll give some background. He sandbagged me. He submitted nothing but whiny posts denying that he had accused Ethics Alarms of being obsessed with partisan political topics, then denied he had done that, then said the all he was looking for was a discussion of a judicial conduct issue (but did this initially with a link in a comment to another commenter, causing me to miss it) then just posted a comment saying that the blog advertised itself as covering judicial misconduct and doesn't (there are **dozens** of judicial ethics posts), and THEN, when I finally get the link to the ethics issue he says he was seeking a reaction to—**HINT**: if you want a reaction to a specific issue, the best way is to write me at jamproethics@verizon.net, and ask, "What do you think about this?" If it's a good issue, I'll respond like a good little ethicist and jump through your hoop.

But no, Walt began by accusing me of pure partisan bias, and issued bitching comment after bitching comment until, finally, he actually revealed his agenda, and GUESS WHAT?

Come on, guess!

Walt's "issue" is about **his own case**, and the link goes to **his single issue website**, which you can try to wade through here[2]

The case is **Tuvell v IBM**, and skimming his messy post that teeters on the edge of madness, I discern that the reason Walt is interested in judicial misconduct is that the judge decided that his case was lousy, and dismissed it. That obviously means that the judge is unethical.

I was going to, as a favor to Walt, because i am a nice guy, show my good faith by addressing his issue even *though he didn't have the courtesy or honesty of fairness to come right out and say what he wanted.* Then I read as much of the entry on his blog–which purports to be about judicial misconduct in summary judgments generally, but is in fact only about his case—as I could stand, and realized that Walt is, in technical terms—this is an opinion, Walt, not an assertion of fact, you

[2] In Marshall's post, a hyperlink to Tuvell's Judicial Misconduct USA website was at the word "here."

can't sue me: put down the banana— a few cherries short of a sundae. This became clear in this passage.

> *Tuvell suffered severe shock/dismay/devastation, and worse. For, Tuvell was/is a long-term victim of whistleblowing/ bullying-instigated PTSD, stemming from previous defamatory/ abusive workplace incidents he'd experienced more than a decade previously while at another employer, but which was since in remission ("passive"/"dormant" phase). Knabe/ Feldman's accusation immediately caused/"triggered" Tuvell to reexperience an acute/"active" PTSD "flashback"/relapse.*

I used to get letters from people like this, long rambling things with court cites and exclamation points. I answer phone calls from people like Walt, and try to help them if possible, but it's usually futile, and often they keep calling and calling until I have to just duck the calls. And I get e-mails with long, rambling court documents. This is the first time, however, someone has abused Ethics Alarms for a personal agenda.

I'm sorry for Walt's troubles, but he was not honest, and misrepresented his purpose by the charming device of insulting my integrity. Obviously, he wanted to check and see whether my sympathies would be with his cause before submitting it for consideration. As I tell my clients, I can't be bought, and you take your chances.

Walt was also obviously looking for a cheap, as in free, expert opinion that he could use in his crusade against the judge.

What an asshole! The fact that he may be a desperate asshole doesn't justify wasting my time, and others who responded to him and misrepresenting his motives.

For this, Walt earns the ultimate ban. He will not be re-instated, and if he submits one more comment having been so warned, I will delete every one of his comments so the stench of his abuse no longer lingers here.

Can you tell that I'm ticked off?

(bold and italics in original).

III. Discussion

In his complaint, Tuvell brings a single claim for defamation based on statements A Marshall made in his "Morning Ethics Warm-Up: 8/27/17" post (hereinafter, "Initial Post") and in the post's comment section (hereinafter "Marshall's Comments"), particularly the comment

titled "ATTENTION: Walt Tuvell is banned from commenting here." Tuvell asserts that the Initial Post falsely accused him of being an "academic" (a term Tuvell claims was intended as derogatory) and falsely attributed negative partisan traits to him, and that Marshall's Comments mischaracterized his email to Marshall, his own comments, the Judicial Misconduct USA website, and his lawsuit against IBM, and otherwise leveled inappropriate insults against him. As explained below, nothing in either in the Initial Post or Marshall's Comments can serve as a basis for Tuvell's defamation claim.

To withstand a motion to dismiss a defamation claim, a complaint must put forward allegations establishing four elements: (1) the defendant made a statement "of and concerning" concerning the plaintiff to a third party; (2) the statement could damage the plaintiff's reputation in the community;[3] (3) the defendant was at fault for making the statement; and (4) the statement caused economic loss or is one of the specific circumstances actionable without economic loss. See *Scholz* v. *Delp*, 473 Mass. 242, 249 (2015); *Driscoll* v. *Trustees of Milton Academy*, 70 Mass. App. Ct. 285, 298 (2007); *Eyal* v. *Helen Broadcasting Corp.*, 411 Mass. 426, 429 (1991). Moreover, the alleged statement must "be one of fact rather than opinion." *Scholz*, 473 Mass. at 249. An expression of opinion "no matter how unjustified or unreasonable the opinion may be or how derogatory it is" is inactionable unless it "impl[ies] the existence of undisclosed defamatory facts on which the opinion purports to be based." *Id.* at 249-250, 252-253 (internal quotes omitted).[4] See also *Lyons* v. *Globe Newspaper Co.*, 415 Mass. 258, 267 (1993) ("Our

[3] Put differently, the plaintiff must allege that defendant made a statement that "would tend to hold the plaintiff up to scorn, hatred, ridicule or contempt, in the minds of any considerable and respectable segment in the community." *Phelan* v. *May Dept. Stores Co.*, 443 Mass. 52, 56 (2004), quoting *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 853 (1975).

[4] In other words, a statement which neither contains nor refers to objectively verifiable facts, and therefore cannot be proved false, is not actionable. *Scholz*, 473 Mass. at 250.

cases protect expressions of opinion based on disclosed information because we trust that the recipient of such opinions will reject ideas which he or she finds unwarranted by the disclosed information.").[5] Rhetorical flourish or hyperbole is likewise inactionable. *Dulgarian* v. *Stone*, 420 Mass. 843, 850-851 (1995); *Lyons*, 415 Mass. at 266-267. In analyzing whether a statement is a fact or opinion, the court "examine[s] the statement in its totality in the context in which it was uttered," taking care to consider "all the words used, not merely a particular phrase or sentence," any "cautionary terms used by the person publishing the statement," and "all of the circumstances surrounding the statement, including the medium by which the statement is disseminated and the audience to which it is published." *Downey* v. *Chutehall Constr.*, 86 Mass. App. Ct. 660, 664 (2014).

