

Make It Make Cents:

How Defamation's Economic Filter Abandons the Disability Class

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Abstract

American defamation converts a dignitary injury into a property injury, and the conversion decides who has a remedy. Two filters run in sequence: whether the statement was of and concerning an ascertainable plaintiff, which eliminates statements aimed at classes, and whether the plaintiff can locate the injury on a ledger. Disparagement of a disability is definitionally class directed, since nobody asserts that a named individual lacks a diagnosis; the assertion is that the category itself is fictitious. The first filter therefore extinguishes the claim before the second is reached, and where a plaintiff clears the first, the second sorts claimants by whether they sell the identity rather than by whether they were injured. The advocate who earns a living speaking about a condition can plead injury to trade or business; the worker who merely has it cannot.

Three corrections follow from the sources. The decision universally cited for the size rule is two opinions, and neither holds what it is said to hold. The modern test is qualitative, asking the intensity of suspicion cast upon the plaintiff, and it has permitted suit by one of sixty football players while barring one of twelve parking operators. The economic filter reaches written defamation notwithstanding a jurisdictional split over libel per quod, because the constitutional actual injury requirement runs across both from above. And the Americans with Disabilities Act already forbids the inference the disparagement rests on: substantial limitation is assessed without regard to learned adaptive modifications, and coverage extends to a person regarded as impaired whether or not any limitation exists.

The Article then reaches the empirical premise underneath the size rule, stated on the face of the controlling authority: that no reasonable reader draws an inference about any individual from a statement about a large class. The research on generic language contradicts it, including the work most skeptical of that literature, which finds that hearing a property predicated of a novel category leads adult listeners to attribute it to an unencountered member. This Article proposes no group libel regime and takes no side in that debate. Its claim is internal. A remedy that scales inversely with the size of the injured class leaves the widest harms with the fewest doors; hostile environment doctrine reaches class directed statements only inside a covered relationship; and a system capable of delivering an identical class disparagement to millions of individual recipients now sits precisely in the gap.

Keywords: libel; group libel; of and concerning; ascertainability; special damages; presumed damages; relationship gate; generic language; ableism; hostile environment; large language models; *Neiman-Marcus v. Lait*.

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I. Introduction

Consider two statements about the same person. In the first, a speaker addresses a hall and announces that nobody present has attention deficit hyperactivity disorder, that the diagnosis is a fashion, and that the people who claim it are performing rather than suffering. In the second, the speaker stops, points, and says the same thing to one person in the third row. The content is identical. The falsity is identical. The person in the third row heard the accusation twice. Only the second version is capable of supporting a claim.

That result is not an accident of pleading. It follows from a requirement as old as the tort, that a defamatory statement be of and concerning the plaintiff, and from a body of authority holding that where the disparaged class is large enough, no member of it has been spoken about at all.¹ The rule is settled. What has gone largely unexamined is what the rule does when the class in question is a protected one, and when the disparagement takes the specific form of denying that the class exists.

Disability disparagement almost never takes the individualized form. The assertion is not that a particular person lacks a particular diagnosis. The assertion is that the diagnosis is not real, that the category is a social construct, that the people inside it are mistaken about themselves or are trading on a label for advantage. Because the accusation is aimed at the category, it is aimed at everyone in the category, and because it is aimed at everyone in the category, the first filter removes it from the tort entirely. The injury is maximally distributed and therefore, as a matter of doctrine, addressed to no one.

A plaintiff who somehow clears that filter meets a second one. The common law required proof of pecuniary loss for slander unless the statement fell within a narrow set of categories in which damage was presumed.² Of those categories, the one that reliably survives is injury to trade, business, or profession. The constitutional narrowing that followed pushed recovery further

1. Restatement (Second) of Torts §§564, 564A (Am. L. Inst. 1977); *New York Times Co. v. Sullivan*, 376 U.S. 254, 288–92 (1964) (holding the advertisement at issue was not of and concerning the plaintiff).

2. Restatement (Second) of Torts §§570–575 (Am. L. Inst. 1977). The categories and their decay are traced *infra* Part II.A.

toward provable loss, limiting private figures to compensation for actual injury absent a showing of actual malice, and preserving presumed and punitive damages most securely where the speech in question concerned commercial credit reporting. What emerged is a tort that recognizes reputational harm most readily when the reputation was producing income.

Applied to the disability class, the two filters interact in a way that inverts the relationship between injury and remedy. The professional advocate, who earns a living speaking and consulting about a condition, can plead that an accusation of fabrication struck at the foundation of a career. The pleading is orthodox. The claim sounds. The person with the same diagnosis and no public role has no comparable allegation available, and yet that person often absorbs the more consequential harm, because a workplace that has come to regard a condition as invented is a workplace in which accommodations become negotiable and the person requesting them becomes a suspected malingerer. The tort protects the reputation that generates revenue and leaves the reputation that generates only dignity to fend for itself.

This is not an argument that the tort should reach every hurtful statement about a group. It is an argument that the current arrangement is not doing what its own justifications claim. Part I traces the ascertainability filter to its source and shows that the familiar numerical account of it is wrong. Part II traces the economic filter through the *per se* categories and the constitutional narrowing. Part III applies both to the disability class and identifies the inversion. Part IV takes up the one place where the law does reach class directed statements, which is inside a covered relationship, and asks what that carve-out implies about the rest. Part V examines the empirical premise underneath the ascertainability rule and argues that the premise is stated rather than supported. Part VI takes up the objections, beginning with the group libel tradition and its collapse, and states what this Article does not propose and what its empirical argument does not establish. A brief conclusion considers what happens to the whole arrangement when a single class disparagement can be delivered to millions of recipients simultaneously, by a system, outside any relationship the civil rights statutes cover.

II. The Ascertainability Filter

A. *What Neiman-Marcus Actually Held*

The case invariably cited for the proposition that group size determines who may sue is *Neiman-Marcus v. Lait*, and it is routinely described as having permitted suit by nine models and twenty-five salesmen while barring 382 saleswomen.³ The description is close enough to be useful and wrong enough to matter, and the error runs in a direction that understates the incoherence of the rule.