With these principals in mind, the Court turns to Tuvell's allegations of defamation. To the extent Tuvell's claim is based on any of the statements in the Initial Post, the claim fails to satisfy the first element of a defamation claim – the alleged statement published by the defendant was "of and concerning" the plaintiff. This element can be satisfied by showing that "either that the defendant intended its words to refer to the plaintiff and that they were so understood [by a third party], or that the defendant's words reasonably could be interpreted to refer to the plaintiff and that the defendant was negligent in publishing them in such a way that they could be so understood." *Driscoll*, 70 Mass. App. Ct. at 298, quoting *Eyal*, 411 Mass. at 430. Here, the Initial Post did not mention Tuvell by name or provide any other identifying information about

[5] *Lyons* provides a helpful example of the difference between actionable and inactionable opinion: "[I]f I write, without more, that a person is an alcoholic, I may well have committed a libel prima facie; but it is otherwise if I write that I saw the person take a martini at lunch and accordingly state that he is an alcoholic." *Id.* at 262, quoting Restatement (Second) Torts, § 566 (1977).

him, and Tuvell has not put forward allegations indicating that the readers of Ethics Alarms understood the post to be referring to him specifically at the time it was published.[6] Indeed, the allegations in the complaint and readers' comments to the Initial Post, indicate that readers only learned that Tuvell was the author of the email discussed in the Initial Post after Tuvell *himself* voluntarily disclosed this information. Accordingly, the statements in the Initial Post cannot be the subject of a defamation claim. See *Driscoll* 70 Mass. App. Ct. at 298 (no claim for defamation where plaintiff not mentioned by name in communication); Cf. *Reilly* v. *Associated Press*, 59 Mass. App. Ct. 764, 777 (2003) (statement was "of and concerning" plaintiff where plaintiff "only person identified in the article").[7]

As for Marshall's Comments, those statements likewise cannot serve as a basis for Tuvell's defamation claim because they can only be reasonably understood as expressions of opinion rather than fact. Given the language Marshall employed and the medium in which Marshall's statements were made – a personal blog where Marshall shares his views on ethics, politics and other matters, his remarks about Tuvell's email, comments, Judicial Misconduct USA website, and lawsuit against IBM plainly expressed his opinions. See *Scholz*, 473 Mass. at 252 (fact that statements made in an entertainment news column indicated that they were

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[6] Marshall's reference to the email he had received from a reader served only as a means for Marshall to transition to a much broader discussion, namely, the perceived ethical lapses of the political left, a topic unrelated to Tuvell.

A

[7] Tuvell takes particular issue with Marshall's statements in the Initial Post that the author of the email was an "academic" and that the "American Left" (which includes academics) "have gone completely off the ethics rails since November 8, 2016." Even if Tuvell had been identified as the author of the email, these statements could not serve as a basis for a defamation claim. The term "academic," even when used in this context, cannot be properly viewed as a statement that "would tend to hold the plaintiff up to scorn, hatred, ridicule or contempt, in the minds of any *considerable* and respectable segment in the community" and is therefore not defamatory. *Phelan,* 443 Mass. at 56 (emphasis added). Moreover, Marshall's assertion that the American Left has "completely gone off the ethics rails" is protected rhetorical hyperbole and opinion. It is an observation that can neither be proven true nor false in any definitive sense.

B C (cf. fn.3 supra)

opinion). Furthermore, these opinions were based on disclosed information. Tuvell's email and comments were in the comment section when Marshall made these statements, as was a hyperlink to Tuvell's website, which discusses his lawsuit against IBM. Marshall's readers, therefore, were fully aware of the basis for Marshall's opinions on these topics and were able to assess whether Marshall's opinions were warranted.[8] See *Scholz*, 473 Mass. at 253-254 (statements in articles that allegedly insinuated that plaintiff was responsible for a suicide constituted inactionable opinion because articles "lay[ed] out the bases for their conclusions" and therefore "clearly indicated to the reasonable reader that the proponent of the expressed opinion engaged in speculation and deduction based on the disclosed facts.") (internal quotations omitted); *Lyons*, 415 Mass. at 264-266 (article stating that plaintiffs' picketing held a political convention "hostage" and which advanced various explanations for picketers' motives was inactionable opinion because it was based on nondefamatory facts disclosed in the article).[9] Accordingly, because the statements are nonactionable opinion, Tuvell cannot prevail on his defamation claim in so far as it is based on Marshall's Comments.

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[8] Marshall's statement that "the judge [in *Tuvell* v. *IBM*] decided that his case was lousy" is clearly based on the information found on Tuvell's Judicial Misconduct USA website, rather than his reading of the judge's rulings in the case.

[9] To the extent Tuvell complains about Marshall's statements that he was "special," "a jerk," an "asshole," "a few cherries short of a sundae," and the like, those statements were also opinions based on disclosed information, or constituted rhetorical hyperbole that could not be reasonably interpreted to state an actual fact. See *Tech Plus, Inc.* v. *Ansel*, 59 Mass. App. Ct. 12, 25 (2003) (statement that plaintiff was "sick," "mentally ill" and "lived with two hundred cats" was, in context, protected as rhetorical hyperbole); *Fleming* v. *Benzaquin*, 390 Mass. 175, 180-181 (1983) (statements that state trooper was a "little monkey," "tough guy," "absolute barbarian," "lunkhead," "meathead," and "nut" were non-actionable); *Phantom Touring, Inc.* v. *Affiliated Publications*, 953 F.2d 724, 728 (1st Cir.), cert. denied, 504 U.S. 974 (1992) (description of theater production as "a rip-off, a fraud, a scandal, a snake-oil job" was "obviously protected hyperbole").

IV. Conclusion

For the reasons set forth above, Tuvell has failed to state a claim for defamation and Marshall's motion to dismiss is **allowed**.

Christopher K. Barry-Smith
Justice of the Superior Court

DATE: August 13, 2018

ANNOTATIONS

1A • The full story of this case (with all documentation, including this instant **Annotated Opinion,** which we denote **OpAnn**), is **available online** at http://judicialmisconduct.us/CaseStudies/TUVELLvMARSHALL. Herein we use these abbreviations:

Comp = Plaintiff's Complaint (Sep 13 2017).