There were two decisions. In the first, Judge Murphy dismissed the claims of every individual plaintiff, models and salesmen and saleswomen alike, and did so on pleading grounds rather than on the size of any group.⁴ On the group question the opinion says only that the size of the class has always been material, which states that size matters without stating how.⁵

The holding people remember belongs to the second decision, on the amended complaint, by Judge Kaufman.⁶ There the numbers finally appear: nine models constituting the entire group, fifteen salesmen out of a total of twenty-five, and thirty saleswomen out of a total of 382.⁷ The salesmen's claim survived. The saleswomen's claim was dismissed as a matter of law.⁸

B. *The Rule Was Never a Number*

The tidy reading of that outcome is that the line falls somewhere between twenty-five and 382. Kaufman's own opinion forecloses it. In the same passage that dismisses the saleswomen, he

3. The description is a composite of two opinions and does not match either one standing alone. See *Neiman-Marcus Co. v. Lait*, 107 F. Supp. 96 (S.D.N.Y. 1952); *Neiman-Marcus v. Lait*, 13 F.R.D. 311 (S.D.N.Y. 1952).

4. *Neiman-Marcus Co. v. Lait*, 107 F. Supp. 96, 100–101 (S.D.N.Y. 1952). The complaint failed to allege that the plaintiffs were members of the libelled groups at the time the cause of action arose, and separately failed to disclose the numerical size of the groups at that time. Leave to amend was granted. The corporate plaintiff's claim survived. *Id.* at 101–102.

5. *Id.* at 100 (“Whatever the rule in jurisdictions related to this controversy on the question of group defamation, the size of the class involved has always been material in determining whether or not a cause of action lies for individual plaintiffs.”).

6. *Neiman-Marcus v. Lait*, 13 F.R.D. 311 (S.D.N.Y. 1952).

7. *Id.* at 313. The models were not the subject of the motion. *Id.* at 316 n.1.

8. *Id.* at 316–317.

collects the cases in which group claims had failed, and among them is a suit brought on behalf of the downtown parking lot owners of Washington, D.C., a group he expressly describes as ten to twelve in number.⁹ Ten was too many there. Twenty-five was few enough here. On the permitting side the same opinion collects four coroners, twelve hospital physicians, twelve radio editors, and a posse.¹⁰ A rule that admits twelve doctors and excludes twelve parking operators is not counting.

What the rule is actually doing is asking whether a reader would understand the statement to point at someone. That is a judgment about inference, not about arithmetic, and Kaufman says so directly. Kaufman was also alert to the incoherence in his own disposition. In a footnote he observes that if the defendants' failure to move against the models concedes those claims, it is difficult to perceive a principled distinction between the assertion that some of the models were prostitutes and the assertion that most of the sales staff were homosexual.¹¹ The judge deciding the case could not locate the line either.

C. The Modern Rule Is Qualitative, and It Reaches the Same Place

Seventy years of law follow *Neiman-Marcus*, and the courts have not spent them counting either. The Oklahoma Supreme Court allowed a fullback to sue over an accusation that a sixty to seventy man university football team used amphetamines, holding that he had established his identity within the group.¹² New York's Second Department allowed claims by at least fifty-three police officers out of a department of more than seventy, rejecting a definitive size limitation outright.¹³

9. *Id.* at 316 (collecting *Service Parking Corp. v. Washington Times Co.*, 92 F.2d 502 (D.C. Cir. 1937), along with *Fowler v. Curtis Publishing Co.*, 78 F. Supp. 303 (D.D.C. 1948), *aff'd*, 182 F.2d 377 (D.C. Cir. 1950) (all taxicab drivers in Washington, D.C.), *Noral v. Hearst Publications, Inc.*, 104 P.2d 860 (Cal. Ct. App. 1940) (officials of a statewide union), and *Louisville Times v. Stivers*, 68 S.W.2d 411 (Ky. 1934) (members of a clan)).

10. *Neiman-Marcus*, 13 F.R.D. at 316 (collecting *Weston v. Commercial Advertiser Ass'n*, 77 N.E. 660 (N.Y. 1906), *Bornmann v. Star Co.*, 66 N.E. 723 (N.Y. 1903), *Gross v. Cantor*, 200 N.E. 592 (N.Y. 1936), and *Chapa v. Abernethy*, 175 S.W. 166 (Tex. Civ. App. 1915)).

11. *Neiman-Marcus*, 13 F.R.D. at 316 n.1.

12. *Fawcett Publ'ns, Inc. v. Morris*, 377 P.2d 42, 47 (Okla. 1962). The court reasoned that the plaintiff had played in all but two games that season and continued on the team for two more years.

13. *Brady v. Ottaway Newspapers, Inc.*, 84 A.D.2d 226, 228 n.1, 234 (N.Y. App. Div. 1981), *discussed in Three Amigos SJL Rest., Inc. v. CBS News Inc.*, 132 A.D.3d 82 (N.Y. App. Div. 2015) (noting that recovery has usually involved groups of twenty-five or fewer, while *Brady* declined to fix a limit).

Oklahoma later distilled the rule into two principles, and neither is arithmetic: size alone is not conclusive, and the question is the intensity of the suspicion cast upon the plaintiff.¹⁴

That formulation is more candid than the counting story, and it deserves to be stated at its strongest before it is questioned. The test asks whether a reader would suspect this plaintiff, which is a real inquiry into how the statement lands rather than a headcount. Courts applying it have kept the small group exception narrow while leaving the door ajar for a plaintiff who can show the accusation concentrated on them.¹⁵

Two things follow, and the second is the one that matters here. First, the qualitative test confirms rather than rebuts the point of the preceding section: there is no number, there never was, and *Fawcett's* sixty-plus football players sitting alongside *Service Parking's* ten to twelve parking operators is not an anomaly to be explained but the rule operating as designed. Second, the qualitative test does not rescue the disability plaintiff, and it fails for a reason more fundamental than size. Intensity of suspicion requires that suspicion attach to someone. A claim that a diagnosis is fictitious distributes suspicion evenly across everyone who holds it and concentrates it on no one, which is what courts mean when they distinguish an impersonal reproach of an indeterminate class from a statement about an identifiable few.¹⁶ The better test reaches the same result by better reasoning, which is a stronger position for the doctrine and a worse one for the plaintiff.

D. The Premise Underneath

The dispositive sentence in *Neiman-Marcus* is not about size at all. Dismissing the saleswomen, Kaufman holds as a matter of law that no reasonable man would take the writers seriously and

14. *McCullough v. Cities Serv. Co.*, 676 P.2d 833, 835–36 (Okla. 1984).

15. *Alexis v. District of Columbia*, 77 F. Supp. 2d 35, 42 (D.D.C. 1999) (describing the small-group exception as narrowly construed); *Arcand v. Evening Call Publ'g Co.*, 567 F.2d 1163, 1164–65 (1st Cir. 1977) (setting out the two governing principles); *Gintert v. Howard Publ'ns, Inc.*, 565 F. Supp. 829, 833–34 (N.D. Ind. 1983) (same); see Tanenhaus, *Group Libel*, 35 Cornell L.Q. 261, 263 (1950), relied on by both courts. The earlier treatment, and the one Kaufman himself cited, is Riesman, *Democracy and Defamation: Control of Group Libel*, 42 Colum. L. Rev. 727, 768 (1942). See *Neiman-Marcus*, 13 F.R.D. at 316.

16. *Excellus Health Plan, Inc. v. Tran*, 287 F. Supp. 2d 167, 176 (W.D.N.Y. 2003) (quoting *Brady*).

conclude from the publication a reference to any individual saleswoman.¹⁷ That is the whole engine. The claim fails because the court concludes, as a matter of law and without evidence, that readers do not form beliefs about individuals from statements about classes.

It is worth naming what kind of proposition that is. It is not a normative judgment about what the law should protect, and it is not a doctrinal inference from precedent. It is an empirical claim about how audiences process class directed assertions, announced from the bench in 1952 and carried forward since. Part V returns to it.

III. The Economic Filter

A. *The Per Se Categories and What Survived Them*

The common law required a slander plaintiff to prove special harm, meaning actual pecuniary loss, unless the statement fell within a closed set of categories in which damage was presumed. Colorado's Court of Appeals states the historical list plainly: a defamatory remark was actionable per se only if it imputed a criminal offense, a venereal or loathsome and communicable disease, improper conduct of a lawful business, or unchastity by a woman.¹⁸ The Restatement (Second) carries a modernized version of the same four, substituting serious sexual misconduct for unchastity and conduct incompatible with business, trade, or office for improper conduct of a lawful business.¹⁹

Three of those four have thinned to the point of near irrelevance. Loathsome disease was built around communicable venereal illness in an era before treatment. Unchastity of a woman is a category the Restatement itself declined to carry forward in its original form. Imputation of crime remains available but overlaps almost entirely with claims that would sound anyway. The gate those categories guard is explicitly monetary. Absent per se status, a slander plaintiff

17. *Id.* at 316.

18. *Hayes v. Smith*, 832 P.2d 1022, 1024 (Colo. App. 1992).

19. Restatement (Second) of Torts §§570–574 (Am. L. Inst. 1977); see *Biondi v. Nassimos*, 692 A.2d 103, 105 (N.J. Super. Ct. App. Div. 1997) (collecting the four); *Clemente v. Espinosa*, 749 F. Supp. 672, 677 (E.D. Pa. 1990) (same).

must plead special damages, which New Jersey’s Appellate Division defines as harm of a material or pecuniary nature.²⁰ What is left doing consistent work is the category denominated in earning capacity. That is not a claim that the other categories were formally abolished. It is an observation about which one plaintiffs actually plead and which one courts actually sustain, and courts have been explicit that the direction of travel is toward narrowing rather than expanding the set.²¹

B. The Constitutional Narrowing

Gertz v. Robert Welch, Inc. limited private figure plaintiffs to compensation for actual injury absent a showing of actual malice, and courts reading it have understood the opinion to signal that per se classifications and presumed damages are disfavored even where they remain constitutional.²² *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* then preserved presumed and punitive damages for speech on matters of purely private concern, in a case about the accuracy of a commercial credit report.²³ The doctrine emerged from its constitutional narrowing with its most secure footing on commercial ground.

C. The Libel Problem

An objection has to be met before the argument goes further, because the categories just described belong to slander, and nothing this Article is about is spoken. A post, a broadcast, a book, and the output of a conversational system are all written or published, which makes them libel, and libel has never been governed by the slander categories in the same way.

In one line of authority the distinction collapses entirely in the plaintiff’s favor. Wisconsin held that damages are conclusively presumed from the publication of the libel itself, permitting

20. *Biondi*, 692 A.2d at 106 (quoting *Ward v. Zelikovsky*, 136 N.J. 516, 643 A.2d 972, 978 (1994)).

21. *Hayes*, 832 P.2d at 1024 (noting that the Restatement (Second) “reflects a trend toward limiting the per se category of slander”); *Biondi*, 692 A.2d at 110 (referring to “the disfavor with which the slander per se doctrine is currently held” and declining to permit speculative inferences to support a verdict for a plaintiff unable to show actual reputational damage).

22. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Hayes*, 832 P.2d at 1025 (reading *Gertz* as indicating that “per se classifications and presumed damages, even where constitutional, are not favored”).

23. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

substantial compensation for reputational harm with no allegation or proof that any loss occurred.²⁴ On that view an economic filter does not exist for written defamation at all, and the thesis of this Part would be confined to the vanishing category of spoken words.

The authority is split, and the other line imports the requirement wholesale. Delaware holds that where defamatory meaning depends on extrinsic facts, the action lies only on proof of special damages, and may proceed without such proof only if the publication imputes a crime, a loathsome disease, misconduct in a trade or profession, or unchastity.²⁵ Maryland's intermediate court traced how this happened: *per quod* carried one meaning in slander (special damages required) and another in libel (extrinsic circumstances required), and the first was engrafted onto the second, so that libel *per quod* came to require both.²⁶

At common law, then, whether the economic filter operates on a written statement depends on which side of that split the forum sits. That is a real limitation and this Article does not minimize it.