Diss = Defendant's Motion to Dismiss (Oct 16 2017).

Opp = Plaintiff's Opposition to Diss (Oct 25 2017).

OppExhA = Opp Exhibit A (Oct 25 2017).

OA = Oral Argument (Jun 7 2018).

OATAnn = OA Transcription, Annotated.

Op = Judge's Opinion (Aug 13 2018).

OpAnn = Op Annotated (this very document).

Ann*NL* = Annotation Number=*N* Letter=*L* in this very OpAnn.

1B • That original email of Aug 26 2017 — as (i) originally sent via email, and as (ii) reproduced/posted on Marshall's website, and (iii) at Op℘4–5 — is discussed in detail at Ann2A *infra.*

All the postings on Marshall's blog relevant to this action — except for the two that Marshall peremptorily/unilaterally destroyed, apparently unrecoverably, see Opp℘14f21 — were filed with the Court (and hence properly included in the record on this Appeal), in the document called OppExhA (34 pages). See Op℘2f1.

1C • "Failure to state a claim" = **Massachusetts Rules of Civil Procedure (MRCP)** 12(b)(6), as mentioned at Op℘2.

Marshall's two other pretended arguments presented for dismissal — regarding MRCP 12(b)(5) "registered mail," and MGL 93A "demand letter" — were utterly false/bogus, as proven at Opp℘9–10 and OATAnn℘18.

2A • *Concerning the original email of Aug 26 2017:* The **body content** of that initial private email from Tuvell to Marshall — but ***missing*** its **subject-line** (and its **signature-line** improperly absorbed into the final paragraph) — is reproduced at Op℘4–5.

But in the OppExhA℘7 version of the original email submitted to the Court (which the Op purported to be reporting), the initial email's **signature-line** is properly included separately, and it reads: "— Walter Tuvell (PhD, Math, MIT & U.Chicago — i.e., 'not-a-crank')." This language signals that the important part of this signature-line, i.e., the very *reason* Plaintiff included it at all, is the part that reads, "i.e., 'not-a-crank'." Thereby, Tuvell established to Marshall his credentials as "not just any old random nut on the Internet," as Tuvell did explain to Marshall, see OppExhA℘32.

The initial email's **subject-line** was never included on Marshall's blog (OppExhA). That original subject-line read: "I can't figure you you" (in the "first original" email, dated 2:09 p.m. Aug 26 2017). However that was a typographical error, which was proactively corrected by Tuvell (in the follow-up "second original" email, dated 4:56 p.m. Aug 26 2017) to the intended wording: "I can't figure you out." It turns out, unexpectedly, that this subject-line has some importance, as it helps establish Tuvell's approaching Marshall as motivated by inquisitiveness, not animus (which "goes without saying," and wasn't recognized as important until just now).

The full/verbatim original email (both first and second versions) is now included in this OpAnn, in the Appendix at ℘23 *infra*.

3A • OppExhA℘1–2. Called Marshall's "Initial Post" at Op℘12.

4A • OppExhA℘6–7.

5A • OppExhA℘8,32.

6A • OppExhA℘8,9–12.

9A • OppExhA℘12–13,14–15.

11A • OppExhA℘15–16.

12A • OppExhA℘1–2. See Op℘3.

12B • OppExhA℘5–34. This includes the excerpts at Op℘4–12.

13A • By critiquing Marshall's Initial Post, in any manner, the Judge is "posturing" himself, falsely stating Plaintiff's claims. Namely, while the Plaintiff does make (correctly) the assertions mentioned by the Judge here regarding Marshall's Initial Post (in particular, that the "academic" attribution *was* intentionally derogatory/defamatory in the *context of that particular audience,* hence marked with a "†" tag at Comp℘5¶8), **no claim of <u>actionable</u> defamation has ever been made** by Plaintiff as to that Initial Post (because that Initial Post was not identifiably "of and concerning" him, as Plaintiff already *stated explicitly* at Opp℘12ƒ18). Instead, the importance of the Initial Post is that it promulgated **false facts** (defamatory, albeit non-actionable) to the audience, which the audience "believed," thereby intentionally **polluting/sliming/prejudicing** Plaintiff in the eyes of (certain/most members of) the audience — and *upon that basis* (certain/most members of) the audience (Marshall and others) then committed *other* **actionable** defamations upon Plaintiff.

We can say more about Marshall's "academic" thing. Namely, why did Marshall attribute the "academic" characteristic to Tuvell at all? Marshall himself proffers this answer (OppExhA℘8): "I come from a tradition where only scholars and academics attach their degrees and *alma mater* to their name." But that is transparently false (he's making it up on the spot), for at least two reasons. (i) One rea-

son it's false is that no such "tradition" exists (academics never advertise their degrees and *alma mater,* say on the walls of their offices, but doctors and lawyers usually do). (ii) But the other reason it's false is Marshall's absurd "PhD implies academic" implication. For, while definitive numbers are difficult to come by, no reliable source I can find estimates that as many as 10% of PhD's enter/remain in academia. This vast disparity (10-to-1 ratio) falsifies Marshall's implication, and is too wide to chalk up to an "innocent misconception" on Marshall's part. So there must be some other explanation. And the only explanation I can think of is that Marshall "Googled" Tuvell, visited his Judicial Misconduct website, and decided for some reason (perhaps because he *likes* rampant Judicial Misconduct, because that generates more wealth for lawyers like himself) to attack Tuvell. So, he decided to "slime" Tuvell on his blogsite, by pretending he was a hated "academic," thereby "forcing" him to be a member of the dreaded American Left in the eyes of his audience. And that amounts to *defamation* (albeit non-actionable *per se*). (This conjectured explanation cannot be proven at this Motion-to-Dismiss time, but must await further interrogatories/discoveries/depositions for its explication/resolution.)

13B • These are the **standardized four "hornbook" elements/criteria** of a cause-of-action for defamation (though languaged according to the cases cited by the Judge). See OATAnn℮3.

13C • *Tendency/potential* of harm to reputation is all that's required (*actual* damage to reputation is not necessary to allege or prove).

13D • The "fact vs. opinion" issue (*vis-à-vis* defamation) is discussed at great length in OATAnn *passim.* It gets very tricky, and remains the biggest sticking point in all of defamation law (see Opp℘4f4,5).