What closes the gap is constitutional rather than common law. *Gertz* bars presumed damages for private figure plaintiffs absent a showing of knowledge of falsity or reckless disregard, and confines recovery to compensation for actual injury.²⁷ A state that would have presumed damages from the fact of publication may no longer do so on that basis alone. The requirement of demonstrated injury therefore now runs across both bodies of law from above, which means the filter this Part describes reaches written defamation regardless of how a given jurisdiction resolved the *per quod* question a century ago. The split survives in form. Its consequences do not.

24. *Martin v. Outboard Marine Corp.*, 113 N.W.2d 135, 138–39 (Wis. 1962).

25. *Spence v. Funk*, 396 A.2d 967, 970 (Del. 1978).

26. *Gen. Motors Corp. v. Piskor*, 340 A.2d 767, 774–75 (Md. Ct. Spec. App. 1975).

27. *Gertz*, 418 U.S. at 349–50.

D. A Necessary Qualification

The thesis must be stated more precisely than the shorthand allows, because *Gertz* itself contains the qualification. The Court was explicit that actual injury is not limited to out of pocket loss, and that the customary harms from defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish.²⁸ Dignitary harm is compensable. The claim advanced here is narrower and survives that concession intact. The economic filter does not operate on the measure of damages. It operates at the threshold, in the determination whether a statement carries defamatory meaning at all and whether it belongs to a category in which harm need not be proved. A plaintiff who gets through the door may recover for humiliation. The question is who gets through the door, and the answer tracks whether the reputation in question was generating income.

Justice White, dissenting in the same case, described the mechanism in a single sentence. Under prevailing law, he wrote, where the defamation is not actionable per se and proof of special damage is required, a showing of actual injury to reputation is insufficient; but if pecuniary loss is shown, general reputation damages are recoverable.²⁹ Reputational injury standing alone does not open the door. Pecuniary loss opens the door, and once it is open the dignitary harm becomes recoverable. That is the filter this Article describes, stated from the bench in 1974 by a Justice who regarded it as settled and unremarkable.

Hayes itself demonstrates the threshold at work. The Colorado court held that a false statement imputing homosexuality was not slander per se even though it arose in an employment context and was aimed at the plaintiff's professional reputation.³⁰ An identity based imputation, delivered at work, about a teacher, failed to clear the gate. That is the closest available analogue to the disability case, and it points the same direction.

28. *Gertz*, 418 U.S. at 350, *quoted in Hayes*, 832 P.2d at 1026.

29. *Gertz*, 418 U.S. at 389 n.29 (White, J., dissenting). White added that the majority changed the second rule and left the first intact, and that requiring proof of actual reputational damage made recovery for pain and suffering "a much more remote possibility." *Id.*

30. *Hayes*, 832 P.2d at 1026–27.

E. The Adjacent Tort

The filter's shape is clearest in the tort next door. Injurious falsehood, also called trade libel or business disparagement, imposes liability for a false statement causing pecuniary loss, and it has always carried requirements more stringent than defamation's in three respects: falsity, fault, and proof of damage.³¹ A plaintiff must prove special damages in the form of pecuniary loss, and the personal elements of damage, mental distress among them, are stricken.³²

That is the economic filter with the qualification removed. Where defamation admits dignitary harm to the measure of damages once liability attaches, injurious falsehood makes pecuniary loss the definition of the injury and excises the dignitary component by name. The two torts sit beside one another protecting different interests, and the argument of this Part is that defamation has drifted toward its neighbor at the threshold while keeping its own vocabulary at the remedy.

IV. The Inversion

A. Why Disability Disparagement Is Structurally Generic

Disparagement of a disability rarely takes the individualized form the tort is built to receive. The characteristic assertion is that the condition is a fashion, a social construct, an artifact of modern life, or a label people adopt for advantage. It is stated about the category. It has to be stated about the category, because the rhetorical work it performs is the denial that the category is real, and one cannot deny the reality of a category by making a claim about one member of it.³³

Congress has already legislated against the precise inference such a statement invites. The Americans with Disabilities Act defines disability to include being regarded as having an impairment, and an individual satisfies that prong on a showing of a prohibited action

31. Restatement (Second) of Torts §623A cmt. g (Am. L. Inst. 1977); *Newsom v. Brod*, 89 S.W.3d 732, 734 (Tex. App. 2002) (contrasting defamation's protection of personal reputation with injurious falsehood's protection of economic interests against pecuniary loss).

32. *Guess, Inc. v. Superior Court*, 176 Cal. App. 3d 473, 479 (Cal. Ct. App. 1986).

33. This is the linguistic form the cognitive literature calls a generic. See *infra* Part V.B.

taken because of an actual or perceived impairment, whether or not the impairment limits or is perceived to limit any major life activity.³⁴ Coverage is to be construed in favor of breadth to the maximum extent the statute permits.³⁵ An impairment episodic or in remission qualifies if it would substantially limit a major life activity when active.³⁶ And substantial limitation is assessed without regard to the ameliorative effects of mitigating measures, a list that expressly includes reasonable accommodations and learned behavioral or adaptive neurological modifications.³⁷

Read together those provisions dismantle the claim the disparagement rests on. The assertion that a person coping successfully is therefore not disabled is the exact reasoning the mitigating measures rule forbids, and the coping itself is enumerated in the statute as something a factfinder must look past. The assertion that perception is irrelevant because the condition is invented is the exact reasoning the regarded-as prong forecloses. Congress saw both moves and wrote rules against them. Defamation has no equivalent, which is the asymmetry this Part is about: the same statement is a legal wrong inside an employment relationship and a nullity outside one.

That grammatical fact has a doctrinal consequence. The statement is aimed at everyone who holds the diagnosis, a population Congress described in the Act's own findings as some 43,000,000 Americans, a number it expected to grow, and as a discrete and insular minority subjected to a history of purposeful unequal treatment.³⁸ Under the rule traced in Part I, a statement addressed to a class that large is understood to be addressed to nobody.³⁹ The injury is maximally distributed and therefore, by operation of the first filter, legally unaddressed. The more people a disability disparagement reaches, the more securely it sits outside the tort.

34. 42 U.S.C. §12102(1)(C), (3)(A).

35. *Id.* §12102(4)(A).

36. *Id.* §12102(4)(D).

37. *Id.* §12102(4)(E)(i)(III)–(IV). The exception is ordinary eyeglasses and contact lenses. *Id.* §12102(4)(E)(ii).

38. 42 U.S.C. §12101(a)(1), (7).

39. *Neiman-Marcus*, 13 F.R.D. at 316; Restatement (Second) of Torts §564A (Am. L. Inst. 1977).

B. Sorting by Monetization

Suppose a plaintiff clears the first gate, as by being one of a small panel named or effectively identified. The second gate then sorts by the wrong variable. A person whose livelihood consists of speaking, writing, and consulting about a condition can plead that an accusation of fabrication struck at the foundation of a career, and the pleading is orthodox: conduct incompatible with business, trade, or office, with damages presumed and lost engagements provable.⁴⁰ A person with the same diagnosis and no public role has no equivalent allegation.

The practical injuries run the other way. The advocate loses bookings, which is a recoverable and often recoverable loss. The worker loses the presumption of good faith. A workplace that has absorbed the belief that a condition is invented is a workplace where an accommodation request reads as a maneuver, where documentation is scrutinized rather than processed, and where the requester acquires a reputation as someone working the system. The second harm is heavier, harder to reverse, and lands on the person with fewer resources to absorb it. The tort registers only the first.⁴¹

This is what it means to say that the tort protects reputation as an earning asset. The doctrine is not indifferent to dignity. It simply has no threshold category that dignity alone can satisfy, and *Hayes* shows what happens when a plaintiff asks a court to create one.⁴²

40. Restatement (Second) of Torts §573 (Am. L. Inst. 1977); *Clemente*, 749 F. Supp. at 677.

41. That sequence is offered as a mechanism the doctrine ignores, not as an empirical finding, and this Article does not claim to have measured it. What is measured is the step the mechanism depends on: that a listener moves from a claim about a category to a belief about an individual within it. *See infra* Part V.B.

42. *Hayes*, 832 P.2d at 1026–27 (holding that a false imputation of homosexuality was not slander per se notwithstanding that it arose in an employment context and targeted professional reputation). That specific holding sits in a line courts have split on and that has moved since. *Compare Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303 (Mo. 1993) (contrary), *with Albright v. Morton*, 321 F. Supp. 2d 130 (D. Mass. 2004) (going further than *Hayes* and holding the imputation not defamatory at all). *Hayes* is relied on here only for the structural point that a court declined to extend a per se category to an identity-based imputation, and for its statements of the historical categories, the narrowing trend, and its reading of *Gertz*, none of which the split disturbs.

V. The Relationship Gate

The law is not silent on class directed statements. It reaches them comprehensively, in one setting, under one condition.

Hostile environment doctrine under Title VII, Title IX, and the Americans with Disabilities Act is precisely a regime in which statements about a protected class are actionable without any requirement that the speaker have named the plaintiff. A supervisor who announces to a department that the diagnosis is invented and that accommodations are a racket has said nothing about any individual, and the statement is nonetheless evidence of, and can itself constitute, unlawful discrimination against every member of the class who works there.⁴³ The size of the class is not a defense. Ascertainability is not an element.

The same structure appears in each of the three principal regimes, with the standard borrowed across all of them. Under Title VII the conduct must be severe or pervasive enough to create an environment that is both objectively hostile to a reasonable person and subjectively perceived as abusive by the plaintiff.⁴⁴ Title IX asks whether harassment was so severe, pervasive, and objectively offensive that it deprived the victim of access to educational opportunities or benefits, with liability turning on the funding recipient's deliberate indifference.⁴⁵ Fair housing law recognizes hostile environment harassment as unwelcome conduct sufficiently severe or pervasive to interfere with the use or enjoyment of a dwelling, on regulations and case law that courts have built by explicit analogy to Title VII.⁴⁶ In none of the

43. The Ninth Circuit joined the consensus in 2024, holding that a disability-based harassment claim is available under both the ADA and the Rehabilitation Act, and requiring only that the plaintiff show harassment because of the disability that was severe or pervasive enough to alter the conditions of employment. *Mattioda v. Nelson*, 98 F.4th 1164, 1173–74 (9th Cir. 2024); *see also Fox v. Costco Wholesale Corp.*, 918 F.3d 65, 74 (2d Cir. 2019); *Flowers v. S. Reg'l Physician Servs. Inc.*, 247 F.3d 229, 233–34 (5th Cir. 2001) (reasoning that Congress used the language of Title VII and intended to reach disability-based harassment).

44. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993).

45. *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 646–47, 650 (1999).

46. 24 C.F.R. §100.600(a)(2); *Quigley v. Winter*, 598 F.3d 938, 946–47 (8th Cir. 2010); *United States v. Hurt*, 676 F.3d 649, 654 (8th Cir. 2012); *Gamble v. City of Escondido*, 104 F.3d 300, 304 (9th Cir. 1997) (noting that most courts applying the Fair Housing Act have analogized it to Title VII).

three is the number of people in the protected class an element, a defense, or a subject of judicial interest.

Two things follow. The first is that the common law's stated justification for the size rule cannot be a general truth about how audiences process class directed speech, because the civil rights statutes proceed on the opposite assumption and no one regards them as incoherent for doing so. The second is that Congress had to write those statutes. The common law would not reach the conduct, which is why the statutory regime exists at all, and courts locate the disability harassment cause of action in Congress's deliberate borrowing of Title VII's language rather than in any common law antecedent.⁴⁷

The condition is a relationship. Employment, education, housing, federally funded programs, and public accommodations are covered.⁴⁸ Everything outside them is not. A person who hears a disability disparagement from a manager has a claim. The same person hearing the same words from a media outlet, a platform, an influencer, or a conversational system has nothing, because there is no relationship for the statute to attach to and the tort has already excluded the statement on grounds of size. The gap is not a doctrinal oversight. It is the shape produced by two regimes each declining, for its own reasons, to cover the same territory.

VI. The Untested Premise

A. *What the Court Assumed*

Return to the sentence that decided *Neiman-Marcus*. Kaufman dismissed the saleswomen's claim by holding, as a matter of law, that no reasonable man would take the writers seriously and conclude from the publication a reference to any individual saleswoman.⁴⁹ No evidence was

47. *Mattioda*, 98 F.4th at 1173 (quoting the Seventh Circuit's observation that the claim exists under the ADA because Congress wrote the statute using the language of Title VII).