13E • This is misleading/incorrect/untruthful (absent additional context/argument), even though the Judge relies upon it in his Op. Namely, it is *not* the case that "actionable opinion *must* be based upon *undisclosed* defamatory facts" (though it will often/usually be). The correct statement is: **"to be actionable as defamation, an opinion must be based upon some underlying defamatory facts, be they *either (i) disclosed or (ii) undisclosed, whether true or false.*"** *Milkovich v. Lorain Journal Co.* (see OATAnn *e*19).

Example: Suppose John has never stolen a car. Then the naked (false) statement "I opine John is a car thief" is an actionable opinion based upon *(ii) undisclosed* defamatory facts. But a speaker *also* utters an actionable defamatory opinion statement based upon *(i) disclosed* facts by: *first* saying "I saw John steal a car" (which is an actionable defamatory *fact* statement); and *second* saying "Therefore I opine John is a car thief." (Because, the second statement *repeats* the defamatory content of the first, thus satisfying the four standard hornbook criteria of Ann13B *supra*.)

13F • This is misleading/incorrect/false (absent additional context/argument). Namely, the clause "and therefore cannot be proved false" is unsupportable/wrong — because, in the common brief paraphrase: "You can't prove(/disprove) a negative."

Example: Continuing the same example from *supra,* suppose John is not a car thief. Then the statement "John is a car thief" is defamatory, even though it "cannot be *proved false*." For, there exists no universal/trusted/queryable database that completely records/proves *all* of John's life acts/events, such as "nonstealing of cars."

14A • "Information" here means "*true* facts." That is: "false factual statements" do not constitute "information" for purposes of defamation

law. The defamer/opinionator cannot be permitted to rely upon "*false* facts (disclosed or undisclosed)," as discussed in Ann13E *supra*.

14B • This long citation about "analyzing a (fact or opinion) statement *in context*" can be *short-circuited* (that is: context need *not* be considered) if the statement is an *objectively/provably false* statement of fact, or is an opinion based upon an *objectively/provably false* statement of fact. Because: "objectively/provably" *means* "independently of (i.e., 'in *every*') context."

14C • Oh my God, why do I have to keep repeating this? There was never any contention that the Initial Post was actionable (Ann13A *supra*). So why does this Judge persist in self-puffing himself up, by pretending to scotch something that was never even claimed?

15A • **The Judge writes falsely here, twisting/distorting/falsifying Tuvell's pleadings.** Far from "taking particular issue" (as the Judge falsely pretends), and as already noted (Ann13A,14C *supra*), there is of course no claim that Marshall's Initial Post *per se* is actionable. Instead, the claim is that Marshall intentionally **infected/polluted/poisoned** the audience, by propagating **false facts** ("academicism"), which he negligently/falsely/maliciously pretended-to-assume about Plaintiff, to an audience (mostly of "right-wing wing-nuts," as opposed to "left-wing moon-bats," in the slang vernacular) that he knew to be predisposed to viewing "academicism & Left Wing" very negatively (and which he himself expressly admits/explicates, see Ann15B *infra*). That this latter claim ("the audience viewed 'academicism & Left Wing' very negatively") is true/correct is quite clear/plain, upon any casual perusal of OppExhA as a connected whole ("in context").

15B · The (false) attribution of the concept/term "academic" to Tuvell is *key* to these events (independently of whether it is *actionably* defamatory; see the concept of "material falsity" *infra* in this An-n15B), because it started everything off on the wrong foot, strongly "setting the tone" for everything that followed — and, the Judge's whole sentence here is untruthful, and he **misstates/falsifies Plaintiff's argument.** For, here's what the Judge writes (emphasis in original): "The term 'academic,' even when used in this context, cannot be properly viewed as a statement that 'would tend to hold the plaintiff up to scorn, hatred, ridicule or contempt, in the minds of any *considerable* and respectable segment in the community' and is therefore not defamatory." **That is provably false.** *Proof (in three steps):* (i) Using the Judge's same "community/segment" language, the "community" involved here is "the membership/readership/followership of Marshall's Ethics Alarms blog" (not to mention the "searchship/Googleship of the Internet at large"), and the "segment of the community" is "the commentership of the blog entry in question;" and the Judge does/can not offer any evidence/proof that either of these is "inconsiderable and/or disrespectable" (see the numerical estimates of community size at OATAnn$_{\wp}$14*e*79, which, albeit inexact/imprecise, are certainly not "inconsiderable and/or disrespectable," by any reasonable/rational definitions). (ii) Many/most/all members of the just-stated commentership segment *did indeed* clearly/plainly/obviously "actually (not just 'tendency/potentially') hold the Plaintiff up to scorn, hatred, ridicule or contempt in the[ir] minds," as any causal perusal of OppExhA shows. (iii) The characterization of "being an academic" *is* "defamatory when used in this context (*viz.,* 'this Ethics Alarms community/segment')," because Marshall did not *only/merely "use"* "the term academic" (*without more,* it just means "member/professor/researcher of the academy/

university/college/teaching professions," see https://en.wikipedia.org/wiki/Academy), but rather he *did "supply more"* by actually going further and *expressly explicating his intended (defamatory) contextual implication of "academicism*, thusly:" "the **fact** **[he claims, not 'opinion,' and his followers/acolytes happily believe it!]** that the entire American Left, along with its sycophants and familiars, the **universities** [hence the "academic" connection], show business and the news media, have gone completely off the ethics rails since November 8, 2016" (OppExhA℘1–2, emphasis added). This is *hate speech:* "incitement to riot."

In fact, this is exactly the kind of thing the Supreme Court is talking about, by recently reviving its defamation concept of **material falsity (" effect on reputation of defamee in the context/minds of the relevant audience")** in *Air Wisconsin v. Hoeper* (see OATAnne18‡): the concept of "academics being members of the American Left, hence 'bad'" is very much endemic throughout Marshall's blogsite, and it directly caused Tuvell's hardships there. That is obvious, just by any casual perusal of OppExhA in its entirety/context.