48. For the regimes treated above, see *Harris*, 510 U.S. at 21–22 (employment); *Davis*, 526 U.S. at 650 (education); 24 C.F.R. §100.600(a)(2) and *Quigley*, 598 F.3d at 946–47 (housing); *Mattioda*, 98 F.4th at 1173–74 (disability, under both the ADA and the Rehabilitation Act, the latter reaching federally funded programs).

49. *Neiman-Marcus*, 13 F.R.D. at 316.

taken on the point. None was thought necessary. The proposition was treated as the kind of thing a court knows.

It is an empirical claim about audience cognition: that a statement predicated of a category does not alter what listeners believe about individual members of that category. Everything the size rule does rests on it. If listeners do draw individual inferences from category statements, then the large group plaintiff has suffered the injury the tort exists to remedy and has been told, on a factual premise the court invented, that no injury occurred.

B. What the Research Shows

The relevant literature concerns generic language, meaning statements predicated of a kind rather than of an individual. It is directly on point. It does not support the assumption, and it does not support the strongest version of the counterclaim either, so both are set out here.

In the foundational study, children and adults were read a storybook about a novel social category, with descriptions presented either generically or as matched statements about one member. Hearing the generic form led both four year olds and adults to develop essentialist beliefs about the category, meaning the belief that it marks a fundamentally distinct kind of person.⁵⁰ Related work found that generic language consistently led listeners to treat described properties as nonaccidental features of the category rather than as facts about the particular members observed.⁵¹ Later work found that generic language led children to essentialize a novel social category regardless of whether the described property was biological or cultural, while adults were influenced by both form and content.⁵²

50. Marjorie Rhodes, Sarah-Jane Leslie & Christina M. Tworek, *Cultural Transmission of Social Essentialism*, 109 Proc. Nat'l Acad. Sci. 13526 (2012). A third study in the same paper found that inducing essentialist beliefs in parents caused them to produce more generic language when discussing the category with their children. *Id.*

51. Noyes & Keil, *There Is No Privileged Link Between Kinds and Essences Early in Development*, 117 Proc. Nat'l Acad. Sci. 10633 (2020).

52. Josie Benitez, Rachel Leshin & Marjorie Rhodes, *The Influence of Linguistic Form and Causal Explanations on the Development of Social Essentialism*, 229 Cognition 105246 (2022); *see also* Rachel A. Leshin, Sarah-Jane Leslie & Marjorie Rhodes, *Does It Matter How We Speak About Social Kinds?*, 92 Child Dev. e531 (2021) (finding generic language increased beliefs that category properties arise from intrinsic causes and that category boundaries are inflexible, while finding no effect on the switched-at-birth measure of heritability).

That line of work is contested, and the contest matters enough to state plainly. Using the same novel category paradigm, one study found that neither generics nor high proportion quantifiers elicited essentializing at all, and a recent review collects the empirical and theoretical pressure now bearing on the claim that generics have a uniquely problematic effect on social cognition.⁵³

The contest is survivable because this Article does not need essentialism. Essentialism is a claim about beliefs in underlying natures. Kaufman's premise is a claim about reference and inference: that a reader hearing a statement about a class draws no conclusion about any individual in it. The finding that maps onto that premise is generalizing, meaning the attribution of a described property to other members of the group, and generalizing is what the skeptical study found. Generics increased generalizing in adults, and did so more than specific statements, in the very experiment that failed to find essentializing.⁵⁴ The review most skeptical of the essentialism program states the resulting effect in terms that map directly onto the legal question: hearing that members of a novel category sleep in tall trees led participants to believe that a new, previously unencountered member of that category also sleeps in tall trees.⁵⁵ The literature's internal disagreement is about the strong version of the effect. The weak version, which is the version the legal rule denies, is what both sides find.

Two further results bear on the adult reader the legal standard actually posits. In an experiment with 423 adults drawn from the general population, with a mean age near 49 rather than the child or undergraduate samples typical of this literature, generic labels rather than specific ones increased perceived entitativity, meaning the groupness of category members, along

53. Elena Hoicka, Jennifer Saul & Eloise Prouten, *Language Signaling High Proportions and Generics Lead to Generalizing, but Not Essentializing, for Novel Social Kinds*, 45 Cognitive Sci. e13051 (2021); Eleonore Neufeld, Anne Bosse, Guillermo Del Pinal & Rachel Sterken, *Giving Generic Language Another Thought*, 16 WIREs Cognitive Sci. e70000 (2025).

54. Hoicka, Saul & Prouten, *supra* note 49. The authors report that generics and high proportion quantifiers led adults, and to some extent children, to generalize but not essentialize.

55. Neufeld, Bosse, Del Pinal & Sterken, *supra* note 49, describing the Hoicka findings. That inference, from a statement about the class to a belief about an unencountered individual within it, is precisely the inference *Neiman-Marcus* holds no reasonable reader draws.

with stereotype content and perceived essentialism of the described behavior.⁵⁶ And generic statements about a social group's ability degraded the performance of individual members even when the statement favored the group, an effect that persisted after the speaker left and was replaced by someone unaware of what had been said.⁵⁷ Correction helps and does not fully undo the effect. Narrowing a generic's scope to a single individual limits the belief that the category explains what its members are like, but correcting generics did not alter beliefs about feature heritability and had only mixed effects on inductive inference.⁵⁸

One limitation belongs in the text rather than a footnote. Much of this research is developmental, and the legal standard is the reasonable adult reader. The adult samples cited above carry the weight for present purposes, and the developmental work is offered as mechanism rather than as the direct answer to Kaufman.

Kaufman's premise is that the generic form drops out, leaving the listener with nothing about any individual. The form is the operative variable, it works to some degree independently of content, it is not fully undone by correction, and its effects reach the individual performance of category members. Whatever else can be said for the size rule, the reason the court gave for it is not true.