In particular, in the quotation the judge cites, he explicitly adds emphasis to the phrase "*considerable* segment of the audience." That word refers to the "quantitative numerical/percentage measure/fraction" (see the quotation from *Ingalls v. Hasting & Sons* in Ann15C *infra,* which speaks of a "considerable part" of audience) of the relevant audience/community, and it's a very weak hurdle, basically meaning "not just one/two/few extreme 'eggshell skull' outliers who may profess to be 'shocked, shocked' by even the most mild of criticisms/defamations." In our case, the "relevant audience" is "the people following/reading/commenting the website/blogpost (OppExhA)" — and not "the whole entire world." Again, just by casu-

ally reading/perusing OppExhA, it can be seen that Marshall's "academicism" attribution/slur did indeed infect/pollute/poison a "considerable" fraction (*all but* one/two/few) of that audience. (Anyway, that "considerable amount" is a fact question, which a judge cannot "guess" at Motion-to-Dismiss time.) So the Judge is lying.

As for the "respectable" part of "considerable and respectable" audience: *Sack* §2.4.3 speaks of this as "Right-Thinking People." I presume the Judge will grant that criterion is satisfied. Alternatively, does he really want to argue that Ethics Alarms consists of Wrong-Thinking People?

15C · It's obvious **to me, and seemingly to the Judge,** that Marshall's "observation" about the American Left is "mere observation/opinion," hence not actionable as defamation. However, *this is not the case with the audience/community of interest here:* Marshall expressly portrays his observation as **true fact** (see Ann15B *supra*), and **his audience** accepts it as such (noting that Marshall "is God" to his followers, see OATAnn℘24,*e*130), to deleterious effect upon Plaintiff's reputation. But in any case, Plaintiff has never given any hint of a scintilla of an iota of complaint/actionability of defamation about Marshall's harangue against "the American Left." This is very obvious, by reading everything Plaintiff has ever written about this case. In particular, Plaintiff was at pains to very explicitly disassociate/abjure himself from any interest whatever in politics/partisanship of any kind in the original blog interactions (as a casual perusal of OppExhA shows). So, again, why is this Judge abusively puffing himself up here, pretending to "defeat" Plaintiff in some ridiculous/nonexistent sense?

BUT … THAT ("American Left has gone completely off the ethics rails") is not even the point of what Plaintiff is complaining about. I.e., the Judge is **lying, (intentionally) misstating/falsifying**

Plaintiff's argument. Because, instead (as the Judge knows well), Plaintiff's argument has been given already in Ann15B *supra,* and we *repeat* it here again, as a syllogistic implicatory sequence, as intended by Marshall and as received/accepted by his audience: (i) Plaintiff is an academic. (ii) All academics are "sycophants/familiars/members" of the American Left. (iii) The entire American Left has gone off the ethics rails. (iv) Therefore, Plaintiff has gone off the ethics rails. **That is defamatory (read as a whole, in context). For, (i–iii) are all "facts" (so portrayed/declared/disclosed by Marshall, and received by his audience), while (iv) is "defamatory 'opinion' based upon those facts" — at least one of which, (i), is certainly false (and (ii-iii) are almost-certainly false, if there were measurable), hence the opinion is unprotected/actionable.**

And finally, not only was the Judge wrong here (as just proven), but we further note the Judge *cheated/swindled* Plaintiff, in the sense that **the Judge is incompetent/powerless to decide**[†] the defamatory effect upon the community/audience, which is what the Judge has done here. That authority/competence resides only in the audience/community itself (and later, the jury). As *Sack* §2.4.3 puts it (emphasis added): "Communications are judged on the basis of the impact that they will probably have on those who are **likely to receive them,** not necessarily the ordinary 'reasonable man'." Or again, as Massachusetts put it: "[A] writing is a libel if, in view of all relevant circumstances, it discredits the plaintiff in the minds, **not of the court,** nor of wise, thoughtful and tolerant men, nor of ordinarily reasonable men, but of any 'considerable and respectable class in the community.' The emotions, prejudices and intolerance of mankind [including "mob/herd/riot mentality" situations, as with the case-at-bar] must be considered in determining the effect of a publi-

cation upon the standing of the plaintiff in the community. The question, therefore, whether a publication is defamatory or not, being dependent upon the effect produced upon the public or a *considerable part* of it, is one **particularly fit for trial by jury [not for the judge].**" — *Ingalls v. Hastings & Sons,* 304 Mass. 31, 33 (1939, cites omitted, emphasis added). And, it's all the more improper for *this* particular judge to be dismissing this case, given his blatantly biased conduct the Oral Hearing on this Motion to Dismiss (to which we now insistently draw the attention of this Appellate Court; see all the annotations in OATAnn). {† • We do note, however, that it is a threshold question of law whether a statement *is* <u>*possibly*</u> *capable of* defamatory import (as opposed to the *actual* effect on the audience). In the instant case, at Ann15B *supra,* the judge spoke of the effect on the audience, which was forbidden for him to do; while in this Ann15C he speaks of the possibility of "defamatory impact upon the 'American Left'," which is an irrelevancy (as we've noted), and we have no quarrel with it. The affirmative *possibility/potentiality* of defamatory impact upon the Tuvell audience is demonstrated by the syllogism *supra*. In this connection, we note too that defamation *per se* (such as Plaintiff's "theft of professional services" charge, see OATAnn$_{\wp}$27,*e*134) is *exempt* from these potentiality-of-defamability considerations, because defamability can/must be *automatically granted/assumed* for *per se* defamatory statements.}

15D • This ("only reasonable understood as expressions of opinion rather than fact") is stupidly false. The statements Plaintiff complains-of are all **based upon (i.e., "imply," as precedent) underlying facts (disclosed or undisclosed, true or false).**

This whole "opinion vs. fact" thing has always been the trickiest area of defamation law, and has been extensively (though it can

never be exhaustively!) discussed at the Oral Argument and in its annotations (OATAnn, *passim,* to which we insistently refer this Appellate Court). See particularly the discussion there of Plaintiff's **Top Five Defamations** (summarized briefly at OATAnn*e*133) — which the Judge in this Op sneakily refuses to address individually/directly, instead breezily/falsely broad-brush handwaving/wishing them away by pretending "they're all about pure opinion, with zero factual content/foundation/implication, hence protected from actionability." He's lying.

15E • It's only a "personal blog" in the limited/cramped/colloquial sense that Marshall runs it and is responsible for the content he himself posts. But to call it "personal" doesn't use language the way the Internet uses it. In Internet language, Marshall's blogsite allow wide commentation, which is not "personal" — it is instead an interactive/collaborative membership/comment-based *shared/nonpersonal* blogsite (albeit with Marshall as the primary owner/leader/bigdog, as is typical for such blogsites).

15F • Yes, Marshall does "share his views on ethics, politics and other matters," but that's not what we're talking about here, is it? The "matters" Marshall wrote concerning Plaintiff, which Plaintiff complains-of in this case-at-bar, are instead very targeted to-the-person *(ad hominem)* attacks, and have nothing whatever to do with "ethics, politics, etc."

15G • Well, in one sense, Marshall's statements did "express his opinion" — but only in the loose/naïve sense of everyday language, **not** in the sense of defamation law or of legal ethics (Marshall's specialty), which is what's relevant here. Marshall's statements are **definitely not** in the legally protected category of "pure/unadulterated/fact-

free opinion, entirely devoid of any factual basis or contextual factual implication." That's essentially impossible anyway (see OATAnn *passim,* beginning with, say, OATAnn*e*18).

16A · This assertion by the Judge ("opinions were based on disclosed information," recalling that "information" means "true/accurate facts," Ann14A *supra*) is very false/untruthful (or at least very falsely misleading, depending on exactly what the Judge means, noting that he "handwaves" rather than explaining himself). Namely, *all* of Marshall's opinions are *based* upon either (i) disclosed *false* facts, or (ii) *un*disclosed facts — both of which render the opinion unprotected/actionable (Ann13E *supra*). (Not to mention that the Judge is being falsely prejudicial here by using the word "information," which is generally reserved in defamation law to mean "*true* facts," see Ann14A *supra*).

The core problem here for the Judge is that he is being entirely "conclusory" — *"Expressing a factual inference without stating the underlying facts [or chain of inferential reasoning] on which the inference is based"* (Black's Law Dictionary 7th). Namely, the Judge makes a bald dispositive assertion — "opinions [~57 of them!] were based on disclosed information" — which requires *proof* (namely: what exactly was/were the "disclosed information" upon which the "opinions" were based??) — but he doesn't bother to back it up by providing any detailed/underlying facts. Whatsoever. In the least. Not even a single detail. Not one. Even though the ~57 instances of defamation (in Comp) each demand (by law) to be addressed individually. (*Hint:* No such "disclosed information" actually exists, as proved *infra*. in this Ann16A.) **This is clear abuse of judicial process.** And, since **the Judge is clearly quite false/untruthful about his conclusory assertions,** this amounts to **Judi-**

cial Misconduct. We prove this now.

As a prerequisite to the remaining discussion in this Ann16A, we preliminarily refer to the discussion at Oral Argument concerning Plaintiff's **Top Five Defamations,** OATAnn*e*133, which we implore this Appellate Court to review at this point. That said, we now continue that discussion as follows, by zeroing in on the *deep details* of *just one* of those five (this example was called an "excellent example" at OATAnn*e*35; another example, not one of the Five Top Defamations, is addressed at Ann16D *infra*):

Here Is Just One Example (*e pluribus unum*): Consider Marshall's accusation of **"theft (attempted) of professional services"** (which is defamatory *per se,* see OATAnn*e*134(δ)). It occurs at OppExhA$_{\wp}$16, in these words of Marshall:

"[Tuvell] was not honest, and misrepresented his purpose by the charming device of insulting my integrity. Obviously, he wanted to check and see whether my sympathies would be with his cause before submitting it for consideration. As I tell my clients, I can't be bought, and you take your chances. Was was obviously looking for a cheap, as in *free,* expert opinion that he could use in his crusade against the judge."

Analysis/Proof: The above accusation by Marshall is *not* "pure/fact-free opinion" as the Judge pretends (which would protect it from actionability), but rather contains the following *seven factual bases* (disclosed or undisclosed, true or false, see Ann13E *supra*) and/or *implications,* all of which are defamatory, which makes all seven of them actionable:

(i) To say "Tuvell was not honest" is a *statement of fact.* Namely, it implies the existence of "something" Tuvell did/said/wrote that "was not honest." What was that "something" exactly, and in exactly what way was it "not honest?" *Hint:* You can't find it; a true/correct/

factual basis doesn't exist in OppExhA. (Note that accusations of dishonest are defamatory *per se.*)

(ii) To say "misrepresenting his purpose" is a *statement of fact.* Namely, it implies the existence of "something" that was Tuvell's "purpose." What was that "something" exactly, and exactly how did he "misrepresent" it? *Hint:* You can't find this; true/correct/factual basis doesn't exist in OppExhA.

(iii) To say "insult my integrity" is a *statement of fact.* Namely, it implies the existence of "something" that Tuvell did/said/wrote to insult Marshall's integrity. What was that "something" exactly, and in exactly what way did it insult Marshall's integrity? *Hint:* You can't find this; true/correct/factual basis doesn't exist in OppExhA.

(iv) To say "check where Marshall's sympathies would be" is a *statement of fact.* Namely, it implies the existence of "something" Tuvell did/said/wrote that checked where Marshall's sympathies (whatever that means) would be. Exactly what was that "something" and how exactly did it "check his sympathies?" *Hint:* You can't find this; true/correct/factual basis doesn't exist in OppExhA.

(v) To say "I can't be bought" is a *statement of (implied) fact.* Namely, it implies the existence of "something" Marshall was "selling," and that Tuvell was somehow attempting to "acquire" it without properly paying for it. What exactly was the "something" that Marshall was selling (was it "sympathies" as in (iv), or "expert opinion" as in (vi), or something else?), and how exactly did try to acquire it? *Hint:* You can't find this; true/correct/factual basis doesn't exist in OppExhA. (Note that Marshall does peddle his expert/professional services on his *other/business* website, ProEthics, see OATAnne35, but does not do so on his Ethics Alarms blogsite.)

(vi) To say "looking for cheap/free expert opinion" is a *statement of (implied) fact.* Namely, it implies (from context, see (v)) the exis-

tence of “something” (presumably “expert opinion”) which Marshall was selling, but which Tuvell was underhandedly/improperly attempting to acquire cheaply/freely. What exactly was that “something” (was it perhaps related to “expert witness” services, or to an expert *amicus* brief?), and in exactly what way was it for sale, and in exactly what way did Tuvell attempt to underhandedly acquire it cheaply/freely? *Hint:* You can’t find this; true/correct/factual basis doesn’t exist in OppExhA. Note that all of Marshall’s opinions on his blogsite (as opposed to his other/business website, but he doesn’t publish any opinions at all) are advertised only as “plain” opinion (not “expert opinion” — the word “expert” does not appear on his About page, and the word “professional” appears only in connection with a certain theater company). In fact, Marshall explicitly states, concerning his Ethics Alarms web/blogsite: “[N]one of the opinions here should be taken as legal opinions [presumably meaning “expert opinions,” because Marshall certainly doesn’t produce what are normally called “legal/judicial/court opinions,” which employs an entirely different meaning of the word “opinion” altogether, unrelated to defamation law], because they aren’t.”