C. What Does Not Follow

This does not establish that group defamation should be actionable. Reasons unrelated to audience cognition support the rule, and one of them is serious. Group libel statutes have a history of being turned against minorities and dissenters, which is the strongest argument for leaving the category alone, and it is the argument that has kept the doctrine stable while its stated

56. Christian Burgers & Camiel J. Beukeboom, *How Language Contributes to Stereotype Formation: Combined Effects of Label Types and Negation Use in Behavior Descriptions*, 39 J. Language & Soc. Psych. 438 (2020); see also Camiel J. Beukeboom & Christian Burgers, *How Stereotypes Are Shared Through Language*, 7 Rev. Comm. Rsch. 1 (2019) (framework treating linguistic form of category labels as a mechanism by which stereotypes are shared and maintained).

57. Daeun Park, Marjorie W. Schaeffer & Kyle Nolla, *How Do Generic Statements Impact Performance? Evidence for Entity Beliefs*, 20 Developmental Sci. (2017), <https://doi.org/10.1111/desc.12396> (published online 2016).

58. Emily Foster-Hanson, Sarah-Jane Leslie & Marjorie Rhodes, *Speaking of Kinds: How Correcting Generic Statements Can Shape Children's Concepts*, 46 Cognitive Sci. e13223 (2022).

rationale eroded.⁵⁹ What follows is narrower and sufficient. A rule defended by an empirical assertion that is false must be defended on some other ground, and the substitute ground has to be stated and evaluated rather than assumed. Courts applying the size rule are currently reciting a justification that the evidence does not support. Part VI takes up the grounds on which the rule might still be defended, and the objections this Article's argument has to answer.

VII. Objections

A. *The Group Libel Tradition and Its Collapse*

The obvious rejoinder is that American law did once reach group disparagement, and that the reason it stopped is a reason to leave the doctrine alone. *Beauharnais v. Illinois* upheld a criminal group libel statute by a vote of five to four.⁶⁰ Two things about it matter here, and the first is often missed.

Justice Black's dissent draws precisely the distinction this Article is about. Whatever the Illinois law was, he wrote, it was not the criminal libel constitutionally recognized time out of mind, because that offense punished false, malicious, and scurrilous charges against individuals rather than against huge groups.⁶¹ The individual and group asymmetry was visible to a dissenting Justice in 1952, stated as the reason the majority was wrong, and it has gone unexamined in the seventy years since.

The second is that *Beauharnais* did not survive, though it has never been formally interred. Justice Douglas wrote a decade later that it should be overruled as a misfit in the constitutional system.⁶² The Eighth Circuit observed that it was a five to four decision and that

59. *Beauharnais v. Illinois*, 343 U.S. 250 (1952), upheld a criminal group libel statute and has never been formally overruled, but it is not relied upon after *Brandenburg v. Ohio*, 395 U.S. 444 (1969), *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), and *Matal v. Tam*, 582 U.S. 218 (2017). *Matal* is explicit that speech demeaning on the basis of disability, among other grounds, remains protected.

60. 343 U.S. 250 (1952).

61. *Id.* at 272 (Black, J., dissenting).

62. *Garrison v. Louisiana*, 379 U.S. 64, 82 (1964) (Douglas, J., concurring).

in light of later cases it was extremely doubtful the statute would be sustained.⁶³ The Seventh Circuit held that *Sullivan*, *Garrison*, and *Gertz* were indisputable evidence that libel now raises First Amendment problems sufficient to require substantial rewriting of both criminal and civil libel law, while the district court in the same litigation noted that the case had never been expressly overruled and that it therefore had to assess continued validity for itself.⁶⁴ The Ninth Circuit put it most bluntly, quoting the Seventh Circuit's conclusion that subsequent cases had so washed away the foundations of *Beauharnais* that it could not be considered authoritative.⁶⁵

So the tradition exists, it is not available, and the reason it is not available is the reason to be careful about what this Article does and does not propose.

B. This Is Not a Proposal for Group Libel

A substantial literature argues that the law should reach group directed speech, whether through a tort of racial insult, through attention to the victim's account of the injury, or through a reconception of hate speech regulation as protection of a group's standing modeled on group libel.⁶⁶ An equally substantial literature argues the opposite, on grounds ranging from the structure of public discourse to the demonstrated tendency of such regimes to be turned against the people they were meant to protect.⁶⁷

This Article takes no position in that debate and does not need one. Its claim is internal. Two filters operate, one of them rests on a factual premise the evidence contradicts, and together they distribute remedies inversely to injury within a protected class. That is a coherence problem

63. *Tollett v. United States*, 485 F.2d 1087, 1094 n.14 (8th Cir. 1973).

64. *Collin v. Smith*, 578 F.2d 1197, 1204–05 (7th Cir. 1978); *Collin v. Smith*, 447 F. Supp. 676, 695 (N.D. Ill. 1978).

65. *Dworkin v. Hustler Mag. Inc.*, 867 F.2d 1188, 1200–01 (9th Cir. 1989).

66. Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 Harv. C.R.-C.L. L. Rev. 133 (1982); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320 (1989); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431; Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 Harv. L. Rev. 1596 (2010).

67. Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, in *Speech and Harm* 247 (Routledge 2018); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 Duke L.J. 484; see also Robert Mark Simpson, *Dignity, Harm, and Hate Speech*, 32 Law & Phil. 701 (2012); Eric Barendt, *What Is the Harm of Hate Speech?*, 22 Ethical Theory & Moral Prac. 539 (2019); Note, *Group Libel Laws: Abortive Efforts to Combat Hate Propaganda*, 61 Yale L.J. 252 (1952).

in the existing doctrine, and it would remain a coherence problem for someone who thinks group libel regimes are a bad idea. The remedy might be to abandon the discounting rationale and say plainly that the size rule rests on administrability and on the historical record of misuse. It might be to reconsider what counts as trade or business injury. It might be to extend the relationship gate. Identifying an incoherence does not commit one to any particular repair, and this Article declines to pick one.

C. Fact, Opinion, and Whether Any of This Is Actionable Anyway

A stronger objection is that the disparagement never states a fact at all. The Court has declined to recognize a wholesale exemption for anything labeled opinion, but a statement stays outside the tort where it is not provably false or would not reasonably be understood as asserting actual facts about an individual.⁶⁸ The assertion that a diagnostic category is a social construct is a contested scientific and normative claim, and it is hard to see how a factfinder would adjudicate its falsity.