(vii) To say “could use in his crusade against the judge” is a *statement of fact.* Namely, it implies the existence of “some way” in which the “something” that Marshall was selling could be “used” against the judge. Exactly what was that “some way?” *Hint:* You can’t find this; true/correct/factual basis doesn’t exist in OppExhA. Note that at all times relevant here, Tuvell’s Judicial Misconduct proceeding against the judge was “closed,” that is, it was literally forbidden/impossible (under the Judicial Misconduct Rules) to inject/intervene any third-party production of any kind into the proceedings. (And too, Tuvell’s underlying case, *Tuvell v. IBM,* was “closed” in the even stronger sense of not being active at all, but of course

Tuvell was never interested in discussing that case with Marshall, he was only ever interested in discussing his Judicial Misconduct case.)

Conclusion: Look back at each of those phrases, just written: "*Hint:* You can't find this; true/correct/factual basis doesn't exist in OppExhA." What those mean is that, since the (true/correct/factual) answers to *all* of the questions above (by any reading of OppExhA, no matter how loose or close) **just plain do not exist** in OppExhA, then the (true/correct/factual) answers are implicit/unclear/conjectural/undisclosed. Go ahead, please try this exercise for yourself, right now — the only raw data you need for this exercise is right there before your very eyes, in OppExhA. **The "basis" sought/required must come from some one of Tuvell's 10 posts, listed on the introductory page of OppExhA, "OppExhA℘0" so-to-speak. But the required basis just plain does not exist.**

Given that such bases do not exist, if one further tries taking the next exercise of ***conjecturing*** (as the Judge is *not even permitted* to do at Motion-to-Dismiss time, because the Judge must *blindly assume* all allegations and interpretations in favor of the Plaintiff, as the Judge says at Op℘2) about what the *potential/possible bases might conceivably be (inside or outside of OppExhA)* for Marshall's behavior, they *all* turn out to boil down to *false* statements of fact (as Plaintiff knows them to be, and as he can prove to an impartial jury, but apparently not to a partial Judge), (i) One such conceivable conjecture being that "Marshall inadvertently misread/misinterpreted/twisted Tuvell's writings/posts." (ii) Another conjecture is that "Marshall intentionally misread/misinterpreted/twisted Tuvell's writings/posts." (iii) And yet another conjecture is that "Marshall invented arbitrary answers, because that suited the ranting he wanted to do that day").

Therefore (by the "opinions based on undisclosed and/or false defamatory facts" principle, see Ann13E *supra*), Marshall's accusation(s) about "theft of professional services," as listed/analyzed in this example, are all *actionably defamatory*. QED.

16B • The Judge is saying here that "the audience was fully aware of the bases for Marshall's opinions, because those bases were present in Tuvell's comments on the blog (OppExhA)." **THAT IS OBJECTIVELY FALSE — as was just proven** (for one example, in Ann16A *supra*). Whatever the bases for Marshall's statements were, they simply **do not exist** on the blog. Tuvell's comments on the blog **do not support/match Marshall's defamation, period.** So, whatever Marshall's bases are, they are/remain **undisclosed. Period.**

16C • No, Marshall's readers were *not* "able to assess Marshall's opinions," because the underlying true/correct/factual bases for his opinions were *undisclosed,* as just proved (Ann16B,C *supra*).

16D • *The "'lousy' case" example (OATAnn℘19–21,e37–38).* No. The Judge is engaging in ridiculous/nonlegal/false/untruthful (in bad faith) reasoning in his footnote 8. For multiple reasons:

(i) In the first place, the Judge is here explicitly putting a **burden on the audience that has never heretofore been imposed in defamation law.** Namely, he's saying, "a statement is not actionably defamatory provided that the audience can 'just go look it up' on the Internet (or elsewhere)." In other words, he's expanding the concept of "disclosed facts" to encompass "discoverable facts, depending upon the investigatory resources of the audience." That's absurd (it's not at all what "disclosed facts" means in defamation law), and has been dealt with at OATAnn*e*143.

(ii) In the second place, *even if* audience members were to access "the information found on" Tuvell's website (as the Judge

thinks is incumbent upon them, see (i)), they would have no idea exactly *what parts* of that website Marshall based his "lousy" opinion on. So, that means they'd have to comb through Tuvell's website with a fine-tooth comb, trying to ferret-out the basis of Marshall's "lousy" opinion. Which is a *huge* burden. And even then, they couldn't be certain that the information they found was exactly the information Marshall relied upon for his "lousy" opinion.

(iii) In the third place, *even if* audience members were able to find the exact information information just discussed (in (ii)) that Marshall relied upon, they'd have no way of knowing exactly how he *interpreted* that information (the Judge calls it "his reading"), and in particular they'd have no way of knowing *why* Marshall called Tuvell's case "lousy" (i.e., whether it was warrantedly justified, based upon a valid reasonable interpretation, or was just off-the-wall intentional defamation — i.e., a "true/accurate/correct fact" or a "false/defamatory non-factual misinterpretation").

(iv) In the fourth place, we need to be careful about *to whom* Marshall is attributing the assessment of "lousy" (because Marshall doesn't make it clear): is he saying that the District judge herself assessed the *Tuvell v. IBM* case as "lousy," or that Marshall himself is now assessing the case as "lousy?" That question is not "disclosed," but it's answerable, by noting that that judge in that case nowhere said anything close to "lousy" (such as "frivolous," or "without merit," or some other such judge-like language), therefore it is certainly Marshall himself who is now making the "lousy" assessment (and the instant motion Judge agrees with that determination, because he writes "Marshall's statement … is clearly based … [not] on … his reading of the judge's ruling in the case," even though it is the height of legal/ethical irresponsibility for an "ethical" lawyer like Marshall to call a case "lousy" without even reading-up on it). So

now, given that it's Marshall who made the assessment of "lousy," we need to ask about the *factual basis* upon which he made that assessment (because, if there were *no disclosed factual basis,* his assessment would be defamatory). Again, the instant motion Judge think it's "clear" that the underlying factual basis of Marshall's "lousy" assessment came from Tuvell's own writings on his own website, not from the judge's ruling. But that cannot be right (i.e., the judge is wrong), because Tuvell nowhere described his own *Tuvell v. IBM* case as "lousy," and to the contrary he proved everywhere that his case had great merit ("was not lousy"). Therefore we can/must conclude, yet again, that Marshall's "lousy" defamation has no true/accurate/factual basis. (And, this conclusion holds whether or not the Judge's "clearness" conjecture is correct.) (Incidentally, note that we have no need here to deeply parse the etymology of the word "lousy," because the only important aspect of the word is that all audience members perceived it as defamatory, as they certainly did.)

(v) In the fifth place, we observe that Marshall's statement, "the judge decided that his case was lousy," was **objectively/demonstrably/provably 100% false.** For, that judge **did *not* "decide Tuvell's case" at all.** Instead, that judge ***illegally fabricated/falsified the facts*** of Tuvell's case (*Tuvell v. IBM*), by crediting IBM's versions of the facts instead of Tuvell's at Summary Judgment time (a clear violation of the Rules of Procedure, amounting to criminal Obstruction of Justice), and then proceeded to **"'decide' *that different/falsified* case."** And indeed, it is precisely this falsification-of-facts incident that forms the basis of Tuvell's (very proper/correct) Judicial Misconduct charge against that judge. This has already been explained in Tuvell's information provided in the instant case (Comp℘9¶14·I; OATAnn℘19–21,*e*37–38), and it's obviously true;

so the fact that the instant motion Judge pretends it doesn't exist or is wrong is flatly untruthful, and frankly constitutes an act of Judicial Misconduct in itself.

(vi) In the sixth place, we come to the question of why Marshall bothered making any pronouncement at all about the *Tuvell v. IBM* case. That case had nothing to do with why Tuvell approached Marshall in the first place. Tuvell had no motive to do that, because the *Tuvell v. IBM* case has nothing to do with Marshall's field of legal ethics (instead, it's a 100% employment case which presumably Marshall knows little-to-nothing about). Instead, Tuvell approached Marshall concerning his ***Judicial Misconduct case*** against the *Tuvell v. IBM* judge(s), and *that* case indeed has a large component of legal ethics attached to it (because Judicial Misconduct is a subspecies of Judicial Ethics). Therefore, Marshall's 180° turn away from the only reason Tuvell contacted him, for the sole purpose of sliming Tuvell's *other* case as "lousy," amounted to a wholly gratuitous non-sequitur. And, no, lawyers don't make "innocent mistakes" like confusing/mixing-up two distinct cases like this. Therefore, Marshall's "lousy" assessment of the completely irrelevant *Tuvell v. IBM* case amounted to **"actual malice"** against Tuvell (in the technical language of defamation law, see OATAnn*e*33,143).

16E • Misleadingly false/untruthful. As has been explained/proved over and over again (in Comp, Opp, and OATAnn, and now in this OpAnn), the various "negative language words" uttered by Marshall are complained-of — **not** because of their trivial/mere insult/ridicule/hyperbole/etc. nature — but rather because of their **contextually defamatory implicatory** nature (denoted "CTXDEFIMPL" in Opp).

The problem here is that the Judge **misstates/falsifies the law** (in exactly the same way he has done elsewhere, see Ann16A *supra*).

Namely, he's saying that "opinions based on disclosed information are not actionably defamatory." That's false. His falsity lies in **omitting the qualifier "true"(/nondefamatory)** qualifying the information being disclosed (and, also again, he's misusing the word "information," where he should be speaking of "statements of fact," see Ann14A *supra*). If the (disclosed or undisclosed) statements-of-fact which underlie opinions are **themselves defamatorily false** (as they *are* in the case-at-bar, as proven *ad nauseam* herein *passim*), then the opinions amount to **actionably defamatory repetitions** of those defamatory statements-of-fact, and hence those opinions are indeed actionable as defamation. This is what "CTXDEFIMPL" *means.*

APPENDIX

The original emails from Tuvell to Marshall (both first and second versions, Ann2A *supra*) are reproduced in this appendix *infra,* in their entirety. These are also available online at http://judicialmisconduct.us/sites/default/files/2017-09/EthicsAlarms%2CEmails%3D2017-08-26.pdf.

Subject: I can't figure you you
From: Walt Tuvell <walt.tuvell@gmail.com>
Date: 08/26/2017 02:09 PM
To: jamproethics@verizon.net

Jack —

I've been following your website (https://ethicsalarms.com) since I "discovered" it a couple of months ago. Its About page is especially lucid and luring.

The problem is, your posts don't live up to the About advertisement. Specifically, the About page speaks only about whole-life ethics (a very laudable goal, what I was looking for), but says nothing about partisan/political rants. Yet, it seems like that's what the website does, and only that. Further, everything you say appears to be entirely one-sided (right/conservative/republican is good, left/liberal /democrat is bad).

Is that the way you really see things? Or am I missing something?

Thx.

— Walter Tuvell (PhD, Math, MIT & U.Chicago — i.e., “not-a-crank”)

Subject: Re: I can't figure you you
From: Walt Tuvell <walt.tuvell@gmail.com>
Date: 08/26/17 16:56
To: jamproethics@verizon.net

Typo on the Subject line (sorry): It should read "I can't figure you out".

On 08/26/17 14:09, Walt Tuvell wrote:

> Jack —
>
> I've been following your website (https://ethicsalarms.com) since I "discovered" it a couple of months ago. Its About page is especially lucid and luring.
>
> The problem is, your posts don't live up to the About advertisement. Specifically, the About page speaks only about whole-life ethics (a very laudable goal, what I was looking for), but says nothing about partisan/political rants. Yet, it seems like that's what the website does, and only that. Further, everything you say appears to be entirely one-sided (right/conservative/republican is good, left/liberal/democrat is bad).
>
> Is that the way you really see things? Or am I missing something?
>
> Thx.
>
> — Walter Tuvell (PhD, Math, MIT & U.Chicago — i.e., “not-a-crank”)

CERTIFICATE OF SERVICE

Pursuant to MRAP 13(d), I hereby certify, under the pains and penalties of perjury, that I have served notification of and access to this document upon Defendant, via email and first-class U.S. Mail.

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Dec 12 2018