That objection is sound as to that formulation, and it does not reach the one that matters. Two statements sit in the vicinity and they behave differently. The claim that a condition is not real is unprovable and probably protected. The claim that a particular person is performing a condition they do not have, in order to obtain something, is an accusation of dishonesty about a specific individual, checkable against a diagnostic record, and squarely the kind of assertion *Milkovich* leaves actionable. The second is what the first is heard as by people who hold the diagnosis, which is the point of Part V: the generic form transmits an inference about individual members that its speaker never has to state.

The argument here therefore does not require that the generic statement itself be actionable. It requires only that the injury be real and that the doctrine's stated reason for ignoring it be false. Both hold whether or not the sentence that produced the injury could ever support a claim. If the fact and opinion line independently bars recovery, that is a third mechanism producing the same distribution rather than a refutation of the two examined here.

68. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18–21 (1990).

D. The Route Already Exists

A reader might answer that the harm is covered, since the statement is actionable the moment it operates inside employment, education, housing, or public accommodation, and that a plaintiff with a real injury will have a relationship to sue on. That answer holds for the workplace and fails for everything else. The relationship gate leaves uncovered the channels through which class disparagement now actually travels: publication to a general audience, broadcast, and conversational systems addressing individual users. The manager who says it is liable. The system that says it to nine million people is not, and neither is the broadcaster. The route exists precisely where the audience is smallest.

E. What the Empirical Argument Does Not Establish

Part V shows that listeners draw inferences about individual category members from generic statements. It does not show, and this Article does not claim, that any particular plaintiff's reputation moved by a measurable amount, or that the effect size in a laboratory translates into a damages figure. Nothing in the research supplies a method for individuating harm across a class of millions, and the administrability concern that supports the size rule survives this Article's argument intact. What does not survive is the reason courts give. There is a difference between a rule that is hard to administer otherwise and a rule justified by the assertion that no injury occurred, and only the second is refuted here.

VIII. Conclusion

The two filters produce a single structural result. Remedy scales inversely with the size of the injured class. A statement that damages five people supports five claims. The identical statement, damaging five million, supports none. Within the surviving remnant, recovery sorts by whether the injured reputation was generating income, so the tort reaches the professional who monetizes an identity and not the person who merely holds it, while the heavier practical injury falls on the second.

That arrangement was tolerable, if never coherent, while the cost of delivering a class disparagement to a very large audience remained high and the number of actors capable of doing it stayed small. The condition no longer holds. A conversational system can deliver an identical generic assertion about a protected class to millions of individual recipients, each in a private exchange, each calibrated to the person receiving it. The statement is generic in form, which places it outside the tort under Part I. It arrives outside employment, education, housing, and public accommodation, which places it outside the statutory regime under Part IV. And the delivery is individualized in a way the 1952 assumption never contemplated, since the recipient is not a member of an audience overhearing a broad claim but a person in a conversation being told something about a category to which the person belongs.

Two further doctrines meet the same fact pattern and neither was built for it. The single publication rule collapses a mass communication into one cause of action, but by its terms it does so only for an aggregate: one edition, one broadcast, one communication heard at the same time by two or more persons. The baseline in the same section is the opposite, that each of several communications by the same speaker is a separate publication, and the rule's own comment confines the exception to communications simultaneously available to many.⁶⁹ A system composing a separate response for each user is not an edition and is not simultaneous. It is the mirror image of the case the rule was written for: not one publication reaching millions but millions of publications, each individually composed, each carrying the same generic proposition.

Section 230 is the other, and it points the same way. Immunity runs to a service that is not itself an information content provider, meaning one responsible in whole or in part for the creation or development of the content, and a defendant loses the shield where it contributed materially to what made the content unlawful.⁷⁰ Neutral tools do not forfeit it. A model that

69. Restatement (Second) of Torts §577A(1)–(3) & cmt. b (Am. L. Inst. 1977); *Ciolino v. Simon*, 2021 IL 126024, ¶¶20–22; *Petro-Lubricant Testing Labs., Inc. v. Adelman*, 233 N.J. 236, 184 A.3d 457, 466–67 (2018); *Firth v. State*, 98 N.Y.2d 365, 370–71 (N.Y. 2002).

70. 47 U.S.C. §230(c)(1), (f)(3); *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1167–68 (9th Cir. 2008); *Force v. Facebook, Inc.*, 934 F.3d 53, 68 (2d Cir. 2019); *Henderson v. Source for Pub. Data, L.P.*, 53 F.4th 110, 127 (4th Cir. 2022); *Calise v. Meta Platforms, Inc.*, 103 F.4th 732, 744 (9th Cir. 2024).

composes the sentence does not obviously qualify as a neutral tool, and the provider is therefore an unpromising candidate for the immunity that has absorbed most claims arising from online content.

The upshot is that the two doctrines most likely to dispose of such a case before its merits, aggregation and immunity, both fit poorly, while the two examined in this Article, ascertainability and the economic threshold, dispose of it cleanly and for reasons that have nothing to do with whether anyone was hurt.

There is at least a signal that courts will not treat such output as expression. In the wrongful death action against Character Technologies, the district court declined at the pleading stage to hold that large language model output constitutes speech for First Amendment purposes and allowed product liability and negligence claims to proceed.⁷¹ The implication for this Article is not that a defamation claim becomes available. It is the opposite and it is more useful. If the output is not speech, then the harm it causes is not a speech harm, and the doctrines that failed to reach it were the wrong doctrines to consult. What remains is a product that reliably generates a class directed assertion, an audience that demonstrably draws individual inferences from that form, and an injured population the tort has defined out of existence by counting it.⁷²

71. *Garcia v. Character Techs., Inc.*, No. 6:24-cv-01903 (M.D. Fla. May 21, 2025). The court subsequently denied certification for interlocutory appeal, and the parties settled in January 2026, so the ruling stands as an unreviewed district court order.

72. The disability statutes already proceed on the premise that perception governs: a person is covered when subjected to a prohibited action because of a perceived impairment, whether or not any limitation exists or is perceived. 42 U.S.C. §12102(3)(A). What the statutes require in addition, and what the tort would not, is a relationship.

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